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# THE PACIFIC REPORTER

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CONTAINING ALL THE DECISIONS OF THE

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COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING  
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OF CALIFORNIA AND COLORADO, AND CRIMINAL  
COURT OF APPEALS OF OKLAHOMA

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS  
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<sup>2</sup> Became Chief Justice January 4, 1915.

<sup>3</sup> Term expired January 3, 1915.

<sup>4</sup> Became Chief Justice January, 1915.

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<sup>6</sup> Term expired.<sup>7</sup> Appointed November 23, 1914.<sup>8</sup> Qualified January 4, 1915, to succeed Warren Truitt.<sup>9</sup> Term expired January 11, 1915.<sup>10</sup> Elected. Term beginning January 12, 1915.<sup>11</sup> Commission expired by law, February 1, 1915.<sup>12</sup> Ceased to be Presiding Judge January, 1915.<sup>13</sup> Became Presiding Judge January, 1915.

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(50 Mont. 106)

**EDER v. CROWN BUTTE CANAL & RESERVOIR CO.** (No. 3426.)

(Supreme Court of Montana. Dec. 16, 1914.)

**1. APPEAL AND ERROR (§ 193\*)—QUESTIONS PRESENTED—SUFFICIENCY OF COMPLAINT.**

An allegation that plaintiff's land suffered injury due to the negligence of defendant in the construction, maintenance, and operation of its canal, whereby water escaping therefrom rendered plaintiff's land swampy and unfit for cultivation, if not as direct and certain as it should have been, is sufficient to support a judgment for the plaintiff against an objection, made for the first time on appeal, that the complaint does not state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.\*]

**2. APPEAL AND ERROR (§ 1005\*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.**

Where the evidence was conflicting on the material issues, the verdict of the jury, approved by the trial court, cannot be disturbed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by Sophia Eder against the Crown Butte Canal & Reservoir Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

Massena Bullard, of Helena, for appellant. W. C. Packer, of Helena, for respondent.

**BRANTLY, C. J.** In this action the plaintiff recovered a judgment for damages for injury alleged to have been caused to her agricultural lands by water escaping by seepage from defendant's irrigation canal which passes over said lands, and by overflow water from a spillway in the canal. The canal was constructed by the defendant to divert water from Sun river to irrigate lands lying along the south side of the river in Lewis and Clark county. The lands in controversy lie between the river and the canal. It is alleged that the injury suffered by plaintiff was due to the negligence of the defendant in the construction, maintenance, and operation of the canal, whereby the wa-

ter escaping therefrom has rendered a large portion of her lands so wet and swampy as to be unfit for cultivation. The defendant has appealed from the judgment and an order denying its motion for a new trial. Of the several assignments of error in his brief, counsel has argued only two, viz., that the complaint does not state a cause of action, and that the evidence is insufficient to justify the verdict.

[1] It is said that the plaintiff's right of recovery is predicated upon negligence which she has not alleged. The sufficiency of the complaint was not tested in the trial court by demurrer or other appropriate method. If it be conceded that the allegations imputing negligence to the defendant are not as direct and definite as they might have been, they are sufficient as against a general objection, made in this court for the first time, to support the judgment.

[2] The transcript of the evidence is voluminous. It would serve no useful purpose to set it forth at length and enter upon an analysis of it. Having made an attentive study of it, we find that it presents a sharp conflict upon every issue involved. This is particularly true of that portion of it tending to show the condition of the plaintiff's lands, by way of comparison before and after the construction of the canal. There was a direct conflict in the testimony of the witnesses upon this subject. This is true, in equal measure, of the testimony upon the question whether the defendant so constructed the canal as to guard the plaintiff's lands from injury from it by water escaping, either by seepage or overflow from it, and has since used due care to maintain it in that condition. The evidence as to the damages is not so definite as it might have been; but, upon the assumption that the plaintiff made out a prima facie case of damage caused by defendant's negligent maintenance and operation of its canal, the amount of the verdict is well within the estimates of the different witnesses. This being the condition presented by the evidence, it was the exclusive province of the jury to determine the issues, subject to discretionary review of its conclusion by the trial judge on motion for a new

trial. As has been so often said, with the result thus reached, this court may not interfere.

The judgment and order are affirmed.  
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(50 Mont. 108)

SUBURBAN HOMES CO. v. NORTH et al.  
(No. 3440.)

(Supreme Court of Montana. Dec. 16, 1914.)

1. CANCELLATION OF INSTRUMENTS (§ 24\*)—CONDITIONS PRECEDENT—RESTORATION OF PROPERTY RECEIVED.

A party seeking to rescind a contract, as authorized by Rev. Codes, § 5063, must restore or offer to restore to the adverse party every thing of value received under the contract, on condition that the adverse party will do likewise.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

2. CANCELLATION OF INSTRUMENTS (§ 24\*)—CONTRACT OF SALE—CONDITIONS PRECEDENT.

A vendor, suing for the cancellation of a contract of sale to clear his title, by asserting his right under the contract for the failure of the purchaser to pay installments called for, need not restore or offer to restore payments made.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

3. CANCELLATION OF INSTRUMENTS (§ 60\*)—CONTRACT OF SALE—JUDGMENT—EFFECT.

A decree in a suit by a vendor to cancel the contract of sale as a menace to his title, by asserting his right to declare the contract no longer binding for the failure of the purchaser to pay installments, which merely declares that the vendor is entitled to be restored to his rights as they existed prior to the contract and that the contract be delivered up for cancellation, leaves the question whether the purchaser may recover payments made by him, or any part of them.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 127-129; Dec. Dig. § 60.\*]

4. VENDOR AND PURCHASER (§ 341\*)—RECOVERY BY PURCHASER OF PARTIAL PAYMENTS—GROUNDS.

A purchaser, making partial payments under the contract and then voluntarily breaching it by failing to make further payments, cannot recover the payments made, without alleging and proving that his default was not the result of his grossly negligent, willful, or fraudulent breach of duty, and then only on full compensation to the vendor, as provided by Rev. Codes, § 6039.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.\*]

5. CANCELLATION OF INSTRUMENTS (§ 24\*)—CONTRACT OF SALE—PAYMENT OR OFFER TO PAY FOR IMPROVEMENTS.

A vendor suing to rescind the contract of sale for the failure of the purchaser to pay required installments need not pay or offer to pay for improvements made on the property by the purchaser, in the absence of a showing that the improvements were within the contemplation of the parties at the making of the con-

tract and that performance has not been prevented by his breach of contract.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

7. JUDGMENT (§ 251\*)—CANCELLATION OF CONTRACT—DEFENSES.

Where, in an action by a vendor for the cancellation of the contract of sale for the purchaser's failure to pay installments, the answer set forth merely defensive matter, the purchaser could not object to a decree granting relief on the ground that the vendor did not pay or tender payment for improvements made on the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

7. VENDOR AND PURCHASER (§ 299\*)—IMPROVEMENTS BY PURCHASER—MEASURE OF COMPENSATION.

In the absence of a provision in a contract of sale fixing a different measure of compensation for improvements by the purchaser, the amount recoverable for improvements is the enhanced value of the property, not exceeding the cost of the improvements, less the fair rental value of the premises recovered by the vendor forfeiting the contract for the purchaser's failure to pay required installments; and in the absence of any evidence of the value of improvements, or of any enhanced value of the property, the court cannot award any relief to the purchaser for improvements.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. § 299.\*]

8. VENDOR AND PURCHASER (§ 187\*)—CONTRACTS—FORFEITURE—WAIVER.

A stipulation in a contract of sale of real estate making time of the essence, and reserving an option to the vendor to terminate the contract for the failure of the purchaser to pay any required installments of the price, may be waived by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.\*]

9. VENDOR AND PURCHASER (§ 100\*)—CONTRACTS—FORFEITURE—WAIVER.

Default in the payment of any installment of the price called for in a contract of sale of real estate is a distinct breach, and gives the vendor a right to declare a forfeiture, as stipulated for in the contract; but the right must be promptly exercised, or the vendor will be presumed to treat the contract as valid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 170; Dec. Dig. § 100.\*]

10. VENDOR AND PURCHASER (§ 93\*)—CONTRACTS—FORFEITURE—WAIVER.

A vendor who grants time to the purchaser to pay installments of the price, though the contract makes time of the essence and stipulates for a forfeiture for nonpayment of any installment at maturity, may, on the default continuing, demand payment of the balance of the price, and give notice of his purpose to terminate the contract in the event of further default; and where the purchaser after such notice does not pay within a reasonable time, the vendor may terminate the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

11. CANCELLATION OF INSTRUMENTS (§ 21\*)—CONTRACTS FOR SALE—CONDITIONS PRECEDENT.

Where the complaint in an action by a vendor to cancel the contract for the purchaser's breach in failing to pay required installments

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



did not allege that a demand on the purchaser to pay the price was accompanied by a tender of a deed, but a deed was tendered on the trial, and the purchaser failed to respond to the demand of the vendor, and failed to tender payment at the trial and demand a deed, the vendor was entitled to relief.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 29; Dec. Dig. § 21.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by the Suburban Homes Company against Austin North and others. From a judgment for plaintiff, defendants North appeal. Affirmed.

O. F. Goddard, of Billings, for appellants. Johnston & Coleman, of Billings, for respondent.

BRANTLY, C. J. On March 17, 1905, the plaintiff and the defendant Austin North entered into a contract under the terms of which the plaintiff agreed to sell to this defendant a number of blocks and lots situated in the city of Billings and Foster's addition thereto, in Yellowstone county. The consideration for the contract was the sum of \$25,000, to be paid by North in installments as follows: \$1,000 in cash upon the execution of the contract, \$5,000 on March 17, 1907, a like sum on March 17, 1908, and the balance of \$10,000 on March 17, 1909, with interest on any installment not paid when it should become due at the rate of 8 per cent. per annum, payable on March 17th of each year. The defendant was to pay all taxes and assessments, ordinary and extraordinary that might be subsequently levied and assessed against the property or any part of it. Upon default by defendant in the payment of any installment of the purchase price or interest thereon, or of any taxes or assessments upon the property, plaintiff might, at its option, declare the contract null and void and no longer binding upon it. In such case the property, together with all payments, should thereupon be and remain the property of the plaintiff, its successors and assigns, the defendant thereafter to have no right or interest therein or right of action to recover it or any installment of the purchase money theretofore paid. Time was expressly made of the essence of the contract. It was further agreed that in case the defendant defaulted in the performance of any of the stipulations of the contract, and the plaintiff elected to exercise its option to declare it null and void because of such default, such declaration should be made by written notice directed to the defendant and deposited in the post office at Billings. Upon the performance by the defendant of all the stipulations of the contract on his part, he became entitled to a conveyance with the usual covenants of warranty. Except the cash payment and the installment due on March 17, 1906, the defendant failed to pay any of the

installments as they fell due, or at all. He did make payments of interest in amounts not exceeding \$600 at any one time, down to April 23, 1912, when the last payment was made. On June 5, 1912, the plaintiff made written demand for payment of the balance then due, amounting to \$25,983.33. In this demand the defendant was informed that, if he did not make payment on or before July 10, 1912, the plaintiff would treat the contract null and void and would bring an action to have it canceled. Defendant was further informed that the plaintiff would also ask for the cancellation of a deed executed to defendant by Yellowstone county, to the streets and alleys contiguous and adjacent to the property covered by the contract. The defendant having failed to comply with this demand, the plaintiff on July 27th notified him by mail, through the post office at Billings, that it had elected to terminate the contract because of his failure to comply with its demand, and thereupon brought this action to have the contract and deed canceled. After reciting the foregoing facts, the complaint alleges that the taxes and assessments levied upon the property for the years 1910 and 1911 are due and unpaid; that if the contract between the plaintiff and defendant North be left outstanding, it may cause serious injury to plaintiff, in that it would appear as a cloud upon his title; and that the defendant Hattie North is the wife of defendant Austin North. The relief demanded is that the defendants be decreed to have no right or interest in the property, and that plaintiff's title thereto be decreed good and valid, that said defendants be enjoined from claiming any interest therein, that the contract between plaintiff and defendant Austin North be ordered delivered up for cancellation, and that the plaintiff recover its costs.

The answer does not controvert any of the material allegations in the complaint, except that it is denied that the plaintiff made written demand upon North for payment of the balance of the purchase price, or that it thereafter gave notice of its election to forfeit the contract. It does not allege facts upon which defendant seeks affirmative relief. It states as separate defenses the following: (1) That after the execution of the contract the defendant North paid to the plaintiff \$10,870, but that plaintiff did not at any time prior to the bringing of the action offer to repay to the defendant this amount or any part of it; (2) that after defendant went into possession he expended large sums of money in installing a water supply, in grading the streets and alleys, and otherwise improving the property, but that plaintiff did not, before commencing the action, pay to the defendant the money so expended, or any portion thereof; (3) that after default by defendant in making payment, the plaintiff accepted various payments from him, applying the same upon the con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

tract without objection, that by this conduct it had led the defendant to believe that it intended to extend the time of payment fixed in the contract, and that it thereby waived its right and estopped itself to declare forfeiture of the contract under the stipulation therein; and (4) that plaintiff at no time before commencing the action offered to restore to the defendant the benefits it had received under the contract.

The findings of fact and conclusions of law by the trial court were in favor of plaintiff, and a decree was entered awarding it the relief demanded. The defendants North have appealed from the decree and an order denying their motion for a new trial. A recital of the facts relating to the deed from Yellowstone county has been omitted from the foregoing statement, for the reason that no appearance was made at the trial by the defendant commissioners, and the propriety of the relief granted in this behalf is not brought in question in this court.

[1, 2] 1. The first contention made is that the court erred in overruling defendants' objection to the introduction of evidence. It is said that, since the apparent purpose of the action is to enforce a rescission of the contract, it was incumbent upon plaintiff to allege that it had restored, or offered to restore, to the defendant Austin North everything of value received from him in part performance of the contract, viz., payments made by him. This contention is based upon a misconception of the scope and purpose of the action. Rescission requires the party seeking to rescind to restore, or offer to restore, to the other party everything of value received by the former under the contract, upon condition that the latter will do likewise. Rev. Codes, § 5063; *Clark v. American Dev. & Min. Co.*, 28 Mont. 468, 72 Pac. 978; *Cotter v. Butte & Ruby Valley S. Co.*, 31 Mont. 129, 77 Pac. 509. If he seeks the aid of a court of equity, he must aver that he has done this, or set forth excusatory facts. Such is not the purpose of this action. Plaintiff seeks to have the contract canceled as a menace to his title, having asserted his right under the express stipulation therein to declare it no longer binding upon him because of a breach of it by the defendant. While both actions are of equitable cognizance, they are wholly different in their scope and purpose, and the rules applicable to the one have no application to the other. *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700. In this sort of action the complaint need not contain any allegation on the subject of restoration.

[3, 4] 2. The same may be said of the contention that the purpose of the action is to enforce a forfeiture, and therefore cannot be sustained. Plaintiff does not ask that the court declare a forfeiture of the amounts paid by the defendant, nor does the decree adjudge the rights of the parties in this be-

half. It merely declares that the plaintiff is entitled to be restored to its rights as they existed prior to the execution of the contract, and that the instrument—the only evidence of any right in defendant—be delivered up for cancellation, so that it may not hereafter be a source of embarrassment to the plaintiff, as a standing menace to its title. It leaves the question whether the defendant is entitled to recover his payments, or any part of them, wholly unadjudicated. As was pointed out in *Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424, one who has been guilty of a breach of his contract, by stopping short of full performance, cannot ordinarily recover payments, or any part thereof, made prior to the breach; nor can he do so under any circumstances, unless, within the rule of the statute, upon full compensation to plaintiff (Rev. Codes, § 6039), he can allege and prove that the default was not the result of his "grossly negligent, willful or fraudulent breach of duty." The right to recover in such case is an exception to the general rule that the law forfeits to the innocent party all payments made, or the value of acts done, in part performance by the other party, when he stops short and refuses to proceed to the ultimate conclusion. *Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Cook-Reynolds Co. v. Chipman*, supra; *Fratt v. Daniels-Jones Co.*, supra.

[5] 3. It is contended that the decree cannot stand because the complaint contains no allegation on the subject, and the evidence shows conclusively that the defendant spent a large sum in installing improvements upon the property, which the plaintiff did not pay or tender to him before the commencement of the action. Here again the defendant proceeds upon the assumption that the purpose of the action is to have adjudicated a rescission of the contract. Even were this its purpose, the defendant is not entitled to relief in this behalf, in the absence of a showing of some equitable basis for it, as, for instance, that the improvements were within the contemplation of the parties when the contract was made, and that complete performance has not been prevented by his grossly negligent, willful, or fraudulent breach of his obligation. If he has equities, he must assert them (*Moore v. Giesecke*, 78 Tex. 543, 13 S. W. 290), and unless he does so he is not entitled to reimbursement. Otherwise, the vendor, though without fault, could exercise the option reserved in the contract only by paying for the privilege. *Moore v. Giesecke*, supra; *Banks v. McQuatters* (Tex. Civ. App.) 57 S. W. 334; *Coleman v. Stalnacke*, 15 S. D. 242, 88 N. W. 107. In *Moore v. Giesecke*, supra, the court said:

"When the vendor's suit is predicated upon the mere refusal of the vendee to pay the whole consideration contracted for, the fact that the vendee has paid part of the consideration and made \* \* \* valuable improvements, coupled with possession of the property, unaided by some other sufficient equity, will not entitle him to recover for such purchase money or improve-

ments. In such cases, when the vendor has neither waived his legal rights nor committed any default, he cannot be involuntarily taxed with improvements made upon his property without his consent, or be made to pay a price for recovering it back."

[6] As already stated, the assumption of counsel for defendant has no basis in fact. The answer does not allege facts to justify, nor does the prayer demand, affirmative relief of any kind. It is defensive merely, and alleges only matter which goes to the sufficiency of the complaint, from the viewpoint of counsel. Therefore a case is not presented warranting relief to the defendant. In order to avoid the consequences of his default, we can see no reason why the defendant should not be required to bring himself within the equity of the statute as interpreted in *Cook-Reynolds Co. v. Chipman*, *Fratt v. Daniels-Jones Co.*, and other cases cited above.

[7] Apart from these considerations, there is not in the record any evidence touching the value of the improvements, other than the testimony of witnesses as to what they cost in actual outlay. Nor does the evidence disclose whether they were made exclusively for the benefit of the property covered by the contract, or were designed in part to improve other property in the vicinity belonging to the defendant North. Upon this evidence the court would not have been justified in making a finding as to their value. "In the absence of some provision in the contract fixing a different measure of compensation, the amount recoverable for improvements is not what it cost to put them on the property, but the enhanced value of the property, not exceeding the amount expended for the improvements, and from them is to be deducted an amount equal to the fair rental value of the premises." 39 Cyc. 1403. See, also, *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. 1081; *Glass v. Hampton* (Ky.) 122 S. W. 803; *Guthrie v. Holt*, 9 Baxt. (Tenn.) 527; *Herring & Bird v. Pollard*, 4 Humph. (Tenn.) 362, 40 Am. Dec. 653; *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179. So far as the evidence discloses, the amounts expended by the defendant did not add a penny's worth to the value of the property, nor can it be ascertained therefrom what part of the outlay was made for the benefit of it, as distinguished from other property of defendant in the immediate vicinity.

[8, 9] 4. Although by its express terms time is made of the essence of a contract, and an option is reserved by the vendor to declare it terminated for failure to pay the purchase price at the date it falls due, or, if it is payable in installments, at the date that any one of the installments falls due, this provision may be waived by a failure to exercise the option, or by accepting a payment after it is due. The vendor cannot thereafter allege such default as a ground for declaring the contract terminated. *Pomeroy on Con-*

*tracts*, § 857; 2 *Warvelle on Vendors*, § 820; *Grigg v. Landis*, 21 N. J. Eq. 506; *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. If payment is to be made in installments, default in the payment of any installment is a distinct breach and gives the vendor the right to declare a forfeiture. The right must be promptly exercised, however; otherwise, the right being exclusively that of the plaintiff, he will be presumed to regard the contract as still valid and existent. On this subject Mr. Warvelle says:

"In the absence of other circumstances, nothing can be predicated upon a mere neglect of the vendor to declare a forfeiture at the time such right accrues; and the fact that the vendor has before indulged the vendee by accepting payments after they were due furnishes no excuse for his not meeting the other payments promptly, nor will it operate to prevent the vendor from declaring a forfeiture. It would seem, however, that where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendor cannot then suddenly stop short and insist upon a forfeiture for the nonpayment of the arrears remaining unpaid, without any previous notice of his intention so to do if the arrears are not paid. Indeed, the fact of indulgence is a strong circumstance tending to show that neither party intended that a failure to perform the contract according to its terms, at the time specified, should forfeit the right of the party failing to have a specific performance; and where the vendor suffers the purchaser to remain in possession of the property, and receives payments from him down to within a short period of declaring a forfeiture, such payments aggregating a large portion of the purchase price, he will, it seems, not be permitted to insist upon a forfeiture without first giving notice to the vendee and allowing him a reasonable time to perform on his part." 2 *Warvelle on Vendors*, § 820.

[10] Where the indulgence has been extended until long after all the installments are due, nonpayment alone will not justify a forfeiture. *Boone v. Templeman*, *supra*; *McCroskey v. Ladd*, 96 Cal. 459, 31 Pac. 558. But, though the vendor has extended indulgence to the vendee, he is not required to wait indefinitely for the vendee to perform his obligation. If the latter continues in default, the vendor, by demand for payment of the balance of the purchase money and notice of his purpose to terminate the contract in case of further default, may put the vendee upon his guard. If after such notice he does not make payment within a reasonable time, the vendor may declare the contract at an end. This doctrine was recognized by this court in *Fratt v. Daniels-Jones Co.*, *supra*, and is announced by these cases: *King v. Wilson*, 6 Beav. 126; *Eaton v. Schneider*, 185 Ill. 508, 57 N. E. 421; *Boone v. Templeton*, *supra*; *Maffet v. Oregon & C. R. Co.*, 46 Or. 443, 80 Pac. 489; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Mo v. Bettner*, 68 Minn. 179, 70 N. W. 1076; *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Walker v. McMurchie*, 61 Wash. 459, 112 Pac. 500.

[11] 5. So far as they are questioned by

the contentions of counsel, we think the findings of the trial court are amply justified by the evidence and fully support the decree. It is true that it is not alleged that the demand upon the defendant was accompanied by a tender of a deed. A deed was tendered on the trial, however. In view of the failure of defendant to respond to the demand of the plaintiff, as well as his failure to tender payment at the trial and demand a conveyance, the conclusion seems inevitable that he is either unwilling, or, more probably, unable, to meet his obligations under the contract. Such being the case, he is in no position to claim that the plaintiff ought to be denied relief.

The judgment and order are affirmed.  
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(50 Mont. 88)

In re SUTTON. (No. 3502.)

(Supreme Court of Montana. Dec. 11, 1914.)

1. ATTORNEY AND CLIENT (§ 53\*)—MISCONDUCT OF ATTORNEY—DISBARMENT—CONVICTION OF FELONY.

By Rev. Codes, § 6393, a certified copy of the record of conviction of an attorney for a felony or for misconduct involving moral turpitude is conclusive evidence of his unfitness to be a member of the bar, and the Supreme Court must disbar him under section 6410 without notice by citation or other process.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.\*]

2. ATTORNEY AND CLIENT (§ 39\*)—DISBARMENT—CONVICTION OF FORGERY—MORAL TURPITUDE.

Forgery is an offense involving moral turpitude, within Rev. Codes, § 6393, providing for the disbarment of attorneys on conviction of a felony or of a misdemeanor involving moral turpitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 52; Dec. Dig. § 39.\*]

3. ATTORNEY AND CLIENT (§ 39\*)—DISBARMENT OF ATTORNEY—CONVICTION OF FELONY—PARDON—EFFECT.

Where an attorney was convicted of forgery and a certified copy of the judgment filed in the Supreme Court, its effect as furnishing conclusive ground for disbarment was not nullified by a conditional pardon granted to the attorney by the Governor.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 52; Dec. Dig. § 39.\*]

4. PARDON (§ 14\*)—CONDITIONS—AUTHORITY TO IMPOSE.

In the granting of pardon, the Governor is authorized, by Const. art. 7, § 9, and Rev. Codes, § 9556, to impose conditions without restriction, so long as they are neither illegal, immoral, nor impossible of performance.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 28-31; Dec. Dig. § 14.\*]

5. PARDON (§ 9\*)—"PAROLE."

The parole of a convicted criminal does not wipe out the conviction, but merely suspends its operation by remitting for the time being the confinement at hard labor, until the end of the term or an unconditional pardon is granted; the offender in the meantime being subject to prison discipline and to be taken in-

to custody on violation of any of the conditions as though the parole had not been granted.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 16-22; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, Second Series, Parole.]

Proceedings against E. L. Sutton for disbarment. Rule absolute.

E. L. Sutton, of Great Falls, in pro. per.

BRANTLY, C. J. On April 11, 1914, E. L. Sutton was tried in the district court of Chouteau county upon a charge of forgery, and by a verdict of the jury found guilty. He was thereafter by judgment of the court sentenced to a term of two years in the state prison. At the time the charge was preferred against him, and at the time of his conviction, Mr. Sutton was an attorney and counselor at law and a member of the bar of Montana. Thereafter, on May 14th, the clerk of the district court, under the command of the statute (Rev. Codes, § 6409), lodged with the clerk of this court a certified copy of the record of conviction. When this fact was brought to its attention, this court made an order directing a citation to issue to Sutton requiring him to show cause why he should not be removed from his office. The citation was served on June 1st. On June 6th Mr. Sutton filed an answer, admitting his conviction, and alleging that there was then pending in the district court an application for a new trial; that it was being prosecuted by him in good faith; and that, in the event it should be denied, he intended to prosecute an appeal to this court. He also alleged that the crime of which he was convicted does not involve moral turpitude, and therefore his conviction of it does not justify his suspension or disbarment. The court thereupon deferred disposition of the matter until the criminal prosecution could be disposed of. On September 14th Mr. Sutton filed an amended answer, in which he alleged that on August 10th the Honorable Samuel V. Stewart, the Governor, transmitted to the board of pardons a pardon of the offense of which he had been convicted; that on August 28th, after consideration, the board approved the Governor's action; that on August 31st the Governor made an executive order pardoning Mr. Sutton; and that on September 3d Mr. Sutton accepted the pardon, which is now in full force and effect. The order of the Governor, after reciting that he had granted a conditional pardon to Mr. Sutton and that his action had been approved by the board, recites:

"Now, therefore, I, S. V. Stewart, Governor of the state of Montana, in view of the approval of my action by the state board of pardons do hereby declare and order the release of the said E. L. Sutton from the state prison of the state of Montana, on the following condition:

"First. That the said E. L. Sutton shall make a written report to the secretary of the state board of pardons, at least every thirty

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

days, stating his post office address, the nature of the work in which he is engaged, the name of his employer if he be employed steadily by one employer, and such other information as may at any time be required of him by the board or any member thereof.

"Second. That he shall not at any time be guilty of a breach of any of the laws of the state of Montana or of any of the conditions of this pardon. And further that he shall abstain from the use of intoxicating liquors in any manner or form whatsoever during the term and life of this conditional pardon, and that he shall refrain from frequenting saloons or other places where intoxicating liquors are kept or sold.

"Third. That he shall immediately proceed to look after, provide for and care of his wife and children.

"Fourth. That he shall, during the remainder of his term of service, be at all times in the legal custody and control of the state board of prison commissioners, and subject at any time to be returned to the state prison for a breach of any of the conditions of this conditional pardon or for other good and sufficient cause to the state board of pardons appearing. And a written order of the state board of pardons, certified by the state prison warden in charge of the state prison, shall be a sufficient warrant to any officer to retake and return said prisoner to actual custody.

"This conditional pardon having been approved by the state board of pardons, it shall immediately effect the release of the said E. L. Sutton under the conditions named, but before leaving the custody of said prison, the said Sutton shall signify in writing his acceptance of the conditional pardon and of all the conditions imposed thereby and therein."

[1] Since, under section 6393 of the Revised Codes, the certified copy of the record of conviction is made conclusive evidence, and this court is left no discretion but to proceed under section 6410, the convicted attorney and counselor is not entitled to notice by citation or other process. It is his bounden duty to know that the legal consequence of his final conviction is his disbarment. In *re Bloor*, 21 Mont. 49, 52 Pac. 779. Of course the conviction must be final by reason of acquiescence by the convict in the judgment of the trial court, or by affirmance by this court. It would manifestly be an injustice to him for this court to disbar or suspend him from office, until the finality of the judgment has been made apparent; otherwise, though by the subsequent proceedings in the criminal prosecution he might be found not guilty and be awarded full and complete vindication and his innocence of any wrong be fully established, in the end the order of disbarment or suspension would stand of record. In the *Bloor* Case the judgment of conviction had become final by affirmance by this court. *State v. Bloor*, 20 Mont. 574, 52 Pac. 611. In this case, the record not disclosing what was the condition in the case of *State v. Sutton*, we deemed it proper to issue the citation in order to permit it to be disclosed.

[2] We shall not stop to investigate the question whether the crime of forgery involves moral turpitude. That it does is so clearly apparent that argument to the contrary is not permissible.

[3] By applying to the Governor for a par-

don and obtaining it, Mr. Sutton acquiesced in the judgment of conviction. For the purpose of this proceeding, therefore, that judgment became final. In his brief Mr. Sutton assumes the position that the effect of the pardon is not only to release him from the punishment inflicted by the judgment of conviction, but that it obliterates, in legal contemplation, the offense itself and restores him to the same standing in the community as if the offense had never been committed. In support of this argument he cites *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *Carlisle v. United States*, 16 Wall. 147, 21 L. Ed. 426; *Osborn v. United States*, 91 U. S. 474, 23 L. Ed. 388. He also cites and relies with confidence upon the case of *Scott v. State*, 6 Tex. Civ. App. 343, 25 S. W. 337, to the point that though the statute makes it the duty of the court to strike from the rolls the name of an attorney upon proof of his conviction of a felony, if it is made to appear that the offender has been pardoned, the record of the judgment of conviction has wholly lost its probative value because it has been wiped out by the pardon. Hence he argues, the judgment having been canceled by his pardon by the Governor, all its force as a conviction for a felony has been taken away, and it no longer furnishes the basis for a disbarment proceeding. We have no fault to find with anything said in any of these cases. It will be noted, however, that all of them, except *Osborn v. United States*, discuss the force and effect of an unconditional pardon. In this case the court had under consideration the effect of a pardon of *Osborn* by the President, of the offense of participating in the rebellion on account of which his property had been condemned and ordered to be sold under the confiscation law of 1862. Act July 17, 1862, c. 195, § 7, 12 Stat. 591. Two conditions were attached to the pardon: First, that *Osborn* should pay all the costs of the proceeding pending against his person or property before his acceptance of the pardon; and, second, that he should not, by virtue thereof, claim any property, or the proceeds of any property, which had been sold by decree of a court under the confiscation laws of the United States. There was no question that the first condition had been fulfilled. The question was whether an attempt by *Osborn* to assert a claim to the proceeds of his property, as against the officers of the court who had misappropriated them, was a violation of the second condition. The court, speaking through Mr. Justice Field, held that it was not. In the opinion it was said:

"The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it relieves the offender from the consequences of his offense."

This passage discloses that the court was of the opinion that, inasmuch as the first condition imposed by the pardon, which was precedent, had been performed, the pardon had become unconditionally operative for all purposes, except so far as restrained by the second condition, which was in legal effect a limitation as to its operative effect, and not a condition for the violation of which the pardon would become nugatory.

Scott v. State was a disbarment proceeding. Inasmuch as it appeared that the offender had been granted an unconditional pardon prior to the institution of the proceeding, the court held that the record of conviction, having been wiped out by the pardon, could not be looked to as evidence of a conviction of a felony necessary to support a judgment of disbarment under the statute. A conditional pardon, such as was granted by the Governor in this case, cannot, in the nature of things, have such effect.

Besides the other conditions which Mr. Sutton must observe, he is required during the remainder of his term of service to remain in the custody and control of the state board of prison commissioners and be subject to be returned to the prison for a breach of any of the conditions, or for any other cause appearing to the state board of pardons to be good and sufficient.

[4] Under the Constitution (article 7, § 9) and the statute (Rev. Codes, § 9556), the Governor is authorized to impose conditions without restriction, so long as they are not illegal, immoral, or impossible of performance. Fuller v. State, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; Ex parte Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684; In the Matter of Convicts, 73 Vt. 414, 51 Atl. 10; State v. Peters, 43 Ohio St. 629, 4 N. E. 81; Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395.

The act of the Governor, as expressed in the order supra, though designated by him as a pardon, is closely assimilated to a parole, which he also has the authority to grant under certain restrictions. Rev. Codes, §§ 9573-9575.

[5] A parole does not operate to wipe out the judgment of conviction but merely suspends its operation by remitting, for the time being, the confinement and hard labor, until the end of the term, or until an unconditional pardon is granted. Until one of these events occurs, the offender is subject, upon a violation of any of the conditions, to be taken into custody and be held to suffer actual imprisonment as though the parole had not been granted. The same rule applies here. The imposition of the conditions implies the existence of a judgment; that it is just and regular; that its execution has been by the act of the Governor merely deferred to a future time, to be determined by Mr. Sutton's failure to perform the obligations he has as-

sumed by his acceptance of it. Whenever he transgresses any of the restraints imposed upon him, he will occupy the position of an escaped convict and be subject to be dealt with accordingly. Fuller v. State, supra. This was the rule at common law (Bacon's Abr. tit. "Pardon," E), and it has been recognized and adopted generally in this country (In the Matter of Convicts, supra; Arthur v. Craig, supra; Fuller v. State, supra; State v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. Rep. 582; Kennedy's Case, 135 Mass. 48). The pardon being in the nature of a deed, it must be accepted. United States v. Wilson, 7 Pet. 150, 8 L. Ed. 640. Having been accepted, all the conditions of it not open to any of the objections above noted become binding. In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

For the purpose of this proceeding, therefore, the judgment in State v. Sutton is a valid, subsisting judgment, notwithstanding the order of the Governor. It is true that, upon expiration of Sutton's term of service, the pardon will become absolute. At least this seems to have been the purpose of the Governor. But this does not relieve this court from the duty imposed upon it by the statute. It is left without discretion, and hence must make the order of disbarment. To give the pardon the effect which Mr. Sutton insists should be accorded to it might lead to consequences which would prove embarrassing. If Mr. Sutton should transgress any of the restraints imposed upon him, or his conduct, though not directly violative of any of them, should, in the opinion of the board of pardons, be such as to justify his return to prison, the pardon would be annulled. The result would be that Mr. Sutton would be a member of the bar in good standing, notwithstanding his status as such would, in the eye of the law, have ceased to exist.

Let judgment be entered in accordance with section 6420 of the Revised Codes.

HOLLOWAY and SANNER, JJ., concur.

(50 Mont. 95)

NIXON v. MONTANA, W. & S. RY. CO. et al.  
(No. 8418.)

(Supreme Court of Montana. Dec. 11, 1914.)

1. PLEADING (§ 216\*) — COMPLAINT — DEMUR-  
RER.

The court, in determining whether a complaint attacked by general demurrer states a cause of action, must consider the entire complaint and determine whether its sufficiency can be asserted on any theory.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.\*]

2. RAILROADS (§ 361\*) — FENCING TRACKS —  
STATUTORY PROVISIONS.

Rev. Codes, § 4308, requiring railroad corporations to fence their tracks and maintain cattle guards, and making them liable for killing stock on their road in the event they do not maintain fences and guards, protects live

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stock only, and the failure of a railroad company to maintain a fence does not render it liable on that ground for the death of a child entering on the unfenced tracks and run over by a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1246; Dec. Dig. § 861.\*]

**3. NEGLIGENCE (§ 23\*) — DANGEROUS PREMISES—INVITATION TO CHILDREN.**

While an invitation to children may be implied from the maintenance by an owner of dangerous machinery on his premises, he may conduct his business with such machinery operated in such manner as may be necessary and convenient to make his business successful, and unless the machinery was especially and unusually attractive to children, and its unusual attractiveness was known, or should have been known, a cause of action for injuries to children does not lie.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

**4. NEGLIGENCE (§ 23\*) — INJURIES TO CHILDREN ON TRACK—ATTRACTIVE NUISANCE.**

A railroad, operating through an unincorporated village a train in which two cars are placed behind the caboose, does not thereby impliedly invite children to enter on the track on the theory of the attractiveness to children of the train, and it is not liable for the death of a child run over by the train.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

**5. NEGLIGENCE (§ 23\*)—RAILROADS (§ 356\*)—INJURIES TO PERSONS ON TRACK—LIABILITY—ATTRACTIVE NUISANCE.**

A railroad company, permitting the use of its tracks in an unincorporated village by school children, must expect their presence and operate trains accordingly, but the presence of a child on the track does not carry with it an invitation to board a train or to use any of its property, and it is not liable on that theory for the death of a child killed while attempting to board a moving train.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23; Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.\*]

**6. NEGLIGENCE (§ 111\*) — ATTRACTIVE NUISANCE—COMPLAINT.**

A complaint, in an action against a railroad company for the death of a child run over by a train, which alleges that the invitation of the child to attempt to board a moving train was implied from the attractive character of the train, and that the attempt was not made on any other invitation, does not state a cause of action on the theory that an invitation to children to board moving trains could be implied from toleration by the company from prior attempts of children so to do.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.\*]

Appeal from District Court, Carbon County; Geo. W. Pierson, Judge.

Action by O. R. Nixon against the Montana, Wyoming & Southern Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mackel and Tyvand, of Butte, for appellant. John G. Skinner, of Red Lodge, for respondents.

SANNER, J. The plaintiff elected to stand upon his complaint after a general demurrer thereto had been sustained. Judgment for

the defendants was entered, and this appeal is the result.

The material allegations of the complaint, pleaded as one cause of action, may be epitomized as follows: That the plaintiff is the father of Emma Nixon, who was run over and killed by one of defendants' trains on December 5, 1912; that at and for some years prior to that time the defendant company was engaged in operating a railway through Bear Creek, an unincorporated village in Carbon county; that it was the duty of said company to maintain on both sides of its track a good and legal fence and to keep at its crossings cattle guards over which cattle and other domestic animals could not pass, but in this duty it wholly and negligently failed; that at the time of the accident Emma Nixon was eight years old and resided about 1½ miles west of Bear Creek, south of the company's track; that she, together with a great number of other children residing in the same neighborhood, attended school at Bear Creek, north of the track; that because of defendants' failure to maintain a good and legal fence it became and was the custom of such children to walk upon said track, particularly between 3 and 5 p. m. of each day, except Saturdays and Sundays, and said track, for many years prior to the date of the accident, had been used as a common highway for pedestrians en route to and from Bear Creek, all of which was well known to the company; that it was also a common custom for such children, when returning from school by way of said track, to attempt to ride upon the rear end of the trains traveling thereon, especially if such trains were moving slowly, and this the defendants well knew; that at the time of the accident one of the company's trains was moving slowly between Bear Creek and the residence of Emma Nixon, which train consisted of nine cars, two of which cars were placed in an unusual position, to wit, behind the caboose; that said train, so made up and so moving, was attractive to children and was dangerous; that defendants should have known these facts, and should have known that such children would attempt to ride said train, and should, in the exercise of ordinary care, have placed some person upon the rear thereof, to prevent such children riding thereon; that defendants failed to do that, or to do anything in that behalf; that Emma Nixon, and other children, entered said track at a point where it was the duty of defendants to have kept a fence, and, being upon said track to the knowledge of defendants, was attracted by the train so made up and slowly moving, and was thereby impliedly invited to ride the rear thereof, and attempted to do so, being too young to appreciate the danger; that her death was the result of that attempt.

[1] The question presented is whether a cause of action is stated in the foregoing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

facts, bearing in mind that the complaint stands confronted only by a general demurrer, and that the duty of this court is to search it from end to end and determine whether its sufficiency can be reasonably asserted upon any theory. The appellant insists that a cause of action is stated under (1) the statutory duty imposed upon railway companies to fence, and (2) under the common-law duties arising upon implied invitation.

[2] 1. The application to this case of the statutory duty imposed upon railway companies to fence is erroneously assumed in consequence of the decision of this court and some authorities cited in *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26. A moderately discriminative reading of that case should have satisfied counsel that it not only does not sustain his view, but makes directly against it. We there dealt with a statutory provision the manifest purpose of which was to impose an absolute duty for the protection of persons, for the benefit, not of a class, but of the entire public considered as a composite of individuals; we took pains to distinguish those statutes which impose a duty for the benefit of the public considered as a composite of individuals from those statutes which impose a duty for the benefit of a particular class, and we held that in the one case a right of action may arise in favor of any person especially injured by a failure in such duty, while in the other a right of action could accrue only to a person of the contemplated class. The fencing statute invoked as a basis of liability in this case, is as follows:

"Railroad corporations must make and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines and cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables." Section 4308, Rev. Codes.

This language, as well as the history of the section, demonstrates that its enactment was for the particular benefit of a particular class. In every case where liability exists because of failure to perform a specific duty, there is involved the proposition that no liability exists when such duty has been performed; but the notion that the Legislature intended compliance with this statute to absolve from liability for injuries to children is beyond the pale of discussion.

[3] 2. The argument upon implied invita-

tion is, like the complaint, of rather mixed complexion. At one time the invitation is implied from custom, at another from attraction under the so-called "turntable doctrine," and often it is directed to the presence of the child near the track, instead of to her attempt to board the train. The extent to which the turntable doctrine has been accepted in this state, and how it may be invoked, are disclosed in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373, and in *Gates v. Northern Pacific Ry. Co.*, 37 Mont. 103, 94 Pac. 751. The effect of these cases is to hold that, while an invitation may be implied from the maintenance, by the owner, of dangerous machinery upon his premises, which is so especially and unusually alluring to children of tender years that they are attracted thereby to the knowledge of the owner, he may nevertheless conduct his business on his own premises with such machinery, operated in such manner as may be necessary and convenient to make his business successful; and, if it does not appear but that the machinery or the use thereof was proper, necessary, and convenient, and that it was especially and unusually attractive to children, and that its unusual attractiveness to children was known, or should have been known, to the owner, no cause of action under the turntable doctrine is stated. As elucidating some of the circumstances to which this doctrine cannot be applied, we incorporated in the *Driscoll Case* certain expressions of the Supreme Court of Texas in *San Antonio, etc., Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28, including the following:

"It has been contended broadly that when an owner places \* \* \* anything upon his property which is attractive to others and one is thereby induced to go thereon, the invitation may be inferred as a fact by the court or jury. Now, since it is manifest that to some classes of persons, such as infants, the things ordinarily in existence and use throughout the country, such as rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks, etc., are both attractive and dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon the owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore it has been generally held that the invitation cannot be inferred in such cases."

[4] Analyzing the complaint, we observe that the attraction was a train, the only unusual feature of which was that two cars were behind the caboose. It is alleged that defendants knew, or ought to have known, that the children, including Emma Nixon, would be attracted by the train; but it is not alleged that this train, or trains, so made up, were any more attractive than other trains. The mere fact that trains, as such, are attractive does not suffice; for they are familiar objects and, whether moving rapidly or slowly, they are necessary instrumentalities through which a railroad must conduct



its business. So, too, the placing of cars behind the caboose may have been quite reasonable and proper. In any event, there is no intimation in the complaint that from previous practice, or otherwise, the company or its agents knew, or should have known, that a train so made up was especially alluring to children. No reason is suggested why this should be so, and the other allegations strongly indicate that such was not the fact. In no jurisdiction, so far as we are informed, in which the turntable doctrine is accepted, has it been applied to moving trains. *Underwood v. Railroad Co.*, 105 Ga. 48, 31 S. E. 123; *Wilson v. Railway Co.*, 66 Kan. 183, 71 Pac. 282; *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254. The complaint cannot be sustained upon this theory.

[5] It is not necessary to canvass the averments touching the implied invitation to Emma Nixon and her companions to be upon or near the track at the time and place of the accident. Suffice it to say that they were there, and the complaint contains enough to charge that they were there by invitation to use the track as a highway, implied, not from want of a fence, but from custom. It was therefore the duty of the company to expect their presence and to operate the dangerous instrumentalities of its business accordingly. This, however, is not important, because Emma Nixon was not killed while she was on the track using it as a highway; she was killed in consequence of her attempt to board a moving train. Her presence near the track was, of course, necessary to an attempt to board a train, but a license to use the track as a highway does not carry with it an invitation to use the track for other purposes, or to board the company's trains, or to use any of its other property.

[6] Assuming, but not deciding, that an invitation to children to board its moving trains can be implied from toleration by the company of previous attempts so to do, we may, by piecing an averment here with an averment there, say that such an invitation is sufficiently alleged. To make it available to the plaintiff, however, we should be obliged to ignore the plain meaning of paragraphs 13 and 15. In these paragraphs we are expressly told that the invitation upon which the fatal attempt was made was the invitation implied from the attractive character of the train, and we are inferentially informed that the attempt was not made upon any other invitation.

The ruling complained of was correct, and the judgment appealed from is affirmed.

**Affirmed.**

BRANTLY, C. J., concurs. HOLLOWAY, J., being absent, did not hear the argument, and takes no part in the foregoing decision.

(74 Or. 105)

# TELSCHOW v. QUIGGLE et al.

(Supreme Court of Oregon. Dec. 29, 1914.)

## 1. VENDOR AND PURCHASER (§ 232\*)—BONA FIDE PURCHASER—NOTICE.

Where a grantor, executing a deed with the grantee in blank, remained in possession of the property, and a third person, obtaining the deed without authority to fill in the name of the grantee, except on specified conditions, inserted the name of the grantee without the performance of the conditions, and the grantee conveyed the property to another, who relied on the grantee's representations, the latter was not a bona fide purchaser, and acquired no title as against the grantor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.\*]

## 2. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASER—WHO IS.

Where a deed executed by a grantor, with a blank for the grantee, is surreptitiously and fraudulently taken from the grantor's house and the blank filled up, no title passes, and a bona fide purchaser for a valuable consideration from the grantee in the deed acquires no title, especially if the grantor remains in possession of the property.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

## 3. DEEDS (§ 67\*)—DELIVERY—EFFECT.

A deed delivered to the grantee without the express or implied consent of the grantor that the deed shall pass irrevocably from his control conveys no title to the grantee.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 145-148; Dec. Dig. § 67.\*]

## 4. DEEDS (§ 32\*)—DELIVERY—EFFECT.

A deed with a blank for a grantee is a conveyance only where the blank is filled by one authorized to fill it, before or at the time of delivery to the grantee, and on compliance with the conditions imposed by the grantor.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 64; Dec. Dig. § 32.\*]

## 5. DEEDS (§ 68\*)—MUTUAL ASSENT OF PARTIES.

The force of a deed depends on the mutual assent of the parties to it, without which there can be no delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

## 6. VENDOR AND PURCHASER (§ 232\*)—BONA FIDE PURCHASER—NOTICE.

One contemplating the purchase of land from a grantee while the grantor remains in possession must take notice of the rights of the grantor which may exist outside the deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.\*]

Department 2. Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Suit by August Telschow against George E. Quiggle and others. From a decree for plaintiff, defendant F. L. Kelly appeals. Affirmed.

This is a suit to set aside two deeds of a quarter section of land in Lane county, for the reason that the one from plaintiff was obtained and delivered by means of a fraudulent scheme, and was void, and the other to defendant Kelly passed no title. From a decree rendered in favor of plaintiff, and

against defendants, George E. Quiggle, F. L. Kelly, and Carl Tucker, defendant Kelly appeals.

Chas. E. Lenon, of Portland (John A. Jeffrey, of Portland, on the brief), for appellant. Richard S. Smith, of Eugene (Woodcock, Smith & Bryson, of Eugene, on the brief), for respondents.

BEAN, J. It appears that the plaintiff, August Telschow, was a man of advanced years, uneducated, and ignorant of business ways. He obtained title under the homestead laws to a quarter section of land in a remote part of Lane county. He had been living on this place for a long time, when the defendant Carl Tucker and wife came to live with him. As time went on the plaintiff gained confidence in Tucker, and there was some talk between them in regard to trading the former's land for a farm in the Willamette Valley. Pursuant to this talk, on the 18th of June, 1912, plaintiff and Tucker went to Florence, where Telschow executed and acknowledged a deed of the land with the name of the grantee in blank, the possession of which was retained by plaintiff for some time. When Tucker started for the Willamette Valley, Telschow permitted him to take the deed with authority to trade the land for a farm of equal worth in the valley. Tucker had no authority to insert the name of the grantee in the deed or deliver the same, except upon the conditions stated by the plaintiff. Tucker went to Portland, Or., retained the deed until August, and wrote the plaintiff that he had not been able to trade the land. About the last of August he met defendant Quiggle, whom, he states, he informed in regard to the conditions of the deed, and with whom he exchanged the land, pursuant to Quiggle's advice, for two residence lots in Portland, subject to a mortgage, and 40 acres of land in Clark county, Wash., also subject to a mortgage. These properties were deeded directly to Tucker by Quiggle, whose name was inserted in the deed by a stenographer. The instrument was then recorded, September 3, 1912, in the records of deeds of Lane county, Or. Tucker soon traded the property for two second-hand automobiles, which he sold.

The circuit court found, and the evidence shows, that Quiggle knew of the conditions attached to the authority conferred upon Tucker by plaintiff, knew that Tucker had no authority to make the exchange, and that Quiggle was a party to the fraud practiced in the transaction. Quiggle had never seen the Lane county land, and had no knowledge of the same, except such as he received from Tucker. The trial court found that the manner in which the deed was obtained was a species of larceny. About four days after Quiggle obtained the deed, he traded the land to defendant Kelly for the furnishings and lease of a rooming house in Portland,

known as the "Otis rooming house," and received a bill of sale therefor. Quiggle, as a witness for defendants, testified that he gave Kelly all the information, in regard to the land in question, that he received from Tucker. After the execution of the deed, June 18, 1912, Telschow resided upon the land, and was in the exclusive, open, and notorious possession thereof, and knew nothing about the pretended transfer to Quiggle until about the 15th of October of that year, when he immediately commenced this suit.

[1] Kelly obtained an abstract of title, but did not examine the land, nor make any further inquiry to ascertain the true condition of the possession or title, except such as was given him by Quiggle. It is contended upon the part of the defendant Kelly that he is an innocent purchaser of the land for value, and that as to him the deed is valid. By the conveyance from Quiggle, the grantee named in the deed executed in blank by Telschow, who thereafter retained exclusive, open, and notorious possession of the land, defendant Kelly acquired no title as against Telschow, the grantor named in the original deed, for the reason that there had been no valid delivery of such deed to Quiggle, who never obtained lawful possession of it. *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1. The holding in the case cited has ever since been followed.

[2, 3] On the question of the sufficiency of facts to excite inquiry and to put a person upon notice, each case depends upon its own facts. *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295; note to *Garbutt v. Mayo* (Ga.) 13 L. R. A. (N. S.) 60. If a deed which has been executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantor's house, and the blank filled up, no title passes thereby, and a bona fide purchaser for a valuable consideration from the person holding the deed stands in no better situation than such fraudulent holder, especially if the original grantor remains in possession of the property. 39 Cyc. 1692. A deed that is delivered to the grantee, without the express or implied consent of the grantor to the effect that the deed shall pass irrevocably from his control, conveys no title to the grantee. Such a deed would be of no more force than one with a forged signature. *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Gaston v. Portland*, 16 Or. 255, 19 Pac. 127; *Burns v. Kennedy*, 49 Or. 588, 90 Pac. 1102; *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 535, 97 Pac. 717; *Bradford v. Durham*, 54 Or. 1, 101 Pac. 897, 135 Am. St. Rep. 807; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

[4] There are two conditions requisite to make a deed, executed with the name of the grantee left blank, that operate as a conveyance of the real estate described: The blank must be filled by the party authorized to fill

it, and this must be done before or at the time of delivery of the deed to the grantee. *Cribben v. Deal*, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; *Allen v. Withrow*, 110 U. S. 128, 3 Sup. Ct. 519, 28 L. Ed. 90. Tucker had no authority to fill in the name of Quiggle as grantee in the deed, or any other person's name, except on the condition named by Telschow, to wit, upon the conveyance to the plaintiff of a farm in the Willamette Valley. The whole transaction between Tucker and Quiggle was a farce, and we think, if Kelly had exercised the care of an ordinarily prudent man, he could have ascertained the facts. Quiggle obtained legal advice, and was informed that the deed executed in blank would be good with the name of the grantee inserted, provided Tucker had authority to fill in the name. Under the circumstances shown by the record, Tucker never had any authority to insert Quiggle's name in the deed. Telschow at all times had full right to its control.

[5] The binding force and effectiveness of a deed must necessarily depend upon the mutual assent of the parties to it, without which there can be no delivery. *De Bow v. Woltenberg*, supra. In *Sharp v. Kilborn*, 64 Or. 371, 130 Pac. 735, we find the law stated that, where a grantor delivered a deed to a third person, with instructions not to deliver it to the grantee unless the purchase price was paid, a delivery contrary to such directions passed no title, whether the third person was an agent of the grantor or whether he was an escrow. It appears that Kelly not only failed to take notice of plaintiff's possession, but was at least careless and negligent in regard to making inquiry either as to the value or possession of the land. As stated by the trial court:

"The most that can be said for Kelly is that the transaction was a 'sight and unseen' trade so far as concerned the Lane county property; and certainly the exercise of ordinary prudence, based upon the information possessed by Kelly and the aforesaid circumstances, would have betrayed the fact that plaintiff had been wickedly defrauded."

[6] The authorities are inharmonious as to the effect of a grantor's possession of the premises which he has conveyed after the execution of a deed, and whether his possession under these circumstances is such that a person contemplating the purchase or acquiring some interest in the land is compelled to take notice of the rights of such grantor which may exist de hors his deed. 2 *Devlin on Real Estate*, § 761. After careful examination of many authorities, we find in no case, where a deed executed and acknowledged with the name of the grantee left blank, and afterwards fraudulently inserted, where the grantor has remained in the open and notorious possession of the premises, that a deed to a third person claiming to be an innocent purchaser has been upheld. *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Rahdall*

*v. Lingwall*, 43 Or. 386, 73 Pac. 1; *Bumpas v. Zachary* (Tex. Civ. App.) 34 S. W. 672; 2 *Devlin on Real Estate*, 762.

It appears from the record that Kelly relied upon defendant Quiggle as to the value of the plaintiff's land, the condition of the title, except as shown by the abstract, and the possession thereof. For his damages, if any, he should look to defendant Quiggle.

The decree of the lower court is right, and should be affirmed; and it is so ordered.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(75 Or. 100)

# BIRD v. MAYO et al.

(Supreme Court of Oregon. Dec. 31, 1914.)

## 1. REFORMATION OF INSTRUMENTS (§ 43\*)—MUTUAL MISTAKE—QUANTUM OF PROOF.

In a suit to reform a deed for mistake, the plaintiff must show precisely and by clear and convincing testimony in what the mistake consisted and that it was mutual.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 154; Dec. Dig. § 43.\*]

## 2. REFORMATION OF INSTRUMENTS (§ 45\*)—DEEDS—MUTUAL MISTAKE IN DESCRIPTION.—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to reform a deed held to show a mutual mistake in consequence of which the description covered an entire lot, instead of only a portion thereof, as the contracting parties intended.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by Clara S. Bird against Lucretia Mary Mayo and another. From decree for defendants, plaintiff appeals. Reversed and rendered.

John H. Hall, of Portland, for appellant. H. W. Hogue, of Portland, and G. C. Fulton, of Astoria (Milton W. Smith, of Portland, on the brief), for respondents.

PER CURIAM. This is a suit to correct a mistake alleged to have been mutually made by the parties in a conveyance from the plaintiff to the defendant Lucretia Mary Mayo. It appears that at the date of the conveyance the plaintiff was the owner of lot 10 in block 2 of Ocean Grove Annex in Clatsop county, Or. The plats in evidence show that block to consist of a row of lots lying between Broadway street and the ocean beach. Beginning at Broadway, the lots are numbered consecutively from east to west from 1 to 10, inclusive. All of them to and including 9 are of the uniform width of 50 feet. Lot 10 next to the sea is of much greater area, and, as it fronts upon the sands, is irregular in shape on the western boundary. The deed itself calls for lot 10 in block 2. The plaintiff contends that both parties mutually understood that the actual ground

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conveyed was to be that portion only of lot 10 lying west of a line parallel with its eastern boundary and 50 feet distant therefrom. The defendants, as usual in such cases, deny the mistake and assert that the deed was drawn and executed according to the actual intention of the parties at the time.

[1] It is a judicial platitude to say that it is incumbent upon the plaintiff to show precisely in what the mistake consisted and that it was mutual, all of which must be made to appear by clear and convincing testimony. *Newsom v. Greenwood*, 4 Or. 119, 123; *Ramsey v. Loomis*, 6 Or. 367, 374; *Remillard v. Prescott*, 8 Or. 37, 43; *McCoy v. Bayley*, 8 Or. 197; *Foster v. Schmeer*, 15 Or. 363, 368, 369, 15 Pac. 626; *Epstein v. State Ins. Co.*, 21 Or. 179, 181, 27 Pac. 1045; *Parker v. Thomson*, 21 Or. 523, 529, 28 Pac. 502; *Kleinsorge v. Rohse*, 25 Or. 51, 58, 34 Pac. 874; *Thornton v. Krimbel*, 28 Or. 271, 274, 42 Pac. 995; *King v. Holbrook*, 38 Or. 452, 460, 461, 63 Pac. 651; *Stein v. Phillips*, 47 Or. 545, 549, 550, 557, 84 Pac. 793; *Pope v. Hoopes (C. C.)* 84 Fed. 927, 929; *Pom. Equity Jur.* (3d Ed.) § 862.

[2] It is impracticable to set out more than the salient points of the testimony. According to her contention, the plaintiff had sold to another party what she supposed was lot 8 in that block, and proposed to sell to Mrs. Mayo all the remainder of the block between that and the ocean, reserving lot 9 whereon to place a residence which she intended to build for herself. The substance of the testimony on behalf of the plaintiff is to the effect that the defendant Martin Mayo, representing his wife, the other defendant, applied to the plaintiff to buy realty fronting on the ocean. She, in company with her sister-in-law, accordingly went with him upon the premises where she pointed out the ground she had already sold upon which was afterwards erected a hotel called Lockesley Hall Annex. She showed Mayo a stake 50 feet west of the lot occupied by Lockesley Hall Annex and told him that she would sell all west of the stake. The defendant declined to purchase at the price set, but afterwards, when the plaintiff met Mayo in Portland, he inquired if she had yet sold that property, with the result that after some negotiations they agreed upon a price, and the defendant Martin Mayo caused a deed to be drawn conveying to his wife from plaintiff all of lot 10. There is no question made but what the plaintiff knew that the deed was written so as to include all of lot 10, because she looked it over at the time she signed it and understood its literal contents. The testimony further tends to show on behalf of the plaintiff that the defendants took possession of the property bounded on the east by the line 50 feet west of and parallel with the eastern boundary of the lot, constructed a fence on the line thus dividing lot 10, erected two houses west of the fence fronting the ocean, and sold to one King 40

feet off the east end of his holding which he told King to take, immediately west of of the fence already mentioned. The deed to King described the 40 feet as the easterly 40 feet of lot 10, bounding it by beginning at the southeast corner, running thence northerly along the east line of the lot, and so on around to the place of beginning. King built his residence west of the fence more than 50 feet from the actual eastern boundary of the lot, as he says, by direction of the defendant Martin, representing his wife. No complaint was made to him about his having built upon the wrong property, for several months, according to the statement of Mayo, and for more than a year, according to the testimony of King. The actual eastern 50 feet of lot 10 remained unimproved until the hearing of the case, except that the plaintiff, acting by her sister-in-law, the proprietress of the Lockesley Hall Annex, built a fence along the street or southern boundary of the vacant tract, laid a sidewalk there, and put gates in the fence for the accommodation of neighbors who desired to cross to their premises in the rear. The only act of ownership exercised over the property by the Mayos consisted in putting a fence along the eastern boundary of it after this suit was commenced and in allowing some one to pile some wood on the premises.

The testimony on behalf of the defendant is to the purport that he applied to the plaintiff to purchase the premises and demurred to the price, but that some months afterwards she came to him in Portland, and, after some negotiations, named a lower price which he accepted; that he produced a plat of the addition and pointed out to her lot 10 as what he desired to purchase; that she was familiar with the premises; and that he caused the deed to be drawn, as stated, which she signed, knowing fully that it was a conveyance of all of lot 10.

If this were all the testimony, we might well decline to disturb the instrument in question. In our judgment, however, there are two admissions of the defendant Martin Mayo, who carried on all the business, although the conveyance was taken in the name of his wife, which turns the scale in favor of the plaintiff. Referring to the conversation in Portland, he testified thus:

"Q. Did you ask her in the restaurant anything about lot 9? A. Yes. Q. The first conversation? A. Yes, I did. Q. Well? A. I—she offered to sell lot 10. I says, 'Like to buy all that lot 9, too, if you like to sell it.' She says, 'No, I don't want to keep that lot 10; if I ever get married, I like to build a house on it.' I says, 'In a case of that kind, all right.' Just exactly, I says, 'I wish you would get married soon so you can have a home.' That is just exactly what I say."

Another circumstance is derived from his evidence concerning his notification to Mr. King that he had built on the wrong property. He was asked:

"Q. When did Mr. King say that you notified him at that time? A. Yes, sir; and they says,

'I told him,' I says: 'You remember, Mr. King, I told you you have to give me deed back of that property, then I deed you another lot.'

Knowing the actual situation of Lockesley Hall Annex, which was in very truth upon lot 9 instead of lot 8, the defendants must have believed that the vacant ground between that building and where King actually constructed his house was lot 9 instead of part of lot 10. Moreover, if the defendants' theory was correct, their deed to King correctly represented the ground conveyed to the latter, and there would be no necessity for King to reconvey to them. Between the Mayos and King the error consisted in the latter putting his house on the wrong ground. There was no mistake in the deed from Mayo to King if the contention of the defendants here is legitimate.

Considering that the defendants made no use of the eastern 50 feet of lot 10, made no objections to King taking possession of the tract west of the fence until long after he had built his house, and that the defendants wanted to buy from the plaintiff lot 9 which she had already sold to another party, it is clear to our minds that the defendants participated in the mistake alleged by the plaintiff. It is equally manifest that the plaintiff made a mistake in the description of the property actually intended to be sold. It is obvious from the conduct of both parties that the actual ground intended to be made the subject of the conveyance began 50 feet west of the eastern boundary of lot 10. The error consisted in applying that conventional description to that part of the lot. The deed should be made to cover only the ground actually intended to be conveyed, regardless of the arbitrary designation applied to it in the writing. A careful consideration of the whole testimony convinces us that the clear preponderance is with the plaintiff, and that the conveyance should be reformed according to the prayer of the complaint.

Accordingly, the decree of the circuit court is reversed, and one here entered as desired by the plaintiff.

McBRIDE, C. J., did not participate in this decision.

(74 Or. 112)

#### STATE v. WEST, Governor, et al

(Supreme Court of Oregon. Dec. 29, 1914.)  
STATES (§ 127\*)—APPROPRIATIONS—FUNDS.

For the years 1911 and 1912 the Legislature appropriated \$142,000 for the maintenance of the penitentiary. Of this, \$80,000 was spent, and the sum of \$20,000 derived from sales of brick made by the convicts was deposited as a revolving fund, out of which sum \$18,000 was spent for the maintenance of the penitentiary. *Held* that, as, except in the case of school or other funds raised by special taxation, there is no segregation of moneys in the treasury, the money derived from the sale of brick made by the convicts could not be deposited in a special fund, subject to warrants drawn for penitentiary purposes, but, as the full appropriation for the

penitentiary was not expended, warrants paid out of the so-called revolving fund should be treated as paid out of the appropriation for the penitentiary, and the state, not having been damaged by payments out of the so-called revolving fund, could not recover the same from the state officers making such payments.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125; Dec. Dig. § 127.\*]

Burnett, Eakin, and Moore, JJ., dissenting.

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by the State of Oregon against Oswald West, Governor, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

In substance, it is stated in the amended complaint that during the period involved in this controversy the defendant West was Governor, the defendant Olcott secretary of state, and the defendant Kay treasurer of the state of Oregon; that they assumed to act as a board purporting to have control of what they termed the "Oregon State Penitentiary Revolving Fund," consisting of rent of a foundry plant at the prison and of money derived from sales of brick made by the convicts, aggregating during that time \$16,905.92; that, without the same having been appropriated by any act of the legislative assembly, they expended, of that amount, by a pretended process of auditing alleged claims and drawing warrants and payment thereof in form as if regularly appropriated, \$16,518.83, without any authority of law, for services rendered, materials and supplies furnished, and land purchased for the penitentiary, all in excess of the moneys appropriated by law for any purpose connected with that institution during the period mentioned; and that the moneys actually appropriated by the legislative assembly for that purpose were otherwise expended. Alleging that the state is damaged in the sum so wrongly disbursed, the plaintiff demands judgment for \$16,518.83. The allegation of damage to the state and that the payments in question were in excess of lawful appropriation therefor are denied by the answer. The official character of the defendants is admitted. All other allegations of the complaint are denied, except as stated in the answer. After alleging, in substance, that the money derived from rent of foundry and sale of brick made by the convicts had been carried in the accounts of the state treasury under the head of "Oregon State Penitentiary Revolving Fund," the answer alleges:

"That during the year 1911 large numbers of the prisoners and convicts confined at said penitentiary were employed under the direction and control of the superintendent of said penitentiary in useful and profitable labor, as making bricks, repairing and constructing buildings and other equipment in and about said institution for the maintenance and betterment of said penitentiary, all pursuant to rules and regulations prescribed by defendant Oswald West, Governor of the state of Oregon. That,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the course of said employment of said prisoners and convicts, it became necessary to engage the services of men and to purchase the materials, supplies, and land as described in the amended complaint for the more useful, profitable, and efficient employment of said prisoners and convicts, and for the enlargement of their employment, and for the maintenance and betterment thereby of said penitentiary. That said services, materials, supplies, and land were engaged and purchased by said superintendent for the state of Oregon for the use and benefit of said institution; that payment was made therefor in the following manner, to wit: Vouchers specifying the items for said claims were duly certified by said superintendent, and by him transmitted to defendants, who examined and approved the same, and thereafter transmitted the same to defendant Ben W. Olcott, secretary of state. Said defendant Ben W. Olcott, secretary of state, thereafter duly audited, approved, and allowed said claims and drew warrants in payment of the same on said defendant Thos. B. Kay, said warrants purporting to direct said defendant Thos. B. Kay to pay the same out of said 'Oregon State Penitentiary Revolving Fund.' Said defendant Thos. B. Kay paid said warrants and charged the same to said 'Oregon State Penitentiary Revolving Fund.' That said rents and proceeds of said labor, inclusive of said balance of \$1,006.34, aggregated in moneys from January 1, 1911, to September 3, 1912, the sum of \$20,808.26. That the cost of said services, materials, supplies, and land for which said warrants were drawn and paid, as alleged, aggregated \$16,191.33. \* \* \* Said expenditures were found necessary in order to insure the safe custody of the inmates, promote the welfare of the said institution, and carry out the purposes for which it was established."

By whom it was found necessary to do all these things is not stated.

In a second defense, after stating that the Legislature had appropriated for the biennium of 1911 and 1912 \$142,000 for the salaries of officers and employes and for the general maintenance and contingent expenses of the penitentiary, the answer contains this allegation:

"That the salaries of the officers and employes and the general maintenance and contingent expenses of said penitentiary for the year 1911 over and above, and for other purposes than those expenditures described in the amended complaint, aggregated the sum of \$80,375.45; and obligations were incurred and warrants drawn pursuant to said act and appropriation during the whole of said year 1911 over and above said expenditures described in the amended complaint for no other or greater sum than \$80,375.45; and there was in the hands of defendant Thos. B. Kay, state treasurer, on January 1, 1912, unexpended of said appropriated sum and over and above all warrants drawn or obligations incurred pursuant to said act and appropriation, exclusive of said expenditures described in said amended complaint, the sum of \$61,624.55."

A third defense is, in substance, that the amount paid for the services, materials, supplies, and land mentioned in the complaint was the fair market price such as would have been paid for the same had there been in the hands of the state treasurer money duly appropriated by the legislative assembly for that purpose, and that no damage was done to the plaintiff by the payments challenged by the complaint. Much to the

same effect is the fourth separate defense, in substance, that the materials, land, and supplies mentioned were used in the maintenance of the state prison and for the better and more efficient conduct and management thereof. This fourth separate answer concludes with these allegations:

"That all of said matters and things in the answer alleged and set forth in the amended complaint were brought to the full notice and knowledge of the legislative assembly of the state of Oregon for the year 1913, by means of reports made to said assembly pursuant to law by defendants and by reports of investigating committees appointed for such purposes by the legislative assembly; that said legislative assembly took no action toward the repudiation of said matters, transactions, or things, but acquiesced therein, and ratified and confirmed the same, and accepted all of the benefits thereof for and on behalf of the state of Oregon."

A demurrer to the new matter in the answer was overruled by the circuit court. The reply denied the allegation of the answer respecting the acquiescence and ratification by the legislative assembly of the acts complained of, and alleges, in substance, that a committee appointed by the legislative assembly at the session thereof held in the year 1913 expressly reported that the expenditures in question were without authority of law and illegal, and that none of them were ever acquiesced in, ratified, or confirmed by the legislative assembly or by the direct vote of the people. The pleadings having been thus concluded, both parties moved for favorable judgment on the pleadings according to their respective prayers. The circuit court overruled the motion of the plaintiff, and sustained that of the defendants, entering judgment dismissing the action. The plaintiff appeals.

A. M. Crawford, Atty. Gen. (James W. Crawford, Asst. Atty. Gen., on the brief), for the State. John H. McNary, of Salem, and Claude C. McColloch, of Portland, for respondents.

McBRIDE, C. J. (after stating the facts as above). The answer of the defendant contains many conclusions of law and some inconsistencies. From all the pleadings it appears that there came into the hands of the state treasurer from sales of brick and other products of the state penitentiary during the biennium of 1911 and 1913 the sum of \$20,808.26, which, under the direction of the board, was charged in a separate account as a revolving fund, of which \$16,191.33 was paid out by warrants drawn upon it for expenditures "found necessary in order to insure the safe custody of the inmates, promote the welfare of the institution, and carry out the purposes for which it was established." It also appears that, for the support and maintenance of the institution, the salaries of officers and employes, and for the general maintenance and contingent expenses of the penitentiary, the Legislature appropriated \$142,000, of which there was expended \$80,

375.45 over and above the sum of \$16,191.33, before mentioned, making up a total expenditure for the biennial period of \$96,566.78. There is no authority of law for creating this so-called revolving fund, and therefore it did not legally exist. The moneys paid into the treasury from the proceeds of materials manufactured at the penitentiary became legally part of the general funds in the state treasury, and the attempt to maintain and draw warrants upon this so-called revolving fund was not authorized by law. Except in the case of school funds and other funds raised by special taxation and authorized by law for a particular purpose there is no segregation of moneys in the treasury. As to moneys appropriated by the Legislature out of the general funds of the state, the separation and designation of the particular sums appropriated as "funds," such as "penitentiary fund," "asylum fund," etc., is largely a matter of bookkeeping, and is done for convenience in ascertaining when the amount appropriated has been exhausted. The amount, therefore, designated by the state's bookkeeper as the "revolving fund" was, in fact, a part of the general funds of the state, and subject to be paid out upon any warrant presented against any so-called fund the amount of which had not been exhausted. It was a mistake, therefore, to designate warrants drawn for the maintenance of the penitentiary as drawn upon the so-called revolving fund and payable out of it. Technically speaking, they should have been drawn upon what was known on the books of the treasurer as the "penitentiary fund"; but, so far as the state is concerned, except for some confusion in bookkeeping which might, but in this case did not, lead to warrants in excess of the amount appropriated by the Legislature, the result is exactly the same as though the warrants had been drawn against that portion of the general funds of the state designated for the purposes of bookkeeping "the penitentiary fund." This is too plain for argument. It is admitted that the expenditures made were for the maintenance of the penitentiary's legitimate indebtedness. For that purpose any money which came into the state treasury and was otherwise unappropriated could be drawn upon so long as the amount did not exceed \$142,000. This \$16,191.33 did come into the state treasury, and was not otherwise appropriated, and could therefore be legitimately used, along with any other money in the treasury, to answer the demands caused by expenditures at the penitentiary. Had the amount of \$142,000 appropriated by the Legislature been first consumed, and this \$16,191.33 been used in addition to that, the state would have been damaged, but it is an admitted fact that only \$96,566.78, including the amount drawn from the revolving fund, was drawn altogether, leaving a balance of \$45,433.22 to be returned to the treasury. To say that the state has been damaged in any respect by the irregular

manner in which the warrants were drawn and paid is to ignore plain facts and figures which speak for themselves.

The judgment of the circuit court is affirmed.

BURNETT, J. (dissenting). It is laid down in section 79, L. O. L., that:

"At any time when the pleadings in the suit or action are complete, or either party fails or declines to plead further, the court may, upon motion, grant to any party moving therefor, such judgment or decree as it may appear to the court the moving party is entitled to upon the pleadings."

The object of this section was to confer upon the court a power hitherto deemed to be doubtful, to declare the proper judgment to be deduced from uncontroverted allegations.

Taking all the pleadings together, it appears in this case a certain fund accrued to the state of Oregon from the sources mentioned. It is admitted that the defendants treated this fund as if the same had been regularly appropriated by the legislative assembly for the expenses connected with the maintenance of the penitentiary, and, under the forms of law prescribed for the disbursement of the actual appropriation, they disbursed the same in addition to and beyond the fund created for the purpose by the legislative assembly. The only substantial difference between the parties on the facts is that the plaintiff charges the expenditure of \$16,518.83, for which it demands judgment, while the defendants only concede the payment of \$16,191.33.

Section 4, art. 9, of the state Constitution declares that:

"No money shall be drawn from the treasury but in pursuance of appropriations made by law."

It is said also in article 3 of the same instrument that:

"The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

It is thus clearly apparent that the appropriation of public funds is a legislative function; for they are only to be "made by law." Neither of the defendants is vested with any legislative authority. The limit of their power in the expenditure of public funds is, and must be, defined by the utterances of the legislative department. To admit a contrary principle would open the doors to unlimited extravagance in the administration of public affairs. It is for this reason that the people reserved to themselves, through their representative in the legislative assembly, the exclusive right to limit the disbursement of money belonging to the state. When, therefore, the defendants assumed to pay out state funds without the same having been appro-

priated by an act of the legislative assembly, they did so without any authority, and can claim nothing on account thereof. As stated by Mr. Justice Eakin in *State v. Ross*, 55 Or. 450, 104 Pac. 596, 106 Pac. 1022, 42 L. R. A. (N. S.) 601, 613, in discussing conversion of public money:

"We understand from these authorities, and many others we have examined, that, in relation to trover, the term 'conversion' necessarily means conversion to one's own use, and is fully accomplished by any exercise of a dominion over a chattel without the authority of the owner, whereby the true owner is deprived of the enjoyment of his chattel. And it is wholly immaterial whether the person so converting did it for his own personal advantage or not."

It is urged by the defendants, in substance, that it was necessary that these expenditures should be made, but our attention has not been directed to any statute declaring such necessity. It was manifestly only the judgment of the defendants that the same was necessary. In this they usurped the legislative prerogative. It is stated also that by receiving the benefit the state has ratified the act. Such a principle is well applicable to transactions between private parties and their agents; but, in the absence of any authentic exercise of the legislative power, ratification does not attach. The only actors in the transactions mentioned are the defendants themselves, who are the official servants or agents of the people within the respective powers conferred upon them by the Constitution and laws of the state. It cannot be said that the defendants may perform acts contrary to and in excess of their official authority, and at the same time ratify them on behalf of the state. It cannot be admitted that official malfeasance is self-sustaining. Ratification is an act that can be performed only by a principal. Even if the same could be applied in this case, it is a function not attributable to, nor to be exercised by, the agent whose acts are in question. The principles applicable to the expenditure of public funds are exemplified in *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758; *Boyd v. Dunbar*, 44 Or. 380, 75 Pac. 695; and *Calbreath v. Dunbar*, 46 Or. 580, 81 Pac. 366.

In short, the pleadings show that the defendants, without authority of law, have expended from the state treasury some amount of money, or, in other words, have converted that amount of money to their own use within the meaning of *State v. Ross*, supra. The measure of damages in a case of conversion is the value of the property converted, and the only legal way in which the matter can be adjusted is to require the defendants to replace the money which they have unlawfully disbursed.

The legislative assembly of 1911 passed a law to provide for the payment of the maintenance, improvements, buildings, equipments, betterments, and repairs at the Oregon State Insane Asylum, Oregon State Penitentiary, and other state institutions named in the ti-

tle of the act, and for such other purposes and items of expense as in that statute were expressly enumerated. Laws 1911, c. 183. Section 1 of the enactment begins by stating that:

"The following sums, or so much thereof as may be necessary and no more, are hereby appropriated out of the moneys in the general fund in the state treasury not otherwise appropriated, for the several objects and purposes hereinafter named, for the two years commencing on the first day of January, 1911, and ending on the thirty-first day of December, 1912."

Among other items it then makes the following appropriations:

For the payment of the salaries of the officers and employes, and for the maintenance and general and contingent expenses of the Oregon State Penitentiary.....	\$142,000.00
For the payment of the expenses of purchasing material, etc., for new roof over cell house at the Oregon State Penitentiary.....	8,000.00
For the payment of the expenses of purchasing material and for labor replumbing old cells, wiring cells for electric lights, and rewiring cell houses, offices and guards' quarters, at the Oregon State Penitentiary .....	2,000.00
For the payment of the expenses of purchasing two 1,000 gallon (each) automatic air tanks for the Oregon State Penitentiary.....	1,500.00
For the payment of the expenses of purchasing pump and connections conducting water to the Oregon State Penitentiary.....	450.00
For the payment of the expenses of purchasing material for repainting cells, houses and other buildings at the Oregon State Penitentiary .....	800.00
For the payment of the expenses of purchasing material for repairing stock barns and other outbuildings at the Oregon State Penitentiary .....	250.00
For the payment of the expenses of making necessary repairs and maintaining pumping plant at Oregon State Penitentiary.....	1,200.00
For the payment of the expenses of making repairs, etc., to the hospital at the Oregon State Penitentiary .....	500.00
For the payment of expenses of making incidental repairs, etc., at the Oregon State Penitentiary...	300.00
For the payment of the expenses of purchasing and installing 24 new steel cells at the Oregon State Penitentiary .....	11,250.00
For purchasing supplies to be sold to convicts.....	1,000.00

These expressions of the legislative will about the necessity of expending public money and the extent thereof are paramount to the judgment on that subject of any officer in the administrative department of the government. If that were a judicial question, actual damage to the state and its people could well be predicated upon unauthorized and extravagant disbursement of public money, and the standard by which such damage should be estimated is found in the statute providing for the expenses of the public service.



The essence of the second defense is that out of the funds appropriated by law the defendants have paid out \$80,375.45, and that they have on hand \$61,624.55, making the total appropriation of \$142,000. They expressly avow that they made the expenditures described in the complaint to the amount of \$16,191.33 outside of and in addition to the money appropriated by law. If the transaction had been regular as measured by the appropriation, their account would be stated substantially thus:

To amount of appropriation.....	\$142,000 00	
Contra credit .....	\$80,375 45	
By revolving fund		
paid out.....	16,191 38	96,566 78
		\$45,433 22

The defendants, however, explicitly aver that they still have on hand an unexpended balance of the legislative allowance in the sum of \$61,624.55. The mathematical deduction is that the \$16,191.33 was money they were not authorized to disburse, and when they allege they still have \$61,624.55, we cannot rightly say they have only \$45,433.22, and thus cover up the unauthorized payment in face of their own answer.

But they say, in substance, that they paid fair prices, and the state got the worth of its money. To uphold such business, in the absence of any legislative validation, is to allow an administrative officer to substitute his own judgment for that of the legislative branch of the government and pay out public money in his hands in any manner or for any purpose finding favor in his sight. In this case it seems that the defendants have profitably operated a state institution on state capital, and claim the right to expend the gains in enlarging the business, unhampered by legislative appropriation. This is a palpable invasion of the lawmaking prerogative and constitutionally cannot be upheld.

If the legislative assembly had deemed it wise or prudent to make the expenditures in question, it probably would have made appropriations out of the general fund for those items, but, not having done so, it is not within the constitutional power of either the administrative or the judicial department of government to make such payments or to sanction them after they are made. Whether we consider the source from which the money was obtained or the objects to which it was applied, the transaction is equally in excess of the authority conferred by the legislative assembly. That body prescribed in detail, as stated above, the amounts of money appropriated and for what it was to be expended, and that is the limit of the defendant's authority. All in excess of that constitutes conversion of public funds for which they should be held responsible on their own answer.

The allegations in the answer properly

might be addressed to the legislative assembly as an argument for increased appropriation in the first place or for a relief bill in the interest of the defendants in the present juncture, but, as those averments involve legislative functions beyond the power of this court, they ought not to be regarded here. There being at least an undetermined issue as to the amount of money expended in excess of the appropriation, we cannot render judgment upon the pleadings. The circuit court, however, was in error when it overruled the demurrer to the new matter in the answer, and also was mistaken in deciding for the defendants on the case stated.

For these reasons, the judgment should be reversed, and the cause remanded to the circuit court for further proceedings.

MOORE and EAKIN, JJ., concur.

(74 Or. 153)

### STATE v. AYLES.

(Supreme Court of Oregon. Dec. 31, 1914.)

#### 1. ADULTERY (§ 7\*)—INDICTMENT—PROSECUTION BY INJURED SPOUSE.

An indictment for adultery need not allege that the prosecution was instituted by the injured spouse, as required by L. O. L. § 2072.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 12-16; Dec. Dig. § 7.\*]

#### 2. ADULTERY (§ 3\*)—ELEMENTS OF OFFENSE—JOINT GUILT.

One party to an illicit intercourse may be guilty of adultery and the other innocent thereof; it not being essential to the commission of such offense that there be a joint criminal intent.

[Ed. Note.—For other cases, see Adultery, Dec. Dig. § 3.\*]

#### 3. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS—ADULTERY.

An instruction that "if one of the parties to the illicit intercourse is guilty, then both are guilty of adultery," being a statement unduly favorable to the defendant convicted, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

#### 4. ADULTERY (§ 2\*)—DEFENSE—CONNIVANCE OF HUSBAND.

That the husband of the woman connived with and abetted defendant in the commission of the act of adultery constituted no defense.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. § 7; Dec. Dig. § 2.\*]

#### 5. GRAND JURY (§ 41\*)—PROCEEDINGS—SECRECY.

In a prosecution for adultery, it was not error to admit the testimony of the clerk of the grand jury that the husband of the woman appeared before the grand jury and testified against his wife and defendant, and that the wife appeared as a voluntary witness, and testified that she had intercourse with defendant on the night of their arrest.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 86, 87; Dec. Dig. § 41.\*]

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

James G. Ayles was convicted of adultery, and appeals. Affirmed.

Robert E. Hitch, of Portland (John Manning, of Portland, on the brief), for appellant. George Mowry, of Portland (Walter H. Evans, Dist. Atty., and Robert F. Maguire, Deputy Dist. Atty., both of Portland, on the brief), for the State.

**McNARY, J.** Convicted of adultery and sentenced to pass a term of six months in the county jail of Multnomah county, defendant prosecutes this appeal, and assigns as grounds therefor the commission by the court of 11 distinct errors. On the 30th day of January, 1913, defendant and Lydia Mulloy were jointly indicted for the crime of adultery, committed as follows:

"The said James G. Ayles and Lydia Mulloy, on the 13th day of January, A. D. 1913, in the county of Multnomah and state of Oregon, not being then and there married to each other, but the said Lydia Mulloy then and there having a husband living other than the same James G. Ayles, to wit, A. C. Mulloy, had carnal knowledge together each of the body of the other, and thereby committed adultery contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

The defendants were tried together, the jury returning a verdict of guilty as to the defendant, and not guilty as to Lydia Mulloy.

[1] We read from section 2072, L. O. L.:

"A prosecution for the crime of adultery shall not be commenced except upon the complaint of the husband or wife, or if the crime be committed with an unmarried female under the age of twenty years upon the complaint of the wife, or of a parent or guardian of such unmarried female, and within one year from the time of committing the crime, or the time when the same shall come to the knowledge of such husband or wife or parent or guardian. When the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery also, and be punished accordingly."

Returning to the indictment, it will be observed that no mention is made that the action was initiated by the husband of Lydia Mulloy. The introductory part of the indictment merely recites that:

"James Ayles and Lydia Mulloy are accused by the grand jury of the county of Multnomah and state of Oregon by this indictment of the crime of adultery."

Notwithstanding the statutory command that the prosecution shall be commenced only upon the complaint of the injured spouse, the cases hold that it is not necessary to allege such facts; for evidence thereof may be introduced without the averment. *State v. Athey*, 133 Iowa, 382, 108 N. W. 224; *State v. Andrews*, 95 Iowa, 451, 64 N. W. 404; *State v. Maas*, 83 Iowa, 469, 49 N. W. 1037; *People v. Isham*, 109 Mich. 72, 87 N. W. 819; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; 1 Cyc. 956.

[2, 3] It is claimed by defendant that the trial court committed a legal mistake in advising the jury that, "if one of the parties

to the illicit intercourse is guilty, then both are guilty of adultery." Some courts advance the doctrine that, after the acquittal of one of the defendants in a joint charge of adultery, there can be no conviction of the other. This is not in accord with the better authority, and the proper rule appears to be that the acquittal of one of the defendants is no bar to the prosecution and conviction of the other defendant. While it is true that, to constitute adultery, there must be a joint physical act, it is not necessary that there should be a joint criminal intent. One party may be guilty and the other innocent, though the joint physical act necessary to constitute adultery is complete. *State v. Eggleston*, 45 Or. 346, 77 Pac. 738; *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599; *Commonwealth v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; 1 R. C. L. 644. Unquestionably, the trial court missed the law when he told the jury that, "if one of the defendants is guilty, then both are guilty." However, we fail to discern where this instruction injuriously affected the defendant, because it is a more favorable statement than the law sanctions or than defendant might expect. In a case where the court erroneously instructs the jury to the advantage of defendant, and the jury acts in accordance with the law and in disregard of the instructions, the defendant cannot be heard to say that he has been injured.

[4] Defendant's strongest contention is that the court erred in refusing to admit evidence tending to show that the husband of Lydia Mulloy connived with and abetted defendant in the commission of the act of adultery. Defendant invokes the benefit of the same theory in the following requested instruction:

"I instruct you that, if you find from the evidence that the prosecuting witness, A. C. Mulloy, the husband of Lydia L. Mulloy, one of the defendants herein, acquiesced in or assented to the act or acts of sexual intercourse between the defendants, Lydia L. Mulloy and James G. Ayles, if you find any act or acts of sexual intercourse between said defendants did occur, then you should find the defendant James G. Ayles not guilty."

An outline of the testimony proffered by defendant is: That the defendant Lydia Mulloy, when a girl under 17 years of age, was seduced by A. C. Mulloy, who subsequently married her in order to cover the infamy of the crime; that since the time of their marriage the husband has been seeking to invent grounds for a separation and divorce; that he insisted upon his wife remaining alone in the house with defendant while he (Mulloy) absented himself therefrom; that the husband connived in every imaginable way to throw his wife in the company of defendant by having defendant assist his wife in washing dishes and helping her about the kitchen and house; that during some festive occasion at Hillsboro Mr. Mulloy entered a saloon, and, in the presence of several witnesses, stated that he had left defendant to bring his wife in from the

farm, and that he "hoped to God he would run off with her"; that defendant was solicited by Mr. Mulloy "to have intercourse with his wife by inference and innuendos"; that Mulloy stated in the presence of defendant, and to him directly, that he didn't care if he caught somebody having connection with his wife, because he wanted to get a divorce from her; that the husband knew his wife and defendant were going to Portland; and that defendant had assurance that he would not be harmed.

With much pressure it is argued that, if these things were true, defendant could not be convicted of the offense, for the reason that he was induced to commit the act. The books abound with much learning upon this interesting department of the criminal law. Nevertheless our steps have not been guided by the light of adjudged cases involving the crime of adultery. Still we feel no reason for hesitating to announce the rule that seems to us best adapted to the promotion of justice. In the case of *State v. Hull*, 33 Or. 57, 54 Pac. 181, 72 Am. St. Rep. 694, this court, speaking through Mr. Justice R. S. Bean, said:

"It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it."

This was a case of larceny where the property charged to have been stolen was taken, not only by the consent and passive acquiescence of the owner, but by his express direction, and upon the advice and with the active co-operation and assistance of his agents; and this court held, in effect, that there was no trespass committed in the taking if there was no taking without the owner's consent. Even in the larcenous class of cases we know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. If the crime originates with the accused, and the intended victim does not actually urge him on to the commission of the crime, the mere fact that he facilitates the execution of the scheme will be no defense to the accused. *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *Thompson v. State*, 106 Ala. 67, 17 South. 512; *State v. Jansen*, 22 Kan. 498; *State v. West*, 157 Mo. 309, 57 S. W. 1071; *People v. Krivitzky*, 168 N. Y. 182, 61 N. E. 175.

"The fact that decoys were set, or a trap laid, by means of which a person was detected in the perpetration of a crime, cannot be set up as a defense to the prosecution therefor, where the crime was conceived by the accused, and not suggested by the prosecuting witness, or those acting for him duly authorized in the premises, and the owner did not willingly part with and consent to the taking of the property." *Wharton's Criminal Law* (11th Ed.) vol. 1, § 389.

Counsel, in support of his position, attracts our attention to cases having for their purpose the dissolution of the marriage contract where the courts have held that a husband may not obtain a divorce who directly encourages his wife to commit adultery. An examination of the cases and our own statute reveals the situation that this defense is statutory. Section 510, L. O. L., reads:

"In a suit for the dissolution of the marriage contract on account of adultery, the defendant may admit the adultery, and show in bar of the suit, \* \* \* (1) that the act was committed by the procurement or with the connivance of the plaintiff."

The reason is apparent. Plaintiff in a divorce case may with propriety watch his wife whom he suspects of adultery, in order to obtain proof of that fact, which he may use in evidence to procure a decree of divorce, but when he commits acts which have the effect of beguiling his wife to an adulterous bed, the law interposes the statute as an obstacle to the accomplishment of his purpose. We acknowledge that in those crimes where the element of trespass and intent are necessary ingredients consent to the act relieves the party charged from liability to criminal prosecution; yet in those acts which affect the public morals, and where the idea of the sale and barter of private property is not concerned, we cannot see the application of the rule. True, in cases of this character the prosecution can only be commenced on the complaint of the outraged spouse; yet the act is an offense against the state. *State v. Donovan*, 61 Iowa, 281, 16 N. W. 130; *State v. Smith*, 108 Iowa, 443, 79 N. W. 115; *State v. Athey*, 133 Iowa, 386, 108 N. W. 224.

The fact that the husband may have been guilty of sinful conduct which encouraged the defendant to commit the crime does not lessen or in any manner affect the wrong which society suffers, and public policy, good morals, common decency, and considerations of justice demand the punishment of the offense under such circumstances as strongly as though the crime had been committed by stealth and through the employment of agencies unknown to the husband. For these reasons the evidence was properly excluded, and instructions properly refused. Well may we add that, if the rejected testimony is true, offended justice has not yet been fully vindicated.

[8] The only remaining assignment of error which we deem necessary to consider concerns the action of the trial court in admitting testimony of the clerk of the grand jury to the effect that the husband of Lydia Mulloy appeared before the grand jury and gave testimony against his wife and defendant, and that Lydia Mulloy also appeared as a voluntary witness and testified that she had intercourse with defendant on the night of their arrest. The particular ground of objection to the testimony is that the grand jury room "is supposed to be secret, and the grand jurors are not to reveal anything that

may transpire therein, except when witnesses examined before the grand jury refute their testimony before the trial jury." We think counsel draws too narrowly the limitations upon the testimony of grand jurors. Public policy forbids that the jurors be allowed to state how the members of the jury voted or make public the opinions expressed by the different jurors during their deliberations, or to unbosom the fact that an indictment has been found prior to its becoming a public record. But much authority is to be found in support of the rule that testimony of a grand juror is admissible to show that a person did or did not testify before the grand jury, and testimony given by the witness before the grand jury, when otherwise competent, may be recounted by a grand juror. *State v. Moran*, 15 Or. 262, 14 Pac. 419; *Commonwealth v. Hill*, 11 Cush. (Mass.) 137; 20 Cyc. 1353; *People v. Nonthey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *State v. Carroll*, 85 Iowa, 1, 51 N. W. 1159; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157. There are a few additional questions presented on behalf of defendant, and which we have examined, and deem them not of sufficient importance to require separate notice; therefore the judgment of conviction is affirmed.

MCBRIDE, C. J., and EAKIN and BEAN, JJ., concur.

(73 Or. 558)

#### KALICH v. KNAPP.

(Supreme Court of Oregon. Dec. 21, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§§ 44, 703\*) — CONTROL BY LEGISLATURE—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 2, as amended, declaring that corporations may be formed under general laws, and that the Legislature shall not enact, amend, or repeal any charter of any municipality, but that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the state, and article 4, § 1a, reserving the initiative and referendum powers to the legal voters of every municipality as to all local, special, and municipal legislation, insure to each municipality a full measure of home rule, and place beyond the power of the Legislature to make any change in local, special, and municipal legislation and the Legislature may not amend any municipal charter directly or indirectly where the amendment is the subject of municipal concern and regulation, and Motor Law (Laws 1911, p. 265), regulating the use of motor vehicles throughout the state, is unconstitutional in so far as it attempts to regulate the speed of automobiles in municipalities, though the act contains a criminal provision, which is not a criminal law of the state within the Constitution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 122, 1509-4513; Dec. Dig. §§ 44, 703.\*]

#### 2. CONSTITUTIONAL LAW (§ 50\*)—LEGISLATIVE POWER—CONSTITUTIONAL PROVISIONS.

The amendment of Const. art. 4, § 1, declaring that the legislative authority shall be vested in a legislative assembly; that the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same, and also reserve the power to approve or reject any acts of the legislative assembly, does not lessen the powers of

the Legislature in matters of legislation only, but the Legislature is not the exclusive agent of legislation, and such power is conferred on the people by article 11, § 1, and article 4, § 1a, reserving to the people the initiative and referendum.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 44\*)—CONTROL BY LEGISLATURE—PUBLIC OR LOCAL CONCERN.

All public matters concerning the people of the state at large, in common with people of any particular municipality, are matters of state jurisdiction within Const. art. 11, § 2, prohibiting the Legislature from enacting, amending, or repealing any charter of any municipality, but empowering the legal voters of every city to enact and amend their municipal charter subject to the Constitution and criminal laws of the state, and article 4, § 1a, reserving to the voters of every municipality the power over local, special, and municipal legislation, while all public affairs concerning the inhabitants of a locality as a municipality, apart from the people of the state at large, as supplying purely local needs, are matters of local concern, within the exclusive control of each municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 122; Dec. Dig. 44.\*]

McBride and Burnett, JJ., dissenting.

In Banc. On petition for rehearing. Denied, and judgment of trial court reversed.

For former opinion, see 142 Pac. 594.

Will R. King, of Washington, D. C., for appellant. R. W. Wilbur, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for respondent.

McNARY, J. In the original opinion of this case, reported in 142 Pac. 594, the majority of the court composing department No. 1 decided that section 2 of article 11 of the Constitution withheld the Legislature from amending or repealing the charter of any city, or the ordinances enacted pursuant thereto in respect to those matters peculiar to municipal regulation, though reserving that power to the sovereignty through the initiative and referendum provision of the fundamental law. At a rehearing of the case, counsel for defendant presented argument for a reversal, which is clearly embodied in the scholarly dissenting opinions of Mr. Chief Justice McBride and Mr. Justice BURNETT, to which our attention will now be briefly given. Owing to the importance of the questions suggested and their grave bearing upon future legislation, we think it not amiss succinctly to state our position anew. Looking backward over the path of our state legislation, we observe that the organic law primarily contained the following clause:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." Const. Oregon, § 2, art. 11.

[1] With pleasing fidelity to this provision of the Constitution, the recurring legislative assemblies created municipal corporations, and lavishly bestowed their time upon the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amendment of particular charters until a remedy was sought and obtained by the people in the adoption of the constitutional provision under consideration.

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon." Section 2, art. 11, as amended.

A comparison of the two provisions of the fundamental law will at once reveal the intention of the voters and the evil they purposed to correct. The original section of the Constitution permitted the Legislature to create municipal life by special law, and to clothe it with a charter which could be altered or repealed at any legislative session, when either the municipal welfare or political exigencies required.

Over the municipality the Legislature had exclusive and unrestrained control, and, having the power to create, so it had the power to modify or destroy. In fact, the ultimate sovereign power of the state over its cities and towns was unquestioned. To remedy the many ills flowing from the absolute dependency of cities upon the autocratic will of the Legislature and its oft-repeated interference in matters of local concern, the people conceived the idea of city sovereignty as a separate attribute of state sovereignty; consequently we have, by the adoption of the constitutional provision under consideration, vested our cities with more political power than they heretofore possessed since the formation of our state government. The electors now are, subject to the Constitution and the criminal laws not affecting local regulation, made the legislative assembly to enact and amend the local laws which should regulate their municipal affairs. In the former opinion, this court said:

"By the force of section 2 of article 11 of the Constitution, the electors of municipalities are, subject to the Constitution and criminal laws and such general laws as may be enacted by the Legislature affecting the relation of the state to the locality, made the legislative assembly to enact the laws germane to the general purpose and object of the municipality, free from legislative molestation, which autonomy in a sense constitutes a sovereign city, subject at all times, however, to the supreme will of the state, reserved by the people of the state through the initiative and referendum provision of the fundamental law."

In the studiously considered case of *Branch v. Albee*, 142 Pac. 598, a majority of this court reaffirmed the same construction, saying through Mr. Justice Ramsey:

"Said section, as amended, first withdraws from the legislative assembly all power that it previously had to enact, amend, and repeal charters, and then confers upon the legal voters of every city and town power to enact and amend their charters, and this power, thus conferred upon cities and towns, is made subject to the Constitution and the criminal laws of the state. It

is not made subject to the *civil* laws of the state. The conclusion seems to be irresistible that the people, by the adoption of said amendment, intended to withdraw from the legislative assembly all power that it previously possessed to enact, amend, or repeal charters or acts incorporating cities or towns, and to confer upon the legal voters of cities and towns all of said power, *except* the power to repeal charters. If effect is given to the language of this amendment, no other conclusion appears to be tenable." 142 Pac. 600.

Referring to the same provision of the Constitution in the case of *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43, Mr. Chief Justice McBride said:

"We are of the opinion that the true intent of the amendment above quoted was to give to cities and towns the authority to enact and amend charters affecting property and other rights within the boundaries of such cities and towns, and that, so far as legislation outside of these boundaries is concerned, they must find it elsewhere than in this amendment. Inside their boundaries, and in relation to matters purely local, they are, as regards regulation by the state Legislature, supreme; beyond these boundaries they are invested with no power except that which the Legislature may see fit to grant them in common with all other cities, and under like circumstances."

At this juncture, we deem it prudent carefully to consider the case of *City of Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28, on account of its similitude to the one in hand. The point we desire to develop is that this case is an authority for the doctrine enunciated in the original opinion in *Kalich v. Knapp*, *supra*, namely, that the Legislature is inhibited by the Constitution from amending the charter of the municipality either by special or general legislation in those matters of local and municipal concern. In January, 1903, the charter of the city of Portland provided, among other things, that a property owner who was displeased at the assessment levied upon his property for a street improvement could appeal to the circuit court, but that the verdict of the jury should be a conclusive determination of the questions giving birth to his grievance. A dispute having arisen between the city and Mr. Nottingham regarding the reassessment of the property of the latter, the remedy provided by the charter provision was invoked, resulting in a verdict for the city, which was set aside by the court and a new trial granted. The city prosecuted an appeal to this court upon the assumption that the Legislature did, at its biennial session in 1907 (Sess. Laws 1907, c. 162, p. 311), adopt an act whereby an appeal was allowable. Considering the vital question whether the Legislature could, by general enactment, amend a charter provision, this court, in a forceful opinion written by Mr. Justice Burnett, said:

"This provision of the Constitution (section 2, art. 11) was adopted by the people at the June election of 1906, and went into effect upon the proclamation of the Governor, June 25th of that year. Its effect is to take from the legislative assembly the right to amend the charter of the city of Portland, although enacted by the legislative assembly itself in January, 1903."

Further, section 1(a) of article 4 of the Constitution provides that:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts." These constitutional provisions confer ample and exclusive power upon the people of every municipal corporation to regulate their own affairs respecting municipal legislation and procedure. The legislative assembly cannot pass laws to repeal or amend municipal charters, even by implication, respecting such matters."

After extracting from the Motor Act the criminal element therein contained, we cannot discern any appreciable difference in the principle propounded in these two cases, viz., that the Constitution as it is now built withholds the Legislature from amending any municipal charter by legislation, be it direct or indirect, general or special, which is properly and purely the subject of municipal concern and regulation.

As additional evidence of their political intention to preserve the ancient right of local self-government of municipalities, the people of the state in June, 1906, ingrafted on the Constitution section 1(a) of article 4, which provides:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts."

This provision of the Constitution like section 2 of article 11 was designed to insure to each incorporated community a full measure of home rule and to place beyond the capacity of the Legislature the power to make any change in the system of government of any municipality by legislation other than that authority reserved to the Legislature in section 2 of article 11. Since the adoption of these constitutional provisions, this court has given thought to their intendments and limitations, and has, we think, generally arrived at the conclusions reached in this case. *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145; *Haines v. City of Forest Grove*, 54 Or. 443, 103 Pac. 775; *City of McMinnville v. Howenstien*, 56 Or. 451, 109 Pac. 81; *City of Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28; *State v. Schluer*, 59 Or. 18, 115 Pac. 1057; *State v. Hearn*, 59 Or. 227, 115 Pac. 1066, 117 Pac. 412; *McKeon v. City of Portland*, 61 Or. 385, 122 Pac. 291; *State v. Port of Tillamook*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C, 483; *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43; *Riggs v. Grants Pass*, 68 Or. 266, 134 Pac. 776; *Kalich v. Knapp*, 142 Pac. 594; *Branch v. Albee*, 142 Pac. 598. True, in such cases as *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, *Kiernan v. Portland*, 57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339, and *Churchill v. Grants Pass*, 141 Pac. 164, the court seems to have announced the rule that the amend-

ments adverted to are competent to restrain the Legislature in the enactment of special but not general laws affecting the municipalities.

With vigor the argument is pressed upon us that on account of the Motor Act (Laws of 1911, p. 275), containing a clause providing a penalty for its violation, that the act is a criminal law, and therefore without the competency of municipal legislation, citing *Baxter v. State*, 49 Or. 353, 88 Pac. 677, 89 Pac. 369, and *State v. Schluer*, 59 Or. 18, 115 Pac. 1057. In these cases the question arose as to whether a city could amend its charter under section 2 of article 11 of the Organic Act so as to be legal proof against the operation of the Local Option Law. Laws of 1905, p. 47. After a careful review of the provision of the Constitution, this court held that the local option law was general in its scope and criminal in its character, and therefore within the power of legislative expression. Without doubt, these cases were correctly decided, for the subject-matter of the Local Option Law involves either the sale or prohibition of intoxicating liquors, and for that reason was the proper subject for legislative action. Treated as either a moral or an economic question, the state has, in the interest of better citizenship, abundant authority to regulate the sale of alcoholic liquors and to provide a punishment for disobedience to the law, whether we consider the prohibitory legislation from the standpoint of a criminal law or an enactment involving the state in its sovereign capacity. Problems of this kind lie too deep for municipal solution and far beyond the limits of purely municipal concern.

The concept that the Motor Act is a criminal law finds its mainspring in the last sentence of section 2, art. 11 of the Constitution:

"The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon."

Recurring to section 23 of the Motor Act, it will be observed that a punishment is provided for the infractors of the law which it is argued brings the act within the power of the Legislature to adopt. Considered by itself, the constitutional provision last quoted might supply the Legislature with sufficient excuse for this legislation, even though it had the legal effect of amending or superseding a city charter or ordinance. But this section cannot be construed alone, as at the same election an amendment to article 4 was adopted, but inserted after section 1, designated as section 1(a), *supra*. Particularly do we desire to accentuate this sentence:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in and for their respective municipalities and districts."

These two amendments, referring as they do to the same subject-matter, must be considered together, and be so interpreted as to carry out the intent of the framers and the people who have adopted them. In reading the excerpt from section 1(a) of article 4, it will be noticed that the powers created by section 2 of article 11 were enlarged and made applicable "to *all* local, special and municipal legislation of every character."

In considering the two sections of the Constitution for the purpose of welding an harmonious construction, we think it was the clear intention of the electors of the state to restrain the Legislature from legislating in criminal matters affecting those subjects that are purely local and municipal in character. But in those public matters which concern the people of the state at large, in common with the inhabitants of the chartered communities, the Legislature has undoubted power to define those acts which shall constitute a crime and provide a penalty for their infraction. This must be so, else we shall have dissipated the greatest power for the preservation of order, and without which the government of the state would be incomplete, and utterly fail to attain one of its great ends, the protection and security of person and property in organized cities, as well as throughout its entire territory. Certainly the necessity of enlarging municipal powers in both civil and criminal matters, wholly local, is thoroughly appreciated, even by the casual observer of the conditions in the crowded modern centers of population, yet, even so, the constitutional amendments only grant unto the cities the exclusive right to exercise such powers, civil or criminal, as legitimately belong to their local and internal affairs, and beyond this the legislative assembly and the people of the state, speaking through the initiative, occupy a field of action exclusively their own.

The city of Portland received its charter from the hands of the Legislature at the session of 1903. Sp. Laws of 1903, pp. 3-172. By that franchise it was ordained that the common council should have full power and authority to exercise all powers conferred by the charter and the Constitution and laws of the state. To the council was given, co-extensive with the state, the right to exercise within the limits of the city, all the powers commonly known as the police power, and to regulate and control the use of its streets and the traffic thereon, except as otherwise provided in the Constitution and laws of the state of Oregon. Sections 72 and 73. By these provisions of the charter, the Legislature vested the city with the same authority over its streets as the state itself possessed. As an expression of this potentiality, the ordinances were enacted in 1904 and 1906; hence at the time of their enactment the city of Portland had, within its corporate limits, concurrent power with the

state to pass laws relative to the regulation and control of traffic over the streets of the city. The constitutional provisions forming the meat of this discussion were adopted by the people of the state in 1900, and had for their effect the removal of legislative authority over the subject of municipal traffic; consequently, at the time of the passage of the Motor Act through the Legislature in 1911, that department of government was impotent to nullify or amend the charter or ordinances of the city of Portland in a matter of acknowledged local concern such as the regulation of traffic over the streets of the metropolis.

From what has been said it must follow "as night the day" that the Motor Act if valid, expressly amends every charter of every municipality in the state by divesting such cities of the power to pass or enforce ordinances in conflict with the statute. To assert that the adoption of the act is not an amendment but a suppression by paramount authority is but a hollow statement that must fall for the want of a distinguishing prop. The desideratum is to discover the intended effect of the legislation rather than the particular choice of words that may be used to express that effect. If the statute nullifies the charter or ordinances of the incorporated communities, it supersedes them either by suppression by paramount authority or by amendment. The resultant effect is the same. And from what has been said this cannot be done. In the title of the Motor Act we are confronted with this declaration: "To limit the authority of cities and towns on like subjects concerned with \* \* \* vehicles." In section 25 of the act, we find an express statement that local authorities shall have no power to prescribe a lower rate of speed than in the enactment provided. Without doubt, the legislative act embraces the same subject-matter as the ordinances and is in direct conflict therewith, and if the statute is constitutional, then it expressly repeals the ordinances. In aid of our deductions that this language works an amendment of the charter, we adduce *State v. Wright*, 14 Or. 365, 12 Pac. 708; *Warren v. Crosby*, 24 Or. 558, 34 Pac. 661.

[2] Associated with the other questions is this one: Does the supreme law of the state prohibit the people from diminishing the power of the Legislature in the exercise of any of its original prerogatives of legislation? The primary draft of the Constitution, ratified by the electors of the territory in 1857 and approved later by the Congress of the United States, specified that:

"The legislative authority of the state shall be vested in the legislative assembly, which shall consist of a Senate and House of Representatives." Article 4, § 1, Const.

Thus did the people of the state so hew and shape the body of their fundamental law as to constitute the Legislature the only instrument through which the people could express



their choice on legislative matters. As a result of political expansion, the people amended this section of the Constitution by imposing an indirect limitation on the Legislature compelling that institution to share its powers of legislation with that of the people publicly expressed through the initiative. For we read that:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Article 4, § 1, as amended in June, 1902.

Here, it will be seen that the people did not shorten the powers of the Legislature in matters of legislation only, they did declare that the Legislature was no longer to be their exclusive agency of expression. Experimentation of this character having proved popular, the electorate set about further to curtail the Legislature as an organ of legislative expression. This they succeeded in accomplishing in the adoption of article 11, § 1, and article 4, § 1(a) of the Constitution, when they forbade the Legislature from voicing their sentiments in matters of purely municipal concern.

We are liable to confuse the discussion of the subject if we fail to discern between sovereignty itself and that force which stands as the representative of sovereign power. The source—the abiding place of sovereignty—is in the people. Government is merely an agency by which it is exercised. The legislative body is but a component of that agency—a contrivance by which the people crystallize their ideas into the form of legislation. Therefore, in the enactment of organic legislation having for its function the abridgment of legislative power, the people of the state are not parting with any of their sovereignty, rather they are exercising their right to express this sovereign power directly. In time the people may strip the Legislature of every power it once enjoyed, leaving it but a place in memory, and themselves exercise directly within the state all of the powers formerly committed to the Legislature. No further need we seek to disclose the authority of this statement than to quote article 1, § 1, of the Constitution:

"We declare that all men, when they form a social compact, are equal in right; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper."

Surely, then, in checking the Legislature from further interference in municipal affairs does not constitute the surrender of any sovereignty. Nor does the city on that account become a miniature state, for at all times and under all forms of government

sovereignty remains in the people of the state who, speaking through the initiative, may legislate on all matters unless restrained by the federal or the state Constitutions.

[3] Finally, we cannot yield to the plaint that the conclusions reached are not justifiable, because judicial minds may differ with respect to the station where municipal power ends and state authority begins. The difficulty of locating the boundary between legislation that is purely municipal, and therefore within the administrative competency of cities and legislation that lies without its fold and consequently, within the embrace of legislative enactment is more apparent than actual. Though it must be admitted that the differentiation is not and never can be totally free from perplexity, however, this unfortunate situation is the handmaid of many legal rules that either entwine or shade into each other without regard to the layman's dislike for complexity in legal jurisprudence. Discussing municipal affairs as distinguished from state functions, Mr. McQuillin, in his excellent treatise on *Municipal Corporations*, vol. 1, § 173, says:

"All of those public matters which concern the people of the state at large in common with the people of the particular locality, as the administration of justice, and the authority of the state generally, through and by legislative enactments administered by state officers or by virtue of the power of the central government, in the preservation of the public peace and affairs of like general character, although some of which may be in the hands of the local or municipal authorities, are matters of state or central jurisdiction. On the other hand, all of those public affairs which concern the inhabitants of the locality as an organized community apart from the people of the state at large, as supplying purely local needs, conveniences, and comforts like water, light, and gas, the establishment of sewers, fire protection, and the enforcement of by-laws or ordinances touching the interests of the local corporation alone are essential matters of local concern."

From the general principles of law herein discussed, we conclude that the judgment of the trial court is erroneous, and therefore must be reversed.

MOORE, EAKIN, BEAN, and RAMSEY, JJ., concur.

McBRIDE, C. J. (dissenting). It is an old saying that "hard cases make bad law," and in this case I think the enactment by the Legislature of a foolish and unnecessary statute has created a hardship which has led the court into an erroneous construction of section 2, article 11, of our Constitution as now amended. The section is as follows:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon, and the exclusive power to li-



cense, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the Local Option Law of the state of Oregon."

The intent of this section was to put an end to the theretofore prevalent practice of legislative intermeddling with particular city charters by acts special in their nature and not infrequently against the wish of a majority of the voters of the municipality. The language employed seems to me clearly to indicate a purpose to prohibit special and local legislation affecting city charters. It provides that the Legislature shall "not enact, amend, or repeal any charter or act of incorporation of any municipality, city, or town"—using the singular number, whereas if it had been the intent to prohibit general legislation affecting all towns and cities the plural would naturally have been employed. The act in question is a statute prohibiting a certain rate of speed by automobiles, and providing a penalty for its violation. This under the ruling in *Portland v. Erickson*, 39 Or. 1, 62 Pac. 753, and *Baxter v. State*, 49 Or. 353, 88 Pac. 677, 89 Pac. 369, makes the act in question a criminal statute, and therefore within the power of the Legislature to enact in any event. Emergencies have arisen, and may arise again, in which it is desirable that general legislation to enable towns, cities, and ports to carry on the purposes of their organization should be speedily passed without the delay incident to the adoption of a measure by the initiative; and I hesitate to assent to a ruling by this court that in the end may result in much inconvenience to the various municipalities of the state. While deprecating legislative intermeddling with the local affairs of towns and cities in the manner the act in question has done, I consider it, not a question of power, but of public policy, which can and, no doubt will, be corrected at the next session of the Legislature soon to meet.

The judgment should be affirmed.

**BURNETT, J. (dissenting).** The plaintiff brought an action to recover damages for injuries sustained by him in a collision with an automobile driven by the defendant at the intersection of Williams avenue and Russell street in Portland, contending that the defendant was driving at a reckless and unlawful rate of speed. For the purpose of proving negligence in that respect, the plaintiff offered some ordinances of the city of Portland limiting the speed of such vehicles in the city to a maximum rate of 15 miles per hour in general graded to 10 miles per hour within the fire limits and to a rate no greater than a walk upon any street where street cars turn. The circuit court sustained an objection to the introduction of these ordinances on the ground that they had been superseded by an act of the legislative as-

sembly of the state, known as the Oregon Motor Vehicle Law (Laws 1911, c. 174). This ruling is assigned as the principal error on an appeal by the plaintiff from a judgment against him as a result of the jury trial there. In an opinion written by Mr. Justice McNary, filed June 2, 1914, the judgment was reversed on the ground that, in the respect involved, the Vehicle Law was an attempt to amend the charter of the city of Portland contrary to the injunction of section 2 of article 11 of the state Constitution that "the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city, or town." Involving as it does the issue of which shall be supreme, the city or the state, the importance of the subject has brought about a rehearing in banc.

The direct question involved is the constitutionality of the vehicle law as applied to chartered cities and towns. At the outset we must remember that the legislative assembly is a co-ordinate branch of the government of equal dignity and importance with the judicial department, and if we assume to disregard or overturn its declarations of what the law shall be we must be prepared to demonstrate to a reasonable certainty that its utterances violate the Constitution, which is supreme in authority over the executive, the Legislature, and the courts. *Cline v. Greenwood*, 10 Or. 230; *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533; *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *State v. Shaw*, 22 Or. 237, 29 Pac. 1028; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *Kadlerly v. Portland*, 44 Or. 118, 143, 74 Pac. 710, 75 Pac. 222; *State v. Walton*, 53 Or. 557, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *State v. Cochran*, 55 Or. 157, 179, 104 Pac. 419, 105 Pac. 884; *Miller v. Henry*, 62 Or. 4, 124 Pac. 197, 41 L. R. A. (N. S.) 97; *Lidby v. Olcott*, 66 Or. 124, 134 Pac. 13.

Another doctrine equally well settled is that of *stare decisis*, to the effect that when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides. *State v. Clark*, 9 Or. 466; *Multnomah Co. v. Silker*, 10 Or. 65; *Despain v. Crow*, 14 Or. 404, 12 Pac. 806; *Corvallis v. Stock*, 12 Or. 391, 7 Pac. 524; *Sheridan v. Salem*, 14 Or. 323, 12 Pac. 925; *Paulson v. Portland*, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178.

At all the times involved in this litigation

tion the city of Portland was working under a charter granted by the legislative assembly in 1903 (Sp. Laws 1903, p. 3), and afterwards adopted by the vote of the people of that city at an election therein. That enactment equipped the council with all the legislative power of the city and subject to the provisions, limitations, and restrictions contained in the act authorized the council:

"(1) To exercise within the limits of the city of Portland, all the power, commonly known as the police power, to the same extent as the state of Oregon has or could exercise said power within said limits; \* \* \* (60) except as otherwise provided in this charter, or in the Constitution or laws of the state of Oregon, to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places, and parks of the city; to regulate the use of streets, roads, highways, and public places for foot passengers, animals, bicycles, automobiles, and vehicles of all descriptions; \* \* \* (63) to control and limit traffic on the streets, avenues, and elsewhere."

The municipal legislation above referred to was enacted under the provisions of this charter. The Motor Vehicle Law is a general act of the legislative assembly applicable by its terms to all public roads, streets, and highways in the state of Oregon. It permits a maximum speed of 25 miles per hour; declares that local authorities shall have no power to pass, enforce, or maintain any ordinance, rule, or regulation inconsistent with the provisions of the act, and provides that cities may limit the speed of vehicles on their streets on condition that the minimum shall in no case be less than one mile in six minutes. Other conditions are annexed to the exercise of local authority on the subject, but these are sufficient for example.

At the threshold of the discussion it will be observed that under the very terms of the charter itself, in subparagraph 60 of section 73, supra, the city is permitted to exercise the power in question "except as otherwise provided in this charter or in the Constitution or laws of the state of Oregon." The exception makes no distinction between the civil and criminal laws of the state as a limitation upon the powers of the council. Hence, for the time being, we need not concern ourselves about whether the Motor Vehicle Law is a criminal statute or not, within the meaning of section 2 of article 11 of the state Constitution. The people of Portland in adopting their fundamental law have thus expressly made the legislative power of their city council subject and subordinate to both the civil and criminal laws of the state as well as its Constitution. It follows that when the council adopts an ordinance conflicting with any state law, that body exceeds the legislative powers delegated to it by the people of the city and its legislation of that nature must yield and be set aside at all points of such conflict. In that charter the people of Portland themselves have asserted the supremacy of the laws of the

state without distinction over the enactments of the city council. Laying aside for the moment all other questions, it is beyond dispute that the council cannot lawfully exceed its legislative authority defined and limited by the charter under which it acts. Viewing the matter from the standpoint of the city alone, its charter is paramount in authority over the council, and at least until the people of the municipality change that instrument by their initiative power the council must obey it. The legal voters of Portland have not yet amended their charter in the respect involved, and as the ordinance in question is plainly in conflict therewith because it exceeds the limiting words of the charter "except as otherwise provided in this charter or in the Constitution or laws of the state of Oregon," the ordinance is void so far as not in harmony with the Motor Vehicle Law enacted by the state Legislature. Based merely upon a construction of the fundamental law of the city of Portland, the disquisition might well end here, for the supremacy of the state law is reserved under the very instrument upon which the plaintiff depends.

Owing to the importance of the question, however, it is proper to consider anew the relative authority of the state and of cities and towns within its borders as defined in section 2, article 11, of the state Constitution:

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the state of Oregon."

The evil which gave rise to this expression of the will of the people as part of the fundamental law forbidding the legislative assembly to enact, amend, or repeal any municipal charter is well described by Mr. Justice McNary in the former opinion, to the effect that the legislative assembly had wasted much valuable time in dealing with particular charters of various cities and towns throughout the state which might have been more profitably devoted to general legislation. Ambitious villages were often burdened with charters sufficiently comprehensive for the metropolis, and each measure of the kind required as much attention as any other. The people, therefore, said in this amended section that corporations of whatever kind may be formed under general laws, but shall not be created by the legislative assembly by special laws. Going further into particulars, and by way of reiteration, it restrains its

body of lawmakers from devoting any attention in any way to any single charter or act of incorporation. It left unrestricted and unchanged the general power of legislation lodged by the Constitution with the legislative assembly.

The state is the paramount unit of government established by the people. This same people has ordained in article 1, section 4, of its fundamental law that "the legislative authority of the state shall be vested in a legislative assembly consisting of a Senate and House of Representatives," reserving to the people, of course, the power to enact laws or to reject those promulgated by the Legislature. Thus the general power of legislation remains in the legislative assembly as from the beginning of the state, and the reservation by the people was designed to be a corrective exception. As much as ever before, the rule applies as laid down in *Straw v. Harris*, 54 Or. 424, 428, 103 Pac. 777, 779, as follows:

"That in the enactment of laws, the legislative department of a state, unlike that department of the national government, may enact any law not expressly or impliedly prohibited by the Constitution."

It is also there said by Mr. Justice King:

"There remains, however, as formerly, but one legislative department of the state. It operates, it is true, differently than before—one method by the enactment of laws directly through that source of all legislative power, the people; and the other, as formerly, by their representatives—but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. \* \* \* The powers thus reserved to the people merely took from the Legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them."

Considering section 2 of article 11, supra, and section 1a of article 4 of the Constitution, conferring upon municipalities and districts the initiative and referendum powers reserved to the people, Mr. Justice King in *Kiernan v. Portland*, 57 Or. 454, 467, 112 Pac. 402, 403 (37 L. R. A. [N. S.] 339), writes thus:

"It will be observed from the first sentence in section 2 that no restriction is placed upon the Legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the Legislature. Under all the rules of construction, this exception reserved to the legislative department the right, whether by the people directly through the initiative or indirectly through the Legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws."

Further on in the same case the learned justice writing the opinion used this language:

"Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the Legislature, could formerly have granted indirectly. All the prerogatives, attempted to be exercised by Portland in the construction of the

Broadway Bridge, formerly could have been granted by the Legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the lawmaking department of our state, provision for which may be made by the Legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject."

In *State ex rel. v. Port of Tillamook*, 62 Or. 332, 341, 124 Pac. 637, 640 (Ann. Cas. 1914C, 483), Mr. Justice Bean says:

"Such municipal corporations are always subject to the control and regulation of the lawmakers of the state in the manner directed by the Constitution. *City of McMinnville v. Howenstien*, 56 Or. 451, 458, 109 Pac. 81 [Ann. Cas. 1912C, 103]. While these public corporations are capable of adopting and amending their charter, they still continue to be agencies of the state. A general control is left in the legislative assembly."

Again, in *Riggs v. Grants Pass*, 66 Or. 266, 271, 134 Pac. 776, 778, Mr. Justice Eakin, after quoting with approval the language of Mr. Justice King in *Straw v. Harris*, supra, to the effect that "it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control of them," goes on to say:

"Article 11, section 2 of the Constitution confers power and authority upon cities to form their own charters and make their own laws within their municipal needs, that is, in local and special municipal legislation. Authority beyond that must come from the sovereign, namely, the Legislature, by general laws or by the people by general or special laws."

In brief, so long as the legislative assembly promulgates only general laws, it may proceed without let or hindrance based on anything contained in section 2 of article 11 of the Constitution. The enactment of special laws on the subject of municipal charters is the only thing forbidden to that lawmaking body by that section, while the people at large may enact by the initiative either general or special laws affecting charters. The circumstances produced by that section are the same as if the people had added to section 23 of article 4 another prohibition of local or special laws, so that besides those now there specified that section would read:

"The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say \* \* \* 15. Enacting, amending or repealing any charter or act of incorporation for any municipality, city or town."

Under such conditions the question to be determined would be whether the Motor Vehicle Law is one affecting only a certain locality, and hence unconstitutional, or is it one of general application throughout the state, and consequently within the power of the legislative assembly to enact. The question is precisely the same in the present juncture.

In considering the relative authority of the state and of the city it comes to this, as

stated by Mr. Justice Moore in *State v. Hearn*, 59 Or. 227, 233, 117 Pac. 412, 413:

"It is an axiom that no creature can ever become greater than its creator, and as a corollary deducible from this principle the rule is universal that the police power cannot be bargained away in such a manner as to place it beyond recall."

The principle of the supremacy of the state over any municipality within its borders, when manifested only by general legislation enacted by the legislative assembly or by either general or special laws initiated and adopted by the people, was first declared by this court in the elaborate and masterly opinion of Mr. Justice King in *Straw v. Harris*, supra. That opinion has been cited many times since, with approval as shown by the following precedents, and has already become a classic in the legal literature of the state: *McMinnville v. Howenstien*, 56 Or. 451, 109 Pac. 81, Ann. Cas. 1912C, 193; *Kiernan v. Portland*, supra; *Portland v. Nottingham*, 58 Or. 1, 112 Pac. 28; *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 Pac. 863; *State v. Schluer*, 59 Or. 18, 37, 40, 115 Pac. 1057; *State v. Hearn*, supra; *Schubel v. Olcott*, 60 Or. 503, 510, 120 Pac. 375; *State ex rel. v. Port of Tillamook*, supra; *Riggs v. Grants Pass*, supra; *Couch v. Marvin*, 67 Or. 341, 136 Pac. 6.

For authority to reverse the judgment in this case much reliance seems to be placed upon the following precedents: *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145; *Haines v. Forest Grove*, 54 Or. 443, 103 Pac. 775; *McMinnville v. Howenstien*, 56 Or. 451, 109 Pac. 81, Ann. Cas. 1912C, 193; *Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28; *State v. Schluer*, 59 Or. 18, 115 Pac. 1057; *State v. Hearn*, 59 Or. 227, 115 Pac. 1066, 117 Pac. 412; *McKeon v. Portland*, 61 Or. 385, 122 Pac. 291; *State v. Port of Tillamook*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C, 483; *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43; and *Riggs v. Grants Pass*, 66 Or. 266, 134 Pac. 776. In not one of those decisions, however, is the paramount authority of the legislative assembly over the various cities, towns, and other municipalities doubted or questioned when asserted by general laws. Which shall prevail in case of conflict, a general law of the state enacted by the legislative assembly or an ordinance or charter of a city, is not discussed in any of them. All the doctrine of *Farrell v. Port of Portland* is that the Enabling Act of 1907 was available to the port for the purpose of amending its fundamental law, the act of 1907 being a general law enacted by the Legislature to provide a formula for the exercise of the initiative by municipalities. *McMinnville v. Howenstien* decided that a city could exercise the right of eminent domain to supply its inhabitants with water from a source outside its boundaries. Mr. Justice Slater wrote to the effect that the right was conferred by the general law of February 21,

1891, now codified in section 6874, L. O. L. Mr. Justice King was of the opinion that the power was incident to the general authority of the city to provide for the health and welfare of its people. However, after discussing the causes leading up to the adoption of section 2 of article 11 of the Constitution in its new form, he is careful to sum up the matter in these words:

"As a solution of this problem the people, through their sovereign power expressed at the polls, have, by amendment of the fundamental law, transferred those special powers from the legislative department to the particular localities directly affected, leaving only a general control thereof in the legislative assembly, at the same time retaining under the initiative and referendum, all power over them, differing only in the manner of the exercise of this supervision, which supervision lies with the people at large as a legislative branch of the state. In other words, the legislative assembly, as one of the state's lawmaking branches, may by general laws control and regulate all its municipalities, while the people, through the direct method provided, may enact either general or special laws for this purpose."

The other members of the court concurred in the result. *Haines v. Forest Grove* only decides that in authorizing an issue of bonds in question by the initiative process the city had conformed substantially to the Enabling Act of 1907 thus recognizing the control of the legislative assembly over municipalities when expressed by general laws. To sustain his position in the instant case Mr. Justice McNary lays great stress on what was written in *City of Portland v. Nottingham*, 58 Or. 1, 112 Pac. 28, to the effect that "the legislative assembly cannot pass laws to repeal or amend municipal charters, even by implication," etc. In that case the city, acting under the charter of 1903, had improved a street, a purely local affair, and had assessed the expense upon the adjacent property benefited thereby. The charter provided an appeal to the circuit court of Multnomah county for the property owner aggrieved by the assessment, and declared that the verdict of the jury there should be a final and conclusive determination of the question. *Nottingham* appealed and the circuit court on his motion set aside the verdict, rendered at the hearing, on the ground that the jury had disregarded the instructions of the court. When the charter was promulgated there was no appeal from an order granting a new trial in an action at law. In 1907 (Laws 1907, p. 311) however, the legislative assembly amended what was originally section 525 of the act of October 11, 1862, of the legislative assembly, entitled "An act to provide a code of civil procedure" so as to authorize an appeal from an order setting aside a judgment and granting a new trial. Here were two entirely distinct procedures, the one purely local embodied in the city charter affecting only the property owner whose holdings in the locality were benefited by the improvement and the other incorporated in the statute regulating actions in the circuit courts. Although the two laws,

the Code and the charter, had no relation to each other, the city sought to appeal to this court from the order granting a new trial in the circuit court, and that, too, in the face of the charter provision that the verdict of the jury should be a final and conclusive determination of the matter. In discussing the appeal it was decided here, in substance:

(1) That to be effectual a verdict must be rendered in obedience to the law as declared by the trial court; and (2) that the amendment of the Code of Civil Procedure did not and could not affect the previously enacted charter of Portland. For that matter the legislative assembly did not pretend such a result in that instance. It would have been like contending that because 60 days are made the limit of time for taking appeals to this court, that would operate to enlarge to that period the 20-day limit for appealing from an assessment of damages in a county road proceeding (L. O. L. § 6292) or the 30 days allowed by section 2457, L. O. L., for appeals from justice's courts. The Nottingham Case does not affect the present question for three reasons: (1) There was a purely local matter controlled by a procedure *sui generis*, outlined by the charter and not controlled or attempted to be controlled by general legislation; (2) the right to travel on the highways, roads, and streets within the state is common to every person lawfully within the state and legislation on that subject operates upon the general public instead of any mere locality exclusively; and (3) the Motor Vehicle Law is not an amendment of any particular charter, but is a legitimate assertion of the general legislative power of the state on a subject properly within the scope of that prerogative. *State v. Schluer* is devoted to the construction of what was known as the "Home Rule Amendment," and discusses the question of whether it authorized the local option law to be administered with incorporated towns or with general election precincts as the units upon which to operate. The excerpt quoted above from the Hearn Case shows that it recognizes the principle of state supremacy over municipalities. *McKeon v. Portland* held in effect that one municipal corporation could not absorb another without some action on the part of the latter as a municipality, and that the one whose annexation was sought could not commit sovereignal suicide. The opinions in *State v. Port of Tillamook*, *Thurber v. McMinnville*, and *Riggs v. Grants Pass* all recognize the potency of a general law passed by the legislative assembly over city legislation.

The fallacy of the plaintiff's argument lies in assuming that the Motor Vehicle Law operates as an amendment of the Portland charter. It is not a question of amendment. It is a question of supersession by paramount authority. It is analogous to the situation arising when state regulation of interstate railways must and does yield to national legislation promulgated under the interstate

commerce clause of the Constitution of the United States. It may also be likened unto the supremacy of the National Bankrupt Law over the state enactments about assignments for the benefit of creditors. Amendment implies the corrective act of the author or other person having direct control at the time over the instrument or document to be amended. We do not speak of Jones amending the check or promissory note of Brown or his will or contract. The amendment of such papers is left to the author or some one having his consent. Of course in this instance the legislative assembly framed the original act constituting the Portland charter but the legal voters of the city adopted it and the constitutional amendment committed it to the city as much as if the municipality was the original author of it. The word "amend" was doubtless put into the new constitutional section, so that the Legislature might have no loophole by which to evade its injunction and tinker with individual charters on the plea that it would be only amending its own work. It was never the design, however, to divest the legislative assembly of any of its power to enact general laws of pre-eminent authority throughout the state.

The legislative assembly properly may have delegated some of its legislative power to the city, but the Constitution does not permit the lawmaking body of the state to abdicate that prerogative permanently. It may at any time reassert it, and is only forbidden to do so by special laws in such cases as the present. The power of the legislative assembly to pass general laws with supreme sanction has not been impaired by any amendment to the Constitution.

We further observe in our examination of section 2 of article 11 that the power of its legal voters to enact, or amend the charter of any city or town is expressly subject to the Constitution and criminal laws of the state. The penal statutes there mentioned are not merely such enactments of the kind as were in existence at the time the amendment containing that language was adopted. The section evidently includes any criminal law of general application which either branch of the legislative department of the government might afterwards enact by virtue of its plenary power. To determine whether the Motor Vehicle Law is a criminal law we have only to advert to the statutory definition of the term "crime" found in section 1369, L. O. L., reading thus:

"A crime or public offense is an act or omission forbidden by law, and punishable upon conviction by either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; 5. Disqualification to hold and enjoy any office of honor, trust or profit under the Constitution or laws of this state."

It is the language of the Criminal Code enacted in 1864, and remains throughout the half century since then. It is so consonant with the signification imparted to the term by courts and law writers from time

immemorial that citation of precedents is superfluous. The Motor Vehicle Law does forbid certain acts and omissions, and provides for their punishment by fine. It is unquestionably a criminal law, and we cannot extract that element from it without utterly disregarding as plain language as ever was written. Like the Local Option Law, as construed in *Baxter v. State*, 49 Or. 353, 88 Pac. 677, 89 Pac. 369, the Motor Vehicle Law is a criminal law in that it forbids certain things and provides penalties by fines and imprisonment for violations of its precepts. If for no other reason, this criminal law of the state, by the very terms of the Constitution, must prevail over the city ordinance.

Under present conditions where the people from any part of the state may so easily journey into the metropolis and through the various cities, towns, and villages of the state by private conveyances, the matter of travel upon the streets and highways of the commonwealth in every part of it is a legitimate subject for general legislation regulating the same. The streets of Portland do not belong to that city in the property sense of the word. They are dedicated to public use, and are alike open to all citizens of the state. Where not thus freely placed at the service of the public by the original owners of the land, they exist by virtue of the power of eminent domain, which is an original attribute of state sovereignty. As stated by Mr. Chief Justice Wolverton in *Brand v. Multnomah County*, 38 Or. 79, 91, 60 Pac. 390, 391 (50 L. R. A. 389, 84 Am. St. Rep. 772):

"Primarily, the state has paramount control over all the highways within its borders, including public streets and highways within the confines of municipalities. Whatever authority a municipality may enjoy or possess, pertaining to its streets and highways, must be derived from the legislative assembly through its franchises or charter; and such a corporation acts, if at all, through a delegated power emanating from the initial source. \* \* \* Nor does the mere fact that the state has delegated certain powers to the municipality inhibit it from again assuming or exercising such powers."

It is true that this was written before the amendment of section 2 of article 11, but it illustrates the principle that the state has original power over city streets and all other highways, and that authority granted to any city may be reassumed by the state to the exclusion of the municipality through exercise of the legislative prerogative. The only question is, How shall the resumption of the grant be accomplished by action of the legislative assembly? It is plain that the only restriction imposed upon the legislative assembly by the people in its fundamental law in such cases is that it shall not interfere with the municipality by any special law, and that the exercise of its legislative authority by means of general laws still exists in its unconfined and pristine vigor. We must remember, also, that the right of a city

electorate to amend its charter is subject to the state Constitution, part of which is section 1 of article 4, declaring that "the legislative authority of the state shall be vested in a legislative assembly," etc. We cannot leave this clause out of the case. It is not overcome by the following section granting the initiative to municipalities. The latter section only allows cities to use the initiative formula within the scope of their authority, and was never designed to exempt them from their subordination to the Constitution and criminal laws of the state, nor to infringe upon the general lawmaking power vested in the legislative assembly by section 1 of article 4. Discussing a similar situation in *Ewing v. Hoblitzelle*, 85 Mo. 64, 78, Mr. Justice Norton said:

"We do not hold that the Legislature in exercising the power referred to in section 25, article 9, of the Constitution, can exercise it by the passage of a local or special law; but that it can do so by a general law we have no doubt, and when it is exercised, as we think it has been exercised in the act of 1883, by a general law, and such law is, in any of its provisions, in conflict with a charter provision, that the law prevails over the charter in obedience to the mandates of the constitution that 'such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state.'"

The travel of the citizens of the state at large upon its streets, roads, and highways is greater in scope and importance than any local or municipal concern, and the legislative assembly, in the exercise of its power through general laws, may well consider it as a legitimate subject for its consideration despite the provisions of any local charter. If the Legislative function, as vested in the legislative assembly by section 1 of article 4, is of any validity whatever, we cannot act as censors upon that co-ordinate branch of the government and say, as we did in *Baxter v. State*, 49 Or. 353, 88 Pac. 677, 89 Pac. 369, that the Criminal Local Option Law prevails over a city charter, yet, in our judgment, travel on public streets and highways in the state is not a fit subject for the Legislature to regulate by means of a penal statute general in its terms. To establish a contrary rule will cast upon the legislative assembly, as well as upon the judiciary, the burden of ascertaining, not whether the public laws conform to the Constitution of the state as a supreme standard of comparison, but whether they conflict with any of the multitudinous charters from that of the metropolis to that of every little hamlet in the state. To declare the ordinances of the city superior to the laws of the state will be to invite and encourage conflict between the two jurisdictions. An instance of this has already occurred where the council of the city of Portland undertook to prescribe rates of fare on street railways within the city. The United States District Court, speaking by Judge Robert S. Bean, in *Portland Railway, Light & Power Co. v. Portland* (D. C.) 210 Fed.

667, held that, as the legislative assembly had committed the regulation of such matters to the railroad commission of the state in its capacity of supervising public utilities under the act of February 24, 1911 (L. 1911, 483), the city law must yield to that of the state. Other instances of conflict will readily suggest themselves. Suppose any city adopts ordinances governing the sale of farm products, or nursery stock, or the punishment of crime contrary to the state laws on the same subjects, which of the inconsistent enactments must yield? It is plain that the state law will take precedence.

It is said, in substance, in *Straw v. Harris*, supra, that the state cannot lose control over its municipalities, as it would but lead to sovereign suicide; and it may be added that it was never the intention of the people to so hamper its legislative assembly on the one hand, and extend the powers of cities and towns on the other, as to lead to the slow death of the state by disintegration.

The people have spoken through their representatives in the Motor Vehicle Law. It is not for us to question the wisdom of the policy which it announces. We can only declare what the law is. We should have due respect for the co-ordinate branch of the government and should not declare its utterances to be in violation of the fundamental law unless such a conclusion is supported by incontrovertible authority. Still further, the principle having been thoroughly settled by the precedents following *Straw v. Harris*, the doctrine of *stare decisis* ought to control, preserving continuity of purpose in decision and certainty of the law. The Motor Vehicle Law was clearly within the authority of the legislative assembly to enact as a general law with paramount authority over any local legislation whether of charter or ordinance. The learned judge at the circuit court was right in maintaining the supremacy of the state legislation.

The judgment should be affirmed.

(75 Or. 316)

EVERART v. FISCHER et al.

(Supreme Court of Oregon. Dec. 31, 1914.)

1. INFANTS (§ 74\*)—ACTIONS—PARTY PLAINTIFF.

An action for personal injuries to a minor should be brought in the name of the real party in interest, and not in the name of the guardian ad litem.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 188-190; Dec. Dig. § 74.\*]

2. INFANTS (§ 80\*)—ACTIONS—GUARDIAN AD LITEM—OBJECTIONS TO APPOINTMENT.

An objection that the appointment of a guardian ad litem fails to show that the minor was over 14 and nominated his own guardian can be raised only by answer or demurrer, and not by objection to the admission of the order of appointment, where the answer was a general denial.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 210-221; Dec. Dig. § 80.\*]

3. MUNICIPAL CORPORATIONS (§ 703\*)—CONTROL BY LEGISLATURE—REGULATION OF MOTOR VEHICLES.

The ordinance of the city of Portland regulating motor vehicle traffic was not superseded by the Motor Vehicle Act (Laws 1911, p. 265).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.\*]

4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICE.

In an action for injuries to a bicycle rider who collided with an auto truck, testimony of a witness for plaintiff that she judged that the truck was going about 30 miles per hour, basing her estimate on the marks made by the truck which she had described to the jury, was not prejudicial, especially where defendant's liability did not depend upon the speed of the truck.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4160; Dec. Dig. § 1050.\*]

5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICE.

Nor was the testimony of a witness that he presented another's professional card to the plaintiff in soliciting a damage case prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4160; Dec. Dig. § 1050.\*]

6. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—INSTRUCTIONS—MOTOR VEHICLE LIGHTS.

In an action for personal injuries to a bicycle rider who was struck by an auto truck, the court can instruct the jury as to the requirement of Motor Vehicle Act (Laws 1911, p. 265), that each motor vehicle shall display certain lights from one hour after sunset to one hour before sunrise, although there was no testimony as to the hour the sun set, since that is a matter of which the court can take judicial notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

7. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—REPETITION.

Requested instructions which, so far as competent, were covered by those given, were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

8. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Contributory negligence of the plaintiff which will defeat a recovery for personal injuries must be a proximate cause thereof.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 112-114; Dec. Dig. § 82.\*]

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Mary Everart, mother and guardian ad litem of Clifford Everart, a minor, against Helmuth Fischer and another. Judgment for the plaintiff, and defendants appeal. Affirmed.

This is an action for personal injuries. Clifford Everart, a minor of the age of 16 years, was riding a bicycle north on Nineteenth street, and claims to have been injured by an auto truck which was going south on said street. Upon the trial of the action against the defendants plaintiff recovered a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—3

verdict, and from a judgment thereon the defendants appeal.

Chas. J. Schnabel and George Rossman, both of Portland, for appellants. P. J. Bannon, of Portland (L. W. O'Rourke, of Portland, on the brief), for respondent.

**EAKIN, J.** [1] The action should have been brought in the name of the real party in interest, but as no question is raised upon that error we will pass it.

Defendants first insist that the court erred in refusing to instruct the jury to bring in a verdict in favor of defendants; but we find that the evidence was sufficient to require the case to be submitted to the jury on the question of the negligence of defendants.

[2] It is assigned as error that the court admitted in evidence the order of the circuit court appointing plaintiff guardian ad litem for Clifford Everart. That Clifford was a minor, and the appointment of the guardian ad litem are alleged in the complaint, and no special issue is raised thereto. There is a general denial of the allegations of the complaint, and no objection thereto was suggested at the trial except as to the introduction of an order appointing the guardian ad litem; the ground of the objection being that the application for the appointment fails to show that the minor was over 14 years of age and nominated the guardian. Probably that is an issue that should be specially raised by a plea in abatement. Woerner on The American Law of Guardianship, p. 64, says that in practice it is sufficient if the appointment is recited in the count, and the formality is generally waived. The defendants may take advantage of this defect by demurrer or answer only, and not by motion in arrest of judgment. *Jones v. Steele*, 36 Mo. 324.

[3] Defendants also contend that the court erred in the admission in evidence of ordinance of the city of Portland No. 26,255; the ground of the objection being that the ordinance is superseded by the general statute (chapter 174, Laws 1911) relating to the manner of operating autos, etc.; but the effect of that statute was held not to supersede a city ordinance in the opinion of this court in the case of *Kalich v. Knapp*, 145 Pac. 22, handed down December 22, 1914.

[4] Defendants objected to the admission of the testimony of Lottie Hatfield, in which she was permitted to base an estimate of the speed of the auto upon the marks or burns which she claimed were made in the pavement by the sliding of the wheels when locked. When asked about her knowledge of the speed of an auto, she answered, "Well, I know pretty well about the speed," and the question was repeated, to which defendants objected on the ground that the defendants' case ought not to be influenced by testimony so whimsical. The court said, "The jury can judge as to how whimsical it is." She was

then asked if she would be able to approximate the speed of the auto from the tracks it left in stopping. She answered she could, and said, "I should judge from that about 30 miles an hour, by the depth of the burns." She only gave her judgment based upon facts which she stated to the jury, and we do not deem that defendants' case was prejudiced thereby. The liability of the defendants would not depend upon the speed of the auto.

[5] Exception is also taken to the admission of the evidence of the witness Gould, in which he states that he presented Ralph Citron's professional card to Mrs. Everart in soliciting a damage case. The evidence did not in any manner have any bearing upon the liability of the defendant, and is not ground for reversal.

[6] Defendants also contend that the court erred in instructing the jury as to the provisions of the act of the Legislature (chapter 174, Laws 1911, p. 285) which provides:

"Every motor vehicle \* \* \* shall, during the period from one hour after sunset to one hour before sunrise, display at least two white lights," etc.

This objection is based principally upon the absence of testimony as to the hour at which the sun sets, but that is a matter of which the court takes judicial knowledge, and if the defendants thought it important they should have asked the court to instruct the jury in regard thereto.

[7] Further, he objects to the refusal of the court to give certain instructions requested by him; but we consider the points raised, so far as competent at all, are well covered by those given, and it was made plain to the jury that the defendants' negligence, in order to create a liability, must have been the proximate cause of the injury.

[8] Defendants contend that if they were guilty of negligence, yet if the plaintiff was also guilty of negligence which contributed to the injury, the plaintiff cannot recover. Negligence on plaintiff's part which would relieve the defendants of liability must be the approximate cause of the injury, and the requests seek to make it his duty to avoid the accident if he saw the situation at the time. Although the evidence fails to disclose that he carelessly failed to escape by some means available to him as he saw it, and fails to make distinction as to the cause of the injury, contributory negligence of the plaintiff which would defeat recovery must be the proximate cause thereof. It is said in 29 Cyc. 526:

"While it is held that the negligence of the person injured is sufficient to defeat recovery if it contributes in any degree to the injury, yet to defeat recovery plaintiff's contributory negligence must be the proximate cause thereof."

We find no prejudicial error, and the judgment is affirmed.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.



(74 Or. 426)

## STATE v. HAMMER.

(Supreme Court of Oregon. Dec. 31, 1914.)

## 1. FALSE PRETENSES (§ 49\*)—SUFFICIENCY OF EVIDENCE—TITLE TO LAND.

In a prosecution for securing, by false pretenses, a signature to a deed, oral testimony by the prosecuting witness that she and the other signers of the deed owned the land, which was admitted without objection, was sufficient proof of the title.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.\*]

## 2. FALSE PRETENSES (§ 49\*)—SUFFICIENCY OF EVIDENCE—PARTICIPATION BY DEFENDANT.

In the separate trial of one charged jointly with others with having obtained the execution of a deed by false pretenses, evidence held to show that the defendant participated with another in carrying out the fraudulent scheme.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.\*]

Department, 2. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

L. C. Hammer was convicted of having obtained the signature of another to a deed by means of false pretenses, and he appeals. Affirmed.

On the 31st day of May, 1911, the defendant L. C. Hammer was jointly indicted with W. H. Whiteaker, O. F. A. Peck, H. G. Luker, and J. C. Luker, by the grand jury of Multnomah county, and charged with the crime of having obtained the signature of Emma A. Smith to a deed by means of false pretenses.

The gist of the allegation of the indictment is that the defendants, conspiring together, made representations to Mrs. Smith that the Lake Oil, Gas & Pipe Line Company, of which the defendants were officers and directors, was then the owner and had a legal title to a certain tract of 800 acres of land located in the state of California, upon which paraffin oil had theretofore been discovered in great quantities; that it was the most valuable oil land in California; that a certain bottle of oil then delivered to Emma A. Smith by the defendants was taken from holes dug at three feet in depth on the land; that a certain prospectus issued and published by the defendants and delivered to Emma A. Smith contained true statements, accounts, and pictures representing the tract as being oil-bearing land; that it was of the value of \$500,000; that the shares of stock issued by the corporation were of the value of \$1 each; that the defendants, as directors and officers of the corporation, having for sale a large number of shares of its capital stock, made representations and pretenses to Emma A. Smith for the purpose of inducing her to purchase 7,950 shares of the corporation's capital stock, whereas, in truth, the corporation was not the owner, had no legal title to the tract of 800 acres, no paraffin oil or other oil had been discovered thereon, the tract was not the most valuable oil land in California, but was of no value, the bottle

of oil so delivered was not taken from the land, and the prospectus or advertising pamphlet did not contain a true account and pictures representing said land, but contained false, fictitious, and misleading statements. It is further shown that the defendants, with intent to injure and defraud, did fraudulently obtain the signature of Emma A. Smith to a certain warranty deed conveying to W. A. Whiteaker a piece of land situated in Multnomah county, Or., containing 91.8 acres, of the value of \$11,475, in exchange for 7,950 shares of the capital stock of the corporation; that Emma A. Smith, relying upon the false pretenses and representations and believing them to be true, was thereby induced to sign the deed.

The defendant Hammer demanded a separate trial. On the 23d day of June, 1913, his case was submitted to the jury, who returned a verdict of guilty as charged in the indictment. Judgment was rendered thereon sentencing the defendant to serve not less than one nor more than five years in the penitentiary. From this judgment the defendant Hammer has appealed. The defendant Whiteaker was found guilty as charged in the indictment. He appealed to this court, and the decision of the lower court was affirmed. State v. Whiteaker, 64 Or. 297, 129 Pac. 534.

O. W. Corby, of Portland, for appellant. John A. Collier, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for the State.

BEAN, J. (after stating the facts as above). The assignments of error are all practically embodied in the assertion of the defendant that the court erred in not sustaining defendant's motion for a directed verdict of acquittal made at the close of the state's case. It is the main contention of the defendant that the oral testimony of Emma A. Smith that she owned the real property described in the deed to which her signature was obtained was insufficient.

The evidence in the case tended to show that one Kelly discovered what was thought to be oil land in the Mona Lake Basin, Cal., and came to Portland to obtain assistance to develop the same; that Kelly, W. H. Whiteaker, and L. C. Hammer and others organized the Lake Oil, Gas & Pipe Line Company, a corporation with a capital stock of \$500,000, of which W. H. Whiteaker was president and L. C. Hammer secretary, for the ostensible purpose of developing a new oil field in Mona Lake Basin, Cal. Thereafter W. H. Whiteaker caused to be published a pamphlet containing photographs which pretended to represent scenes on lands owned by the company, one of which purported to show a party of people bailing oil out of an open hole on the company's lands. They falsely represented that the field was a proven one;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the company owned and had title to 800 acres of land in California upon which paraffin oil had been discovered; and that the land, by reason thereof, was worth \$500,000. In September, 1910, defendant L. C. Hammer, together with Whiteaker, met Emma A. Smith, widow, nearly 65 years of age, and unaccustomed to business, to whom they recited the oil value of this land in Mona county, Cal., and exhibited pictures and samples of oil shales and fossils which they declared had been taken from the company's property. They further represented to her that the company had commenced to drill wells upon its lands, and that the pressure of gas was so strong that it blew the drill out, and the well had to be closed down until such time as heavier machinery could be obtained. The defendants further exhibited a sample bottle of crude oil on which was a typewritten label as follows:

"Oil taken from holes dug at three feet in depth from our property in California."

In addition to the oral representations made by the defendants, an advertisement was prepared and printed by defendant and his co-conspirators and issued by the company. This was shown to Mrs. Smith and was introduced in evidence. It is headed in large capital letters:

**THE WORLD'S GREATEST OIL FIELDS.**

California's Billion-Dollar Industry.

[Here appears a photo.]

This Photo Taken on Our Property.

The Timber is Being Killed by Oil Coming to the Surface.

Lake Oil Fields District Offers the Best Investment in Oil Properties in the Entire State of California.

This Oil is of a Paraffine Base, with 52 Gravity.

Lake Oil, Gas and Pipe Line Company,  
419 Railway Exchange Building,  
Portland, Ore.

The evidence tends to show further that Emma A. Smith, relying upon these representations and believing them to be true, purchased 7,950 shares of the stock, paying for the same by giving Whiteaker, for the benefit of the company, a warranty deed conveying to him 91.8 acres of land located on what is known as the Base Line Road, Multnomah county, Or.; that Mrs. Smith was ignorant of the facts, and, believing and relying upon the representations so made, was thereby induced to sign said deed, and that all of such representations were false.

It is also contended upon the part of defendant that the testimony of Emma A. Smith shows that her signature was actually obtained by a person who was acting as an agent other than Hammer. It is clear, however, from the evidence that the agent was acting for the defendants, and that it was only a means which was employed by them to obtain the signature of Mrs. Smith.

Section 1964, L. O. L., provides:

"If any person shall, by any false pretenses, or by any privy, or false token, and with intent

to defraud, \* \* \* obtain or attempt to obtain with the like intent the signature of any person to any writing the false making whereof would be punishable as forgery, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

The evidence requisite as proof of such a crime is prescribed by section 1541, L. O. L., as follows:

"Upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memorandum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant. \* \* \*"

[1] As to the title which the evidence shows that Mrs. Smith had to the land embraced in the deed to which her signature was unlawfully obtained, there can be no question but that, if the defendant had forged the name of Emma A. Smith to the deed with a fraudulent intent, he would have been guilty of the crime of forgery, because the deed in question was in due form, signed and sealed by Mrs. Smith, attested by two witnesses, and bears the certificate of a notary public to the effect that the same was properly acknowledged. Upon its face it was a complete and valid conveyance. Mrs. Smith, without objection on the part of defendant, testified that she, with others who also signed the deed, owned the farm described therein. This evidence was uncontradicted and is sufficient as to the title to lay a foundation for a violation of the statute. For a full discussion of what constitutes a violation of section 1964, L. O. L., see the able opinions of Mr. Justice Ramsey in *State v. Leonard*, 144 Pac. 113, and on rehearing, rendered December 15, 1914. The facts in the case at bar are practically identical with those in the case against Whiteaker, Hammer's co-conspirator (*State v. Whiteaker*, 64 Or. 297, 129 Pac. 534), considered by this court in an opinion by Mr. Justice Eakin. As to the law nothing further remains to be said in the case under consideration.

[2] We have carefully examined the evidence, and it clearly appears that defendant Hammer was connected "hand and glove" with Whiteaker in a conspiracy for carrying out the fraudulent scheme which resulted in part in obtaining the signature of Emma A. Smith to the deed of a valuable farm. The evidence was ample to sustain the verdict. There was no error in denying the motion for a directed verdict of acquittal. We find no reversible error in the record. Nothing appears to indicate that the defendant did not have a fair and impartial trial.

The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(74 Or. 162)

**NELSON v. MONITOR CONGREGATIONAL CHURCH et al.**

(Supreme Court of Oregon. Dec. 31, 1914.)

**1. RELIGIOUS SOCIETIES (§ 20\*)—PROPERTY—CONVEYANCE.**

Where a church had secured a decree for specific performance of a contract to convey land to it for a church site, the trustees, with the consent of the members of the church can convey the property to an incorporated church board to be still used for church purposes, without the consent of the court granting the decree and without affecting the title.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 130-143; Dec. Dig. § 20.\*]

**2. RELIGIOUS SOCIETIES (§ 20\*)—PROPERTY—CONVEYANCES—RIGHTS OF MEMBERS.**

A majority of the members or corporators of a religious society or corporation may control the disposition of its property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 130-143; Dec. Dig. § 20.\*]

**3. RELIGIOUS SOCIETIES (§ 18\*)—PROPERTY—CONVEYANCES—RIGHTS OF PURCHASERS.**

A grantee of property which had been conveyed to a church for church purposes takes it subject to the trust, and must use the property for that purpose, but, if it fails to do so, the title does not thereby revert to the original grantor to the church.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.\*]

**4. RELIGIOUS SOCIETIES (§ 18\*)—USE OF PROPERTY—RIGHT OF ACTION.**

One who conveyed land to a church to be used for church purposes, but who is not a member of the church or society, cannot maintain an action to regulate the use of the property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.\*]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit to enjoin trespass by Andrew Nelson against the Monitor Congregational Church and others. Decree for the defendants, and plaintiff appeals. Affirmed.

This is a suit to enjoin a trespass upon three-quarters of an acre of land. A decree was rendered by the circuit court in favor of defendants, and plaintiff appeals.

In 1878 J. P. Shuck purchased a 40-acre tract of land in the J. B. Shank donation land claim in section 25, township 5 S., range 1 W., in Marion county, Or., which included the land involved in this suit. While J. P. Shuck and Mary A. Shuck, his wife, were the owners of the 40-acre tract, they entered into a verbal agreement with the Monitor Christian Church, an unincorporated religious society, of which W. R. Townsend, J. D. Simmons, and J. R. White were the duly elected trustees, whereby they agreed to convey to the society, or its trustees, the 1-acre tract, part of which is in question in this suit, in trust for the use and benefit of its members and the residents and inhabitants of and near Monitor, Or.,

for church and religious purposes, in consideration of the society building a church building thereon. The land was accepted and the church constructed. Shuck and wife failed to make the promised deed to the society. On September 10, 1902, they conveyed a portion of the land to Andrew Nelson, including about three-quarters of the acre tract, and another portion, including the balance, to Hans Nelson. Both grantees had full knowledge of the agreement on the part of Shuck and wife to convey to the church, and accepted their deeds knowing that the church occupied the acre tract. In 1903 the trustees of the Monitor Christian Church commenced a suit in the circuit court for Marion county, Or., against Andrew Nelson, Hans Nelson, J. P. Shuck, and their respective wives, for specific performance of the agreement to convey the acre tract to the church. On August 14, 1903, a decree was rendered and entered perpetually enjoining Andrew Nelson and Hans Nelson from trespassing upon the 1-acre tract (particularly describing it), injuring or destroying the church building, or in any way interfering with or disturbing the members of the Monitor Christian Church or the residents or inhabitants in the neighborhood or vicinity of Monitor, Or., in the use of the premises or church building for church or religious purposes. It was further decreed that the defendants Hans Nelson and Andrew Nelson and their wives should, within 30 days from the date of the decree, make, execute, and deliver to W. R. Townsend, J. D. Simmons, and J. R. White, as trustees of the Monitor Christian Church, a good and sufficient deed of all the described premises in fee, to the trustees of the church "in trust for the use and benefit of the members of the said Monitor Christian Church and the residents and inhabitants of and near Monitor, Or., for church and religious purposes forever"; and, in case of their failure to do so, that the decree stand as such deed. On December 8, 1911, pursuant to a resolution of the Monitor Christian Church adopted at a regularly called meeting, the trustees for and on behalf of the church conveyed the 1-acre tract to the Congregational Missionary Board of Oregon, an Oregon religious corporation for religious purposes, for the use and benefit of the residents and inhabitants of the town of Monitor, Or., and its vicinity and neighborhood. On February 18, 1913, the last-named society conveyed the 1-acre tract to the trustees of the Monitor Congregational Church of Marion county, Or., with the provision that "this conveyance is made that said premises may be preserved for, and devoted exclusively to, religious purposes, and none other, for the use and benefit of the residents and inhabitants of the town of Monitor, Or., and its vicinity and neighborhood, and said premises shall be forever so used," and that,

If the premises should cease to be so used, the same should thereupon revert to the first party. Afterwards, for the purpose of raising funds with which to improve the property and carry into effect the purpose for which the same was held, the trustees of the Congregational Church borrowed \$400, mortgaged the premises to the Congregational Church Building Society, to secure such sum, and expended that amount in improving the property. The premises are now, and were at the time of the commencement of this suit, being used for church and religious purposes exclusively, in compliance with the agreement between Shuck and the Monitor Christian Church. This suit was brought by the plaintiff to enjoin the defendants from breaking and entering the premises, cutting down or destroying trees or timber thereon, and for damages.

E. P. Morcom, of Woodburn, for appellant.  
H. S. Wilson, of Portland (Huntington & Wilson, of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above).

[1] It is the contention of the plaintiff that, because the trustees of the Monitor Christian Church transferred the 1-acre tract to the Congregational Missionary Board of Oregon without an order from the circuit court that entered the decree, the title of the trustees terminated, and the property reverted to the original grantor Shuck; and that, by reason of the latter's deed to Nelson, the title passed to the plaintiff. The transfer of the premises by the trustees of the Monitor Christian Church was made with the voluntary consent of the members of that society, who were the beneficiaries. This transfer was apparently necessary to carry out the purposes of the trust and provide a suitable building upon the land to be used for the purposes of religious worship. The result was that the property has ever since been used exclusively for such purposes; therefore such a conveyance was a proper performance of the trust, and not a breach thereof. 39 Cyc. 346. The conveyance by the trustees of the Monitor Christian Church with the consent and approbation of the beneficiaries, who are the members of that church, passed a good title and concluded the beneficiaries, as well as the settlor of the trust. 39 Cyc. 355, c. 361.

[2] The majority of the members or corporations of a religious society or corporation may direct or control the disposition of its property. 34 Cyc. pp. 1158, b, 1160 (2); Albany College v. Monteith, 64 Or. 356, 130 Pac. 633.

[3] A grantee of trust property, with no-

tice of the trust, takes it subject to the trust and holds it for the purposes of the trust. 39 Cyc. 373 (b); Sharp v. Goodwin, 51 Cal. 219; 2 Pom. Eq. Jur. 621; Amberson v. Johnson, 127 Ala. 490, 29 South. 176. Therefore the Congregational Missionary Board of Oregon and its grantee, the Monitor Congregational Church, took the real estate conveyed subject to the trust, and held it for the purposes of such trust. Should it be found that the trust is being violated or the land used for purposes other than those contemplated by the grant, even then the title would not revert to the original grantor. Chapman v. Wilbur, 4 Or. 362; Raley v. Umatilla County, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142; Albany College v. Monteith, supra.

By the decree of August 14, 1903, the plaintiff's title or interest in the 1-acre tract was terminated, and he was perpetually enjoined from interfering with or disturbing the members of the church. The circuit court of Marion county did not create, but simply recognized, a trust, and the trustees of the Christian Church were agents of the society, and not agents or officers of the court. It is not contended that the transfer from the Christian Church to the Congregational Missionary Board, or from the latter to the Congregational Church of Monitor, was a violation of any trust, or that the use of the property by these grantees is inconsistent with the design of the original grantors. The record shows that the property is still being used for religious purposes for the use and benefit of that community. This is what was evidently contemplated by Shuck, the original grantor. If the mortgage referred to should be foreclosed, it is obvious that the purchaser would take only the interest which the mortgagor had, and the property would still be held for church and religious purposes as heretofore.

[4] The plaintiff is not shown to be a member of either of the church organizations mentioned, and hence not in a position to question the act of any of these societies in the matter of conveying its property. We find in 34 Cyc. 1172, note 88, the following:

"A nonmember of the church or society cannot maintain an action to regulate the use of the church property, even though he was one of the original grantors or was formerly a member of the society."

In 39 Cyc. 362, it is stated that beneficiaries are generally the only persons entitled to attack the validity of a sale by trustees; third persons having no such right.

The decree of the circuit court is therefore affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(45 Utah, 255)

**WILLIAMS v. NELSON. (No. 2679.)**

(Supreme Court of Utah. Dec. 11, 1914.)

**1. LIMITATION OF ACTIONS (§ 130\*)—NEW ACTION AFTER DISMISSAL.**

Under Comp. Laws 1907, § 2893, providing that if any action be commenced within due time, and if plaintiff fail in such action otherwise than upon the merits, he may commence a new action within one year thereafter, where a nonsuit is granted the action fails otherwise than upon the merits, and the reason for which the nonsuit is granted is immaterial.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.\*]

**2. PLEADING (§ 53\*) — SEPARATE COUNTS — "CAUSE OF ACTION."**

Under the code system of pleading, where there is but one promise, agreement, obligation, or imposed duty, there is but one primary right, one primary duty, and one delict, and these three combined constitute one "cause of action"; and though the pleader states the facts in different ways because of a doubt as to the ground upon which he will be entitled to judgment, or a doubt as to the facts which the evidence in the possession and under the control of his adversary may develop, this constitutes a duplicate statement of one right of action, and these different statements are not separate causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114-117; Dec. Dig. § 53.\*]

For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

**3. PLEADING (§ 369\*) — SEPARATE COUNTS — ELECTION.**

Where plaintiff states his cause of action in different ways because of a doubt as to the ground upon which he will be entitled to judgment, or a doubt as to the facts which the evidence may establish, it is error to require him to elect upon which count he will rely for a recovery, and the complaint should be considered in its entirety, the evidence applied to the whole pleading, and such relief granted as the pleadings support and the evidence justifies.†

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

**4. BROKERS (§ 82\*) — ACTIONS FOR COMMISSIONS—ISSUES, PROOF, AND VARIANCE.**

A complaint alleged that defendant employed plaintiff to sell certain mining claims, and agreed to pay plaintiff a commission of 10 per cent. for the sale thereof, when the sale was made, and that such claims were sold through plaintiff's efforts. It was then alleged, as a so-called second cause of action, that defendant employed plaintiff to assist him in selling such mining properties, and to do and perform services for defendant in finding a purchaser; and that defendant agreed to pay plaintiff for such services 10 per cent. of the price for which the property might be sold, whether the sale was made through defendant's efforts, or the efforts of plaintiff, or the joint efforts and labors of both. It was contended that the first cause of action relied upon an express promise, and the second upon an implied promise. Plaintiff testified that he had at one time been interested in the mining claims in question; that defendant asked him to help to sell them, stating that he could be reimbursed partly for what he had lost on the claims; that they would try and sell them and if they were successful he would give plaintiff a commission, and that whenever the property was sold he would pay 10 per cent. commission for whatever services plaintiff had rendered; and that he performed services in bringing about a sale. *Held*, that there was, in legal effect, no substantial difference between

the two so-called causes of action, and the evidence was admissible and justified a recovery under either count, it being immaterial so far as plaintiff's right to compensation was concerned, whether it was termed a commission or compensation.††

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

**5. ACTION (§ 38\*)—JOINDER.**

Parties may incorporate into one contract as many conditions and promises as they may desire, and may declare upon and enforce all such conditions in one cause of action, unless they are so repugnant as to destroy each other.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 566; Dec. Dig. § 38.\*]

**6. LIMITATION OF ACTIONS (§ 130\*)—NEW ACTION AFTER DISMISSAL OF FORMER ACTION.**

A complaint in an action in which a nonsuit was granted, and which was commenced before the action was barred by limitations, alleged that defendant employed plaintiff to sell certain mining claims, and agreed to pay him a commission of 10 per cent. on the selling price, and that a sale was brought about by plaintiff. The complaint, in an action commenced within one year after the granting of the nonsuit, alleged that defendant employed plaintiff to assist him in selling such mining claims and to perform services in finding a purchaser, and agreed to pay plaintiff for such services 10 per cent. of the selling price when the sale was made, whether made through the efforts of plaintiff or defendant, or by the joint efforts and labors of both. *Held*, that the causes of action in both complaints were the same; and hence the second action was not barred by limitations, under Comp. Laws 1907, § 2893.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by D. J. Williams against Joseph Nelson. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Chris Mathison, of Salt Lake City, for appellant. Young, Snow, Ashton & Young, of Salt Lake City, for respondent.

**FRICK, J.** The plaintiff commenced this action to recover a commission or compensation for services rendered which he alleges resulted in the sale of certain mining property owned by the defendant. The complaint contains what is contended constitutes three "causes of action." In the so-called first cause of action, it is in substance alleged that on April 23, 1903, the defendant was the owner of certain mining claims located in Salt Lake county, fully describing them; that on or about the 30th day of April, 1903, the defendant employed the plaintiff to sell said mining claims "and agreed to pay the plaintiff a commission of 10 per cent. for the sale thereof"—that is, 10 per cent. of the sale price, which "was to be paid to this plaintiff by the defendant when said sale was made"; that pursuant to said agreement the plaintiff showed said property to prospective purchasers, and, at times opened negotiations with different parties for the sale thereof.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Oberndorfer v. Moyer, 30 Utah, 325, 84 Pac. 1102. †† Casady v. Casady, 31 Utah, 394, 83 Pac. 32.

What was done in that regard by plaintiff is fully set forth. It is further alleged "that by reason of plaintiff's continuous efforts, explanations, illustrations, and representations to Jos. E. Edmunds of the advantages and values of said mining property, the said Jos. E. Edmunds did, on the 6th day of December, 1906, pay to Joseph Nelson (the defendant) the sum of \$50,000, and did therewith purchase from the defendant all of said mining property." It is further alleged "that said mining property was sold through the efforts of plaintiff, and that said plaintiff was the procuring cause of said sale." It is then alleged that 10 per cent. is the regular commission, and "that plaintiff's services rendered during and between the dates named in reference to the sale of this property were reasonably worth \$5,000, and that 10 per cent. of the sale price is justly due and owing to the plaintiff in this action." It is then alleged that payment of said commission was demanded and refused. For the purpose of avoiding the plea that the action was barred, it was also alleged, in appropriate terms, that a prior action upon the same cause of action had been timely commenced but had failed otherwise than upon the merits. Judgment for \$5,000 was prayed for in the first alleged cause of action. The plaintiff then proceeded to state what is termed a second cause of action, in which the dates respecting the employment, the ownership, and description of the mining claims are precisely as alleged in the first cause of action. The only difference between the so-called first and second causes of action is that in the alleged second cause of action it is stated that the defendant employed the plaintiff "to assist the defendant in selling the mining properties mentioned herein and to do and perform services for the defendant in finding a purchaser therefor, and the defendant agreed to pay the plaintiff for said services 10 per cent. of the price for which said property might be sold," which 10 per cent., it is alleged, was payable when the sale was made, "whether said sale was perfected through the efforts of this plaintiff alone, or through the efforts of the defendant, or whether said sale was perfected by the joint efforts and labors of both plaintiff and defendant." What plaintiff did by way of procuring a purchaser for said mining claims is again fully set forth, and the date of the sale, the amount of the purchase price, and the person to whom sold are alleged in substantially the same terms as in the alleged first cause of action. The bringing of a prior action is also again stated, and judgment prayed for the same as in the preceding cause of action. Practically the same allegations are again repeated in what is denominated a third cause of action. To these several causes the defendant filed an answer in which he admitted that he was the owner of the mining claims at the date alleged, and

denied generally all other allegations of the complaint. He also averred that the alleged causes of action were barred. A separate answer was directed to each one of the alleged causes of action.

The case was tried to the court without a jury. Plaintiff, in substance, testified that he was well acquainted with the mining claims in question; that at one time he was a stockholder in a corporation which owned them; that in April, 1903, he had a conversation with the defendant; that the defendant then stated to the plaintiff that he, the defendant, was not familiar with the mining business and wanted plaintiff to help sell the mining claims in question and get them off defendant's hands; that the defendant, addressing plaintiff, said, "You have lost, of course, on it [the mining claims], and you can be reimbursed partly by helping me sell this property, and now," he said to me, "Dave, will you take hold of it and do the best you can, and we will both try and sell it, and, if successful, I am going to give you a commission, I will pay you a reasonable commission." The witness further testified that the defendant, in substance, said to him that whenever the property was sold the plaintiff would be paid 10 per cent. commission out of the property for whatever services he rendered. "He [meaning defendant] stated it this way: That he wanted me to help him in various ways, and I would get nothing for my services until the property was sold." The witness said that he had several conversations with the defendant from time to time in which the latter substantially made the same promises and statements as we have just outlined. He further testified that, pursuant to these conversations, he made efforts to sell the property, and, for that purpose, showed it to various prospective purchasers by taking them to and over the property; that he in particular labored with Jos. E. Edmunds to purchase the same, who thereafter purchased it from the defendant. The plaintiff stated in detail what he did in order to bring about the sale. Plaintiff's statements were, to some extent at least, supported by another witness, who testified that he and a Mr. Evans were prospective purchasers; that the defendant introduced the witness to the plaintiff, and that he "gave me the impression" that the plaintiff was acting as defendant's agent in selling the property; that the defendant said that plaintiff would show the property to the witness, and the plaintiff did take the witness and Mr. Evans to the property and showed it to them; that terms of sale were discussed by the parties, but they could not agree upon a price. The plaintiff introduced in evidence a warranty deed for the mining claims in question from the defendant and wife to Jos. E. Edmunds which was executed December 6, 1906, and in which the expressed consideration was \$50,000. Plaintiff also testified that before bring-

ing the action he had demanded the commission from the defendant, and that the latter refused to pay the same. The complaint in the prior action was also introduced in evidence.

In substance the foregoing is all the evidence that was produced. When the plaintiff rested, defendant's counsel moved the court to require plaintiff to elect on which "cause of action" he would rely for a recovery. Plaintiff's counsel objected to this, but was compelled to elect, and did elect to stand upon what is termed the second cause of action in the complaint. When counsel had elected to stand on the second cause of action, counsel for defendant moved for nonsuit, upon the ground that it was made to appear that the cause of action upon which plaintiff had elected to stand was barred by the statute of limitations. Counsel for defendant contended, and now contends, that the second cause of action in the complaint was not saved by the prior action, for the reason that it is a separate and distinct cause of action, and is different in its nature and legal effect from the cause of action which was set forth in the prior action.

[1] We have a statute (Comp. Laws 1907, § 2893), which, in effect, provides that if an action is commenced in due time, and the plaintiff "fail in said action or upon a cause of action otherwise than upon the merits," and the time within which an action can be commenced has expired, the plaintiff may, nevertheless, bring a new action within one year after the failure of his action. The allegations of the complaint in the prior action are substantially the same as those contained in what is called the first cause of action in the present complaint. The prior action failed otherwise than upon the merits for the reason that the court sustained a motion for nonsuit. Under our statute the reason for which a motion for nonsuit may be granted is not material. Plaintiff's counsel insists that the court erred in compelling an election, in sustaining the motion for nonsuit, and in entering judgment dismissing the complaint.

[2, 3] We are of the opinion that all three assignments are well founded. If anything was attempted to be settled by the adoption of code pleading, it was to do away with the practice of separating a single transaction into several different causes of action; that is, if there is but one promise, agreement, obligation, or imposed duty, etc., then, under the Code, there is, and can be, but one primary right on the part of the plaintiff, one primary duty on the part of the defendant, and one delict, and these three combined constitute the cause of action. The facts constituting the right, the duty, and the delict, when supplemented by the amount or extent of the injury or damages claimed, are required to be stated in clear and concise language, and only the operative facts, as dis-

tinguished from the evidentiary facts and conclusions, must be stated. The pleader is not required to follow any particular form or special theory in stating the facts, and, if the facts stated entitle the plaintiff to any relief under the substantive law, then he has stated what is termed a good cause of action, and the court must enter judgment in his favor so far as any attack upon the substantial sufficiency of the pleading is concerned. It is, however, also well settled that in case there is but one right of recovery, but there is, nevertheless, substantial doubt in the mind of the pleader with regard to whether he will be entitled to judgment "upon one ground or upon another," or where it is uncertain just what the evidence which is in the possession and under the control of his adversary may develop, the pleader may, nevertheless, state the facts constituting his right of recovery in different ways. This, under the code system, is denominated a "duplicate statement of one right of action," and, by some writers and courts, the dual statements are still denominated separate causes of action. To call such statements different causes of action, to our minds, is, however, illogical, not well considered, and is contrary to the true spirit of the Code, since one right of recovery, under the Code, is but a single cause of action. It is, however, not very material what a duplicate statement of but one right of recovery is called so long as the right to make such statement and the right of recovery are not curtailed or denied, as was done in the case at bar. This court is firmly committed to the doctrine respecting the right of making duplicate statements. In *Oborndorfer v. Moyer*, 30 Utah, 325, 84 Pac. 1102, the doctrine is stated in the headnote in the following words:

"Where a complaint contains two counts, one on an open account and the other on an account stated, for the same cause of action, a motion to elect between the counts was properly denied; the rule being that when a plaintiff has \* \* \* a single cause of action, and there is some uncertainty as to which he will be able to establish, he may set forth his claim in different counts so as to include every ground he may have for recovery."

In addition to the cases there cited, see *Willard v. Carrigan*, 8 Ariz. 70, 68 Pac. 538; *Birdseye v. Smith*, 32 Barb. (N. Y.) 217; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Clark v. Allen*, 125 Cal. 276, 57 Pac. 985; *Phillips on Code Pleading*, § 207.

If, therefore, a pleader may make a duplicate statement of his right to recover judgment, it is a plain and palpable invasion, and may be a denial, of the right to require him to elect upon which statement he will stand. Instances where duplicate statements are required rarely arise, but the fact that such is the case should not affect the right to make them when the occasion arises. The complaint, under such circumstances, must be

considered in its entirety, and the evidence adduced must be applied to the whole pleading, and the court must grant such relief as the pleadings support and the evidence justifies. In this case the court, however, erred in compelling an election for another reason.

[4-8] In truth and in fact the allegations contained in the so-called first cause of action were sufficient to admit all the evidence that was produced and offered by the plaintiff. That such is the law is conclusively settled by what is said in *Casady v. Casady*, 31 Utah, 394, 88 Pac. 32. The contention that because the plaintiff alleged in the so-called first cause of action that the defendant "employed this plaintiff to sell for defendant said mining property, and agreed to pay plaintiff a commission of 10 per cent.," and that in the so-called second cause of action he alleged that the "defendant employed the plaintiff to assist the defendant in selling the mining properties, \* \* \* and the defendant agreed to pay plaintiff for said services 10 per cent. of the price for which said property might be sold," thereby the plaintiff relied upon an express promise to pay a commission in the first and upon an implied one in the second cause of action, is in our judgment, without any merit whatever. We confess our utter inability to understand why all that the plaintiff testified to was agreed upon could not properly be included in one agreement. We are not aware of any law which prevents parties from incorporating into one agreement as many conditions and promises as they may desire, and, so far as we know, there is no rule of practice or procedure that denies them the right to declare upon and enforce all of the conditions contained in such agreement in one cause of action. Of course, if the conditions should be so repugnant as to destroy each other they might not be enforceable. There are, however, no repugnant provisions in the agreement in question here. The defendant certainly could agree to compensate the plaintiff for any services he might render in finding a purchaser for the property. It would seem that, under the agreement as pleaded and testified to by the plaintiff, the defendant purposely left open the question of price and terms until some one who was willing to purchase for some satisfactory price and terms should be found. The plaintiff might then offer to sell the property to some one at a price and upon terms to be ratified by the defendant, or the purchaser might directly deal with the defendant. In either event, under the terms of the agreement, the plaintiff would be entitled to compensation, and it is wholly immaterial whether it is termed a commission or compensation. All of the foregoing facts are sufficiently pleaded in the so-called first cause of action, and such was likewise the case in the second cause of action. In fact, there was but one agreement and one cause of action set forth in the complaint, and, while

a duplicate statement of the same right of action was attempted, the facts and circumstances of this case neither authorized nor required a duplicate statement. It is therefore quite clear that, as the evidence now stands, all of which is without conflict in fact, is conceded to be true by the motion, the plaintiff is entitled to findings and judgment in his favor upon the so-called first cause of action. That such is the law the authorities leave no room for doubt. See *Hoadley v. Savings Bank*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321, where, in a note, the cases upon the subject are collated by the annotator. See, also, as bearing upon the question, *Ralston v. Kohl's Adm'r*, 30 Ohio St. 92; *Rucker v. Hall*, supra; *Sussdorff v. Schmidt*, supra; *Clark v. Allen*, supra. This would, however, also be true even though plaintiff were limited to the allegations of the so-called second cause of action, since, in legal effect, there is no substantial difference between the two so-called causes of action. From this it also follows that the cause of action is not barred, as was held by the court. There is no contention that, upon the face of the pleadings at least, the prior action was not commenced in time, nor that the present one was not commenced within the time required by the statute we have referred to.

The court, therefore, erred in requiring the plaintiff to elect; in holding that the alleged causes of action contained separate and distinct rights of action; that there was a variance between the allegations in the so-called first cause of action and the evidence adduced; and in holding that, by reason of the election, plaintiff's right to recover was barred. The judgment is reversed, and the cause remanded to the district court of Salt Lake county with directions to grant a new trial, and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

McCARTY, C. J., and STRAUP, J., concurring.

(45 Utah, 265)

COMMERCIAL NAT. BANK OF SALT  
LAKE CITY et al. v. BRINTON et al.  
(No. 2466.)

(Supreme Court of Utah. Aug. 11, 1914. On Application for Rehearing, Jan. 2, 1915.)

1. PARTNERSHIP (§ 296\*)—ACTIONS—EVIDENCE—DISSOLUTION.

In an action on a note and deed of trust given to secure a partnership debt, evidence held to show the dissolution of the partnership before the obligations matured.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. § 296.\*]

2. BANKS AND BANKING (§ 134\*)—DEPOSITS—APPLICATION TO DEBTS.

Where a bank applied a debtor's balance to the payment of notes before they matured, and marked such notes paid, delivering them to the debtor, they were paid and discharged; the act

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the bank being in accordance with the understanding of the parties.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.\*]

### 3. PARTNERSHIP (§ 285\*)—DISSOLUTION—EFFECT OF.

To procure capital, one member of a partnership executed a deed of trust to a bank to secure specified advances. Thereafter the partnership was dissolved, and subsequently firm notes for the advances were paid out of partnership funds deposited with the bank by the remaining partner. *Held* that, having been paid, the remaining partner could not renew the obligations; the deed of trust making no provision for such renewal or that it should secure any except the stated obligations.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 634, 645, 650; Dec. Dig. § 285.\*]

On Application for Rehearing.

### 4. MORTGAGES (§ 319\*)—PAYMENT—WHAT CONSTITUTES—EVIDENCE.

In an action on a mortgage given by a retiring partner to secure firm notes, evidence *held* to show that the notes, which were marked "Paid," were discharged, and were not merely canceled upon the giving of renewal notes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. § 319.\*]

### 5. MORTGAGES (§ 298\*)—PAYMENT—WHAT CONSTITUTES.

Before retiring, one member of a firm gave a mortgage to a bank to secure firm notes. Thereafter all of the notes, save the fifth, were discharged, and it was extended. Meanwhile the remaining partner procured other advances from the bank, and when the fifth note became due the amount thereof was deducted from his balance, and the note marked "Paid" and surrendered. *Held*, that the fifth note was discharged, notwithstanding at the time of the transaction the remaining partner was indebted to the bank in an amount exceeding his balance, and that he thereafter incurred other indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 836-854, 864, 871; Dec. Dig. § 298.\*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the Commercial National Bank of Salt Lake City and another against David B. Brinton and others. From the judgment, plaintiffs appeal as do defendants. Affirmed on plaintiffs' appeal, and reversed and remanded, with directions, on that of defendants'.

This is an action on a promissory note dated May 8, 1906, for \$15,000, and to foreclose a trust deed given on real estate to secure its payment.

The transactions out of which this controversy arose, briefly stated, are: In the early part of 1906 (the exact date is not shown, nor is it material), H. D. Page, of Boise, Idaho, and David B. Brinton, of Salt Lake county, Utah, entered into a copartnership to contract for and do construction work on a United States government irrigation project, known as the Boise-Payette project, in the state of Idaho. The partnership, doing business as Page & Brinton, en-

tered into a contract with the United States government to do the construction work mentioned. It needed money to carry on the work and to pay its running expenses until payments, in the form of United States treasury warrants, were made by the government under the terms of the contract and as the work progressed. Page entered into negotiations with the plaintiff bank through its cashier, H. P. Clark, for a loan of \$15,000. The bank required security. A few days thereafter Page and Brinton went to the bank to arrange for the loan. Clark made a memorandum of Brinton's property and designated certain pieces of real estate as satisfactory security for a loan of \$15,000. A note for that amount was signed by David B. Brinton and his wife, Susan Brinton, and by Page & Brinton. A trust deed was executed by the Brintons as security for the payment of the note. Clark, a witness for the bank, testified regarding the transaction in part as follows:

"When it came to fixing up the loan, Mr. Page stated that he would not need all the money at one time. He wanted to have the matter arranged so that the interest would not begin until they needed the money. I stated that could be arranged by holding the Brinton \$15,000 note and the trust deed as collateral security and executing other notes to the bank in different denominations which could be used from time to time as required. The four notes dated May 4th and the note dated May 15th (19th), making a total of \$15,000, were executed in different denominations under that agreement. The five notes and the one note represented only the same loan, and they were left with the bank."

The respective amounts for which the five smaller notes were executed were: \$4,000, \$2,000, \$5,000, \$2,000, and \$2,000. Blank spaces were left on these notes for the insertion of the dates when they should begin to draw interest and become effective. They were signed by Hubert D. Page and David B. Brinton and were left with the bank to be placed to the credit of Page & Brinton as needed. Prior to the time any of the fund represented by the notes was placed to the credit of Page & Brinton, and before the partnership began work under its contract with the government, Page, after consulting with Clark in relation to the matter, purchased Brinton's interest in the partnership business for the sum of \$8,000. It was understood that Page should enter upon and complete the construction work in his own behalf but in the partnership name. The agreement dissolving the partnership was reduced to writing and signed by Page and Brinton. The agreement, so far as material here, provides that:

"The execution of this agreement shall in no wise change . . . any liabilities heretofore assumed by the said firm of Page & Brinton, or either member thereof, under such government contracts aforesaid; nor shall this agreement in any way affect the loan heretofore secured from the Commercial National Bank of Salt Lake City."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Prior to the execution of this agreement, Page informed Clark, through whom the partnership transacted most of its business with the bank, that he had purchased Brinton's interest in the partnership business. Brinton, about this time, also informed Clark that he had sold out to Page. The bank, therefore, had notice of the dissolution of partnership. On different dates between May 19 and July 23, 1906, the proceeds of the five notes referred to were, at the request of Page, placed to the credit of the account of Page & Brinton. During the month of August, 1906, drafts aggregating \$27,285.13 from the United States treasury, remittances on the construction work, were deposited by Page in the bank and were credited to the account of Page & Brinton. The bank on August 28, 1906, canceled four of the notes mentioned and charged the amount, which aggregated \$13,000, to the account of Page & Brinton, leaving a credit balance of \$2,400.26. The other note for \$2,000, which, with the balance of the canceled notes, was introduced in evidence, contained a notation made in lead pencil, "Extended to Feby. 2, 1907," and was stamped "Paid" February 14, 1907, with the bank's cancellation stamp. The word "Paid" was also perforated in the note. From August 28th, the date on which the four notes were paid and the amount charged to the account of Page & Brinton, to and including November 25, 1906, the account at different times showed an overdraft; at other times a credit balance. On November 19, 1906, the account showed an overdraft of \$12,455.83. On November 20th, Page, in order to take care of this overdraft, gave the bank three notes, to which he signed his own name as well as the firm name of Page & Brinton. These three notes aggregated \$13,000 and bear date November 3, 1906. On April 11, 1907, they were stamped "Paid" by the bank. The word "Paid" was also written across the face of the notes in red ink. It is contended on behalf of the bank that these notes were "renewal notes," and that they were given by Page in lieu of the four notes signed by Brinton personally, and canceled by the bank August 28, 1906, and charged to the account of Page & Brinton. During the month of April, 1907, Page, in order to balance his overdraft at the bank, executed seven notes in the name of Page & Brinton, aggregating \$31,000. It does not appear which, if any, of these notes are claimed to be "renewal notes" and given in lieu of the three notes last mentioned. The seven notes were, however, on different dates between May 27 and July 27, 1907, stamped "Paid" with the bank's cancellation stamp. On different dates between August 27, 1907, and January 24, 1908, Page executed notes to the bank for various sums, amounting in all to \$83,000, all of which were stamped "Paid" by the bank on or about the dates on which they matured.

Again referring to the five notes first placed to the account of Page & Brinton, the court found that the indebtedness (\$13,000) evidenced by four of these notes had been paid, but that the indebtedness evidenced by the note for \$2,000, which was canceled by the bank February 14, 1907, has not been paid, and rendered judgment against Brinton for the principal (\$2,000) and accrued interest. Both parties appeal.

Pierce, Critchlow & Barrette, of Salt Lake City, for plaintiffs. Smith & McBroom, of Salt Lake City, for defendants.

McCARTY, C. J. (after stating the facts as above). [1] We think the contention made on behalf of the bank that the firm of Page & Brinton was not dissolved is against the undisputed evidence and admitted facts and is untenable. Page testified on this point, in part, as follows:

"About the 22d day of May, 1906, I went to the bank with respect to this dissolution of the partnership. \* \* \* The business I did was with Mr. Clark, the cashier. I asked him what he thought about it. He said: 'Buy Mr. Brinton out.' He said he would advance the money through the Commercial National Bank to buy Mr. Brinton out. \* \* \* I paid Mr. Brinton \$5,000 on account of the partnership. I got \$4,000 of this money from the Commercial National Bank."

Brinton testified:

"The \$4,000 was paid me by Page in his office in Salt Lake City. It was paid the same day the contract [referring to the contract of dissolution] was made, or perhaps the next day. \* \* \* When I was in the bank after the 22d of May, I told Mr. Clark that I had sold out to Page, and he said that he and Page had talked about it. \* \* \* He seemed to know all about it."

Clark testified:

"Page came into the bank and stated that Mr. Brinton was involved in his subcontracts upon the Cottonwood conduit, needed money to pay off his laborers, and that Page believed he could buy out Brinton's interest in the Boise project on account of his embarrassment at that time. Subsequently he told me that he had bought Brinton's interest in the profit of the contract."

We think this evidence, considered in connection with Brinton's failure to thereafter take any part in the management of the business or transactions entered into by Page in the name of Page & Brinton, and Page's assumption of the entire control of all the assets of the firm and conduct and management of the business as his own, clearly establishes the dissolution of the partnership. 30 Cyc. 603, 604.

[2, 3] The next question presented is: Was the trust deed intended as security for the payment of only the specified \$15,000 loan as represented by the five notes given at the time it was executed, or was it intended to secure the payment of any and all loans or advances, not exceeding \$15,000, the bank might make Page & Brinton, and to include any loan or advance made after the payment and can-

cellation of the five notes executed contemporaneously with the deed? It is vigorously contended on behalf of the bank that the note of \$15,000 and the trust deed were, when executed, intended to be left on deposit with the bank as security for any loan Page & Brinton might thereafter obtain, or that might be obtained by either member of the partnership in the firm name, and that, when the five notes representing the loans for which they were given should be paid, other notes for additional advances should be given and deemed secured by the original note of \$15,000 and the trust deed. On the other hand, it is contended that the note for \$15,000 and the five notes evidenced but one and the same indebtedness, to secure which the trust deed was given, and that it was not intended and was not given to secure any other indebtedness. It is admitted the real indebtedness, to secure which the trust deed was given, was as evidenced by the five notes first placed to the credit of the account of Page & Brinton. The trust deed, so far as material here, provides that:

"David B. Brinton and Susan Brinton, his wife, \* \* \* grantors, convey and warrant to H. P. Clark, trustee, \* \* \* grantee, for the sum of one dollar and in further consideration of the debt hereinafter mentioned and the trusts hereinafter constituted and set forth, the following described tracts of land [describing the land]. \* \* \* In trust, however, to said grantee and his successors for the following purposes: Whereas, David B. Brinton and H. D. Page, as Page & Brinton, have borrowed of the Commercial National Bank of Salt Lake City, Utah, the sum of \$15,000, payable on or before September 7, 1906, \* \* \* said indebtedness being evidenced by one promissory note in the sum of \$15,000. \* \* \* Said note being executed by said David B. Brinton, Susan Brinton, Page & Brinton, H. D. Page, and bearing even date herewith, and being payable to the order of said \* \* \* bank. \* \* \* Now, if the said note and interest be well and truly paid as the same becomes due according to the terms of said note, \* \* \* then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of said grantors."

It will be noticed that there is nothing in the deed of trust from which it can be inferred that it was given or intended to secure any indebtedness other than the specific \$15,000 loan therein mentioned. It contains no language which indicates any other intention, nor is there any evidence dehors the deed showing or tending to show, or from which it can be inferred, that the parties intended the trust deed to secure any indebtedness other than the one specific \$15,000 loan. The evidence affirmatively shows that Page had no authority from the Brintons, or either of them, to enter into any agreement or contract with the bank to modify or extend in any particular any term or provision of the trust deed; nor did he, after the dissolution of the partnership, have any authority to bind Brinton by making or renewing notes in the firm name. It is a well-recognized rule of law:

"That, after a dissolution of a partnership, neither of the parties has implied authority to

bind the firm or his copartners by making, renewing, or indorsing negotiable paper in the firm name, and this is true even though the obligation be given for a firm debt." 30 Cyc. 668.

As we have pointed out in the foregoing statement of the facts, four of these notes, amounting to \$13,000, were paid by charging the amount to the account of Page & Brinton; and the undisputed evidence shows that the notes were stamped paid by the bank and delivered to Page. The notes were not paid by the execution of "renewal notes" representing the same indebtedness. It was more than two months after the four notes were paid before Page executed the three notes which the bank claims were given as renewal notes for the indebtedness, as evidenced by the four canceled notes. And, as we have stated, the four notes secured by the deed of trust were paid (the indebtedness discharged) with money Page had to his credit in the name of Page & Brinton in the bank. Moreover, we think it clearly appears from the evidence that, at the time the trust deed and the notes secured thereby were delivered to the bank, Page and Brinton expected that the remittances they would receive from the government on their work in the form of United States treasury drafts during the months of June, July, and August, 1906, would be sufficient to pay the notes and to carry on the construction work, and that there would be no necessity to continue the loan for the full length of time for which it was made. On this point Brinton testified, in part, as follows:

"At the time these five notes were signed, it was understood that treasury drafts would commence to come in in June, July, and August, and that would give us time to get the money to pay the notes."

Page testified:

"At the time Mr. Brinton signed the first note for \$15,000, and those other notes, we requested to have those notes taken up and canceled. \* \* \* No, not at that particular date, but whenever there was a surplus over and above the amount I required at different times."

On cross-examination he testified:

"Q. It was understood Mr. Brinton would allow you to use the \$15,000 capital that you had put into the business, wasn't it? A. Yes, sir. Q. And that was to give you money to carry on your transactions as you might need it until the surplus came in from the transaction with the government, which would enable you to pay them off? This is correct, isn't it? A. Up to that date. Q. Up to September 4th? A. Yes. That seems to be the limit of the note."

True, Clark testified that:

"There was never any understanding that these notes should be paid and canceled as obligations of Page & Brinton out of the first money that came from the United States. There was never any statement made as to the limit of time or the period of time during which they would need this accommodation by way of loan from the bank. The understanding was that they depended upon the progress of the work."

If there was no express or tacit understanding as to the time limit of the loan other than that fixed by the notes, then the time

specified in the documents must control. The bank, however, by direction of Clark, and without consulting either Page or Brinton, canceled four of the notes more than two months before they matured, and charged the amount to the account of Page & Brinton. After these notes were paid, the Page & Brinton account showed a credit of \$2,619.58. It therefore seems that Clark understood that the notes were to be paid when there was sufficient funds to the credit of Page & Brinton to cover the indebtedness. The court, therefore, did not err in finding that the indebtedness of \$18,000, evidenced by the four notes that were stamped by the bank August 28, 1906, was paid and extinguished.

We think, however, that the court erred in holding that the indebtedness evidenced by the other note for \$2,000, secured by the trust deed, which was stamped paid February 14, 1907, and surrendered by the bank to Page, had not been paid. The evidence of Clark clearly shows that the indebtedness represented by it was paid and extinguished. On this point he testified as follows:

"Q. Mr. Clark, calling your attention to the date of Page & Brinton's account on February, what was the credit balance on that date, 1907? A. The credit balance was \$3,115.35. Q. And calling your attention to plaintiff's Exhibit E [the note in question], I will ask you when was that note paid off? A. February 14, 1907. Q. After the payment of that note, what was the credit balance? A. \$555.81."

The note having been finally paid, canceled, and surrendered to Page by the bank, and the debt evidenced by it extinguished, the question of whether the bank could, under the circumstances and after the dissolution of the partnership, extend the time of payment without the consent or knowledge of Brinton becomes, so far as this case is concerned, unimportant. Counsel for the bank, in support of their contention that the trust deed was intended and was given to secure any advances that the bank might make in the shape of loans to Page & Brinton during the progress of the construction work under the Page & Brinton contract with the government, cite and rely on the following cases: *Lawrence v. Tucker*, 23 How. 14, 16 L. Ed. 474; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Schuelenburg v. Martin* (C. C.) 2 Fed. 747; *Courier-Journal, etc., v. Schaefer-Meyer Brew. Co.*, 101 Fed. 699, 41 C. C. A. 614; *Ripley v. Harris*, 3 Biss. 199, Fed. Cas. No. 11,853. It will be seen, by an examination of these cases, that the instrument sought to be foreclosed in each of them expressly provided for the payment of not only a certain specified sum or sums of money, but for future loans or advances.

In *Lawrence v. Tucker* the mortgage was given "to secure a note \* \* \* for \$5,500, and such advances of money as there had been or might be made within two years, \* \* \* not to exceed in all an indebtedness

of \$6,000," in addition to the sum for which the note was given.

In *Commercial Bank v. Cunningham* the mortgage was given, quoting the language of the court, "to secure the payment of large debts due to the demandants, and also to secure any future demands \* \* \* against the Edgartons, so long as they should be under any liabilities of any sort to the demandants."

In *Jones v. Guaranty & Ind. Co.*, quoting from the statement of facts made by the court:

"The mortgage was conditioned for the payment \* \* \* of the amount that might be due upon the instrument [a bond] secured by it. The bond is set out at length in the record. It states that it was given to cover any advances then made or thereafter to be made by the guaranty company to Coxins to the amount of \$100,000 or less."

In *Schuelenburg v. Martin*, the court, in stating the facts, said:

"The plaintiffs, who are dealers in lumber at St. Louis, Mo., agreed to furnish to said Kulak, who was engaged in the same business, \* \* \* such quantities of lumber as he might order for a period of one year, on a credit of 60 days, provided no order for more than \$5,000 worth of lumber should be made at any one time, and the indebtedness at no time during said year to exceed said sum of \$5,000. To secure the payment of all bills or accounts for lumber ordered and delivered under this arrangement, the mortgage sued on was executed."

In *Courier-Journal, etc., v. Schaefer-Meyer Brew. Co.*, the mortgage contained the following provision:

"The condition of this conveyance and transfer is such that should said party of the first part well and truly pay off and discharge all claims, debts, and liabilities on which said parties of the second part, or any or more of them, may be bound as sureties as aforesaid or *may become hereafter bound as sureties as aforesaid*, to the amount of \$25,000, within four years from the date hereof." (Italics ours.)

In *Ripley v. Harris* the mortgage was given to secure the payment of a bond, which provided, among other things:

"For the payment to the said Van Slyke, or assigns, of all money due on any note or notes, drafts or acceptances, or other evidences of debt, that did or *might thereafter exist* against John Reynolds." (Italics ours.)

It will be noticed that each of the foregoing cases is clearly distinguishable from the case at bar. In each of those cases the mortgage expressly provided for the payment of future loans or advances up to a specified sum and within a specified limit of time, whereas in the case at bar the trust deed was executed to secure the payment of the specific \$15,000, evidenced by the five notes mentioned. These notes were made payable five months from the time they were deposited and left with the bank. It was understood by and between the parties to the transaction that the partnership should be given credit at the bank for the several sums represented by the notes as the money should be needed by it in the prosecution of the construction work under the contract with the govern-

ment. There was, however, a time limit to the loan. This was fixed and made certain in the notes, and there is nothing in the record that shows, or tends to show, that the trust deed was executed or was intended to secure the payment of any loan made by the bank to the partnership other than the five notes that were left with the bank at the time of the execution of the trust deed. Reference is made to certain statements made by Page and transactions entered into by him with the bank after the bank had notice of the dissolution of the partnership. It is argued on behalf of the bank that these statements and transactions tend to show that the trust deed was intended by the Brintons to secure the payment of any loan, not exceeding \$15,000, that the bank might thereafter make to Page & Brinton. Page could not, after the bank received notice of the dissolution of the partnership, enter into any contract or incur any obligation with the bank that would be binding on Brinton, unless he had authority from Brinton to do so. That he had no such authority is clearly shown by the record. Page testified on this point as follows: "I had no authority to obligate Mr. Brinton." Brinton testified, and his testimony is not disputed: "I will state that the Commercial National Bank never consulted me, either orally or in writing, at any time with respect to the signing of any of those notes, nor with respect to the affairs of the concern of Page & Brinton at any time after the 22d of May, 1906; nor did they consult my wife."

It is ordered that the cause be remanded, with directions to the trial court to set aside the judgment and to so modify its findings and conclusions to conform with the views herein expressed, and to render judgment as prayed for by the defendants. Costs to the defendants.

STRAUP and FRICK, JJ., concur.

#### On Application for Rehearing.

MCCARTY, C. J. Counsel for respondents have filed a petition for rehearing, in which they vigorously assail the conclusions arrived at in the foregoing opinion respecting the note for \$2,000 which was stamped "Paid August 28, 1906." While counsel do not directly assail that part of the opinion in which the judgment of the lower court as to the four notes that were paid August 28, 1906, is upheld, they nevertheless, in their discussion of the points presented by their petition, in effect challenge the correctness of that part of the opinion. We shall therefore briefly review the facts bearing upon the questions discussed and referred to by counsel in their brief. Counsel say:

"This court in its opinion proceeds upon the assumption that it was the agreement and understanding that when the five notes referred to in the findings were made by Page & Brinton they should be retired whenever the government

paid to Page & Brinton sufficient to cover the face and interest, and that since at one time prior to February, 1907, when this note No. 3649 was canceled by the giving of a new one, there was in the open account of Page & Brinton at the Commercial National Bank a credit in excess of \$2,000, it should be regarded as paid, and that the fact that it was canceled in February, 1907, is in some manner evidence of the fact that the \$2,000 was no longer secured by the original \$15,000 note. This assumption is contrary to the only evidence upon the subject there is in the record, evidence which cannot be contradicted."

And they further say that for this court to attempt—

"to give effect to a supposed oral agreement between the bank and Page & Brinton, made at the time the notes in question were executed in May, 1906, \* \* \* would be to vary the terms of the promissory note as to its date of maturity by an oral agreement."

On this point Mr. Brinton testified:

"At the time these five notes were signed it was understood that the treasury drafts would commence to come in June, July, and August, and that would give us time to get the money to pay the notes."

Four of these notes were payable November 4, 1906, and the other note was made payable November 19th. On August 28th, three months after the dissolution of the partnership, and more than two months before the maturity of the notes, four of the notes, aggregating \$13,000, were by the bank canceled and the amount charged against the account of H. D. Page, doing business as Page & Brinton. On this point Mr. Clark, cashier, testified:

"In the month of August, 1906, \$13,000 of the notes, \* \* \* 'Exhibits C, D, F, and G,' were—by my direction, I think—charged into the account of Page & Brinton."

[4] During the trial of the cause respondents introduced page upon page of oral testimony endeavoring to show that the mortgage in question was not only executed by the Brintons to secure the notes mentioned, but was also intended (contrary to its terms) to secure the payment of any future advancements that the bank might make to Page & Brinton as needed by them in the prosecution of the work under their contract with the government. The oral and printed arguments of respondents' counsel in their first discussion of the case in this court were mainly devoted to this phase of the controversy. It was vigorously contended that the obligation represented by the notes and mortgage was never paid, but was continued in force by the execution of "renewal" notes; that is, as the notes representing the obligation became due they were canceled, and new notes executed in lieu of the canceled notes, and that thereby the obligation became merged into the renewal notes. Then, as now, counsel contended that the evidence, without conflict, showed that the debt which the mortgage was given to secure was carried along in this way, and never was in fact paid. The undisputed facts referred to in our former opinion, and the testimony there quoted, convinces us that counsel have misconceived the evidence. The

testimony of Brinton and the voluntary act of the bank in canceling four of the notes more than two months before maturity were not referred to for the purpose of varying the terms of the notes as to their dates of maturity, as counsel seem to imply, but for the purpose of inviting attention to the circumstances and conditions under which the notes were paid. We think this clearly appears from the opinion. As stated, the four notes referred to, Exhibits C, D, F, and G, were canceled by the bank, and the amount (\$13,000) charged to the open account of Page, doing business as Page & Brinton, more than two months before maturity. True, it appears from the record that on September 10, 1906, Page wrote to the bank, and, among other things, said:

"You will find, by looking up my account, that Mr. Brinton and myself signed notes for \$15,000. Four thousand dollars, note of which I have since taken up, but the \$11,000 should remain to my credit."

The bank, however, did not, on receipt of the letter, transfer the \$11,000, or any part thereof, from the debit to the credit side of Page's account, but left the account in that regard as it was when the \$13,000 was charged against it. The evidence shows that from the 1st of August, 1906, to the latter part of May, 1907, Page deposited, in cash and United States treasury drafts, over \$90,000 to the credit of his account with the bank. Clark, the cashier, testified that of this amount \$27,285.13 was deposited in August. Referring to Exhibits C, D, F, and G, he further testified:

"Exhibit C was paid on August 10th, the amount of the note, together with interest, \$4,073.77, was charged to the account of Page & Brinton. It was charged out of the funds then at the bank to their credit. Exhibits D, F, and G, amounting to \$9,000, were paid August 28, 1906, together with interest, and were paid out of the credit balance to their credit at that time. After the payment of these accounts on that date, the balance to the credit of Page & Brinton was \$2,619.58."

Moreover, the undisputed evidence—the respondents' evidence—shows that no notes were executed by Page to the bank, either in his own name or in the name of Page & Brinton, after the dissolution of the partnership (May 22, 1906), until nearly three months after the four notes referred to were paid and two weeks after their due date. Clark testified that on November 19, 1906, Page had overdrawn his account at the bank \$12,455.63, that on November 20th he executed notes to the bank for \$13,000, which amount was placed to the credit of his account, and when the bank closed for the day Page's account showed a balance to his credit of \$497.21. He also testified as follows:

"The fact is that in some cases notes were given and the proceeds went into the account of Page & Brinton, and in other cases notes were given in direct renewal of notes theretofore existing without going from their account to the books. Some of these notes may have been taken to cover an overdraft, in which case

they had already drawn the money, and the note would be taken and the amount credited to cover the overdraft."

It is therefore conclusively shown by respondents' evidence that notes were given to meet the overdraft, and were not intended as renewals of the four notes that were paid August 28th. It is idle for counsel to contend, in the face of the foregoing facts, none of which are disputed, that the four notes which were canceled August 28th and surrendered by the bank were paid by Page executing "renewal" notes.

[5] We shall now consider counsel's discussion of what they claim were the circumstances and conditions under which the note for \$2,000, referred to in the bill of exceptions as "Exhibit E," was canceled, and briefly review the evidence bearing on this phase of the controversy. Counsel, in their brief, say:

"The testimony \* \* \* shows without possibility of contradiction that the note of \$2,000 ran on \* \* \* and no request of Page to charge it against the open account was ever made. \* \* \* It is \* \* \* perfectly apparent that there was no money at any time which was applicable to the payment of \* \* \* the note, excepting as above stated by the renewal of February, 1907. \* \* \* We contend \* \* \* that there is not a particle of evidence in the record, and nothing in the entire case, which tends to contradict the finding upon the subject."

When this note, Exhibit E, became due, November 4, 1906, which was more than five months after the dissolution of partnership, time of payment was extended until February 2, 1907. This was done without the consent or knowledge of either Brinton or Mrs. Brinton. When the note came due it was by the bank canceled and the amount charged against Page's open account. This counsel for respondents seem to deny. Clark testified unequivocally that the note was paid by the bank charging it against the open account. His evidence on this point is set forth in the foregoing opinion, to which we invite attention. True, Clark testified that the bank, at the time this note was taken up, held other notes executed by Page, the proceeds of which were credited to the open account, and that if these notes had been charged into the open account at the time Exhibit E was paid it would have created an overdraft in the account of several thousand dollars. This, however, in no way affected the transaction by which the note was charged against the open account. Neither is the question of whether Exhibit E was charged against the open account at the request of Page or whether the bank did it on its own volition important. The fact remains, as shown by the undisputed evidence adduced by respondents, that the note was charged against Page's open account. And there is not a scintilla of evidence in the record that shows, or tends to show, that the note was paid by the giving of a renewal note. When the note was canceled—

stamped "Paid"—and surrendered to Page, and the amount thereof charged to the open account, the obligation, in so far as it affected the Brintons, was discharged. The only note executed by Page in February, 1907, was a note for \$5,000. This note bore date of February 6th, and was payable April 7, 1907. This is the note referred to by counsel in their brief filed in support of the petition for a rehearing. It was executed by Page in the name of Page & Brinton. It was, however, his personal obligation. The Brintons were strangers to the transaction. The note, which is in evidence, shows that it was canceled—stamped "Paid"—April 7, 1907. The word "Paid" was also written across the face of the note in red ink.

Counsel contend that the obligation represented by Exhibit E was merged in this note for \$5,000; that is, that the note, to the extent of \$2,000, is a renewal note. This, however, is only an inference of counsel, which is unsupported by evidence. Moreover, we think it may be fairly inferred that if the bank had intended to continue to hold the Brintons liable for the payment of the debt represented by this particular note (Exhibit E) it would either have extended the time of payment with their consent or have had them and Page execute a new note for the amount. Instead of pursuing either of these courses it charged the amount of the note against Page's open account. If this does not constitute payment of a note, it would be difficult to conceive of a transaction that would.

We have examined the record in this case with more than ordinary care, and we are clearly of the opinion that the decision of the lower court, wherein it is held that Exhibit E was not paid, is unsupported by evidence, and that the evidence without conflict shows that it was paid.

The petition for a rehearing is denied.

STRAUP, J. On a further re-examination of the record I, too, think the petition should be denied. The case, as I view it, is this:

Page & Brinton, partners, to carry on their construction work in Idaho, made arrangements with the bank to borrow \$15,000. A note for that amount was executed by them on May, 8, 1906, payable on or before four months after date. To secure that, a trust deed was given by Brinton and his wife. No moneys were then paid, nor credit given, because of the understanding that none was to be paid or given until needed by Page & Brinton. To better facilitate that, the \$15,000 note was split by Page & Brinton giving five other notes—one for \$4,000, due November 19th, spoken of as Exhibit C; one for \$5,000, due November 4th, Exhibit D; one for \$2,000, due November 4th, Exhibit E; one for \$2,000, due November 4th, Exhibit F; and one for \$2,000, due November 4th, Exhibit G. It is conceded by both parties that

the five notes, aggregating \$15,000, were for the same indebtedness and purpose for which the first note was given.

Now, at the threshold, a controversy arises as to the purpose for which the notes were given. By the bank it is contended that they were given for any and all advances, not exceeding \$15,000, which the bank might make to Page & Brinton, or to either of them, in carrying on the construction work; that is, if say \$15,000 had been advanced in 1906, and subsequently repaid, and thereafter other advances, not exceeding \$15,000, had been made, etc., the notes, and the trust deed given to secure them, evidence such transactions and secured such advances, as well as a single and specific loan of \$15,000. That is disputed by the defendants, who contend that the note and trust deed were given for but a specific and single loan of \$15,000, and none other, and as evidenced by, and as appears on the face of, the notes and the deed themselves. That issue, upon all the evidence adduced, was found by the trial court in favor of the defendants and against the plaintiff. I think the finding is sufficiently supported, and is such as, on the record, ought to have been made.

The further question, then, is as to whether these notes were paid. Upon that issue the trial court found that all of them had been paid but one, the \$2,000 note, Exhibit E, and accordingly granted foreclosure of the trust deed as to that note only. Upon a review of the record we held all the notes had been paid, and that the finding of the court of nonpayment of the \$2,000 note, Exhibit E, was wrong. This holding particularly the bank by its petition has challenged, and contends is against the undisputed evidence. If the bank is right as to its first contention, that the notes were given for any and all future advances, not exceeding \$15,000, that it might make to Page and Brinton, or to either of them, then is it right as to this. For then it would be no defense that the first or prior advances had been paid; the evidence indisputably showing that, when the transactions between the bank and Page closed, he, for advances made to him by the bank, owed it much more than \$15,000. But, as already observed, the court found, and I think the finding justified, that the notes were not given for that purpose, but for a specific and single loan or indebtedness. Hence, from that viewpoint do I now consider the question of payment.

Page & Brinton were partners when these notes were given on the 8th of May, 1906. But that partnership was dissolved on the 22d of May of that year. True, there is a controversy as to that. I think, however, the evidence clearly shows the dissolution, and that the bank had full knowledge of it. The court made no finding as to that issue, evidently regarding it as immaterial. I think it material, and further think that, on the evi-

dence, there is as to that but one finding justifiable, and that is a finding of dissolution, and that the bank at the time had full knowledge of all the terms and conditions of the agreement of dissolution. By that dissolution Page alone acquired and succeeded to the whole of the partnership property and business and to all of the proceeds derived therefrom. What he did thereafter was, hence, not as a partner, but for himself, in his individual capacity. It was agreed, however, that he might continue the business in the name of Page & Brinton, and, further, that "this agreement shall not in any way affect the loan heretofore secured from the Commercial National Bank of Salt Lake City," the plaintiff. The agreement of dissolution was in writing, and at the time of its execution was exhibited to the bank. Of course, the dissolution could not, and did not, affect the prior obligations assumed or incurred by the partnership, and did not affect the loan the bank theretofore had made to Page & Brinton. The dissolution, however, is material as it concerns the future dealings between the bank and Page. And that is material as bearing upon the question of payment of the notes.

Between May and July, 1906, the whole amount of the five notes, \$15,000, was placed to the credit of Page & Brinton at the bank subject to check. Page, in August of that year, from moneys received by him from the government, also deposited to his credit, in the name of Page & Brinton, over \$27,000, of which over \$8,300 were deposited on the 10th, over \$15,300 on the 24th, and \$3,800 on the 29th, of August. So, on the 10th of that month, the \$4,000 note, Exhibit C, was charged against the account, the note by the bank stamped "Paid August 10, 1906," and then surrendered and delivered to Page. On August 28th the \$2,000 note, Exhibit G, the \$5,000 note, Exhibit D, and the \$2,000 note, Exhibit F, were likewise charged against the account, the notes by the bank marked and stamped "Paid August 28, 1906," and then surrendered and delivered to Page. That was a total of \$13,000 of the \$15,000 loan. After thus charging that amount against the account, there still remained a balance credit, on the 29th of that month, of about \$2,400. It will be observed that these notes were not then due—one of them not until November 19, the others not until November 4, 1906. The bank's officer having charge of the matter himself testified that those notes, Exhibits C, D, F, and G, were, under his direction, charged against the account on the dates indicated. Page, when he learned that, claimed that only the \$4,000 note, Exhibit C, should so have been charged, and that the remaining \$11,000 should have remained to his credit. But I do not find anything to show that the bank acquiesced in that, or in any particular modified the charge which

theretofore was made under the direction of the bank's officer.

The remaining note of \$2,000, Exhibit E, was not then paid. It also was due November 4th. Payment of it without the knowledge or consent of Brinton was extended until February 2, 1907. On February 14, 1907, it also was, by the bank, marked and stamped "Paid February 14, 1907," and then also was surrendered and delivered to Page. Now, the claim made is that it in fact was not paid, but was merely renewed by the giving of another note, or included in other notes, given by Page. As to that but two witnesses testified—Page for the defendants, and the bank's officer for the plaintiff. Page testified:

"The note, Exhibit E, for \$2,000, was paid; but I do not remember just how it was paid. I presume it was charged to my account. I don't know that it was paid by giving a new note, but I don't think so. I was getting money from the United States government every month. The bank was getting money from my treasury drafts, and I don't just know how they applied it."

The bank's officer, who had conducted all the business between the bank and Page and Page & Brinton, testified:

"On February 15, 1907, the account (Page & Brinton) showed a credit balance of \$3,115.35. The plaintiff's Exhibit E was paid, and on February 14, 1907, and after the payment of that note, there was a credit balance of \$555.81."

The testimony of these witnesses, together with the presumption of payment from the bank itself marking and stamping the note "Paid" and surrendering and delivering it back, is good proof that it was in fact paid. Not only is it good, but also of such weight, coming as it does from those who transacted the business, and hence knew what the fact in such respect was, as to require something equally clear and strong to overcome it. I find no direct evidence against it. I therefore look to see what, if any, indirect evidence there is bearing on the question. From the 1st of September to the 29th, the account was continually overdrawn. The overdrafts gradually increased until the 27th, when the overdraft was \$8,497.01; but on that day a deposit was made of \$10,296.41, leaving a credit balance of \$441.95. That, however, the next day was checked out, and the account again overdrawn, until the 25th of October, when the overdraft was \$6,767.58. On the next day, the 26th, a further deposit was made of \$7,925.16, and on the close of that day there was a credit balance of \$1,102.82; but on the next day sufficient checks were drawn on the account to create another overdraft of \$3,071.16. And so the overdraft continued and increased until the 19th of November, 1906, when it was \$12,455.63. In the meantime, and on November 3, 1906, Page gave the bank three notes, all payable April 3, 1907—one for \$3,000, one for \$5,000, and another for \$5,000; in all,



\$13,000. These were signed by Page alone, by signing, "H. D. Page, Page & Brinton." No claim is made that they were signed or delivered with the knowledge or consent of Brinton, or that Page had any authority to sign Brinton's name, or the firm name of Page & Brinton, except such as Page had in virtue of the partnership existing at the beginning, but which on May 22d, with full knowledge of the bank, was dissolved, and Page after that authorized to use the name of Page & Brinton as and for only his own and individual purpose. The amount of these notes, so executed by Page alone, was, on the 20th of November, placed to his account, which he also continued to carry in the name of Page & Brinton, and was given credit therefor, which thus extinguished his overdraft and gave him a credit balance of \$497.21. He, however, continued to overdraw his account until the 3d of December, 1906, when his overdraft again was \$8,389.17. In addition to that, there was still the \$2,000 note, Exhibit E, and the \$13,000 notes, which Page gave in November, outstanding and unpaid. And so the account goes on until the 14th of February, 1907, when it, with further deposits made in the meantime, showed, as testified to by the bank's officer himself, a credit balance, in Page's favor, of \$3,115.35. That, of course, and also as testified to by the officer, included on the credit side the \$13,000 notes executed by Page and the \$2,000 note, Exhibit E, of Page & Brinton, given in May, 1906. That is to say, on that day the bank, as to the state of the account, was debtor to the amount of \$3,115.35, and as against this was creditor to the amount of the \$2,000 note, Exhibit E, and the \$13,000 notes given by Page. So, on that day, the bank, as I read the record and the testimony of its officer, deducted from that credit balance of \$3,115.35 the \$2,000 note, Exhibit E, and marked and stamped the note "Paid," and surrendered and delivered it to Page. Now the argument is that that was not payment, because, when the amount of the outstanding notes is considered and compared with the credit balance, Page, or Page & Brinton, were debtors to the amount of nearly \$12,000, and not creditors. That is true. Still the bank then could have applied that credit balance to the \$13,000 notes, or could have held it subject to checks, or could have applied it, as I think it did, to the \$2,000 note, Exhibit E, which then was canceled and surrendered.

In this connection it is also to be noticed that on February 6, 1907, Page, as Page & Brinton, executed still another note for \$5,000, due one month thereafter. Then, on April 3, 1907, he, as Page & Brinton, executed another note for \$3,000, one for \$5,000, and another for \$5,000, all due July 2d; on April 4th, one for \$2,000, due July 3d; on April 6th, one for \$5,000, due July 5th, on the same day another, for \$5,000, due July

5th, still another on the same day, for \$5,000, due July 5th; and on April 25th, one for \$1,000, due June 25th—a total of \$31,000. No claim is made that any of these notes were executed with the knowledge or consent of Brinton, or with his authority, except such as is claimed Page had in virtue of the original partnership. The \$13,000 notes executed by Page in November, 1906, and the \$5,000 note February 6, 1907, were, by the bank, also marked and stamped "Paid April 11, 1907," and were then surrendered and delivered to Page. Page continued to do business with the bank, and between August, 1907, and February 8, 1908, as Page & Brinton, executed 19 other notes, aggregating \$83,000. These, as the others, were also executed without the knowledge, consent, or authority of Brinton. The notes executed in April of that year, aggregating \$31,000, were by the bank marked and stamped "Paid," some "May 28, 1907," some "July 2, 1907," the rest "July 5, 1907," and all surrendered and delivered to Page. Between February 24 and March 28, 1908, Page, still continuing business with the bank as Page & Brinton, executed eight other notes, aggregating \$43,000. These also were executed without the knowledge, consent, or authority of Brinton. The notes, aggregating \$83,000, executed between August, 1907, and February 8, 1908, were all, by the bank, marked and stamped "Paid" on various dates from November 27, 1907, to March 23, 1908, and all surrendered and delivered to Page. The notes aggregating \$43,000 were not paid; that is the amount the bank claims it had advanced the firm of Page & Brinton, and which remained unpaid.

Now it is contended that the original \$2,000 note, Exhibit E, was in fact not paid, but was either included in the \$5,000 note executed by Page February 6, 1907, or was the \$2,000 note executed by him April 4th, or was included in some of the other notes executed by him in April, 1907; this principally because Page at that time, and at all times prior thereto and after he had opened the account with the bank, was its debtor greatly in excess of that amount. There is no doubt that the notes executed by Page in April, 1907, aggregating \$31,000, were in part renewals of other notes executed prior thereto, as were also the notes executed thereafter in part renewals of notes prior to that time. But I am unable to ascertain, on the record, that this particular note was so renewed, or carried, or paid. The bank's officer, who, better than any one else, knew what the fact in such respect was, did not testify that that note was paid by another or others. He testified that some notes were paid that way; but as some were paid, stamped, and returned, by charging them against the account and deposits of moneys and drafts Page obtained from the government as the work progressed, and others

marked "Paid" and returned because of other notes given in lieu of them, he was unable to identify or segregate the one from the other. Still, as to this particular note, his testimony was, not that it was paid by giving another note, but that on February 15, 1907, Page had a credit balance of over \$3,000, and the Exhibit E was paid (not renewed) February 14, 1907, and after the payment (not renewal) of that note "there was a credit balance of only \$555.81." Nowhere by his testimony did he qualify the words "paid" and "payment," nor is it otherwise shown that he, by the use of them, meant paid by a renewal or the giving of another note. That is left to argument and to inference. Nor did he undertake to explain, or point out, in what manner, or by what note, Exhibit E was merely renewed, and not paid. That again is left to argument and inference. If the bank's officer, and if not he another familiar with the transactions and the account, was not able to explain and point out with reasonable certainty in what manner and by what note Exhibit E was merely renewed or carried in one or more of the several batches of notes given thereafter by Page, and was still embraced or included in the last batch aggregating \$43,000, it is hardly to be expected that we can do that. At least, in view of the bank's stamp of unqualified payment, its surrender of the note, and of the testimony of its officer that it was paid, the duty is cast on counsel to point out, and show, on the record, what in such particular is claimed by them. This has not been done to my satisfaction. Pointing out that Page, during all the time of his account with the bank, was its debtor greatly in excess of the amount of the note does not suffice, for, manifestly, between the time the \$83,000 notes were given and the time the \$43,000 notes were given his notes from his drafts and deposits were reduced nearly one-half; that is, about half of them were paid and about half renewed. Whether the \$2,000 note, Exhibit E, if not paid prior thereto, was included in the one or the other, cannot be ascertained. The bank's officer seemingly was not able to tell, nor am I.

I know I may be in error as to that, and should hesitate, as I do, to overthrow the finding of nonpayment of the trial court. But this is a case in equity, and an appeal on questions of both law and fact. On such an appeal, with proper assignments, as here, the litigants are entitled to a review of the record, and to our judgment, not only as to mere questions of law, but of fact as well. As to the latter, our power and duty in a law case are restricted to a mere review and consideration of whether there is any sufficient evidence to support a verdict or findings assailed. But in equity they are broader than that. Our views as to this are stated in the case of *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660. If here there were a conflict

in the testimony respecting the question of whether Exhibit E had or had not been paid, and what the truth was concerning it depended upon the credibility of witnesses or the weight to be given to their testimony, I should not hesitate to approve the finding. I, however, do not find any substantial evidence to support it, and what I do find requires a contrary finding.

The proposition may be looked at from still another view. As already observed, I think it clearly shown that the partnership of Page & Brinton was dissolved May 22, 1906, and that Page thereafter carried on the business in his individual capacity—while under the firm name, still with the bank's full knowledge as to that. That was shown, not only by the testimony of Page and Brinton, but also by the bank's officer. The bank thus knew that Page had no authority after that, either as a partner or otherwise, to execute notes binding Brinton for advances made to Page in carrying on the business in his individual capacity. Because of that knowledge of the bank, the fact that Page, after the dissolution, signed the notes "Page & Brinton," added nothing whatever to his individual liability. If, now, it be true that the \$2,000 note, Exhibit E, a partnership note, was paid and surrendered by Page giving his own note for it, then why is not that, as to Brinton, who did not authorize the giving of the new note, payment of Exhibit E? Certainly, one note may be paid by another, if the parties so intend it, and if given for such purpose. The bank could have surrendered the partnership note, Exhibit E, for Page's individual note and obligation. It is not the question whether it would naturally do that, or whether it was wise to do it. The question is, if Exhibit E, as claimed by the bank, was paid by the giving and the acceptance of another note, was not that just what the bank did? It of course contends that Exhibit E was paid by the giving and the acceptance of another note on the theory of a continuing existence of the partnership, and hence all the notes, partnership notes and all, to the extent of \$15,000, secured by the deed. But if it is wrong as to its two main contentions, the purpose for which the original notes and the deed were given and the continuing existence of the partnership, then is there nothing left to its claim that Exhibit E was paid by the giving and acceptance of another note. For, if those propositions are found against it, then does it follow that the notes given by Page after the dissolution were his individual notes, and nothing more; and if Exhibit E was paid by the giving of another note, then does it further follow that it was paid by the individual note of Page. And thus, with both of those propositions found against it, if Exhibit E was not paid in manner testified to by Page and the bank's officer, I do not see how the bank's position is bettered by the claim that Exhibit E was

paid by the giving and acceptance of another note, for that, as is seen, but leads to the conclusion that it was paid by the giving and the acceptance of Page's individual note. If the bank is right as to its two main contentions, then is it entitled to a foreclosure for the full amount of the original \$15,000 notes; if wrong, then to none.

I see no room for any middle ground, by claiming that Exhibits C, D, F, and G were paid, but that E was not. Either all were paid, or none was paid; and as to that, and for the reasons stated, I think the record requires a finding that all were paid.

FRICK, J. I concur. In view, however, of counsel's insistence that our original conclusion is erroneous, I feel constrained to add a few words.

I have never entertained a doubt respecting the correctness of the conclusions reached in the original opinion, and that those conclusions strictly conform to both the law and the facts. In my judgment the following questions were the only ones involved in the case: (1) To what amount did the firm of Page & Brinton become obligated in the mortgage signed by Brinton and his wife? (2) Was said partnership dissolved, as contended by Mr. Brinton? (3) Was the \$2,000 note, Exhibit E, paid, as contended by both Page and Brinton?

The first question was perhaps one of mixed law and fact. In so far as it was a question of law, I never entertained any doubt with regard to what the construction of the mortgage should be, and that the construction placed thereon by the Chief Justice is the correct one. So far as it was a question of fact, the trial court found against the contention of the bank, and, in my judgment, correctly so. That the firm of Page & Brinton was dissolved, and that the bank knew of the dissolution, and also knew that Brinton, without his consent, express or implied, could not thereafter be held for any sum in excess of the amount stated in the mortgage, are established beyond a reasonable doubt.

The only question that remains, therefore, is whether the whole amount stated in the mortgage, and as evidenced by the note, Exhibit E, was paid. That question is so thoroughly disposed of by Mr. Justice STRAUP that I do not feel called on to argue the matter further, except to say that, when a creditor and holder of a note marks it "Paid" and surrenders the evidence to his debtor, the former, in case he wants to dispute the fact of payment, should be prepared to show by some clear and convincing proof why the evidence of payment he himself furnished, at a time when there was no dispute, nor likely to be one, concerning the fact of payment should not be taken as true. In this case the bank has utterly failed to make such proof. All that are offered in that regard are certain inferences, which, in

my judgment, are by no means conclusive in favor of the bank's contention, but may as readily be construed in favor of Mr. Brinton.

The petition should therefore be denied.

(26 Colo. A. 472)

# CURRY v. EQUITABLE SURETY CO.

(No. 4154.)

(Court of Appeals of Colorado. Dec. 14, 1914.)

COURTS (§ 488\*)—APPELLATE COURTS—TRANSFER TO COURT OF APPEALS—MOTION TO REMAND—FILING—TIME.

Laws 1911, p. 268, § 5, provides that the Supreme Court may transfer to the Court of Appeals such cases as it may deem advisable, with certain exceptions, and on such transfer the clerk of the Court of Appeals shall notify the parties or their attorneys of record and advise them that, unless within 30 days from the date of the notice a petition is filed requesting remand to the Supreme Court, a waiver by consent will be conclusively presumed of the right, if any, to a hearing by the Supreme Court. *Held*, that where a case was transferred, and no petition to remand was filed in the Court of Appeals within the time specified after notice to the attorneys of record, whatever the reason for the delay, the Court of Appeals, with certain exceptions, had no jurisdiction to grant a petition to remand subsequently filed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1316-1323; Dec. Dig. § 488.\*]

Error to District Court, City and County of Denver; J. H. Teller, Judge.

Action by James P. Curry against the Equitable Surety Company. From a judgment in favor of the latter, the former brings error. On motion to transfer to the Supreme Court. Denied.

Barnett & Campbell and Joshua Grozier, all of Denver, for plaintiff in error.

PER CURIAM. The above case reached this court in due course, under assignment from the Supreme Court, under section 5, p. 268, Session Laws 1911, of the act creating the Court of Appeals. Within the required time the clerk of this court, by registered mail, notified Barnett & Campbell, attorneys of record for plaintiff in error, of the transfer. Joshua Grozier is also attorney of record, but the former names appear first on the record. No application to remand the case to the Supreme Court was filed by plaintiff in error within 30 days from the date of the notice, as provided by the statute. The notice was mailed October 12th, and registered receipt, signed by Barnett & Campbell, was returned to the clerk by the post office department, showing delivery of the notice to that firm on October 14th. The date of the notice does not appear, but it must necessarily have been on October 12th or prior to that time. November 12th a motion to remand was filed with the clerk of the court, signed by all the attorneys of record for plaintiff in error. The motion, however, reads in part as follows: "Now comes

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff in error, by Joshua Grozier, one of his attorneys," etc. It appears from the motion that Grozier had devoted more attention to this case than his colleagues; that he never had notice, until the time he filed his motion, that the cause had been transferred from the Supreme Court to the Court of Appeals; that the case is the outgrowth of cause No. 8160, then in the Supreme Court, entitled *Curry v. Trinkle Automobile Co. et al.*; that it would be to the interest of all parties concerned to have the two cases argued together in the Supreme Court; and that, immediately upon learning of the transfer from the Supreme Court, this motion was filed.

Said section 5 reads, in part, as follows:

"And immediately upon such assignment and transfer of causes so pending on error, the clerk of the Court of Appeals, shall, by registered mail, notify the parties to each of said causes or their attorneys of record, of such transfer, and advise them that unless within thirty days from the date of said notice a petition be filed requesting that the same be remanded to the Supreme Court, a waiver by consent will be conclusively presumed of the right or privilege, if any such right or privilege exists, to a hearing and determination of the writ of error by the Supreme Court. \* \* \* But in all cases pending on error thus transferred, wherein no such petition be filed within the 30 days mentioned in the notice, the decision of the Court of Appeals shall, with the exceptions specified in section 6 of this act, be final and conclusive."

There are some matters appearing in the motion, which, if resting in the discretion of the court, would be somewhat persuasive; but we think the Legislature has removed from this court the right to exercise any discretion in the consideration of the petition. The statute reserves the right, in either party to the action, to effect a return to the Supreme Court of any case so transferred, by simply filing a petition requesting the same, but at the same time expressly provides that in the absence of such petition consent to the transfer will be conclusively presumed.

The failure of plaintiff in error to file such petition to remand within the time provided, whatever the reasons for such failure may be, bars him from the right to remand, unless within certain exceptions stated in the statute, and leaves this court without jurisdiction to grant the petition.

The motion will be denied.

(83 Wash. 94)

**SEATTLE, R. & S. RY. CO. v. CITY OF SEATTLE.** (No. 12127.)†

(Supreme Court of Washington. Dec. 30, 1914.)

**1. EMINENT DOMAIN (§ 177\*)—PROCEEDINGS—PARTIES.**

In a proceeding to condemn part of the right of way of a railroad company, a receiver of the company should be made a party.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 478, 480, 481, 483, 485; Dec. Dig. § 177.\*]

**2. EMINENT DOMAIN (§ 241\*)—PROCEEDINGS—JUDGMENT.**

Where a city sought to condemn portions of a railroad company's right of way, it was inequitable to render judgment vesting the city with fee title to portions described, where damages had been awarded on the theory that the city desired a mere joint use of the premises described; for while one having the power of eminent domain may acquire the fee or a less interest in the property, the petition should show what right is to be acquired, and damages should be assessed on that theory.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 621-625; Dec. Dig. § 241.\*]

**3. EMINENT DOMAIN (§ 207\*)—PROCEEDINGS.**

Where a city desired a joint use of a railroad right of way for a considerable distance, the way should not be divided into zones, but damages should be assessed for the whole way.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 545, 546; Dec. Dig. § 207.\*]

**4. EMINENT DOMAIN (§ 207\*)—PROCEEDINGS—JURY QUESTION.**

Though the title of a railroad company to its right of way depended upon various deeds and franchises, and prior litigation had fixed the company's rights thereto, the company may demand that the damages for the acquisition by a city for a joint use in the right of way be determined as a single right in one verdict, and the title of the railroad company to the various portions cannot be submitted to the jury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 545, 546; Dec. Dig. § 207.\*]

**5. EMINENT DOMAIN (§ 128\*)—PROCEEDINGS—DAMAGES.**

Where a city condemned a joint use in a railroad right of way, and the condemnation necessitated a 5 per cent. change of grade from the right of way to the car barns and shops of the company, the measure of damages is such sum as would enable the company to readjust itself to the new grade, so that it would occupy the same relative position as it did before condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 349-351; Dec. Dig. § 128.\*]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

In the matter of the petition of the City of Seattle to condemn property for the widening of a street. From the judgment of condemnation, the Seattle, Renton & Southern Railway Company, a corporation, appeal. Reversed.

Scott Calhoun, of Seattle, for appellant. Jas. E. Bradford and Howard M. Findley, both of Seattle, for respondent.

MORRIS, J. [1] Action by the city of Seattle seeking condemnation of adjacent property for the purpose of widening Rainier avenue. Included in the property affected was the right of way of the railway company, varying in width from 16 to 33 feet throughout the entire distance of about eight miles, and tract 30, Morningside addition, upon which the railway company had erected its shops and car barns. The railway company has appealed, alleging numerous errors.

First, it is contended that, under the authority of *State ex rel. Peabody v. Superior*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on motion to modify, see 145 Pac. 1167.

Court, 77 Wash. 593, 138 Pac. 277, the receivers of the railway company should have been made parties. This contention must be sustained. The city suggests that, because of a different showing as to certain dates relative to the action of the federal and state courts in the appointment and discharge of receivers, the Peabody Case is not controlling. It seems to us, however, that the same reasoning is present here as in that case, and that no valid decree could be made without the presence of the receivers.

[2, 3] The condemnation ordinance referred to the property of the railway company to be taken or damaged, as all right, title, and interest in and to any lands lying within the limits of Rainier avenue, belonging to the Seattle, Renton & Southern Railway Company. The petition adopted the same language, describing the right of way with its varying widths by metes and bounds, and embracing a number of different descriptions, some of which would describe but a small portion of the right of way, while others would describe long distances. The city was permitted by the lower court to try each one of these descriptions separately, upon the theory that the city was not condemning the whole title or interest of the railway company, but only the right to make a joint use for street purposes, which would not interfere with the use of the railway company. The jury in each instance assessed the damages to be awarded for such joint use at the sum of \$10, irrespective of either the length or width of the right of way embraced in that particular description. Judgment was entered upon these various verdicts, the language of which under section 7784, Rem. & Bal. Code, would vest the title to these various descriptions in the city in fee.

There is nothing equitable in ascertaining the damages to be awarded upon the theory of a joint use and then entering a decree that grants the entire use. Such procedure cannot be sustained. As was said in *State ex rel. Union Lumber Co. v. Superior Court for Thurston County*, 70 Wash. 540, 127 Pac. 109:

"The law is well settled in this state that, where the right of eminent domain is given, that right may be exercised in a stipulated manner, and that the court may in its decree provide for a limited use, or a particular use, which shall recognize the rights of both parties in the use of the land appropriated; and that the jury in determining the compensation to be paid, shall do so with reference to the particular use to which the lands are to be put and the particular method sought to be adopted in the taking and use of the lands sought to be appropriated. These and like rules have been laid down in *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940. If, then, a particular use or right may be condemned, we can see no objection to the decree of appropriation definitely determining and adjudicating the particular use to which the lands are to be put and

the particular manner in which the right sought is to be exercised. This has ordinarily been done by stipulation, or some appropriate method employed at the time of the trial to ascertain the damages."

If the city, therefore, seeks to take less than the whole, then its purpose should, in some way, be clearly indicated, so that the judgment of condemnation will be a final and absolute determination of the rights of the parties, and these rights should be ascertained as a whole and not piecemeal. If it is the purpose of the city to obtain a joint use of the railway property for city purposes, the damages, if any, should be determined from such joint use of the whole right of way, and not by dividing such right of way into zones and determining each separately as if it was the only use to be determined. The vice of such a procedure is shown in the several verdicts returned in this case, wherein a uniform sum of \$10 is determined to be the damage, irrespective of the length or width of the right of way included in that zone. Manifestly, if such a sum is a just estimate of the damage to be awarded for a joint use of the smallest zone measured by feet, a like sum would seem inadequate for such a use of the largest zone measured by miles, irrespective of the varying widths.

[4] Answering this suggestion, the city contends that the railway interest in its right of way is determined by various deeds, franchises, etc., and that prior litigation has fixed the rights of the respective parties as to some of these varying zones. In so far as the railway company's rights are determined by various deeds or franchises, we do not think it in any way detracts from its right to have the damages for the city's right of joint user determined as a single right and in one verdict. In so far as the rights of the parties have been determined by prior litigation, it would seem as though the city should determine its rights as fixed by such litigation, and not subject them to the determination of the jury in this case as influencing the amount of damages to be awarded. This is in effect subjecting the title as between the city and the railway company to the jury, which does not seem to us to be proper in this proceeding.

[5] Appellant suggests a serious question as to whether or not the city can condemn the longitudinal right of way of the street railway so as to deprive the railway company of its use. But, inasmuch as it would seem to be the purpose of the city to condemn only a joint use, we will not now undertake to determine the question submitted by the suggestion. In determining the damage to the railway company because of a 5 per cent. change of grade in the avenue adjacent to the property occupied as shops and car barns, the city was permitted to proceed upon the theory that the measure of damage was the amount necessary to readjust the tracks from the main line into the shops and barns on a 5 per cent. grade and the cost of a concrete

retaining wall along the property line, together with an amount estimated to be sufficient as an insurance against the added risk of operation upon a 5 per cent. grade. This amount was estimated by the city's witness as \$2,156, which was the sum fixed by the jury in its verdict, showing the adoption of this theory. This measure of damages is incorrect. The true measure of damages is such a sum as would enable the railway company to readjust itself to the new grade, so that it would occupy the same relative position to the proposed grade as it does to the present grade. The court so instructed the jury in one instance, but added that they might return a verdict in such a sum as would enable the railway company to readjust its tracks and plant to the proposed grade, together with the added cost of operation. This, in effect, permitted the jury to determine the proper measure of damage and to return a verdict accordingly.

Numerous other errors are suggested, but we have said enough to establish reversible error, and the other assignments will not be referred to.

The judgment is reversed.

CROW, C. J., and CHADWICK, GOSE and PARKER, JJ., concur.

(83 Wash. 77)

SECOR v. CLOSE, Sheriff, et al. (No. 12040.)  
(Supreme Court of Washington. Dec. 30, 1914.)

SALES (§ 474\*)—CONDITIONAL SALE—FILING OF NOTICE—LEVY BY CREDITOR.

Where property sold under a conditional contract of sale was returned in payment of the balance of the purchase price, a subsequent judgment creditor of the buyer cannot levy on the property in the hands of the seller, even though the contract of sale was not filed, as required by Rem. & Bal. Code, § 3670, to prevent the sale from being absolute as to the buyer's creditors.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.\*]

Department 1. Appeal from Superior Court, Cowlitz County; Wm. T. Darch, Judge.

Action by George Secor against Ed. Close, as Sheriff, and John Gadbow. Judgment for plaintiff. Defendants appeal. Affirmed.

B. L. Hubbell, of Kelso, for appellants. McGill, McKenney & Brush, of Kelso, for respondent.

PARKER, J. The plaintiff, George Secor, claims title to personal property levied upon by the sheriff of Cowlitz county, at the instance of the defendant John Gadbow, under an execution upon a judgment rendered in his favor against A. C. Luther and W. B. Mitchell, copartners. The plaintiff's claim was made, and trial had in the superior court, in pursuance of sections 573-577, Rem. & Bal. Code, relating to adverse claims to proper-

ty levied upon. Findings and judgment being rendered in favor of the plaintiff, establishing his title to the property and annulling the levy, the defendants have appealed therefrom to this court.

On May 14, 1912, respondent was the owner of a shingle mill in Cowlitz county. On that day he entered into a contract of conditional sale of the mill to Luther & Mitchell, and delivered to them possession thereof; the condition of the sale being that the title to the mill should remain in respondent until full payment of the purchase price. Respondent failed to cause the contract of conditional sale to be filed in the office of the county auditor within 10 days, or at all, after delivering possession of the mill to Luther & Mitchell, and thereby the sale became absolute as to subsequent creditors in good faith, under the provisions of section 3670, Rem. & Bal. Code. Thereafter, on July 2, 1913, Luther & Mitchell surrendered possession of the mill to respondent, and all claim of title thereto, in full payment of the balance due upon the purchase price, only a small portion of which had theretofore been paid. It is not contended that the mill, after its use by Luther & Mitchell for a period of over a year after receiving possession thereof from respondent, was of greater value than the balance due upon the purchase price. Over six months thereafter, on January 13, 1914, appellant Gadbow obtained a judgment against Luther & Mitchell for the sum of \$373, in the superior court for Cowlitz county. In that case effort was made by appellant Gadbow to have his claim decreed to be a lien upon the mill, including respondent's interest therein. This claimed relief was, however, denied by the court, and the action dismissed as to respondent, who had been made a defendant therein. That adjudication touching appellant Gadbow's claimed rights as against respondent remains in force and unappealed from.

Contention is made by counsel for appellants that the trial court erred in finding, as it did in substance that the mill was surrendered by Luther & Mitchell to respondent in payment of the balance due upon the purchase price thereof. A review of the evidence to which our attention has been called by the abstract convinces us that the evidence clearly preponderates in favor of the view of the trial court on this question. Other facts of the case are undisputed, as above summarized.

But little is necessary to be said touching the law of the case. Some contention is made by counsel for appellants, seemingly rested upon the theory that appellant Gadbow's rights have been secured, as he claims them here, by the failure of respondent to file in the office of the county auditor the conditional sale contract, and by Gadbow becoming a subsequent creditor in good faith of Luther & Mitchell. We are quite unable

to see that these facts are of any avail to appellants here. These facts show nothing more than that the sale of the mill to Luther & Mitchell became in law an absolute instead of a conditional one, as to subsequent creditors in good faith. But this did not prevent Luther & Mitchell returning the mill to respondent in payment of the balance due upon the purchase price thereof, even though they thereby preferred respondent as a creditor, in the absence of the value of the mill at that time being in excess of the balance due upon the purchase price, or some other element of bad faith or fraud entering into the transaction.

This is not an insolvency or bankruptcy proceeding, wherein might be sought the setting aside of this settlement of the Luther & Mitchell debt to respondent, if prosecuted with due diligence. Appellant Gadbow was a mere creditor of Luther & Mitchell at the time of their surrender of the mill to respondent in payment of the balance due upon the purchase price. He had no lien upon the mill, nor did he even have his claim reduced to judgment against Luther & Mitchell until more than six months after the surrender of the mill by them to respondent in payment of their debt. This preference payment of their debt was not unlawful to the extent that it can be ignored in the sole interest of appellant Gadbow, who was not a lien creditor at the time of the preference, whatever might have been done in an insolvency or bankruptcy proceeding, timely prosecuted in the interest of all the creditors of Luther & Mitchell, looking to the setting aside of the preference.

The judgment is affirmed.

CROW, O. J., and CHADWICK, MORRIS, and GOSE, JJ., concur.

(83 Wash. 55)

**KELLY v. CITY OF SPOKANE.**  
(No. 12187.)

(Supreme Court of Washington. Dec. 28, 1914.)

**1. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Where, in an action for injuries to a pedestrian stepping into a hole in a sidewalk, the location and dimensions of the hole were testified to by three witnesses besides the pedestrian, and they were in substantial harmony with each other, error in exclusion of a photograph which merely showed a small shadow near the inside of the walk, practically where all of the witnesses located the hole, but not showing that there was no hole into which the pedestrian could have stepped, must be disregarded, as not affecting the substantial rights of the city, within Rem. & Bal. Code, § 307.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**2. EVIDENCE (§§ 195, 359\*)—DEMONSTRATIVE EVIDENCE—PHOTOGRAPHS—MODELS.**

The practice of admitting photographs and models in evidence in all proper cases should be

encouraged, and thereby give the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 680, 1509-1512; Dec. Dig. §§ 195, 359.\*]

**3. MUNICIPAL CORPORATIONS (§ 763\*)—CARE OF STREETS.**

A city must use reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

**4. MUNICIPAL CORPORATIONS (§ 821\*)—STREETS—CARE REQUIRED OF PEDESTRIANS.**

A pedestrian, who has no knowledge to the contrary, may proceed on the assumption that the city has exercised reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel, and mere momentary diversion of the attention of a pedestrian is not, as a matter of law, contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

**5. MUNICIPAL CORPORATIONS (§ 807\*)—USE OF SIDEWALKS—RIGHTS OF PEDESTRIANS.**

A pedestrian may, as a matter of law, travel on any part of an unobstructed sidewalk, and the court may not, as a matter of law, say that the pedestrian walking near the side of a sidewalk, instead of the center thereof, was guilty of contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.\*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Elizabeth Kelly against the City of Spokane. From a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for appellant. Scott & Campbell, of Spokane, for respondent.

GOSE, J. This action was brought to recover compensation for personal injuries sustained by the plaintiff. She claims that she stepped into a hole in a sidewalk in one of the business streets of the defendant city, causing her to fall in such a manner as to inflict upon her serious bodily injuries. The jury accepted her view of the case, and its verdict was made effective by a judgment. This appeal followed.

The material facts fall within a very narrow compass. The respondent said that she was traveling north on the west side of Post street, a business street in the city of Spokane; that in crossing the track of the Northern Pacific Railway Company she kept close to the west margin of the street in order to avoid the sweep of a crossing guard, which she feared might be suddenly lowered; that at a point a few feet north of the crossing and a few inches from the inside of the walk she stepped into a hole in the brick walk about 10 inches by 12 inches

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in dimensions, and fell and was seriously injured. She said she was seeking to avoid two elements of danger, viz., the sweep of the crossing guard in event it should be suddenly let down, and passing engines, and that, with her attention momentarily diverted by these thoughts, she stepped into the hole without observing its presence. She also said that the hole extended to within 2 or 3 inches of the building, and that, whilst she had before traveled the walk, she had not observed the hole. Another witness said that the hole had been there for a considerable period of time before the plaintiff met her injury. All the witnesses agree that the hole was about 10 inches by 12 inches in dimensions, and that it extended to within a few inches of the building. The walk was made of bricks 5 inches in width, 10 inches in length, and  $2\frac{1}{2}$  inches in thickness. There was a hiatus in the walk of probably two bricks. The evidence does not show whether the bricks were left out in the beginning or were later removed. The significant fact is that, under all the evidence, the gap was there.

At the close of the respondent's evidence the appellant challenged its sufficiency. The challenge being denied, it then sought to introduce a photograph in evidence. This was rejected, whereupon plaintiff again challenged the sufficiency of the evidence and rested its case. The errors claimed are: (1) The rejection of the photograph; and (2) the denial of the challenge to the sufficiency of the respondent's evidence.

[1] The photograph was rejected because the court was evidently of the opinion that it had not been sufficiently identified; that is, because it was not shown to correctly photograph the hole with respect to its proximity to the adjacent building. The respondent's witnesses on cross-examination said that, while it did not seem in some respects to correspond with their recollection of the location of the hole, it was substantially correct. Assuming that the photograph was sufficiently identified, and that the refusal of the court to admit it in evidence was error, we think it was error without prejudice. The photograph merely shows a small shadow near the inside of the walk, practically where all the witnesses located the hole. It does not show that there was no hole into which the respondent could have stepped. The location and dimensions of the hole were testified to by three witnesses besides the respondent. They were all in substantial harmony with each other and with the respondent upon both points. If the photograph contradicted any witness upon any material fact, or if it would have materially aided the jury in arriving at its verdict, we would not hesitate to remand the case for a new trial. In our opinion it does neither. We are admonished by the statute to disregard an er-

ror which does not affect the substantial rights of the complaining party. Rem. & Bal. Code, § 307; *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673.

[2] We deem it pertinent, however, to say that the practice of admitting photographs and models in evidence in all proper cases should be encouraged. Such evidence usually clarifies some issue, and gives the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses.

[3, 4] The second point urged is that the respondent was guilty of contributory negligence which was the proximate cause of the injury. It is the duty of a city to use reasonable care to maintain its streets and sidewalks in reasonably safe condition for travel. The traveler who has no knowledge to the contrary may proceed upon the assumption that the city has fulfilled its duty. Momentary diversion of the attention of the pedestrian does not as a matter of law constitute contributory negligence. *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357.

[5] It is argued that it was the duty of the respondent to keep near the center of the sidewalk, the course generally followed by the public. As a matter of law she had a right to travel upon any part of the walk. The court would be taking a liberty not justified by law were it to hold that the law reserves any part of an unobstructed walk from use by the public. It was for the jury to say upon all the facts what a reasonably prudent person ought to have done under the circumstances present.

The judgment is affirmed.

CROW, C. J., and CHADWICK, PARKER, and MORRIS, JJ., concur.

(83 Wash. 23)

STATE ex rel. GWINN et al. v. BUCKLIN et al. (No. 11807.)

(Supreme Court of Washington. Dec. 28, 1914.)  
CORPORATIONS (§ 181\*)—STOCKHOLDERS—INSPECTION OF BOOKS—BY-LAW.

Under a by-law of an abstract company giving each stockholder the right to inspect the books and records of the company at any time during regular business hours, a stockholder has the right to make such inspection, though he is interested in a rival corporation and seeks the information for its advantage.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 674-682, 685; Dec. Dig. § 181.\*]

Department 1. Appeal from Superior Court, Kitsap County.

Mandamus by the State, on the relation of W. L. Gwinn and another, against R. E. Bucklin and another. Judgment for defendants, and relators appeal. Reversed, with instructions to enter judgment for relators.

J. H. Allen, of Seattle, for appellants.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



PARKER, J. The relators, W. L. Gwinn and R. L. Thomas, stockholders of the Kitsap Title Abstract Company, seek by mandamus proceedings to compel the respondents R. M. Bucklin and E. A. Landolt, the president and secretary, respectively, of that company, to permit the relators to examine the books and records of the company. Upon a hearing had in the superior court, judgment was rendered denying the relief prayed for and dismissing the action. From this ruling and judgment, relators have appealed to this court.

The Kitsap Title Abstract Company is a corporation organized and existing under the laws of this state, having its capital stock divided into 1,000 shares. Relators own 497 shares, respondents own 502 shares, and a third person owns 1 share of the stock of the company. Respondents are president and secretary, respectively, of the company. They have the custody of its books and records and the active management of its business. They are willing to accord to relators the privilege of examining the books and records of the company except such books and records as show the list of the customers of the company and the particular prices paid by them for abstracts. Respondents insist that these particular books and records of the company constitute a portion of the good will and trade of the company and are such trade secrets that if made known to relators, who are proprietors of a rival abstract company in competition with the Kitsap Title Abstract Company, such knowledge by relators will result to the material injury of the business of the Kitsap Title Abstract Company. In this connection respondents allege:

"That the only purpose of said W. L. Gwinn in seeking the examination of the books of said company has been to obtain the list of customers of said company, together with the prices quoted to the same for the making of abstracts, so that he may solicit such customers for patronage for the rival company operated by himself and to quote prices below the cost of making such abstracts so as to deprive the Kitsap Title Abstract Company from the patronage of such customers; likewise, the said Gwinn would make use of said information for the purpose of discrediting the work of said Kitsap Title Abstract Company, in so far as it would be possible for him so to do and particularly discredit the management and control of said business by the respondents Bucklin and Landolt."

We assume for argument's sake that this allegation and the facts above stated are true, in so far as such facts may be relevant and controlling in this controversy. This constitutes as favorable a statement as can be made from the record, in respondents' behalf.

Counsel for appellants contend that they have the absolute right to examine the books and records of the company without such right being impaired in the least by respondents' claim of right to inquire into relators' motive and purpose in making such examination.

We are not here concerned with the mere common-law right of stockholders to examine

the books and records of the corporation in which they hold stock, which right is not absolute, but subject to restrictions governed largely by the circumstances of each particular controversy. The nature and extent of such common-law right was reviewed by this court in *State ex rel. Weinberg v. Pac. Brewing Co.*, 21 Wash. 451, 58 Pac. 484, 47 L. R. A. 208. We have no statute in this state bearing upon this subject, but the Kitsap Title Abstract Company has a by-law reading as follows:

"Each stockholder shall have the right to inspect the books and records of the company at any time during regular business hours of said company."

This by-law, we think, has all the force and effect of a statute containing such a provision. *Cummings v. Webster*, 43 Me. 192; *Wyoming Coal Mining Co. v. State*, 15 Wyo. 97, 87 Pac. 337, 123 Am. St. Rep. 1014; 10 Cyc. 351.

In *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156, the court had under consideration the claimed right of the stockholder to examine the books and records of a corporation in which he held stock, under a statute of California providing that such records shall "be open to the inspection of any director, member, stockholder," etc. The secretary of the corporation in resisting the stockholders' claim of right of examination alleged affirmatively:

"That the object and purpose of the plaintiff is to injure the corporation of which defendant is secretary, and to gain information for the private use of plaintiff, in connection with two other corporations, of which plaintiff is a stockholder, engaged in a similar business to that of the corporation represented by defendant."

It was conceded that appellants desired to see the list of the corporation's customers and their contracts. In sustaining the striking out of this defense by the trial court, the Supreme Court said:

"At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation. 2 Cook on Corporations, § 513; *Stone v. Kellogg*, 165 Ill. 204 [46 N. E. 222, 56 Am. St. Rep. 240]. But the writ would not issue as a matter of course to enforce a mere naked right, or to gratify mere idle curiosity; but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired. *High on Extraordinary Legal Remedies* (3d Ed.) § 310. But the great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the Constitution and the statute cannot be defeated by stopping to inquire into motives. If this were so, the stockholder would be driven from the certain definite right given him by the statute to the realm of uncertainty and speculation. The small stockholder—whose rights are as sacred in the eyes of the law as those of the rich owner of the majority of the stock—would be refused the right of inspection given him by the statute, and when he comes into court setting

forth his rights, and the fact that he is a stockholder, and has been refused permission to inspect the books, he is met by an answer of the corporation setting forth that he is not seeking the information nor the inspection for any legitimate purpose, and that his motives are improper. In the trial of this affirmative defense witnesses are required and expenses incurred. If the court should find in favor of the corporation, and deny the petitioner's right, he is driven to an appeal. In the appellate court he is met by the rule that a finding of fact based upon conflicting testimony cannot be disturbed. Thus the certain, adequate, and summary remedy for the right given by statute is driven into the realm of uncertainty, expense, and delay. Such was not the intent of the framers of the Constitution, nor of the Legislature in enacting the statute. The statute is founded upon the principle that the shareholders have a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper."

This doctrine is adhered to in *Kimball v. Dern*, 39 Utah, 181, 116 Pac. 28, 35 L. R. A. (N. S.) 134, Ann. Cas. 1913E, 166, where the subject is treated at considerable length and many authorities reviewed. Among the decisions which seem to regard the statutory rule as being not quite so unqualified as indicated in the California and Wyoming decisions above noticed, we note that of *Foster v. White*, 86 Ala. 467, 6 South. 88, where, referring to the statute of that state giving the right of inspection it is said:

"The only express limitation is that the right shall be exercised at reasonable and proper times; the implied limitation is that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is: The Legislature regarded his interests in the successful promotion of the objects to the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital, to which they have contributed, is employed and managed."

This language seems somewhat inharmonious within itself. It would seem that, if the custodian of the corporate records cannot question or inquire into the motives or purposes of the stockholder in requesting the examination that the custodian's right to withhold the privilege of examination is entirely at an end except as to reasonableness of time, yet the court seems to conclude that there may be motives and purposes on the part of the stockholder which would war-

rant the custodian in withholding the privilege of examination aside from the question of reasonableness of time. We find similar observations by the Maryland court in *Wei-henmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446-457, where the right of examination was claimed under a statute reading:

"The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members."

The court said:

"The right thus given to the stockholder is unconditional and unqualified. \* \* \* It is stated in the answer to the petition that *Wei-henmayer* is engaged in the manufacture and sale of hosiery and knit goods, and is a rival and competitor of the *Windsor Knitting Mills* in business, and that he desired an examination of the books, documents, and records of the corporation for the purpose of obtaining information to be used by him in the conduct of his own business, to the injury and loss of the said corporation. \* \* \* But the petitioner's right would not be forfeited by any such cause. The right is given to him as a stockholder by statute, and is absolute, and not made to depend upon any circumstances but the ownership of the stock. It is easy to see that there might be good reasons for refusing an application; for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied."

Whatever the view of the court in this last quoted language is as to reasons and motives on the part of the stockholder warranting the custodian refusing inspection of the records, it is apparent that the fact that such stockholder is interested in a rival concern which is in competition with the corporation and might by the examination of the books of the corporation acquire and use knowledge in aid of the other concern to the detriment of the corporation by way of competition, his right to the inspection of the books would not thereby be affected in the least. It is possible that the Alabama and Maryland courts had in mind a possible inspection of the books and records of the corporation by a stockholder with a view of disclosing some secret process of manufacturing an article, possessed and used by the corporation, or where the motives and purpose of the stockholder would be to get temporary possession of a record for the purpose of mutilation or theft of the record or some other equally unlawful purpose. If the qualifying language of those courts means no more than this, we would be inclined to agree with them; but there is no such unlawful purpose of relators here alleged or shown. We are of the opinion that the inspection of the books and records here sought by relators cannot be withheld from them on the ground that they would thereby acquire knowledge which would be used by them in aid of the business of their other abstract company, to the detriment of the *Kitsap Title Abstract Company*.

The judgment is reversed, with instructions to the trial court to enter its judgment

compelling respondents to permit relators to examine the books and records of the company, including its books and records showing the list of its customers and prices paid by them, for abstracts.

CROW, C. J., and GOSE, CHADWICK, and MORRIS, JJ., concur.

(83 Wash. 91)

STATE ex rel. GILMUR v. CITY OF SEATTLE et al. (No. 12241.)

(Supreme Court of Washington. Dec. 30, 1914.)

MUNICIPAL CORPORATIONS (§ 126\*) — EMPLOYEES — CIVIL SERVICE — ABOLISHING OFFICE — PURPOSE.

Where, after relator had obtained a final decree restraining a city from removing him from an office in the classified civil service, and to circumvent the effect of the decree the city attempted to abolish the office solely to rid itself of relator and not of the office, which it re-created by passing another ordinance taking effect immediately on the going into effect of the ordinance abolishing the office, such action was mala fide, and relator was entitled to compel the city by mandamus to permit him to fill the office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 298-300; Dec. Dig. § 126.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Mandamus by the State, on relation of C. E. Gilmur, against the City of Seattle and others. Judgment for defendants, and relator appeals. Reversed.

Preston & Thorgrimson, of Seattle, for appellant. Jas. E. Bradford and Wm. B. Allison, both of Seattle, for respondents.

MORRIS, J. Subsequently to our decision in *Gilmur v. Seattle*, 69 Wash. 289, 124 Pac. 919, in which a decree enjoining Gilmur's removal from the office of foreman of outside construction in the lighting department of the city of Seattle was sustained, and with the evident purpose of circumventing the effect of that decision, the city passed an ordinance abolishing the position, and at the same time passed another ordinance re-creating the same position; the latter ordinance to become effective immediately upon the going into effect of the ordinance abolishing the position. Gilmur thereupon commenced a second proceeding to prevent his removal, and the city was again enjoined from removing him from office. In furtherance of its evident design, the city, through its legislative department, again abolished the position filled by Gilmur, and on September 15, 1912, the day such last ordinance went into effect, Gilmur was notified that his services were no longer required. Gilmur subsequently sued out this writ of mandamus, seeking reinstatement and for a direction to the proper officials of the city to deliver to him warrants

upon the general fund of the city for the amount of his salary up to the time of his reinstatement. The judgment of the lower court was adverse to Gilmur, and, it having so announced, the city again indicated the motive actuating it in this matter by passing another ordinance re-creating the position that had been occupied by Gilmur. Nothing more need be said as to what the city was seeking to accomplish in all this maneuvering. It is too apparent to require discussion that for some reason the purpose was to abolish, not the position, but the incumbent. The position was created and filled under civil service regulation, and, as evidencing that it sought to get rid of the man but retain the office, it is shown that during all this time the duties of the office remained and, in order to properly carry on the work of the department, it was necessary for the head of the department to assign to this work men in the different classifications of the civil service but who, under the civil service regulations, were not qualified. The work, however, remained and must be performed by some one. It is also shown that Gilmur has made repeated attempts to obtain permission to fill the position, and has at all times held himself ready and willing to act when called upon.

The purpose of the statutes creating and regulating civil service is to insure the continuance in public employment of faithful and competent officials without subjecting them to the vicissitudes of political strife. Statutes of this character are not intended to, nor do they, abridge the power of the city to abolish an office when its duties have ceased to exist, or to do any other act for the better or more economical administration of the city's affairs, when influenced by good motives and justifiable ends. *State ex rel. Voris v. Seattle*, 74 Wash. 199, 133 Pac. 11; 2 Dillon, Mun. Corp. § 479. To abolish an office, with the sole purpose of getting rid of the man but not the office, is not an act of good faith, and to permit it would make civil service a farce. Having this in mind, it has been uniformly held that municipal authorities cannot obtain the sanction of the courts in seeking to exercise such a power. *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197; *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963; *State ex rel. Cole v. Coates*, 74 Wash. 35, 132 Pac. 727; *People ex rel. Hart v. La Grange*, 7 App. Div. 311, 40 N. Y. Supp. 1026; *State ex rel. Ingram v. Commissioners*, 63 N. J. Law, 542, 43 Atl. 445; *Chicago v. Luthardt*, 181 Ill. 516, 61 N. E. 410; *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 880; *Womsley v. City of Jersey City*, 61 N. J. Law, 499, 39 Atl. 710.

The judgment is reversed.

CROW, C. J., and PARKER, CHADWICK, and GOSE, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(88 Wash. 64)

**BENNETT v. OREGON-WASHINGTON R. & NAVIGATION CO. et al.** (No. 12030.)  
(Supreme Court of Washington. Dec. 29, 1914.)

**TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

While, in an action for personal injuries, it is proper to award compensation for mental anguish which necessarily results from the injury, as in the case of disfigurement, it is improper, in an ordinary action for personal injuries, where there is nothing to show that plaintiff could have suffered mental anguish on account of the injury, to submit that issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Department 1. Appeal from Superior Court, Lewis County; Edward H. Wright, Judge.

Action by Charles Bennett against the Oregon-Washington Railroad & Navigation Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Bogle, Graves, Merritt & Bogle, of Seattle, and Geo. T. Reid and J. W. Quick, both of Tacoma, for appellants. Governor Teats, Leo Teats, and Ralph Teats, all of Tacoma, for respondent.

CHADWICK, J. Plaintiff was a passenger upon a passenger train operated by the Oregon-Washington Railroad & Navigation Company over the tracks of the Northern Pacific Railway Company. Plaintiff had been riding in the day coach. He went forward into the smoker, and while standing in the car with his hands upon the back of a seat the train was wrecked. The car in which he was riding left the track. The forward car smashed in the front end of the smoker, and plaintiff was struck upon the head by the end of the car or wreckage. He suffered a scalp wound. Defendants admit liability. The case was submitted to the jury for a determination of the amount of damages sustained by the plaintiff.

It appears that prior to the injury plaintiff was a strong, robust man; that immediately after the injury he rode in an automobile to the hospital in Tacoma, where his wounds were dressed. He then went to a hotel, where he was called upon three or four times by the physician who had cared for him at the hospital. He then went to Georgetown, where his wife's daughter lived, and after about a week he returned to his home at Dryad, Wash., where he is engaged in the barber business. The testimony tends to show that he was rendered weak and nervous by reason of the accident; that he was unable to attend to his business for about a month or six weeks. From that time on he has carried on his trade himself. He says that he is still nervous and suffers from headaches. The case went to trial,

resulting in a verdict for plaintiff in the sum of \$1,500.

Error is assigned in that the court instructed the jury as follows:

"If you find for the plaintiff, you will allow him such sum as you find from the evidence will reasonably and fairly compensate him for the injuries received. In arriving at this amount, you should take his business into consideration, and the time, if any, he lost by not being able to work at his business through injuries received by him in the wreck. You should take into consideration suffering, pain, and mental anguish, if any, which he has undergone by reason of the injury; and if you find from the evidence that he will probably suffer pain and mental anguish in the future from such cause, then you should consider such probable future suffering also in making up your verdict. From all of these considerations, you should decide upon such sum as, in your judgment, will fairly and reasonably compensate him for such injuries as you find he has received. It is not an easy matter to fix the amount which should be allowed in cases of this character, particularly for pain and mental suffering, if any, but you should bring to bear your own judgment, and, if you find for the plaintiff, assess such damages as you consider reasonable."

We have italicized those parts of the instruction which are objected to.

If there be evidence of a state of facts from which a jury might find mental anguish, or an injury is disclosed that would shock the senses of fair-minded men or invite the unfeeling to ridicule, it would be proper for a court to submit, as an element of the damages sustained, the mental anguish of the injured person, but where, as in this case, there is no evidence tending to show any mental anguish or anything other than the pain and suffering naturally incident to an injury like the one complained of, it is improper to instruct upon that element, for it can only lead the jury into the realm of speculation, with the possibility of penalizing the negligent party; whereas compensation for the injured one is the sole object of the law. This court has discussed this phase of the law in the following cases: Gray v. Washington Power Co., 30 Wash. 665, 71 Pac. 206; Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; Cole v. Seattle, Renton, etc., R. Co., 42 Wash. 462, 85 Pac. 3; Nelson v. Western Steel Corporation, 61 Wash. 672, 112 Pac. 924. While these cases all sustain a recovery for mental anguish, they are likewise authority to the point that a recovery cannot be had upon that theory, unless there is some evidence or a condition is revealed that would warrant the court in submitting it to the jury. As we have said, there is nothing in the testimony in this case to show that respondent has lost, or will lose, the comfort and companionship of other people, be an object of pity, or abhorrence, or ridicule, or otherwise be put under future mental anguish because of his injury.

Without discussing the remaining assignment, but granting, without deciding, that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the direction to the jury, if "you find from the evidence that he will probably suffer pain and mental anguish in the future from such cause, then you should consider such probable future suffering also in making up your verdict," is a proper statement of the law, we would suggest that an instruction falling within the rule announced in *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873, and *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916—that is, that a person is entitled to recover for future pain and suffering only when the jury can find from the evidence that future pain and suffering is reasonably certain to result from the injuries and continue into the future—is more proper, and should be followed in the event of a retrial. It is not for the jury to speculate upon the likelihood or probability of such future pain and suffering; it must be convinced from a fair consideration of the evidence that it is reasonably certain that it will be so.

For the reasons assigned, this case is reversed and remanded for a new trial.

CROW, C. J., and GOSE, PARKER, and MORRIS, JJ., concur.

(83 Wash. 68)

**KROEGER et al. v. GRAYS HARBOR CONST. CO. (No. 12043.)**

(Supreme Court of Washington. Dec. 29, 1914.)

**1. NEGLIGENCE (§ 32\*)—DUTY OF LANDOWNER—LICENSEES.**

Where deceased came upon defendant's premises seeking a position, and remained there after refusal, he was at best no more than a licensee, and defendant was bound only to refrain from willfully or wantonly injuring him, and hence where he was killed by the skip of a derrick which was dropped upon him, defendant is not liable, the servants operating the machine not knowing of his presence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

**2. NEGLIGENCE (§ 121\*)—PRESUMPTIONS.**

There is no presumption in negligence, but it must be proved.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

**3. NEGLIGENCE (§ 67\*)—CONTRIBUTORY NEGLIGENCE.**

One who went upon the property of a construction company and stood upon a railroad track at a point where rock was being unloaded from cars into scows is guilty of negligence in staying in a place of danger without maintaining a lookout for his own safety.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 90, 91; Dec. Dig. § 67.\*]

Department 1. Appeal from Superior Court, Chehalis County; Ben S. Sheeks, Judge.

Action by Jennie Kroeger and Raymond Kroeger and others by their guardian ad litem against the Grays Harbor Construction Company, a corporation. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. Emerson Cross, of Aberdeen, and Hugo Metzler, of Tacoma, for appellants. W. H. Abel, of Montesano, and A. M. Abel, of Aberdeen, for respondent.

CHADWICK, J. Defendants had a contract to supply the government with rock for the jetty at Grays Harbor. The rock was transported on cars from the inland to a trestle or spur running into the Chehalis river. From these cars it was loaded on scows, made fast alongside of the trestle. The manner of unloading was to put the rock into a wooden skip, which was about 12 feet long and 5 feet wide. The skip, when being filled, was made to rest on a parallel track. It was raised by means of a derrick, the boom of which swung in a circle. When the skip had been filled it was raised, carried over the car, and returned to the scow. When empty it was raised, carried over the car, and held until the head "hooker on" indicated where he wanted it lowered, when one of the workmen from a vantage point on the car gave a signal to the engineer to drop the skip. The skip weighed something over a ton. Plaintiffs' decedent went to the place where the work was being carried on, and asked the foreman in charge for employment. There being no place for him, he remained for some little time talking with the employes. At the time of the accident, to be presently mentioned, he was standing on the trestle on the off side of the car that was being unloaded. The engineer, on signal, raised the skip from the scow, swung it over the car, and in obedience to a like signal from one of the employes on the car, lowered it. It struck Kroeger on the forehead, knocked him down with such force that he was rendered unconscious, and so wounding him that he afterwards died. Plaintiffs brought this action, alleging that the defendant was guilty of negligence in the operation of the skip, and, further, that while decedent was standing in a place of apparent safety and in ignorance of any danger, the defendant, knowing of his presence, carelessly, negligently, wantonly, and willfully permitted the skip to be suddenly dropped from its elevated position. It appeared that Kroeger had finished his errand and had no business or employment in or about the work at the time the accident occurred. He was waiting to go with some of the crew who were to go off shift in a few minutes. At the close of plaintiffs' case defendant moved for a nonsuit, which was granted by the court, for the reasons that it did not appear that the defendant was guilty of negligence, and that the decedent, Kroeger, was guilty of negligence on his part.

[1-3] We think the judgment of the lower court was clearly right. Defendant owed Kroeger no duty other than to refrain from willfully and wantonly injuring him. The occurrence was a pure accident. It is shown

that Kroeger was not within the range of vision of the engineer and there is testimony from which it can be clearly inferred that the signalman undertook to arrest the lowering of the skip when he realized that he was in a place of danger. It does not appear that the engineer or signalman had any actual notice, or reason to believe, that Kroeger was in line with the fall of the skip, unless an inference can be drawn from the fact that he had been on the trestle from three to four minutes, as two of the witnesses estimated the time. This would not raise an inference of negligence; for, as we have frequently held, negligence is not to be presumed, but must be proved as a fact. If there had been a duty resting upon defendant to keep a lookout for intruders it would have been for the jury to say whether Kroeger had been on the trestle long enough to raise an implication of notice. There was no such duty. Obviously if his presence had been known to those operating the machinery, the accident would not have happened, for men in such employments are not to be charged with willful murder. The evidence affirmatively shows that Kroeger had remained in a position of apparent danger an inexcusable length of time, considering all of the attending circumstances, that he was taking no account of his own safety, and that he was looking down, with his hat "kinda pulled down over his eyes."

To allow a recovery in this case would be to put upon a defendant similarly situated the duty of maintaining an extraordinary degree of care, whereas the rule is that a defendant owes no duty of actual care, while a duty of vigilance or the highest degree of care is put upon one who, for his own purposes, goes upon the premises of another and puts himself in a place of danger. 2 Cooley on Torts (3d Ed.) p. 1268; 1 Thompson on Negligence, 946-948; 8 Thompson on Negligence, White's Supp. 946.

The distinction between a trespasser and a licensee is clearly drawn in *McConkey v. O. R. & N. Ry. Co.*, 35 Wash. 55, 76 Pac. 526. Within the rule of that case Kroeger was trespasser, and to sustain a recovery it was incumbent upon plaintiffs to show that defendant's agents knew of his presence in time to avoid the injury. As we have said, proof of this fact is entirely wanting. Other cases decided by this court bearing in greater or less degree upon the question at bar are *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452; *Johnson v. Great Northern Railway Co.*, 49 Wash. 98, 94 Pac. 895; *West v. Shaw*, 61 Wash. 227, 112 Pac. 243. The case of *Metcalf v. Cunard S. S. Co.*, 147 Mass. 66, 16 N. E. 701, is in point. Plaintiff went on board a ship to consult the ship's doctor. He met a supposed officer of the ship, and upon inquiry was directed to the doctor's cabin. The way pointed out was a direct

way, although a more roundabout one would have taken him there and would have avoided the danger. Near the end of the passageway which he had followed was an uncovered hatch at which the vessel was loading. A companion said, "Look at those fellows down there." Just as the plaintiff emerged from the passageway he turned his head, and almost immediately was struck on the back and knocked into the hold by a bag of flour, which swung across the deck on its way to be lowered into the hatch. It was held that the plaintiff was, at the highest, a mere licensee, if not a trespasser, that the danger was perfectly manifest, and that there had been no duty to warn the plaintiff against such dangers. See, also, *Flanagan v. Atlantic*, 37 App. Div. 476, 56 N. Y. Supp. 18; *Berlin Mills v. Croteau*, 88 Fed. 860, 32 C. C. A. 126; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; *Wetzmann v. Barker Asphalt Co.*, 190 N. Y. 452, 83 N. E. 477, 123 Am. St. Rep. 560; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *O'Brien v. Union Freight Co.*, 209 Mass. 449, 95 N. E. 861, 36 L. R. A. (N. S.) 492; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718, where it is said:

"He went there on his own business, and in returning he was subserving his own purposes only. The precise question is whether a person who goes upon the land of another, without invitation, to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances."

Paraphrasing the words of the court in *McConkey v. O. R. & N. Ry. Co.*, supra, Kroeger, by the exercise of common judgment, should have known that to occupy the place he did would be attended by great hazard. He knew that he was not upon a highway for pedestrians, but that the trestle was built and maintained and was being used for railway purposes. While he may have believed it was in such condition as would enable him to occupy it with safety, yet the environment, time, and his relation to the defendant were such as to give him no right to act upon such belief or to rely upon any duty owing by the defendant to maintain the place in safety for him.

We agree with the observation of the deceased, who said, upon recovering consciousness, that the accident occurred in consequence of his own fault.

The judgment is affirmed.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 37)

BECKER v. CLARK et al. (No. 12029.)

(Supreme Court of Washington. Dec. 28, 1914.)

**1. VENDOR AND PURCHASER (§ 37\*)—REPRESENTATIONS — RIGHT OF PURCHASER TO RELY ON.**

A purchaser may rely upon the representations of the vendor, where the property is at a distance or for any other reason the falsity of the representations is not readily ascertainable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 54-60; Dec. Dig. § 37.\*]

**2. VENDOR AND PURCHASER (§ 44\*)—REMEDIES OF PURCHASER—ACTIONS—EVIDENCE.**

In a suit to rescind a contract for the purchase of land and recover payments, evidence held to show that the vendor's agent falsely represented the land was in the heart of a German Catholic community.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 69-76; Dec. Dig. § 44.\*]

**3. VENDOR AND PURCHASER (§ 33\*)—FALSE REPRESENTATIONS OF VENDOR—EFFECT.**

Though the purchaser did not immediately intend to make his home on the property, false representations that it was in the heart of a German Catholic community when it was in fact an unsettled wilderness warrants a rescission of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 33, 40-43, 66; Dec. Dig. § 33.\*]

**4. VENDOR AND PURCHASER (§ 108\*) — CONTRACTS—RESCISSION.**

Breach of promissory representations made in a sale of land ordinarily does not warrant rescission, but gives the purchaser a suit for damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 108.\*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by John Konrad Becker against Robert Wm. Clark and others. From a judgment for defendants, plaintiff appeals. Reversed, with directions to render judgment for plaintiff.

V. T. Tustin, of Spokane, for appellant. John M. Gleeson, of Spokane, for respondents.

GOSE, J. This is an action in equity to rescind a contract for the purchase of a section of land near Babine Lake in the province of British Columbia, and to recover a judgment for \$1,600, the amount paid upon the contract, with legal interest from the date of its payment. There was a judgment dismissing the action. The plaintiff appealed.

The appellant, a German farmer of the Catholic faith, 67 years of age, residing at Colton in Whitman county, this state, in the month of April, 1913, entered into a contract with the respondent Clark and the respondent corporation for the purchase of the land in question. The contract price was \$6,400.

\$1,600 was paid when the contract was signed. The negotiations were all carried on, and the money was paid at Colton. The land is 1,700 miles distant from Colton. The appellant had never seen the land, and had no information of either its quality or desirability, except such as he acquired from one Hopkins, the selling agent of the respondents. This fact was known to Hopkins. The appellant and two of his witnesses, Ernest Becker and John Reisenauer, farmers living in the vicinity of Colton, the former a brother of the appellant, testified that Hopkins represented that the land was the center of a German Catholic settlement, and that a Catholic church would be erected on the adjoining section during the summer of 1913. The appellant testified that it was upon these representations he contracted, and that without them he would not have contracted at all. He further said that it was his purpose to take two or three German families with him and move upon the land within a year or two and make it his home. There were no settlers other than Indians within five miles of the land. The whole country was a forest primeval. There were two Indian Catholic churches, each about 12 miles from the land, and Indian villages at these points. The agent Hopkins testified in respect to his representations about the German Catholic settlement as follows:

"Q. Then about the Catholic settlement, you knew that Mr. Becker was interested in having a Catholic settlement there in case he bought? A. He told me that he would be. Q. You knew at that time that the prime reason for his buying there was that there was a Catholic settlement there, and he would move into it, and there would be a church built the coming year? A. No, sir. Q. Didn't he tell you that? A. He didn't tell me that would be his main object because he had no authority to tell me that would be. Q. He had no authority? A. No, because I hadn't told him there was a Catholic settlement. I told him if he bought there, which he might do, that we could probably interest a great many other Germans there who were Catholics and would sell to them, and they could all live there together if they wanted to."

In respect to the building of the church, he testified:

"The facts are I did not tell him there would be a church built there on section 13 or any place else right in there, not naming any particular point. Q. Did you name any particular time? A. No, no particular time, but that if he bought there, he being a Catholic, that other Catholics would probably buy there, and I could see no good reason why they couldn't have a church there at any time they wanted it."

[1-3] It is important to note that the respondents' agent sought the appellant at the latter's home in Colton and induced him to make a contract for the purchase of land 1,700 miles distant, which the agent knew the appellant had not seen. The agent knew that the appellant was a German Catholic and that he wanted land in a German Catholic settlement. To the appellant the presence of a German Catholic settlement around

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes 145 P.—5

the property was a material fact, and the representation that it existed was an inducing cause for the purchase. Aside from the questions of race sentiment and religious belief, it is a well-known fact that the character of the neighbors materially affects the market value of property. The trial court said that there was a preponderance of evidence to the effect that Hopkins represented that the land was in the heart of a German Catholic settlement, but that the evidence upon the point was not clear and convincing. The controlling factor with the court apparently was that, inasmuch as the appellant had no immediate intention of going upon the land, the nationality and religious belief of the neighbors was immaterial. In this we think he was in error. Whether the appellant purchased the land on speculation or for the purpose of making it his home, the character of the neighbors would materially affect the market value of the land. A purchaser of property takes into consideration its probable future value. He knows that, in event he desires to sell it, the question of neighbors, whether good or bad, will enter into the transaction. Indeed, he knows that this element may make or defeat a sale. The appellant swore, however, that he purchased the land for a home, and that the inducing cause was the representation that the neighborhood was settled by people of his nationality and religious belief.

The law in this state is that:

"The purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations are not readily ascertainable." *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Offield*, 59 Wash. 468, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 748; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Brord v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Chapman v. Hill*, 77 Wash. 475, 137 Pac. 1041; *Lamb v. Levy*, 77 Wash. 511, 137 Pac. 1024.

Beginning as early as *Stone v. Moody*, 41 Wash. 686, 84 Pac. 617, 85 Pac. 348, 5 L. R. A. (N. S.) 799, this court has steadfastly adhered to the view that a lie is not legal tender in this state. *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879.

We think the evidence is clear and convincing that the respondents' agent represented to the appellant that the land contracted for was in the heart of a German Catholic settlement, knowing that to be a material fact in the mind of the appellant, and the inducing cause of the purchase, when in fact the whole country was an unsettled wilderness. The mere fact that the appellant did not intend to go upon the land for a year or two does not militate against his right to rescind the contract. To him the representation was material, and without the

representation he testified that he would not have considered the contract at all.

[4] We have treated the promissory representation that a church would be built the following summer upon an adjoining section as immaterial except as it throws light upon the other representations. As a general rule, the breach of a promissory representation does not warrant a rescission, but the purchaser is remitted to an action for damages.

The judgment is reversed, with directions to enter a judgment in favor of the appellant and against the respondent Clark and the respondent corporation as prayed for in the bill.

CROW, C. J., and CHADWICK, PARKER, and MORRIS, JJ., concur.

(83 Wash. 85)

### COOPER v. COOPER. (No. 12194.)

(Supreme Court of Washington. Dec. 30, 1914.)

#### 1. JUDGES (§ 56\*)—DECISION OF DISQUALIFIED JUDGE—REVIEW.

Whether the petition in a proceeding to vacate a decree for fraud states grounds for relief, being a question which can come to the Supreme Court only by appeal from the decision of a qualified trial court, cannot be considered by it, where decided by the disqualified judge after erroneous denial of change of judge for prejudice.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235-245; Dec. Dig. § 56.\*]

#### 2. JUDGES (§ 51\*) — DISQUALIFICATION FOR PREJUDICE — CHANGE — "PROCEEDING" — VACATING DIVORCE DECREE FOR FRAUD.

The proceeding to vacate a judgment for fraud under Rem. & Bal. Code, § 464 (4), which by sections 467 and 468 is by petition on notice in the nature of a summons as in an original action, is within 3 Rem. & Bal. Code, §§ 209 (1), 209 (2), for change of judge for prejudice on affidavit, in any action or "proceeding," though the judgment is a decree for divorce.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

For other definitions, see Words and Phrases, First and Second Series, Proceeding.]

#### 3. JUDGES (§ 51\*) — DISQUALIFICATION — CHANGE—SEASONABLE APPLICATION.

The application for change of judge for prejudice, being made immediately on the cause being assigned to the disqualified judge, and it being impossible to sooner know to what judge it would be assigned under the court rules, was seasonable.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding by William Cooper to vacate for fraud the decree of divorce in the suit against him by Verna L. Cooper. From an order of dismissal, petitioner appeals. Reversed and remanded, with directions.

Walter S. Fulton, Chas. F. Riddell, and Edwin C. Ewing, all of Seattle, for appellant. Paul B. Phillips, of Seattle, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ELLIS, J. This is an appeal from an order dismissing a petition to vacate a decree of divorce. The original action was commenced in the superior court of King county on April 28, 1913, by the respondent here as plaintiff against the appellant here as defendant. The issues were made up, and the cause was finally called for trial July 3, 1913. It was tried before Hon. John E. Humphries, one of the judges of the superior court of King county who entered a decree granting an absolute divorce to the plaintiff in the original action, respondent here, awarding her the care and custody of the two minor children, giving her as her sole and separate property certain real estate including the home and furniture belonging to the parties, and ordering the defendant in that action, appellant here, to pay to the plaintiff for the support of herself and the children the sum of \$35 a month. On August 7, 1913, the defendant in that action, appellant here, began a proceeding by petition under chapter 17, §§ 464 to 473, inclusive, of Rem. & Bal. Code, for the vacation of the decree of divorce on the ground of fraud practiced by the successful party in obtaining it. This proceeding was commenced by service of a copy of the petition and service of notice in the nature of a summons as required by the provisions of the above-mentioned statute and the filing of the petition. In order to avoid confusion, the parties will be designated as "appellant" and "respondent." The case was noticed for assignment for trial, noted in the usual manner, and came on regularly to be set for trial on a day certain, on February 7, 1914. During the interval since the filing of this petition, the rules of the superior court of King county were so changed as to provide for a presiding judge, whose duty it was, among other things, to assign each day all cases set for trial to the various departments of the court. The judge of department 1, Hon. A. W. Frater, was presiding judge, and on February 7, 1914, when this case was called, he set it for trial on February 26, 1914, but did not, so far as the record shows, assign it to any department or judge. On February 27, 1914, the case was called and assigned to department No. 4, Hon. John E. Humphries, judge, for trial. Immediately upon this assignment for trial, the appellant filed in department No. 1, the department of the presiding judge, his motion and affidavit for a change of judge for prejudice, under the act of 1911 (3 Rem. & Bal. Code, § 209 [1]). The motion came on for hearing on March 2, 1914, and on that date, after argument, was overruled by the presiding judge, and a formal order to that effect was entered under date of March 3, 1914. The trial upon the appellant's petition was then had in department No. 4, before Judge Humphries, who ruled that the petition stated no facts sufficient to invoke any relief and dismissed the proceeding. This appeal followed.

Three questions are discussed in the briefs:

(1) Was the proceeding by petition to vacate the decree of divorce a proceeding within the contemplation of the statute providing for a change of judge for prejudice? (2) If so, was the application for the change made in time? (3) Did the petition, in any event, state sufficient grounds to entitle the appellant to any relief?

[1] It is obvious that, if the first two questions be answered in the affirmative, it will be neither necessary nor proper for us to consider the third question. That is a matter which can only come to us by an appeal from the decision of a qualified trial court. This is not a court of first instance.

[2] The act under which this proceeding was instituted, taken as a whole, contemplates two distinct forms of procedure. Section 466 clearly contemplates an application for relief against the judgment attacked, for certain causes therein enumerated. That proceeding is by motion. No specific form of notice is mentioned. The proceeding here was not taken under that section. The pertinent provisions under which this proceeding was instituted (quoting Rem. & Bal. Code by section number), are as follows:

"Sec. 464. The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term (time) at which such judgment or order was made, to vacate or modify such judgment or order: \* \* \* (4) For fraud practiced by the successful party in obtaining the judgment or order. \* \* \*"

"Sec. 467. The proceedings to obtain the benefit of subdivision \* \* \* four \* \* \* of section 464 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action. \* \* \*"

"Sec. 468. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried."

It will be noted that this proceeding by petition is in its nature a new and independent proceeding in which the adverse party is brought into court as upon original process by service of a notice in the nature of a summons as in an original action. Clearly this proceeding by petition is intended as a statutory substitute for a bill in equity to set aside a judgment for certain causes, if brought within the year after its rendition. For every practical purpose such a proceeding is in its nature a new and independent proceeding involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action. In the case of *Roberts v. Shelton* *Southwestern R. R.*, 21 Wash. 427, 58 Pac. 576, in discussing the nature of this proceeding after

reciting the statutory provisions, this court said:

"This chapter of the statute, taken as a whole, plainly imports that the petitioner in proceedings of this character is deemed the plaintiff and the adverse party the defendant. In other words, the proceeding to vacate or modify a judgment is in the nature of an independent action."

It seems to us that a proceeding which is instituted with all the formality of an original action and conducted throughout in the same manner as an original action and in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against a judgment, is in its very nature a new proceeding, and hence falls within the purview of the act of 1911 relating to the disqualification of judges of the superior court, for prejudice. That act, so far as here material (3 Rem. Bal. Code §§ 209(1), 209(2)), is as follows:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case. \* \* \*

"Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge. \* \* \*

It is a universal rule of statutory construction that a statute will be construed so as to give effect to all of the words used therein, unless such a construction would produce a manifest absurdity. The use of the words, "any action or proceeding," in both of the above-quoted sections, indicates the clear intention on the part of the Legislature that by timely motion and affidavit a litigant shall be entitled to a change of judge for prejudice, not only in an original action, but in any proceeding in the nature of an action. Any other view would convict the Legislature, without reason, of using the word "proceeding" to no purpose. The respondent urges that this statute should be liberally construed in favor of jurisdiction as in case of the statute touching venue, citing *Carr v. Remela*, 74 Wash. 380, 133 Pac. 593. The rule there announced, though a wholesome one when soundly applied, would not warrant

the judicial repeal of the statute here in question nor the cancellation of any of its terms. Our recent decision in *State ex rel. Russell v. Superior Court of King County*, 77 Wash. 631, 138 Pac. 291, is clear authority for the view that any proceeding commenced by new and independent process, though arising out of and connected with another action, is a "proceeding" within the meaning of the act of 1911.

[3] We are also clearly of the opinion that the application for change of judge was made in time. The respondent urges that the appellant having filed his petition in the original action on the 7th of August, 1913, and having made no application for a change of judge until February 27, 1914, his application came too late. It will be noted, however, that the petition took its regular course under the rules of the superior court for King county and was not assigned to any particular department or judge for hearing until February 27, 1914. Under the court rule it is manifest that the appellant could not know to what judge the matter would be assigned until the assignment was made. His immediate application for the change was therefore timely. Any other view would be unreasonable and deprive the appellant of his clear statutory right. We conclude that the presiding judge committed error in refusing the application.

We have often held that the jurisdiction of the trial court in divorce cases is a continuing jurisdiction, especially where the interests of minor children are concerned, and that the trial court, in the exercise of its equitable powers, may from time to time, upon proper application, change or modify its decree touching alimony and support money and the custody of the children. *Koontz v. Koontz*, 25 Wash. 338, 65 Pac. 546; *Irving v. Irving*, 28 Wash. 122, 66 Pac. 123; *Kane v. Miller*, 40 Wash. 125, 82 Pac. 177; *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; *Beers v. Beers*, 74 Wash. 458, 133 Pac. 605. In such a proceeding, no new process is necessary. *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673. What we have said in this case is not intended to apply to such cases. This being a statutory proceeding, the case here is clearly distinguishable from the foregoing cases and also from the case of *State ex rel. Stevens v. Superior Court*, 144 Pac. 539.

The judgment is reversed, and the cause remanded, with directions to grant the motion for a change of judge and for further proceeding.

CROW, C. J., and FULLERTON, MAIN, and MOUNT, JJ., concur.

(83 Wash. 100)

STATE ex rel. MURPHY v. BROWN.  
(No. 12497.)

(Supreme Court of Washington. Dec. 31, 1914.)

1. ARREST (§ 71\*)—PAPERS HELD AS EVIDENCE—  
PETITION FOR RETURN—PLEADINGS—JUDG-  
MENT.

Where defendant in a prosecution for bribery obtains an order to show cause for the return of \$1,000 and certain papers, held by the prosecuting attorney for use as evidence, and a motion for judgment is made on the return to the order, it is similar to a motion for judgment on the pleadings in a civil action, and all the allegations in the return of the prosecuting attorney are taken as true.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 174, 175; Dec. Dig. § 71.\*]

2. ARREST (§ 71\*)—SEIZURE OF EVIDENCE—  
VOLUNTARY SURRENDER BEFORE ARREST—  
RECOVERY PENDING TRIAL.

Where papers and money were voluntarily surrendered to the prosecuting attorney, knowing that they were to be used as evidence upon the trial of a charge to be filed against the party surrendering them, they cannot be recovered pending the trial.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 174, 175; Dec. Dig. § 71.\*]

3. ARREST (§ 71\*)—CRIMINAL LAW (§ 393\*)—  
SEARCH OF PRISONER—USE OF DISCOVERIES  
IN EVIDENCE.

Where a person is legally arrested, the officer may search him and take from him money or goods which the officer reasonably believes to be connected with the supposed crime, and discoveries made in this search are admissible in evidence.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 174, 175; Dec. Dig. § 71; Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.\*]

Mount, J., dissenting.

Department 2. In a prosecution for bribery, on petition of defendant J. J. Brown, an order was entered directing the prosecuting attorney to return to defendant \$1,000 and certain papers, held to be used as evidence, and the State brings certiorari. Reversed.

John F. Murphy and S. H. Steele, both of Seattle, for plaintiff. Tucker & Hyland, of Seattle, for defendant.

MAIN, J. On the 29th day of October, 1914, the defendant, J. J. Brown, was charged by information with the crime of attempting to corruptly influence an agent. Thereafter and on the 5th day of November, 1914, the defendant filed in the cause a petition wherein he prayed that \$1,000 of money and certain papers then in the possession of the prosecuting attorney should be returned to him. Upon the presentation of this petition, an order to show cause was entered directing that the prosecuting attorney appear and show cause why he should not deliver the money and papers to the defendant as prayed for in the petition. On the 11th day of November, 1914, the prosecuting attorney made his return to the order to show cause. Thereupon the defendant moved for judgment as prayed for in his petition. This motion was based upon the petition of the defendant, the order to show

cause, and the return of the prosecuting attorney. The court granted the motion and entered an order directing that the \$1,000 and the papers be returned to the defendant. To review this order the cause is brought here by certiorari.

To avoid confusion, the parties will be referred to as the "defendant" and the "prosecuting attorney." The defendant in his petition alleged, in substance: That he is a citizen of the Dominion of Canada; that on the 15th day of October, 1914, he was sojourning in room 935 of the Fry Hotel in the city of Seattle, in King county, Wash.; that on this date the prosecuting attorney in and for King county entered his room and stated to the defendant that he (the prosecuting attorney) had power and authority to arrest the defendant, although at the time the prosecuting attorney was without a warrant or authority to make such arrest; that the prosecuting attorney then commanded the defendant to go with him from his room to the office of the prosecuting attorney in the Alaska building in the city of Seattle; that, upon arriving at the office of the prosecuting attorney, he demanded that the defendant deliver to him \$1,000 in money then upon the person of the defendant; that, at the time the prosecuting attorney commanded the defendant to go with him from his room in the hotel to the office of the prosecuting attorney, the latter commanded and directed the defendant to bring with him all his personal belongings, including two leather grips and their contents, which contained, among other things, papers in the handwriting of the defendant; that upon arriving at the office of the prosecuting attorney, before the issuance of a warrant, and before the filing of any complaint or information against the defendant, the prosecuting attorney demanded that the defendant surrender and deliver to him the \$1,000, together with certain papers belonging to the defendant; that before the surrender of the money and the papers to the prosecuting attorney the defendant informed the prosecuting attorney that he desired to be represented by counsel, and that he desired to telephone his attorney; that the prosecuting attorney refused to permit the defendant to communicate with his counsel and restrained him of his liberty from 12:30 o'clock p. m. until 3 o'clock p. m. of the day named; that a complaint was not filed against the defendant until after the surrender of the \$1,000 and the papers; that the money and papers are unlawfully held by the prosecuting attorney; that the prosecuting attorney proposes to use the money and the papers at the trial of the above-entitled cause.

Upon this petition, as above stated, a show cause order was issued. The prosecuting attorney in his return to the order to show cause denies that in room 935 in the Fry

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hotel on the 15th day of October, 1913, he stated to the defendant that as prosecuting officer of King county he had power and authority to arrest the defendant; admits that he requested the defendant to come with him from his room in the hotel to the prosecuting attorney's office in the Alaska building; admits that after arriving at his office he requested the defendant to deliver to him \$1,000 in money then upon the person of the defendant; admits that after arriving at his office he requested the defendant to deliver to him whatever papers were in his possession relative to the case under consideration; admits that he requested the defendant to bring his grips and papers from the Fry Hotel to the prosecuting attorney's office; admits that after arriving at his office he demanded of the defendant \$1,000 in money, and in addition thereto whatever papers and documents the defendant had in his custody and possession bearing upon the question then under investigation. The prosecuting attorney in his return denies that he refused to permit the defendant to telephone to his attorney; denies that the money and papers or any part thereof are being unlawfully or improperly held; admits that he does intend to use the money and papers as evidence on the trial of the cause filed against the defendant, and that he holds them for no other purpose than to be used as such evidence. Further answering the order to show cause, the prosecuting attorney alleges: That on the 15th day of October, 1914, in addition to being the qualified and acting prosecuting attorney in King county, Wash., he was a duly appointed, qualified, and acting deputy sheriff; that on the 14th day of October, 1914, complaint had been made to him that the defendant had violated and was continuing to violate section 426 of chapter 249 of the Session Laws of 1909; that for the purpose of ascertaining the truth of this charge the prosecuting attorney on the 15th day of October, 1914, in company with others, was in an adjoining room in the Fry Hotel to the room occupied by the defendant, and at that time there was therein one W. F. Heppenstahl, an employé of the William J. Burns International Detective Agency; that at said time and place the prosecuting attorney had in operation in said room of the defendant a dictograph; that the prosecuting attorney and others by virtue of the dictograph heard the defendant offer Heppenstahl \$1,000 as compensation, gratuity, and reward in consideration of the revelation and disclosure to the defendant by Heppenstahl of the name of the client of the William J. Burns Detective Agency who was paying the detective agency for investigation by it then proceeding in the Dominion of Canada; that thereupon the defendant instructed Heppenstahl to place the name upon a slip of paper and that he would place \$1,000 upon the bureau; that the defendant counted out

the sum of \$1,000 in money; that at this time the prosecuting attorney knocked upon the door of room 935 occupied by the defendant under the name of J. J. Harris; that the door was opened, and the prosecuting attorney then walked in and informed the defendant that he was the state's attorney and requested him to accompany him to his office; that J. J. Harris, as he was then known, requested the prosecuting attorney to identify himself, and for this purpose letters and other documents, including a deputy sheriff's commission, were exhibited; that the prosecuting attorney, then believing that the defendant had violated section 426 of chapter 249 of the Laws of 1909, and had committed a crime, and desiring to obtain further evidence for use upon the trial against the defendant, requested the defendant to accompany him to his office and bring with him his books and papers referred to in the petition; that, after arriving at the prosecuting attorney's office, the defendant then stated to the prosecuting attorney that his true name was J. J. Brown, and not J. J. Harris; that the prosecuting attorney then requested the defendant to pay him the \$1,000 and deliver to him the papers referred to in the petition, stating to the defendant at the time that he desired the money and papers for use as evidence on the trial of the charge which was to be filed against the defendant for attempted bribery; that, after making the request for the money and papers, the defendant stated in substance that, "I suppose you have a right to," and thereupon delivered them over; that the defendant voluntarily for that purpose surrendered the money and papers to the prosecuting attorney, after having inclosed the money in an envelope and sealed it; that the prosecuting attorney, after receiving the money and papers, proceeded to prepare and file a complaint against the defendant, charging him with the violation of the statute, and caused a warrant to be issued and served upon the defendant, arresting him upon the charge; that subsequently the prosecuting attorney caused to be filed in the superior court of the state of Washington for King county an information against the defendant charging him with the crime mentioned in the statute; that, while the complaint was being prepared in the prosecuting attorney's office, the defendant asked if he was under arrest, to which it was replied that he was not up to that time, but that he was then placed under arrest; that immediately thereafter the defendant asked permission to telephone to his attorney, who was immediately called, and came to the prosecuting attorney's office; that the prosecuting attorney still has the \$1,000 in money, the letters, and papers referred to in the defendant's petition, and is retaining them to be used as evidence on the trial of the information now pending in the superior court of the state of Washington.

[1, 2] As above noted, the superior court granted the motion, which was similar in its nature to that of a motion for judgment on the pleadings in a civil action. To sustain a judgment entered upon such a motion, all the allegations of the prosecuting attorney's return to the order to show cause must be taken as true. The defendant in his petition does not charge that the money and papers were surrendered by reason of force or duress, or even under protest. There is no statement in either the petition or the return to the show cause order which shows the nature or course of the conversation which took place between the defendant and the prosecuting attorney in the latter's office. According to the allegations in the return to the order to show cause, when the surrender of the money and papers was demanded by the prosecuting attorney, the defendant was informed that they were to be used as evidence upon the trial of a charge which was to be filed against him, and that the defendant voluntarily, with the statement, "I suppose you have the right to," surrendered them. If the allegations in the prosecuting attorney's return are true, the money and papers were voluntarily surrendered by the defendant to the prosecuting attorney for the purpose of being used as evidence upon the trial of a charge which was to be filed.

[3] The general rule is that, where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed crime, and discoveries made in this lawful search may be shown at the trial in evidence. In section 211, Bishop's New Criminal Procedure, the rule is stated thus:

"The arresting officer ought to consider the nature of the accusation. Then if he finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs relating to the transaction, he may take and hold them to be disposed of as the court directs. And discoveries made in this lawful search may be shown at the trial in evidence; as, marks and scars on the prisoner's person; and, if there are tracks supposed to be his, the officer may require him to put his feet into them, or to take off his boots to be compared with them, the result to appear in evidence at the trial."

In *Weeks v. United States*, 232 U. S. 383, 392, 34 Sup. Ct. 341, 58 L. Ed. 652, speaking upon the question of the right to search the person of one under legal arrest, it is said that such right has always been recognized under English and American law, and has been uniformly maintained in many cases. In the present case, if the allegations in the prosecuting attorney's return to the order to show cause are true, the defendant had not

been placed under arrest at the time he surrendered the money and papers in question, but that they were voluntarily surrendered with full knowledge of the purposes for which they were to be used. If the papers and money were voluntarily surrendered, no right of the defendant was invaded. These facts would not bring the case within the rule of the cases cited in the brief, which directed the return of the property where it has been illegally taken from the defendant. That the money and papers would be material and relevant evidence upon the trial of the defendant upon the charge of attempted bribery does not seem to be controverted.

The defendant cites and apparently relies upon, as sustaining his right to the papers, the case of *Weeks v. United States*, supra. That case, however, is distinguishable from the present. There the question involved was the "right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises." From this excerpt quoted from the opinion it appears that the letters and correspondence there involved were seized in the house of the accused, not only without a warrant, but also without his authority. In the present case the money and documents were surrendered to the prosecuting attorney voluntarily, and therefore by the authority of the defendant, after the latter had been advised of the purpose for which they were to be detained.

A number of other questions are discussed in the briefs, but the conclusion we have already reached renders a consideration of them unnecessary.

It follows that the judgment must be reversed, and it is so ordered.

CROW, C. J., and ELLIS and FULLERTON, JJ., concur.

MOUNT, J. (dissenting). It is not disputed that the money taken from the defendant is the property of the defendant. It is not clear that the money is necessary to be used as evidence upon the trial. But conceding that it may be useful and necessary as such evidence, the trial court in its discretion may control it and order it returned to the rightful owner, either before or after the trial. Such discretion will not be reviewed except for abuse. There is no abuse of discretion shown here. It seems to me therefore that the writ should be dismissed and the order affirmed.

I therefore dissent.

(83 Wash. 80)

**METZGER v. SIGALL.****SAME v. LLOYD.**

(No. 12184.)

(Supreme Court of Washington. Dec. 30, 1914.)

**1. BILLS AND NOTES (§ 520\*) — FRAUD ON MAKERS—EVIDENCE.**

The notes being typewritten on printed forms, bearing no evidence of irregularity, and the signers being men of mature business experience, their testimony, merely, that they had no recollection of the circumstances surrounding the execution, or knowledge of how their signatures were obtained, but were confident they did not sign with knowledge of their character, is not the necessary cogent and convincing proof that they were deceived.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.\*]

**2. BILLS AND NOTES (§ 122\*)—"ACCOMMODATION MAKER"—LIABILITY TO HOLDER FOR VALUE.**

That the maker of a note signed, without consideration, to lend his name to another, makes him, by provision of Negotiable Instruments Act (Laws 1899, p. 340), an accommodation maker, liable to a holder for value, though, when taking it, knowing him to be such.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255, 259; Dec. Dig. § 122.\*]

For other definitions, see Words and Phrases, First and Second Series, Accommodation Maker.]

**3. BILLS AND NOTES (§ 92\*) — "HOLDER FOR VALUE."**

Within Negotiable Instruments Act, § 26, providing that, where value has at any time been given for a note, the holder is one for value in respect to all parties who became such prior to such time, the payee accepting notes as evidences of an actual loan of her money made by W., and in a subsequent settlement with W. crediting them in her account with him at their face value, is such a holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. § 92.\*]

For other definitions, see Words and Phrases, First and Second Series, Holder for Value.]

**4. BILLS AND NOTES (§ 443\*)—ASSIGNMENT FOR COLLECTION—HOLDER FOR VALUE.**

Though an assignment of a note is for purpose of collection only, the assignee takes unimpaired the rights of the assignor as a holder for value against the accommodation makers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.\*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Two actions, both by F. D. Metzger, one against A. Sigall, the other against Wesley Lloyd. Judgment for plaintiff, and defendants appeal. Affirmed.

Jas. J. Anderson, of Tacoma, for appellants. Hayden & Langhorne, of Tacoma, for respondent.

FULLERTON, J. Some time prior to the year 1909, one Mary E. Theisz, a resident of

the state of Oregon, advanced to H. D. Wilcox, a resident of this state, certain moneys to be loaned on real estate security. A loan of \$1,500 was made to a person by the name of Huston, who subsequently paid to Wilcox \$500 on the principal of the loan and \$120 interest. Wilcox then informed Mrs. Theisz that he had an opportunity to make another real estate loan for \$1,000, and would make the loan for her if she would forward him money enough to make up the difference between the money he had on hand and the amount required to complete the loan. She forwarded him the difference, whereupon he informed her that the opportunity to make the anticipated loan was gone, but that he could loan the money, if she wished him to do so, upon unsecured notes. She assented to the latter proposition, and shortly thereafter he forwarded her two notes, the one for \$600 dated November 25, 1909, due one year from date, signed by A. Sigall as maker; and the other for \$400, dated January 28, 1910, due on November 25, 1910, signed by Wesley Lloyd, as maker. On each of the notes Wilcox placed his own indorsement, guaranteeing the payment of the note at maturity. Later on Mr. Wilcox reported a collection on account of the first note of \$24 and on the second note of \$16, which sums were credited on the respective notes by Mrs. Theisz under the dates of June 2, 1910, and July 28, 1910. The notes were not paid at maturity, and later on Mrs. Theisz assigned them to the respondent in this action for collection.

On August 22, 1913, the assignee of the notes began separate actions in the superior court of Pierce county against the makers of the notes, and Wilcox as guarantor, to enforce collection of the same. Wilcox made default in each of the actions, although personally served with summons. Sigall answered the complaint, denying the execution of the note, and alleging affirmatively that, if the note was in fact signed by him, his signature was procured by Wilcox, while acting as the agent of the appellant, by misrepresentation and deception, and without knowledge on his part of the nature and character of the instrument, and without any consideration passing to him for signing the same. Lloyd's answer was of similar purport. Replies were filed denying the affirmative matter set forth in the answers, after which the actions were consolidated for trial, and were heard by the court sitting without a jury. Judgment went in favor of the plaintiff, and the makers of the notes appeal.

[1] At the trial the genuineness of the signatures to the notes was admitted by the defendants. Each testified, however, that he had no recollection of the circumstances surrounding the execution of the notes, or knowledge of the manner by which his signature thereto was obtained, but each was confident that he did not sign it with knowledge of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

character of the instrument, and that he had received no consideration for its execution.

But notwithstanding the somewhat positive character of this testimony, we are inclined to the opinion that the court's judgment was right on the facts. There was no attempt to prove the allegations in the answers to the effect that the signatures were procured by misrepresentation or deception, further than misrepresentation and deception can be inferred from the testimony recited. The instruments are in themselves strong witnesses against the appellant's claim that they signed them without knowledge of their character. The notes were filled out from standard printed forms in common use generally throughout the state. The printed matter is in black ink upon a green colored background, making them unusually conspicuous. There were three parallel lines for signatures on each of the notes, all upon the green background. The signatures are upon the upper line, the one closest to the printed matter. One of the notes was filled out with a typewriter and the other with a pen, and neither bear any evidences of irregularities such as are usually found in instruments instigated in fraud. In the light of these circumstances, it would seem almost unbelievable that the most unsophisticated person could have been deceived. And yet the makers of these notes were men of ripe and mature experience. One of them was a lawyer having a practice extending over a period of years, and the other a successful business man in the prime of life. The chance that either of them could be induced to sign any form of obligation without knowledge of its character is exceedingly remote, and that they could be induced to sign a promissory note of the character of the notes shown in evidence without such knowledge is more so. At any rate, the proofs that they were deceived must be cogent and convincing, and there is no such proof in the record before us.

[2-4] The testimony of the appellants to the effect that they received no consideration for the execution of the notes is not, if taken as true, fatal to the validity of the notes. They could be accommodation makers. By section 29 of the Negotiable Instruments Act, an "accommodation maker" is one who has signed the instrument as maker, drawee, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; and every such person is declared by the same section to be liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation maker. By section 28, it is provided that, where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time. We think therefore,

notwithstanding the appellants' contentions to the contrary, the evidence shows that Mrs. Theisz was a holder of these notes for value. She accepted them as evidences of an actual loan of her money made by Wilcox, and in her subsequent settlement with Wilcox credited them in her account with him at their face value. Being a holder for value, she could, of course, transfer her interests unimpaired to the respondent, even though the transfer be only for the purposes of collection. Neg. Inst. Act, §§ 83, 87, 88; State ex rel. Adjustment Co. v. Superior Court, 67 Wash. 355, 121 Pac. 847.

It would seem, moreover, that the testimony of the appellants with reference to the execution of the notes was hardly consistent. If it be true that they have no recollection of the circumstances surrounding the execution of the notes, it would hardly seem possible that they would remember that they signed them without an understanding of their character. On the part of Sigall, furthermore, there is evidence that he had at one time a different view of his liability from that expressed at the trial. It was shown that at a time prior to the commencement of the action he wrote to an attorney holding the note for collection as follows:

"This will inform you that I saw my note at the bank in Tacoma yesterday and I admit that it is my signature, but I could not find Mr. Wilcox to talk the matter over. As it is so long back and I have to talk it over with Mr. Wilcox, as I thought he had paid the note long ago. However, you can assure Mrs. Theisz my note will be paid, if she will give me time, as I have quite a few documents like hers to pay."

Surely, he did not have at the time this was written the idea that he had signed the note without an understanding of its character.

It is probable, and we think the evidence fairly justifies the conclusion, that the notes were signed by the appellants as makers, as an accommodation to Wilcox, without their receiving value therefor, and with the expectation and belief that Wilcox would pay them when due. But their liability to the payee is none the less because of these facts, and the court rightly held them as bound.

The judgment will stand affirmed.

CROW, C. J., and MOUNT, MAIN, and ELLIS, JJ., concur.

(83 Wash. 51)

# HAYNES v. CITY OF SEATTLE

(No. 12132.)

(Supreme Court of Washington. Dec. 28, 1914.)

## 1. MUNICIPAL CORPORATIONS (§ 812\*)—TORTS — NOTICE OF CLAIM — STATUTORY REQUIREMENT.

Laws 1909, p. 181, requiring claims for damages sounding in tort against a city of the first class to be presented in compliance with the charter provisions of such city, prescribing the contents of the notice, and making com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pliance with the provisions thereof mandatory, is reasonable and valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.\*]

**2. STATUTES (§ 138\*) — REFERENCE TO CITY CHARTER—VALIDITY.**

That act is not contrary to Const. art. 2, § 37, providing that no act shall be revised or amended by mere reference to its title, in that it attempts to embody the provisions of the charter by reference only.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.\*]

**3. MUNICIPAL CORPORATIONS (§ 812\*) — DEFECTIVE STREETS — NOTICE OF CLAIM—EXCUSE.**

Seattle Charter, art. 4, § 29, requires claims against the city for damages to be filed within 30 days after the claim accrued and to be sworn to by the claimant. Compliance with that provision was made mandatory by Laws 1909, p. 181. A woman who was injured as a result of a defect in the street was delirious during the entire period of 30 days after the accident. Her father swore to a claim for her injuries and filed it with the city, and after she became conscious she swore to and filed another claim. *Held*, that the charter provision was not unreasonable when applied to such facts and, not having been complied with, there could be no recovery.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Dora Haynes against the City of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. B. Cole and John Wesley Dolby, both of Seattle, for appellant. Jas. E. Bradford and Howard M. Findley, both of Seattle, for respondent.

GOSE, J. This is an action for damages for personal injuries to the plaintiff caused by the alleged negligence of the defendant. Immediately after the jury was impaneled and sworn to try the case, the defendant demurred to the complaint *ore tenus*, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff electing to stand upon her complaint and declining to plead further, a judgment was entered dismissing the action. This appeal followed.

It is alleged in the complaint that Crockett street, in the respondent city, was open for travel and traveled by the public; that there was a deep chasm in the street, and there were no lights or barriers to indicate its presence or to warn the public of the danger; that on the 30th day of March, 1913, about midnight, an automobile in which the appellant was riding as a passenger was driven into the chasm; and that she sustained serious and permanent injuries. The facts constituting the negligence of the city and the injuries which the appellant sustained are

set forth in the complaint with great detail. The complaint shows that the respondent city was culpably negligent.

It is alleged that the appellant was delirious and mentally and physically incapacitated to transact business from the time she met her injury until the 4th day of June following; that on April 26th her father verified and presented a claim for damages in her behalf to the city; and that on the 5th day of June, and as soon as she was mentally and physically able to do so, she duly verified her claim for damages and filed it with the city. Both claims were rejected. The claim presented by the appellant's father is sufficient upon its face in every respect, except that it was verified by him alone. The appellant's claim complies with the conditions of the city charter except as to the time of its presentation. Section 29, art. 4, of the charter of the respondent city provides that all claims for damages against the city must be presented to the city council and filed with the clerk "within thirty days after the time when such claim for damages accrued, \* \* \* and be sworn to by the claimant." Laws 1909, p. 181, provides that claims for damages sounding in tort against a city of the first class shall be presented to and filed with the city clerk or other proper officer of such city "in compliance with valid charter provisions of such city"; that the claim must contain, "in addition to the valid requirements of such city charter relating thereto," a statement of certain facts; and that "the provisions of this act shall be in addition to such charter provisions, and such claims for damages, in all other respects, shall conform to and comply with such charter provisions." Section 3 declares that compliance with the provisions of the act is mandatory upon all claimants presenting and filing claims for damages.

[1] The first contention is that the act is unconstitutional. We held to the contrary in *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, 34 L. R. A. (N. S.) 1166, Ann. Cas. 1913A, 344, and *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

[2] It is argued that the statute is violative of section 37, art. 2, of the Constitution, which provides: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length"—in that it attempts to embody the charter provisions of cities of the first class by reference only. This contention cannot be upheld. *Carstens v. De Sellem*, 144 Pac. 934; *Connor v. Seattle*, 76 Wash. 37, 135 Pac. 617; *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113.

[3] It is contended that, under the facts pleaded, the provisions of the city charter requiring a claim to be filed within 30 days is unreasonable, under the rule an-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nounced in *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938; *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743; *Wurst v. Seattle*, 51 Wash. 654, 100 Pac. 143; and *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144.

We pointed out in *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58, that all these cases were decided before the enactment of the Laws of 1909. In *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365, in construing Laws 1909, p. 627, which provide that all claims for damages against any city or town of the second, third, or fourth class must be presented to the city or town council and filed with the city or town clerk "within thirty days" after the time when such claim for damages accrued, we held that there could be no recovery where the claim was not presented within 30 days, even if the physical and mental incapacity of the plaintiff continued through the entire period fixed by the statute for its presentation. The same principle was enunciated in *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501, and *Hall v. Spokane*, 79 Wash. 303, 140 Pac. 348. In the last two cases, however, plaintiff's incapacity did not run through the entire period of time. In *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, it was said that charter and statutory provisions in respect to the reasonableness of the requirements touching the presentation of the claims for torts against a municipality are upon the same plane. It would seem illogical to hold that the 30-day limitation period is conclusive upon the courts in the smaller cities and towns and that the same limitation is unreasonable in cities of the first class because depending upon a charter provision. We have held that, the Legislature having spoken in respect to smaller cities and towns, the question of reasonableness or unreasonableness is foreclosed. The statute establishes the public policy of the state, and the same dignity must be accorded to charter provisions with a like period of limitation in cities of the first class. In *Ransom v. South Bend*, after referring to the rule announced in *Born v. Spokane* and *Ehrhardt v. Seattle*, we said:

"The appellant invites us to apply this rule of interpretation to the statute. This we cannot do without trenching upon powers vested exclusively in a co-ordinate branch of the state government. When the lawmaking branch of the government has spoken, the courts may interpret, but cannot add to or take from, the clear and unambiguous meaning of the law. To do so would be legislation rather than interpretation. The policy, expediency, and wisdom of a statute are legislative and not judicial questions."

The claim presented by the father did not comply with the provisions of the city charter, because it was not "sworn to by the claimant." In *Cole v. Seattle* we held that this clause was reasonable, and that it was

an "earnest of that good faith which the city has a right to demand."

The judgment is affirmed.

CROW, C. J., and CHADWICK, MORRIS, and PARKER, JJ., concur.

(83 Wash. 41)

DONOFRIO et al. v. WATSON BROS.

(No. 12045.)

(Supreme Court of Washington. Dec. 28, 1914.)

1. TROVER AND CONVERSION (§ 16\*)—RIGHT TO SUE—OWNERSHIP OF PROPERTY.

Where the owner of horses agreed with the sureties on an appeal bond, in an action to foreclose a mortgage against the horses, that if the sureties had to pay the judgment, they should become the owners of the horses, and after the sureties had paid the judgment the owners authorized them to take possession of the horses as owners, the sureties were owners, and not mere mortgagees, and were entitled to sue for the conversion of the horses.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 119-147; Dec. Dig. § 16.\*]

2. TROVER AND CONVERSION (§ 9\*)—DETENTION OF PROPERTY—DEMAND AND REFUSAL.

The refusal by one with whom horses had been left for keeping by a former owner, to deliver them on demand of the new owner for the stated reason that the horses had been sold, is a conversion of the horses.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 58-83; Dec. Dig. § 9.\*]

3. ANIMALS (§ 26\*)—AGISTMENT—LIEN.

One with whom horses had been left pending litigation, under an agreement that he would keep them for their use without cost and redeliver them at any time upon demand, is not entitled to an agister's lien.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 54-69; Dec. Dig. § 26.\*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by James Donofrio and others against Watson Bros. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Walter B. Allen, of Seattle, for appellants. Morris B. Sachs, of Seattle, for respondents.

MOUNT, J. This action was brought by the plaintiffs against the defendants to recover damages upon an alleged conversion of a team of horses. The case was tried to the court without a jury. A judgment was entered in favor of the plaintiffs for the sum of \$500, being the value of the horses at the time of the conversion, as found by the court. The defendants have appealed.

The facts as shown by the evidence and as found by the court are briefly these: In June, 1911, Nardone Bros. were the owners of the horses in question. At that time the owners executed a chattel mortgage upon these horses, together with other property, in favor of one D'Ambrosio, as security for the payment of \$1,200. This mortgage was

duly recorded. Thereafter, Nardone Bros. being in default, the mortgagee brought an action in the superior court for King county to foreclose the mortgage. A receiver was appointed and took possession of the property in that action. After the appointment of a receiver, the owners substituted a bond for the property and took possession of the horses and other property. The plaintiffs in this action became sureties upon that bond. A judgment was entered in that case foreclosing the mortgage. An appeal was prosecuted from that judgment to this court. When the appeal was prosecuted, these plaintiffs became sureties upon the appeal and supersedeas bond. At the time this bond was given, it was agreed between the owner of the horses and the sureties upon the appeal and supersedeas bond that, in case the judgment was affirmed and the sureties were required to pay the judgment, they should become the owners of the horses and other property. The judgment was thereafter affirmed in 72 Wash. 172, 129 Pac. 1092, and these respondents paid the amount of the judgment, which was \$1,316.25. Thereupon Nardone Bros. authorized the respondents to take possession of the horses as owners. Pending that litigation the Nardones took this team of horses to the appellants in this case, Watson Bros., and authorized them to keep the horses at their stable. The testimony on behalf of the respondents in this action shows that, at the time the appellants, Watson Bros., took the horses into their possession, they agreed to use the horses for their keep, and that if the appellants in the foreclosure suit should be successful, in that event they should retain the horses as security for a debt owing by the Nardones to Watson Bros; but in case the Nardones upon the appeal should not be successful, they should deliver the horses to the Nardones, or in satisfaction of the foreclosure judgment. After the respondents in this case had paid the judgment in foreclosure, they demanded the team of horses from the appellants, Watson Bros., who refused to deliver the horses. The evidence tends to show that when the Nardones demanded the horses on behalf of the respondents, the appellants made the statement that the horses had been sold and could not be delivered. This testimony was disputed by Watson Bros., who claimed an agister's lien upon the horses for the sum of \$230.

[1] The appellants make several assignments of error, to the effect: First, that under the pleadings the respondents were not authorized to maintain the action, for the reason that they are in effect mortgagees, and are therefore not entitled to the possession. It is no doubt true that if the respondents were mere mortgagees, they would not be entitled to possession until after foreclosure and purchase by them. But the facts in this case show that they are owners, and entitled to possession of the prop-

erty because the right of possession was authorized by the owners, the Nardones, after the payment of the judgment in foreclosure. It is plain, therefore, that there is no merit in the point that they are merely mortgagees.

It is next argued that the evidence of value of the horses in October, 1912, was not proper. As we read the evidence we think it shows conclusively that the value of the horses was fixed at the time of the conversion by the defendants. It is true there was some evidence which showed that, at the time the Nardones purchased the horses, they were of a certain value. At the time they placed the horses with the defendants they were of a certain stated value. And there is also evidence that they were of that value at the time the demand was made for the return of the horses. This is clearly within the rule as stated in *Armour v. Seixas*, 141 Pac. 308.

[2] It is next argued that no conversion was proven. If the testimony of the plaintiffs and of the Nardones and other witnesses is of any weight, this assignment is entirely without force, because it was shown that, when the Nardones demanded the return of the horses, this demand was refused, for the reason that the horses had been sold. This was clearly a conversion.

It is next argued that the respondents have never had possession, nor the right of possession, and therefore cannot maintain the action. Of course these were questions of fact. And, according to the statement we have heretofore made, it is clear that the respondents, at the time they made the demand, were entitled to possession of the property, because the ownership and right of possession had been transferred to them by the former owners. If there was no agister's lien upon the property, the owners were entitled to possession.

[3] It is next argued by the appellants that they are entitled to an agister's lien prior to the mortgage. Assuming that, under the statute, the appellants might have acquired an agister's lien prior to the mortgage, which we do not decide, it is plain from the evidence in the case that the defendants are entitled to no agister's lien, by reason of a special contract relating to the horses. As we have stated above, it was shown, we think, by a preponderance of the evidence, that at the time the possession of the horses was obtained by the appellants, they agreed that they would keep the horses for their use without cost, and redeliver the horses at any time upon demand. They, therefore, had no valid claim for feeding the horses, and had no agister's lien.

We find no error in the record. The judgment is affirmed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

(83 Wash. 80)

**MAXWELL et al. v. DIMOND et al.**  
(No. 12021.)

(Supreme Court of Washington. Dec. 28, 1914.)

**1. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—PLEADING.**

Under Rem. & Bal. Code, § 307, requiring the Supreme Court to disregard errors not affecting the substantial rights of the complaining party, the failure of a complainant in the usual form for the conversion of wheat to plead a title acquired by estoppel and ratification and the ultimate facts relied upon to constitute ratification and estoppel, though the action was tried on that theory on the merits, was not reversible error, in the absence of any claim of surprise or of any application for a continuance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

**2. LANDLORD AND TENANT (§ 252\*) — LANDLORD'S TITLE TO CROP—SALE BY TENANT—QUESTION FOR JURY.**

In an action for damages for the alleged conversion of a crop of wheat which plaintiff had bought from defendant's lessee, tried by plaintiff upon the theory of defendant's ratification and estoppel, evidence held to make such ratification and estoppel questions for the jury and to warrant a verdict for plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1002, 1022-1026, 1029; Dec. Dig. § 252.\*]

**3. ESTOPPEL (§ 52\*) — "ESTOPPEL IN PAIS" — GROUNDS.**

The basis of all "estoppel in pais" is that there is one innocent party and one negligent party, and that, when the innocent party has been induced to surrender a valuable right or to change his position to his prejudice, relying on the acts or representations of the negligent or wrongdoing party, the latter cannot assert the falsity of the act to his own advantage and to the prejudice of the former.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.\*]

For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

**4. LANDLORD AND TENANT (§ 254\*) — TENANT'S SALE OF CROP—ESTOPPEL—SILENCE.**

Where defendants, in an action for conversion of a crop of wheat, knew that plaintiff had bought their tenant's interest in the crop without their consent, as required by the lease, and was intending to cultivate it, it was their duty to speak and assert their claim, and their silence would warrant an inference of ratification or estoppel, as, when silence becomes a fraud, it will operate as an estoppel.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 986, 1034-1044; Dec. Dig. § 254.\*]

**5. LANDLORD AND TENANT (§ 252\*)—TENANT'S SALE OF CROP—ESTOPPEL—EVIDENCE.**

In an action for damages for the conversion of a crop of wheat which plaintiff had purchased from a tenant of defendant, without defendant's consent, as required by the lease, evidence that plaintiff had thereafter harrowed the wheat, and so informed defendant, held admissible to show his good faith and defendant's knowledge.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1002, 1022-1026, 1029; Dec. Dig. § 252.\*]

Department 1. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by F. W. Maxwell and others against A. R. Dimond and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Daniel T. Cross, of Ephrata, and W. E. Southard, of Wilson Creek, for appellants. Boyd P. Doty and C. G. Jeffers, both of Ephrata, for respondents.

GOSE, J. The facts are these: On the 28th day of February, 1911, the appellants entered into a written contract with one Meyers by which they leased to him certain land in Grant county. A portion of the land was leased for one year, and the remainder for two years. The lease was duly filed for record in March following. The lease provides that the lessee shall not assign the lease or sublet the leased premises without the written consent of the lessors. It further provides that the title to all the products of the land shall be and remain in the lessors until they have received their rent—viz., one-third of the crop at the machine in sacks furnished by them—and that the lessee shall not dispose of any part of the crop to the prejudice of the lessors. The lessee fallowed 150 acres of the leased land which fell within the two-year clause in 1911, sowed it to wheat in September, and on the 24th day of February, 1912, caused his interest in the growing crop to be sold at public sale to the respondents, who paid at the rate of \$2.95 per acre. The attempted sale was made without the knowledge or consent of the lessors.

The appeal presents three principal questions: (1) A question of pleading and practice; (2) the effect of the sale of a growing crop under the provisions of the lease; and (3) the sufficiency of the evidence to support the verdict.

[1] At the close of the respondents' opening statement to the jury the appellants' counsel moved the court to require the respondents to elect whether they would predicate title upon the purchase at public sale or whether they would rely upon title by estoppel. This motion was denied. The case was tried by the respondents upon the theory of ratification and estoppel. It is now contended that the complaint is insufficient, in that it does not plead a title acquired in either of these ways. It is alleged in the complaint that respondents were the owners, and entitled to immediate possession and control, of the wheat, describing the land upon which it grew, the quantity threshed, and value per bushel, and alleging further that at a time stated the appellants, then being in possession of the wheat, converted and disposed of it to their own use and benefit, to respondents' damage in the sum stated. In short, the complaint is in the usual form of a complaint in an action of conversion. It is earnestly contended that the respondents should

have alleged the ultimate facts upon which they relied as constituting ratification and estoppel. This question we need not decide. The appellants were apprised of the course the case would take at the commencement of the trial. They made no claim of surprise or unreadiness to meet the issues, and after the respondents had rested their case they offered evidence tending to rebut the theory of ratification and estoppel. The statute requires us to disregard all errors which do not affect the substantial rights of the complaining party. Rem. & Bal. Code, § 307; *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673. Inasmuch as there was no claim of surprise and no application for a continuance, and the case was tried upon the merits, the error, if any, is without prejudice.

It is next contended that, under the terms of the lease, the lessee had no authority to sell the crop without the consent of the appellants, which, it is conceded, was not given at the time of the sale. Inasmuch as the court so instructed the jury, this question need not be further considered.

[2] The chief contention upon the merits is that the evidence does not support the verdict. It is admitted that, shortly after the pretended sale of the growing crop, Meyers left the leased premises and did not return. The appellants claim that they re-entered and repossessed themselves of the premises on the 23d day of April, 1912. They harvested the crop in July following. Upon the other side of the case the respondent Maxwell testified that the respondents bought Meyers' interest in the growing crop upon 150 acres of the leased premises, on the 24th day of February, 1912; that they paid \$2.95 per acre, and gave a note for the purchase price; that they harrowed all of the wheat the latter part of March; that the respondents again went upon the land about the 20th day of April; that the respondent Maxwell then told the appellants that they "had bought Charley Meyers' wheat, and they said, 'Yes;'" that "we talked about the crop, and I asked them [the appellants] if they thought that winter wheat up there would make anything, and that Abe [meaning the appellant A. R. Dimond] says, 'Well, it didn't look like there is anything there; pretty thin.' So we went on up and left there [meaning the barn where the conversation occurred] and went up on the wheat and put out the poisoned wheat." He further testified that he told the appellants that he had harrowed the wheat. He further testified that the respondents were next there about May 20th; that they harrowed between 50 and 60 acres of the wheat at that time; that the harrows pulled out some of the wheat, so that they concluded that it would be best to discontinue the harrowing at that time; that he then had a conversation with Hugh Dimond in which he (Maxwell) told Dimond that he believed he would quit har-

rowing, because the harrows were pulling out the wheat; and that Dimond said, "'If it has got a good mulch on it, it does not need any harrowing any more.'" So I told him it had, and so we quit harrowing and went home." The witness said that the respondents were next there about the 23d day of May; that they put squirrel poison over the entire tract and pulled some weeds and fixed a little fence; that the appellants then called them down to their house, which was near by, and for the first time asserted ownership to all the wheat, and said to them that they intended to hold it. This information was given by the appellants, the respondents say, immediately after a heavy rain. The wheat was then heading, and, according to the testimony of one of the respondents, its condition was such that it was "bound to be a bumper crop." At this stage of the case the court, upon the motion of the appellants' counsel, struck the evidence as to the harrowing done in March. After this testimony was stricken, the appellants' counsel, upon the cross-examination of a witness, developed the fact that the respondents had harrowed the entire crop during the month of March. This fact was shown later by the testimony of one of the respondents, which was not stricken. One of the respondents testified that at the time they harrowed the 50 or 60 acres of wheat, and at the time they put out the squirrel poison, the appellants were upon the adjoining tract, and that, "I could not say that they saw me; no. They could not very well help it." At the time this harrowing was done the appellants were living in a house about a quarter of a mile distant from the land upon which the respondents were working, and were working upon adjoining land. The topography of the country was such that we think the jury was warranted in drawing the inference that the appellants did see the respondents at the time they were harrowing, putting out poison, pulling weeds, and fixing the fence.

At the close of the respondents' testimony the appellants' challenge to the sufficiency of the evidence was denied. The appellant A. R. Dimond testified that the auctioneer told him the latter part of March that he had sold the wheat; that he told him, "I guessed he was mistaken; \* \* \* that there was a lease; that the lease said that it could not be assigned nor disposed of without written consent." The appellants in the main denied the conversations to which the respondents testified.

Upon these facts we think the court was warranted in denying the appellants' challenge and submitting the case to the jury. *Rowe v. James*, 71 Wash. 267, 128 Pac. 539; *Carruthers v. Whitney*, 56 Wash. 327, 105 Pac. 831, 134 Am. St. Rep. 1114.

[3] In *Rowe v. James* we said:

"The basis of all estoppel in pais is that there is one innocent party and one negligent or

wrongdoing party, and the doctrine means that, when the innocent party has been induced to surrender a valuable right or to change his position to his prejudice, relying upon the acts or representations of the negligent or wrongdoing party, then the latter will not be heard to assert the falsity of his acts or representations to the prejudice of the former."

In *Carruthers v. Whitney*, Judge Dunbar, speaking for the court, said:

"The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage."

[4, 5] The testimony as to the harrowing done in March was admissible upon two grounds: (a) To show that the respondents were acting in good faith; and (b) because of the testimony of the respondent Maxwell to the effect that he told the appellants in the first conversation he had with them that he had harrowed the wheat. The jury evidently believed this testimony. When silence becomes a fraud, it will operate as an estoppel. When the appellants found that the respondents had bought Meyers' interest in the crop and had harrowed the wheat, and were intending to again harrow it and do whatever was necessary to contribute to its proper growth and maturity, it became their bounden duty to speak, and their silence in the face of the facts stated was of such a character as to warrant the jury in inferring ratification or estoppel. It was upon this theory that the court submitted the case to the jury. He instructed the jury that, under the terms of the lease, Meyers had no right to sell his interest in the growing crop; that if he did sell it and left the leased land without any intention of returning, the attempted sale and departure from the land operated as an abandonment of the lease; that the respondents acquired no rights from the mere fact of purchase, "unless the attempted sale was subsequently ratified or acquiesced in by the Dimonds, or unless their subsequent words, acts, or conduct were such as to legally estop them from now claiming that they did not ratify or acquiesce in such attempted sale." The court further instructed the jury that, if they should find from the evidence that the respondents bought Meyers' interest in the growing crop and paid a valuable consideration therefor, and thereafter claimed it as their own, and these facts came to the knowledge of the appellants, and they by their conversation or conduct led the respondents to believe that they consented to the sale or ratified it, and that, relying on such belief, the respondents thereafter expended work and labor upon the crop, their verdict should be for the respondents for the sum which the parties had stipulated was the net value of the wheat.

No error is assigned to the instructions, and we think the evidence warranted the verdict.

The judgment is affirmed.

CROW, C. J., and MORRIS, PARKER, and CHADWICK, JJ., concur.

(83 Wash. 59)

BENJAMIN v. ERNST et al. (No. 12175.) (Supreme Court of Washington. Dec. 28, 1914.)

1. APPEAL AND ERROR (§ 411\*)—NOTICE OF APPEAL—SUFFICIENCY.

Under the express provision of Rem. & Bal. Code, § 1719, notice of appeal given in open court at the time of the rendition of the judgment was sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2100; Dec. Dig. § 411.\*]

2. PLEADING (§ 406\*)—DEMURRER—WAIVER.

Under Rem. & Bal. Code, § 263, providing that the objection that a complaint does not state facts sufficient to constitute a cause of action can be taken at any time either in the superior or the Supreme Court, such objection is not waived by the filing of an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1388; Dec. Dig. § 406.\*]

3. APPEAL AND ERROR (§ 544\*)—BILL OF EXCEPTIONS—NECESSITY.

On an appeal based upon the insufficiency of the complaint, a statement of facts is not required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

4. QUIETING TITLE (§ 19\*)—ADVERSE CLAIMS—PROCEEDINGS—STATUTE.

Under Rem. & Bal. Code, § 199, providing that one having in his possession property or money, or being indebted, may commence an action to determine adverse claims, a defendant who suffered judgment, and who, after the judgment had been assigned, suffered a default judgment as garnishee in a suit by a third party against his judgment creditor, had no action to determine to which party the judgment was payable; his remedy, in case judgment was obtained by fraud practiced against him or on account of unavoidable casualty or misfortune preventing him from defending the action, being a proceeding under Rem. & Bal. Code, §§ 464, 467, to set the judgment aside upon those grounds.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 48; Dec. Dig. § 19.\*]

5. JUDGMENT (§ 848\*)—ASSIGNMENT—VALIDITY.

An assignment of a judgment made without notice to the judgment debtor was void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1556-1559; Dec. Dig. § 848.\*]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by E. W. Benjamin against A. B. Ernst. Judgment for plaintiff, and after action by the International Mercantile & Bond Company against Benjamin, in which Ernst was a garnishee and suffered a default judgment, he brought application to determine the party to whom to pay the judgment. From a decree restraining the International

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mercantile & Bond Company from collecting the judgment, it appeals. Reversed, and proceeding dismissed.

Cassius E. Gates, of Seattle, for appellant.  
Vernon W. Buck, of Seattle, for respondent.

**MOUNT, J.** This appeal is from a judgment of the superior court for King county restraining and enjoining the appellant from collecting a judgment obtained against A. B. Ernst, where Mr. Ernst was a garnishee defendant.

The respondent moves to dismiss the appeal, for the reason that no notice of appeal was served or given as required by law; and also for the reason that no statement of facts or bill of exceptions has been filed. It appears from the transcript that when the appellant appeared in the action it filed a demurrer to the complaint of the respondent, Ernst, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled and an exception reserved.

[1] The appellant thereupon filed an answer. A trial was had and a judgment rendered as above stated. At the time of the rendition of the judgment, notice of appeal was given in open court. This was clearly sufficient under the statute. Rem. & Bal. Code, § 1719.

[2] It is contended by the respondent that, because the appellant did not stand upon his demurrer, but permitted a judgment to be entered, that he has waived the error. But this is not the rule. The statute provides at section 263 that the objection that the complaint does not state facts sufficient to constitute a cause of action may be taken at any time, either in the superior or the Supreme Court. This court has many times held that this objection is not waived by filing an answer. *West v. Martin*, 47 Wash. 417, 92 Pac. 334.

[3] It is true no statement of facts or bill of exceptions has been filed. The appellant is basing the appeal upon the insufficiency of the complaint, and a statement of facts in such case is not required. The motion is denied.

[4, 5] The facts in the case are not disputed. As shown by the complaint and admitted by all parties, they are substantially as follows: In December, 1909, E. W. Benjamin brought an action against A. B. Ernst and others in the superior court for King county. After appearance of the defendants in that action a judgment was entered against the defendant Ernst and in favor of Benjamin, the plaintiff therein. This judgment was entered on November 12, 1910. Prior to the entry of that judgment Mr. Benjamin assigned the judgment to his attorney, H. O. Durk. This assignment was filed in the clerk's office on August 1, 1910. In De-

cember, 1910, the International Mercantile & Bond Company brought an action against E. W. Benjamin and others, and served notice of garnishment upon A. B. Ernst. Ernst made default, and a judgment was entered against him as garnishee defendant on August 28, 1911. The clerk in entering this judgment indexed the judgment against B. Ernst, instead of against A. B. Ernst. In November, 1913, more than two years after the entry of the latter judgment Ernst filed an application in the action of E. W. Benjamin v. A. B. Ernst alleging the judgment of Benjamin against him on November 12, 1910; that on December 17, 1910, notice of garnishment was served upon him in an action of the International Mercantile & Bond Company v. Benjamin et al.; that, as he was owing said Benjamin, he made no appearance in that action; that thereafter, in September, 1913, wishing to pay the judgment, he examined the records and found that the judgment in the case of Benjamin v. Ernst had been assigned to Howard O. Durk, and he thereupon paid Durk a part of that judgment; that later he was informed that the International Mercantile & Bond Company claimed a judgment against him as garnishee defendant in the case of International Mercantile & Bond Company v. Benjamin. He also alleged that the only money he ever owed to the said Benjamin was the indebtedness represented by said judgment. He prayed that both Benjamin and the International Mercantile & Bond Company be brought into court, and that the court should determine to which one of the parties he should pay the judgment entered against him. The court upon these facts entered a decree restraining the International Mercantile & Bond Company from collecting the judgment obtained against A. B. Ernst in the case of International Mercantile & Bond Company v. Benjamin and A. B. Ernst, garnishee defendant.

The only question presented upon this appeal is the sufficiency of the facts alleged and admitted as stated above. The respondent in this case, no doubt, intended his proceeding to come within the provisions of section 199, Rem. & Bal. Code, which provides:

"Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action."

But we are satisfied that the facts in this case do not bring it within the provisions of that section, because in this case the appellant, the International Mercantile & Bond Company, had a judgment against the defendant A. B. Ernst, which was obtained by de-

fault against said Ernst. The fact is conceded that Mr. Ernst was indebted to Mr. Benjamin upon the judgment which Benjamin obtained against him. He alleges in his complaint that he was not informed of the assignment of the Benjamin judgment to Mr. Durk. Mr. Ernst either had notice of the assignment or he did not have notice of it. If he had notice of the assignment, he was required to appear and answer the writ of garnishment. When he permitted a judgment by default to be entered against him upon that writ, he was clearly bound to pay that judgment. If he had no notice of the assignment of the judgment in the case of Benjamin v. Ernst, that assignment, of course, was void, and the payment of the judgment in garnishment satisfies both judgments to the extent of that payment. If the judgment of the International Mercantile & Bond Company was obtained by fraud practiced against Mr. Ernst, or if, on account of unavoidable casualty or misfortune which prevented him from defending the action, the judgment was taken against him, his remedy was to proceed within a year to set aside the judgment upon these grounds. Rem. & Bal. Code, §§ 464, 467. This he did not do, but waited more than two years, and then set up the fact that there was but one debt owing to these different parties, and asked the court to determine to which of these parties the debt should be paid. As a matter of course, if the former judgment—namely, the judgment of Benjamin v. Ernst—is not paid by the payment of the judgment of the International Mercantile & Bond Company v. Ernst, then by his own neglect he has permitted two judgments to go against him. In short, by his own failure and neglect, instead of owing one debt, he apparently owes two. His remedy, if he has a remedy, depends upon the validity of the assignment from Benjamin to Durk. If that assignment was made in good faith, and Mr. Ernst had notice of it, or was required to take notice of it, it was his duty to answer the writ of garnishment in the other case. His neglect to answer that writ of garnishment cannot be made the basis of a collateral attack of the judgment in the garnishment case. This is clearly, we think, a collateral attack upon that judgment. That judgment can only be held void for reasons which affirmatively appear upon the record. *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757.

There is nothing in the pleadings in this case to show that that judgment is void. In fact, it is conceded that it was obtained by reason of the neglect of the respondent, Mr. Ernst, to defend against it. We are satisfied, therefore, that the complaint is not amendable, and that the trial court should have sustained the appellant's demurrer and dismissed the action.

The judgment is reversed, and the proceeding is dismissed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 40)

YARBROUGH v. PELLISSIER et al.

(No. 12087.)

(Supreme Court of Washington. Dec. 28, 1914.)

APPEAL AND ERROR (§ 265\*)—REVIEW—OBJECTION BELOW—NECESSITY.

Where the trial court adopted the findings of the jury and also made complete findings of its own and no exceptions were taken, the Supreme Court cannot review the findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.\*]

Department 1. Appeal from Superior Court, Columbia County.

Action by Edith Stribley Yarbrough against Louis Pellissier and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. O. Colburn, of Spokane, for appellant. Will H. Fouts, of Dayton, for respondents.

MORRIS, J. This action was originally brought to establish a one-half interest in appellant in certain farm lands upon the grounds of want of capacity, fraud, and undue influence in the obtaining of title from appellant's parents. Upon the trial, it appearing to the satisfaction of appellant that the title to the land was in innocent purchasers, the relief against the land was abandoned, and a money judgment demanded against the original grantee. The case was submitted to an advisory jury, to whom interrogatories were submitted involving each ground for relief as alleged by appellant. These interrogatories were in each instance answered adversely to appellant's contention; the jury finding in effect that there was no want of capacity, no deception, fraud, nor undue influence, but that the sales were fairly made and for an adequate consideration. The trial court adopted the findings of the jury, incorporated them into its own findings, and entered judgment for respondent. No exceptions were taken to these findings by appellant, and respondents contend that this court cannot review the evidence, but must accept the findings and inquire only as to whether or not the findings support the judgment. This contention is well taken under numerous cases. *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868.

Appellant urges that this was a jury trial, and that no exception need be taken in such cases to any finding of fact. No finding made by the jury is here for review. The jury was used as advisory only, and, though accepting the findings of the jury as correctly determining the facts, the court has not rested its decision upon such findings, but made full and complete findings of its own after, as it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—6

recites, "having duly considered the evidence and the interrogatories submitted to the jury and the answer returned by them into court and the written brief of respective counsel for plaintiff and defendant." Upon such findings so arrived at, the judgment appealed from was entered, and not upon the answers made by the jury to the interrogatories submitted. They therefore differ in no degree from findings of fact made by the lower court in any other case, and if they would be reviewed due exception must be taken to them. The findings support the judgment. We might add that, upon the merits, we are convinced the judgment is correct.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(83 Wash. 45)

**OCHS v. GREEN et al. (No. 12057.)**

(Supreme Court of Washington. Dec. 28, 1914.)

**SALES (§ 359\*)—ACTIONS BY SELLER—EVIDENCE—SUFFICIENCY.**

Evidence held to show that defendants who purchased plaintiff's bank stock at \$75 per share and agreed to pay him any sum realized over that did not realize on the shares any amount in excess of the sum paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056-1059; Dec. Dig. § 359.\*]

Department 1. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Action by Harry Ochs against John F. Green and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Merritt, Oswald & Merritt, of Spokane, for appellant. Burcham & Blair, of Spokane, for respondents.

MORRIS, J. On June 10, 1910, appellant was the owner of 67 shares of the capital stock of the Harrington State Bank, the remainder of the stock being owned and controlled by respondents, except 40 shares owned by J. L. Ball. Respondents at this time owned another bank at Harrington known as the Bank of Harrington, and three other banks in that vicinity. The Harrington State Bank was a corporation organized under the banking laws of this state, while the bank of Harrington was conducted as a partnership business of respondents. The Union Securities Company is a corporation whose business is to own and control various banks in Eastern Washington. Prior to June 10th, the respondents and the Union Securities Company had entered into arrangements, providing for the sale of the banks controlled by respondents to the Union Securities Company, which arrangements included the transfer to the Securities Company of the stock of the Harrington State Bank. In order to carry out this arrangement, it was necessary for respondents to obtain stock owned by ap-

pellant, and negotiations for its purchase were entered into, culminating in the following agreement:

"Harrington, Wash., June 10th, 1910.

"We, the undersigned, having purchased from Harry Ochs sixty-seven shares of the capital stock of the Harrington State Bank, and having paid for the same, in cash, the sum of seventy-five dollars per share, further agree to use our best efforts in settling up the affairs of the above named bank, and whatever is received over and above seventy-five dollars per share, we agree to distribute so that each share of stock will receive its proportion and agree to pay the said Harry Ochs or his representatives the amount represented by the sixty-seven shares that we have purchased.

John F. Green.

"M. F. Adams.

"A. G. Mitchum."

The action is brought upon the theory that, in transferring the stock of the Harrington State Bank to the Securities Company, the respondents received \$106.05 per share, and it is sought to recover the difference between this sum and \$75 per share.

In order to ascertain the real value of the stock of the Harrington State Bank as represented in its sale to the Securities Company, it is necessary to ascertain the terms under which it was purchased. It appears that the purchase was represented by two contracts, the first of which is dated June 8, and the second June 13, 1910. The first contract in so far as it relates to the Harrington banks, provided that the stock of the Harrington State Bank was to be sold at \$100 per share "made sound," but such sale was not to include its real estate or other assets except such as the Securities Company might elect to take, the furniture and fixtures of the Harrington State Bank to be taken at actual value, the real estate of the Bank of Harrington, its furniture and fixtures, to be taken at figures named in the agreement, and a bonus of \$5,000 to be paid as the agreed value of its good will. By the second agreement the respondents bound themselves as guarantors of the book assets of the Harrington State Bank, and agreed that, on or before January 1, 1911, they would repurchase at par with accrued interest such of the securities and assets of the Harrington State Bank shown on its books on June 13, 1910, including accounts, bills receivable and renewals, as the Securities Company should designate, and that they would "make good" in 10 days after notice any inaccuracy discovered by the Securities Company in the books of the Harrington State Bank. Under this agreement the Securities Company transferred to respondent all the real estate of the Harrington State Bank at the price at which it had been valued in making up the book value of the stock, and required the respondents to take back at book value certain of the assets and securities of the bank that were not considered of full book value. It is evident, and the lower court has so found, that at the time of the sale

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the assets of the Harrington State Bank were depreciated, and that there was a wide margin between the actual and book value, and because of this a like margin between the actual and book value of the capital stock. The book value of the stock was readily ascertainable, but its real value depended upon the extent of the depreciation of the bank's assets and the amount and value thereof to be transferred to respondents under the sales contract. The book value of the real estate and fixtures transferred to respondents by the Securities Company under the sales contract was \$15,000, and the book value of the other assets and securities taken over prior to January 1, 1911, aggregated \$8,883.55. There is no showing that in accepting these items at these figures the respondents were actuated by other than the best business motives and an attempt to carry out their contract with the Securities Company and the appellant. The lower court has also found, and the facts sustain such finding, that the respondents had made diligent efforts to realize upon all assets of the Harrington State Bank retransferred to them by the Securities Company, and in so far as they were able have converted the same into cash for the best price obtainable, and in all things have administered these assets in good faith and for the joint benefit of all parties in interest. The facts, we think, demonstrate that the appellant knew the situation as between the Securities Company and respondents, that as to the assets of the Harrington State Bank; that at least on one occasion, in the fall of 1911, the respondents exhibited to him a statement of the then condition of the assets of the bank, and that he was then agreeable to what had been done. The appellant has received \$75 per share for his stock. Respondents have received less, and it is doubtful from the references made to the present value of these retransferred securities if respondents ever will receive an amount equal to \$75 per share for the stock owned by them.

We find no error in the findings of the lower court, and its judgment is affirmed.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

(83 Wash. 108)

**TENNENT v. CITY OF SEATTLE.**  
(No. 12536.)

(Supreme Court of Washington. Dec. 31, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 106\*)—ORDINANCES—ADOPTION—INTRODUCTION BY TITLE.**

Seattle Charter, art. 4, § 11, providing that no ordinance shall be passed on its final reading at the meeting at which it is introduced, was violated where merely the title of an ordinance for the submission of a proposed issuance of bonds to the voters was introduced at one meet-

ing and referred to a committee, and at a subsequent meeting the committee reported a completed ordinance, and it was then adopted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 221-223, 225-228; Dec. Dig. § 106.\*]

**2. MUNICIPAL CORPORATIONS (§ 106\*)—ORDINANCES—ADOPTION—INTRODUCTION BY TITLE.**

Under that provision the council can amend an ordinance previously introduced as to matters of form and matters which do not alter the effect of the ordinance, and adopt the ordinance as amended at the same meeting; but it cannot substitute an entirely different ordinance for the one previously introduced.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 221-223, 225-228; Dec. Dig. § 106.\*]

**3. MUNICIPAL CORPORATIONS (§ 106\*)—ORDINANCES—TIME FOR PASSAGE—VIOLATION OF CHARTER.**

The fact that an ordinance was introduced and passed at the same meeting of the council, contrary to Seattle Charter, art. 4, § 11, renders it invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 221-223, 225-228; Dec. Dig. § 106.\*]

**4. MUNICIPAL CORPORATIONS (§ 108\*)—ORDINANCES—INVALID ORDINANCE—RATIFICATION BY POPULAR VOTE.**

Under Seattle Charter, art. 4, § 26, providing that proposals to create a debt which exceeds a certain amount must be submitted to a vote of the electors by an ordinance providing for such submission, and section 27, providing that no debt shall be created except by ordinance, the ratification by popular vote of an ordinance for the issuance of bonds, which was invalid because adopted at the same meeting at which it was introduced, contrary to section 11, did not validate the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 108.\*]

**5. MUNICIPAL CORPORATIONS (§ 122\*)—ORDINANCES—VALIDITY—CONCLUSIVENESS.**

The rule that an enrolled law is in itself conclusive evidence that it was regularly enacted does not apply to an ordinance adopted by a city council, which is a subordinate body of delegated powers, and not a department of the government co-ordinate with the courts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-289; Dec. Dig. § 122.\*]

**6. MUNICIPAL CORPORATIONS (§ 278\*)—PROPERTY—CHARTER PROVISIONS.**

Under Seattle Charter, art. 4, § 18, subd. 7, providing that, whenever the city of Seattle or the port of Seattle shall have adopted a comprehensive plan of harbor improvement, the control of the streets and the title to city lands lying within the proposed improvement shall vest in the port of Seattle, the port has no interest in the streets or waterways until after the improvement plan has been adopted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 734-738, 744; Dec. Dig. § 278.\*]

**7. MUNICIPAL CORPORATIONS (§ 911\*)—BONDS—CONDITIONS PRECEDENT.**

The city of Seattle may issue bonds for bridge construction before it has acquired the land necessary for the bridge, in the absence of anything which will prevent it from ultimately acquiring the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1899, 1901; Dec. Dig. § 911.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, King County.

Suit for injunction by T. M. Tennent against the City of Seattle. Judgment for defendant, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Preston & Thorgrimson, of Seattle, for appellant. Jas. E. Bradford, Howard A. Hanson, and Geo. A. Meagher, all of Seattle, for respondent.

**FULLERTON, J.** The appellant, a citizen and taxpayer of the city of Seattle, brought this action against the city to restrain it from issuing and delivering certain negotiable bonds, purporting to have been authorized by ordinance of the city of Seattle, and by the vote of the electors of the city at a special election at which the question of the issuance of such bonds was submitted. The court below, after a trial of the issues made by the pleadings, adjudged the action unfounded, and ordered its dismissal. This appeal followed.

The principal question suggested by the appellant is the sufficiency of the proceedings of the city council leading up to the enactment of the ordinance. It is contended that such proceedings were so far irregular, and so far a departure from the requirements of the city charter relative to the enactment of ordinances of this character, as to render the ordinance void. To make clear the precise contention the facts must be briefly recited. On May 8, 1914, at an adjourned session of the city council, a member thereof introduced an instrument entitled "Ordinance No. —," reading as follows:

"An ordinance submitting to the qualified voters of the city of Seattle at a special election to be held in said city on the — day of —, 1914, the proposition of the issuance and sale by said city of its general bonds in the sum of one million one hundred twenty-five thousand (\$1,125,000) dollars, for the purpose of providing money for the construction of a system of bridges for the city of Seattle across the government canal, Lake Union and Salmon Bay waterway.

The council journal shows that the instrument was then "read first time and referred to finance and streets and sewers committees." On May 18, 1914, at a regular meeting of the city council, the committees before named reported back the instrument to the council with the recommendation "that the same be amended to conform to Exhibit A attached hereto, and when so amended the same do pass." The report of the committees was adopted, and the exhibit referred to the judiciary committee for engrossment. Subsequently, at the same meeting, the judiciary committee reported the same as properly engrossed, whereupon it was "read second and third times and passed," as Ordinance No. 33133. The exhibit was in form a completed ordinance. It contained a title which in outline substantially conformed to the instrument originally introduced. The

date of the proposed election, however, was specified in the title, the amount of the bonds proposed to be issued was \$1,323,000, instead of \$1,125,000, as first named, and seemingly a body of water, other than any of those mentioned in the original instrument, was named across which the proposed system of bridges should be constructed. Other new matter added were some nine "whereases," containing various recitals, immediately following the title. These in turn were followed by an enacting clause, beneath which were some nine separate sections containing the provisions of the ordinance proper.

These provisions we need not recite in detail. Generally, they provide the terms and conditions upon which the bonds proposed to be issued may be sold, the interest rate thereon, the time in which they shall run, and the means by which the accruing interest and the principal, when due, shall be paid. They also provide the time and manner in which the proposition of incurring the indebtedness shall be submitted to the electors. Four separate and distinct propositions were provided for submission for the construction of four separate bridges at as many designated places; each proposition specifying the amount of bonds to be issued for the construction of the particular bridge, all to be so arranged on the ballot as to enable an elector to vote for or against each one separately. The propositions were submitted to the electors in accordance with the terms of the ordinance. Two of them only, however, met with the approval of the electors. These authorized the issuance of bonds in the sum of \$829,000. It is this issuance that the appellant seeks to enjoin.

The provisions of the city charter thought to be violated in the passage of the ordinance are found in sections 10, 11, 26, and 27 of article 4 of that instrument. These in substance provide that every legislative act of the city shall be by ordinance; that no ordinance, other than an ordinance providing for appropriations for salaries or current expenses, shall be passed on its final reading at the meeting in which it is introduced; that when loans shall be created exceeding 1½ per centum of the taxable property of the city, and bonds therefor issued, the proposition for creating the indebtedness shall be first submitted to the electors of the city, and the mode and manner of submitting such proposition to the electors shall be prescribed by ordinance; and that no debt or obligation of any kind against the city shall be created by the city council, except by ordinance specifying the amount and object of such expenditure.

[1] It is our opinion that the appellant's contention to the effect that the charter provisions of the city were violated in the enactment of the ordinance is well founded. The introduction of the instrument at the adjourned meeting of May 18, 1914, was in no sense the introduction of an ordinance.

The instrument contained none of the elements of an ordinance. It was without body or parts, and was a mere sham and subterfuge. If it had been enacted in the form in which it was introduced, and afterwards submitted to the vote of the electors in that form, no one would contend it sufficient to authorize an issuance of bonds for any purpose; and, this being so, its introduction into the city council cannot be said to be the introduction of an ordinance therein. Doubtless the instrument was intended as the title to an ordinance subsequently to be written under it. It did not prove even sufficient for that purpose; but, if it had, it would not have been the introduction of an ordinance, as clearly the introduction of a title to an ordinance is not the introduction of an ordinance.

[2] We do not, of course, intend to deny the power of the council to amend an ordinance properly introduced, and pass it at the meeting at which it is amended. This can be done where the amendment is in matter of form, or in the addition of new matter which does not alter the effect and scope of the ordinance; but it does not permit the substitution of an entirely new and different ordinance for the one originally introduced, nor does it sanction the gross attempt at subterfuge practiced in this instance. The requirement that an ordinance shall not be passed at the meeting at which it is introduced has a purpose. It is intended to prevent hasty and ill-advised legislation. The record before us bears evidence of the salutary design of the rule. It shows that this ordinance could have with advantage received more careful consideration. Two of the propositions submitted met with the entire disapproval of the electors, and the others succeeded with no very considerable margin.

[3] It is clear to our minds, therefore, that the city council in the passage of the ordinance in question did not comply with the requirements of the city charter. That this is fatal to an ordinance deriving its sanction wholly from the act of the city council was held by this court in *Savage v. Tacoma*, 61 Wash. 1, 112 Pac. 78. There the city had passed an ordinance providing for an extension of its water system, and had entered into a contract for the performance of the work. Subsequently, but before the work had been entered upon, the city repudiated the contract and repealed the ordinance. An action was brought for a breach of the contract, and the city pleaded in defense the invalidity of the ordinance, founding its claim upon the fact that the ordinance had been introduced and passed at the same meeting of the city council, contrary to the provisions of the city charter. The lower court sustained the plea, and this court affirmed its judgment. In the course of the opinion the court said:

"We believe it to be the law that, where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the lawmaking body of the municipality to pass ordinances except in the manner required by the charter. *Dillon, Municipal Corporations* (4th Ed.) § 809; *Abbott, Municipal Corporations*, § 525; *Smith, Modern Law of Municipal Corporations*, § 506; *State (Gleason) v. Bergen*, 33 N. J. Law, 72; *Avis v. Vineland*, 55 N. J. Law, 285, 28 Atl. 149; *Danville v. Shelton*, 76 Va. 325. The ordinance being void, no authority was thereby vested in the commissioner of public works to enter into the contract, and the contract, or its breach, could not be made the basis of an action at law. \* \* \*

[4] The foregoing case concludes the question against the validity of the ordinance, unless the question is taken without the rule by the fact that the incurrence of the indebtedness was subsequently approved by the electors of the city. But we cannot think this alone sufficient. An invalid ordinance is no more effective to authorize a bond issue than is the want of an ordinance, and, as we have shown, the city charter expressly provides (article 4, § 27) that no debt or obligation of any kind against the city shall be created by the city council, except by ordinance specifying the amount and object of such expenditure, and where the amount exceeds  $1\frac{1}{2}$  per centum of the taxable property of the city, and bonds therefor are to be issued, not until the proposition for creating such indebtedness shall have been submitted to the electors of the city by an ordinance providing the mode and manner of such submission (Id. § 26). Since, therefore, the fundamental law makes an ordinance an essential to the institution of the proceedings, it is difficult to see how a valid issuance of bonds may be made without a compliance with such essential. But it is said that this court has announced a different rule in the case of *State ex rel. Atkinson v. Ross*, 46 Wash. 28, 89 Pac. 158. We cannot so read the case. True, the court did say in the course of the opinion that the passing of the ordinance was not the most essential step in a proceeding leading up to an issuance of bond; that the most essential step was the notice to the taxpayers, and the exercise of their right to vote upon the proposition. But an examination of the case will show that the court did not find that the vote was had and the bonds then in question issued upon an ordinance introduced and passed at the same meeting of the council. This is made clear by the concluding sentence of the opinion, wherein it is stated that "no provision of the law was violated," and by the following extract taken from an earlier part thereof:

"The findings of fact show that there were many meetings of the city council during the month of January, 1906, and while it is true that those meetings were pursuant to adjournment, it does not necessarily follow that they were adjourned or continued meetings in the sense that they all constituted one and the same

meeting. It is conceded that the council had a right to call special meetings, and it is settled by authority that any business may be transacted at a special meeting, and that the purpose of the meeting need not be stated, unless the law requires it, and it is conceded that the charter of Seattle does not require it. What the council did, in effect, when it adjourned on motion, was to call a special meeting. This intention was simply expressed by the motion for adjournment to a certain time. It is true that ordinarily this might technically constitute an adjourned meeting, but the facts show that such was not the intention in this case, for the council met regularly every Monday evening, and instead of commencing the business where it left off at the previous meeting, the manner of transacting the business showed that it was intended to be treated as a regular meeting, the business being transacted as follows: (1) Roll call. (2) Approval of the journal. (3) Special order. (4) Communications and reports from city officers. (5) Petitions and remonstrances. (6) Reports of standing committees. (7) Introduction of resolutions. (8) Introduction of bills by committees. (9) Introduction of bills by members. (10) First reading of bills. (11) Second reading of bills. (12) Third reading of bills. (13) Unfinished business. (14) Other business. The court also found that it was generally known throughout the city of Seattle and by its citizens that the city council of the city of Seattle regularly held its meetings on Monday evening of each week, and that the council had only adjourned *sine die* on the last meeting of each two years' term. So that the council evidently did not give much consideration to the parliamentary language used in the motion to adjourn, and, if bound to the technical meaning of such language, could be held to have had only one regular meeting in two years, a construction which, of course, the council did not place upon its proceedings, and which a court would not be authorized to place upon them."

[6] The respondent further claims that it is beyond the power of the court to inquire into the manner in which the ordinance was introduced and passed, but that the enrolled bill is in itself conclusive evidence of the fact that it has been regularly enacted by the city council. This is the rule this court has applied to acts of the Legislature, and is undoubtedly the rule usually applied by courts to such enactments. But we cannot think it applicable to ordinances or laws of inferior bodies. The Legislature is, in virtue of the Constitution, "the judge of the election, returns, and qualifications of its own members," and has power to prescribe "the rules of its own proceedings." It has, therefore, the sole right to judge of the regularity and sufficiency of its own proceedings. Moreover, it is one of the three co-ordinate branches of the government, and, aside from the public inconvenience and positive harm that would result from another rule, it is but showing that respect and proper deference which each department owes to each of the others, to presume that a law regular upon its face, has been enacted with due reference to the requirements of the Constitution regulating the manner of its passage. But the city council stands on another plane. It exercises a delegated authority, and can legislate only upon certain subjects and in a prescribed manner. The rules governing

its proceedings are prescribed by another body, and it is proper that an authority be exercised to see that it performs its functions in the prescribed manner. The fact that the city of Seattle is a city of the first class and may frame its own charter does not affect the principle. A charter so framed must be "consistent with and subject to the Constitution and laws of this state," and no independent or extraordinary exemption can be claimed because it has this privilege. Furthermore, this court has from the earliest time exercised the right of inquiry into the regularity of the passage of city ordinances. We did so inquire in *Vancouver v. Wintler*, 8 Wash. 378, 36 Pac. 278, 289, in *Raborn v. Mish*, 12 Wash. 167, 40 Pac. 731, in *State ex rel. Atkinson v. Ross*, 46 Wash. 28, 89 Pac. 158, in *State ex rel. Northern Pac. R. Co. v. Hughes*, 53 Wash. 651, 102 Pac. 758, and in *Savage v. Tacoma*, 61 Wash. 1, 112 Pac. 78. And in the last-cited case, as we have heretofore shown, we held an ordinance invalid for the precise reason urged against the validity of the ordinance before us.

[6] The foregoing considerations require a reversal of the judgment entered by the court below, and we could properly end the discussion here. But the appellant has suggested other questions going to the power of the city to issue bonds for this particular purpose, and it may simplify such further proceedings the city may desire to take if we notice them at this time. The city charter, in article 4, § 18, subd. 7, provides:

"\* \* \* That whenever the city of Seattle or the port of Seattle shall have presented to the qualified electors of either municipality for adoption or rejection, and there shall have been adopted by vote of the electors voting thereon, a comprehensive plan or scheme of harbor or port improvement, that the control of such streets and the title to any lands belonging to the city which shall fall within the limits of such proposed improvement shall pass to or be vested in the port of Seattle within thirty (30) days after said port of Seattle is prepared to proceed with the improvement so authorized and shall have so certified to the city council."

It is contended by the appellant that under this provision of the charter the port of Seattle has some right in, or authority over, the waterway across which the bridges intended to be constructed out of the funds derived from the bond issue in question would extend, and that the city could not properly proceed with the construction of such bridges without an agreement with or consent from the port of Seattle. But we agree with the city that this provision of the charter is not self-executing, that the port of Seattle's interest will only accrue when the "comprehensive plan or scheme" therein mentioned has been adopted, and that until then the city's power over its streets is absolute.

[7] It seems, also, that the city has not acquired up to the present time, from the individual owners, all of the land necessary to be used in the construction of one of the

contemplated bridges, and it is thought that bonds cannot properly be issued for the construction of the particular bridge until such land is obtained by the city. But since it is not shown that there is any impediment in the way of the city which will prevent it from ultimately obtaining the property, we cannot think the obtaining of the property anything more than a mere detail of the general scheme, which will be accomplished in due season. The obtaining of real property on which to place a bridge is not made by the city charter a condition precedent to issuing bonds to procure funds for the construction of the bridge, and we are clearly of the opinion that the validity of bonds so issued cannot be affected by the fact that the necessary property has not been acquired in advance.

For the reason first suggested, the judgment of the trial court is reversed, and the cause remanded, with instructions to enter a judgment in accordance with the prayer of the complaint.

CROW, C. J., and ELLIS, MOUNT, and MAIN, JJ., concur.

(83 Wash. 73)

CROUCH v. ROSS, Commissioner of Public Lands. (No. 12155.)

(Supreme Court of Washington. Dec. 29, 1914.)

1. CERTIORARI (§ 60\*)—PROCEEDINGS—DISMISSAL.

Under Rem. & Bal. Code, § 1010, which enlarged the common-law writ of certiorari and provides that where the merits are involved, the question whether there was competent proof of all necessary facts shall be determined by the reviewing court, and that the determination of the inferior tribunal shall be set aside if there is such preponderance of proof against it that a verdict of a jury under similar circumstances would be vacated, the reviewing court cannot try proceedings de novo; hence an appeal from a decision of the commissioner of public lands must be dismissed, and the decision vacated, where the evidence heard before the commissioner was not incorporated in the record, though the reviewing court had jurisdiction of the parties and subject-matter.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 153-167; Dec. Dig. § 60.\*]

2. CERTIORARI (§ 68\*)—PROCEEDINGS—STATUTORY WRIT.

As Rem. & Bal. Code, § 1010, provides that on certiorari to review the determination of an inferior tribunal, the court shall review the evidence, a decision by the commissioner of public lands cannot be sustained on the theory that it was equivalent to a verdict where the evidence upon which it was based was not incorporated in the record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. § 68.\*]

3. PUBLIC LANDS (§ 109\*)—COMMISSIONER—FINDING OF.

On certiorari a finding by the commissioner of public lands, based on evidence, cannot be upheld because he was not confined to evidence taken at the hearing, but might make his find-

ing irrespective thereof, and on independent investigation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.\*]

4. EVIDENCE (§ 48\*)—JUDICIAL NOTICE.

The Supreme Court will take judicial notice of the practice of the officers of the public land service as commissioners to administer oaths in all hearings pertaining to state lands.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 70; Dec. Dig. § 48.\*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Certiorari by J. G. Crouch, as administrator of the estate of Edwin R. Knight, deceased, to review a determination of E. W. Ross, Commissioner of Public Lands. From a judgment dismissing the proceeding, plaintiff appeals. Modified and affirmed.

T. M. Vance, of Olympia, Fenley Bryan, of Seattle, and Gordon & Easterday, of Tacoma, for appellant. W. V. Tanner and R. E. Campbell, both of Olympia, and F. H. Murray, of Tacoma, for respondent.

CHADWICK, J. Without reference to antecedent facts, it is enough to say that on January 21, 1911, an application was made by an interested party to cancel a deed theretofore made by the commissioner of public lands on July 14, 1906, whereby the state conveyed to one Henry G. Knight 96.43 acres of tide land for oyster cultivation, said deed being executed under chapter 16, tit. 51, Rem. & Bal. Code. The application was based on several grounds, among others, that the land had not been used by the grantee or by his grantees for the cultivation of oysters, that the land was not suitable for cultivation of oysters, and that it had been used for other purposes. A hearing was had before the commissioner of public lands, in which the parties immediately concerned participated. The commissioner of public lands made findings inter alia that the land had not been devoted to the cultivation of oysters and was not suitable for the cultivation of oysters, and accordingly canceled the deed. Whereupon the relator sued out a writ of certiorari in the superior court of Thurston county, to which the commissioner made return. At the time of the hearing the commissioner took the testimony of several witnesses, and, it appearing by the writ that the testimony of the witnesses had not been transcribed and made a part of the record, the court directed a further return. It appears that the commissioner was unable to certify the testimony because the stenographer who had taken it was not thereafter able to read or transcribe her notes. On motion of the respondent's counsel the proceeding was dismissed; the court holding that it had no jurisdiction in the premises.

[1] We cannot concur in the reasons given for dismissing the proceeding. The court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had unquestioned jurisdiction over the subject-matter and of the parties, but we nevertheless believe that, no question of law appearing which was determinative of the case, it was not only within the discretion of the court, but was in a sense incumbent upon him, to dismiss the proceedings.

The writ of certiorari as it has been defined by our statute is an enlargement of the common-law writ, and in a proper case puts upon the court the duty of inquiring into the facts upon which the judgment rests. It is provided in Rem. & Bal. Code, § 1010, that questions involving the merits to be determined by the reviewing court are:

"1. \* \* \* 2. \* \* \* 3. \* \* \* 4. Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination. 5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, would be set aside by the court, as against the weight of evidence."

In *State ex rel. S. & I. E. R. Co. v. State Board, etc.*, 75 Wash. 90, 134 Pac. 695, we held:

"It seems clear that our statutory certiorari and review proceeding contemplates a review in the courts of the proceeding had in an inferior tribunal only upon the record of such proceeding made therein, and that such review is in no sense a trial de novo of the questions determined by the inferior tribunal sought to be reviewed."

It is apparent, therefore, that the court could not review the action of the commissioner because the facts upon which his judgment was based had not been brought to the court, and, it appearing that it was impossible to do this, the court could make no other order than one of dismissal, for it is made the duty of the superior judge, in a certiorari proceeding depending upon facts alone, to review evidence and ascertain for himself the preponderance of the proof. He cannot do this without the record.

[2] It is contended, however, by counsel for the commissioner that the findings of the commissioner must be taken, in the absence of the evidence, as the verdict of a jury, and that they are sufficient to sustain his judgment. The answer to this is that the statute has provided for a review of the facts by the court in cases of this kind. It is a special proceeding defined by statute, and is not controlled by the rules of common law or by the Code of Civil Procedure.

[3] It is suggested by the Attorney General that the commissioner is not confined in his determination to any evidence taken at a hearing; that he can make his finding irrespective of the evidence or by an independent investigation, and that, having once decided that a deed shall be canceled his order must be held to be conclusive. This question is not before us on the record as we find it.

The commissioner did take testimony, and has made his finding upon the evidence.

[4] Nor will we inquire into the power of the commissioner to subpoena witnesses or to take the evidence of witnesses, or to administer oaths in a proceeding instituted to cancel a deed executed under chapter 16, tit. 51. However, in passing, it seems not out of place to say that the record shows a formal hearing before the commissioner, and that he did administer oaths to the witnesses. It has been the practice of that department, of which we now take judicial notice (18 Cyc. 903) to administer oaths in all hearings pertaining to state lands. We deem it not out of place to say that we have no doubt of the power of the commissioner to receive the sworn testimony of the witnesses, and if he has not that power by the implications arising out of the act, the oath might be administered by any other officer authorized to administer oaths in any judicial inquiry or proceeding under the laws of the state of Washington.

The court ordered that the proceeding be dismissed without prejudice. No appeal was taken from this part of the order. To make the judgment of the lower court effectual, it will be necessary to remand the case, with directions to the trial judge to make an order vacating the decision of the commissioner without prejudice to another hearing before the commissioner.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(163 Cal. 750)

# In re PIERCY'S ESTATE.

PIERCY v. PIERCY.

(S. F. 6819.)

(Supreme Court of California. Dec. 11, 1914.)

## 1. JUDGMENT (§§ 670, 739\*)—RES JUDICATA—IDENTITY OF ISSUES AND PARTIES.

It is no bar to assertion against an administrator, on his accounting of claim for use and occupation of land of the estate, that, pending the administration, the heir, asserting title as such, successfully sued to set aside her deed of the land to him; the right of possession until distribution being, under Code Civ. Proc. § 1581, in the administrator, so that there could not have been recovery in the action for use and occupation, and, in addition, the action having been against him individually.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1181, 1185, 1267; Dec. Dig. §§ 670, 739.\*]

## 2. APPEAL AND ERROR (§ 484\*)—STAY BOND—EFFECT ON SCOPE OF JUDGMENT.

The condition of a stay bond to pay the value of the use and occupation pending appeal from a judgment setting aside a deed does not extend the scope, as an adjudication, of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2286; Dec. Dig. § 484.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 499\*)—COMMISSIONS—SUCCESSIVE ADMINISTRATORS.

An administrator who, pending administration, is removed and succeeded by another is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not entitled to the statutory commissions, but, at most, to such part thereof as may be apportioned to him on a consideration of the rights of both.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2130; Dec. Dig. § 499.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 501\*)—COMMISSIONS—APPLICATION FOR ALLOWANCE—TIME.**

Code Civ. Proc. § 1616, as amended in 1911, providing for an application, after a year from granting of letters of administration, for an allowance on commissions, is applicable to successive administrations.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. § 501.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 501\*)—CLAIM FOR COMMISSIONS—DISALLOWANCE.**

An administrator, who had been succeeded by another, having merely claimed, by a charge in his account, what he was not entitled to, the entire statutory commission, and not asked for an allowance on the commission ultimately payable for the administration as a whole, there was no error in merely refusing to allow the charge.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. § 501.\*]

**6. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.**

Finding on accounting by administrator of the rental value of premises chargeable to him for use and occupation, being on conflicting evidence, with testimony supporting the conclusion, is not reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.\*]

**7. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—ADMISSION AND REJECTION OF EVIDENCE.**

Sustaining of objection to a question may not be complained of; the substance of the testimony sought thereby being brought out by later questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200–4204, 4206; Dec. Dig. § 1058.\*]

**8. EVIDENCE (§ 113\*)—RENTAL VALUE.**

One testifying in his own behalf as to rental value may not testify to what he had "undertaken to do with reference to renting this out."

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259–296; Dec. Dig. § 113.\*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of David J. Piercy, deceased. From an order settling his account as administrator, Edward M. Piercy appeals, Andrew J. Piercy being the respondent. Affirmed.

See, also, 145 Pac. 91.

Rogers & Bloomingdale, of San Jose, for appellant. John E. Alexander, of San Francisco, and Beasley & Fry and Fry & Jenkins, all of San Jose, for respondent.

SLOSS, J. This is an appeal by Edward M. Piercy from an order settling his account as administrator of the estate of David J. Piercy, deceased.

David J. Piercy died intestate in February, 1901, leaving as his sole heir his mother, Mary Piercy. Edward M. Piercy was appointed administrator of his estate on April 10, 1901. In March, 1901, Mary Piercy executed a deed conveying to Edward the real estate which had descended to her as heir of David. In September, 1903, Mary commenced an action against Edward to set aside this deed on the ground of fraud and undue influence. Judgment was rendered against her, but thereafter, on motion of Andrew J. Piercy, as administrator of her estate (she having died, and said Andrew having been appointed as such administrator and substituted as plaintiff in the action), a new trial was granted. See *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507. On a retrial the plaintiff secured judgment decreeing that the title to the premises in dispute was vested in him as administrator of the estate of Mary. Edward appealed, giving a stay bond in the sum of \$10,000 to secure payment of the value of the use and occupation of the premises pending the appeal. The judgment was affirmed; the judgment of affirmance becoming final in June, 1912. *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561. Thereupon steps were taken to compel Edward to file an account and to have him removed as administrator. Before these matters had been disposed of, in October, 1912, Edward agreed to turn over the possession of the real estate in controversy, and possession was delivered. A first account theretofore filed had been disallowed. A second was filed on December 12, 1912. This, too, was disallowed, and the letters of administration of Edward were, on January 16, 1913, revoked. Andrew was appointed administrator of the estate of David on January 31, 1913.

On February 15, 1913, Edward filed a third account, which forms the subject of the present controversy. Considerable testimony was introduced. The court announced its conclusion that Edward M. Piercy had, during his possession of the real estate belonging to the estate, used it and conducted it as his own, in conjunction with adjoining property belonging to him; that he had kept no accounts of his use of the estate's property; that he had mingled the proceeds of the estate with his own funds and had used them for his own purposes and benefit; and that it was impossible to ever find out the true state of the affairs of the estate, and what had been received and disbursed in connection therewith. Accordingly, the court announced Edward should be charged with the reasonable rental value of the land of the estate for his use and occupation thereof. That the evidence fully sustains the foregoing statement of the facts shown cannot be disputed, and the appellant does not question the propriety, under this state of facts, of charging him with the rental value of the land, except that he makes the claim—to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

considered later—that the judgment in the action instituted against him by Mary Piercy bars such charge. At this stage the court set a day for hearing evidence of rental value. Such evidence was introduced, and the court made an order fixing the rental value of the real property of the estate during the administration of Edward at \$1,740 per annum; 300 acres at \$3.30 each, and 750 acres at \$1 each. Thereafter the order now appealed from was made. By it the court charged Edward with \$1,740 per annum from April 10, 1901, to October 8, 1912. It refused the request of the respondent that the appellant be charged with compound interest on these sums, and refused to allow Edward any counsel fees or commissions.

[1, 2] The first point urged is that the respondent's claim for the value of the use and occupation of the premises might have been litigated in the action brought by Mary Piercy against the appellant, and that the judgment in that action is therefore a bar to a renewal of the same claim. A sufficient answer to this contention is that the value of the use and occupation could not have been recovered from the appellant in the former action. He was there sued as an individual, claiming title to property which, it was alleged, belonged to Mary Piercy. The substituted plaintiff in that case, as administrator of the estate of Mary Piercy, recovered judgment declaring that she (or her estate) was the owner of the property. But the title asserted by her was that of an heir of the estate of David Piercy. That estate had not been administered. During its administration the heir, although succeeding to the legal title, was not entitled to the possession of the property. Until distribution, the right of possession was in the administrator. Code Civ. Proc. § 1581; *Meeks v. Hahn*, 20 Cal. 620; *Washington v. Black*, 83 Cal. 290, 23 Pac. 300. So that, whatever may have been the effect of the former judgment as an adjudication in favor of Mary, and against Edward, that the title was in the former, there could have been no recovery of the value of the use and occupation, for the simple reason that, during the entire pendency of the action, the plaintiff therein was not entitled to the possession of the premises. Furthermore, that action was against Edward M. Piercy as an individual. The judgment could not determine his liability to the estate as administrator, and this is the liability upon which the order now before us is based. The fact that he gave a stay bond, conditioned to pay the value of the use and occupation pending the appeal, did not have the effect of extending the scope, as an adjudication, of the judgment appealed from.

[3, 4] The appellant complains of the refusal of the court to allow him administrator's commissions and counsel fees. The appellant had been succeeded as administrator by Andrew J. Piercy and the administration of the estate remained uncompleted. The for-

mer administrator was not, therefore, entitled to the statutory commissions, but, at most, to such part thereof as the court might apportion to him upon a consideration of the respective rights of the successive administrators. Prior to the amendment in 1911 of section 1616 of the Code of Civil Procedure, no such apportionment could be made until the estate had been completely administered and was ready for distribution. *Estate of Barton*, 55 Cal. 87; *In re Levinson*, 108 Cal. 456, 41 Pac. 483, 42 Pac. 479. The amended section provides, however, for an application, after the expiration of one year from the grant of letters, for an allowance upon commissions. This provision is applicable to successive administrators. *Estate of Jones*, 166 Cal. 147, 135 Pac. 293.

[5] It does not alter the rule that the statutory commissions are to be paid but once, and are to be apportioned among all the administrators. The appellant did not invoke the power of the court, under the amended section, to make an allowance on account of the commission which would ultimately be payable for the administration as a whole. He simply charged the estate, in his account, with the entire statutory commission. This charge the court refused to allow, and there can be no doubt that it was right in thus refusing. The appellant was clearly not entitled to what he asked, and, if he desired to have the court make a partial allowance on account, he should, in some way, have requested that the court exercise the discretion vested in it by the amended section 1616. This, so far as the record shows, he did not do, and it must accordingly be held that the court did not err in denying the only application made to it. This conclusion is no bar to the right of the appellant to proceed hereafter for a partial allowance under section 1616. The question, much discussed by counsel, whether the misconduct of the appellant as administrator would justify the court in denying him any allowance of commissions need not be here decided. It will remain open for consideration upon any future application that may be made, whether on final distribution or prior thereto. The demand for an allowance for attorney's fees stands upon similar grounds.

[6] Appellant's remaining points have to do with the determination of the rental value of the premises. It is claimed that the evidence does not sustain the court's finding in this regard. But an examination of the record discloses the familiar situation of a conflict in the evidence, and, since there is testimony supporting the conclusion reached, that conclusion cannot be assailed here.

[7, 8] It is further urged that the court below erred in sustaining objections to two questions asked by appellant of witnesses testifying on the matter of value. In one of these instances—that of the witness Dassel—the substance of the testimony sought to be



elicited was brought out by later questions. The other question was put to the appellant himself. He was testifying in his own behalf, and had given his opinion of the rental value of the land. He was then asked what he had "undertaken to do with reference to renting this out." The court properly declined to permit an answer to this question. See *Santa Ana v. Harlin*, 99 Cal. 538, 84 Pac. 224.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(168 Cal. 755)

**In re PIERCY'S ESTATE.**

**PIERCY v. PIERCY.**

(S. F. 6820.)

(Supreme Court of California. Dec. 11, 1914.  
Rehearing Denied Jan. 9, 1915.)

**1. EXECUTORS AND ADMINISTRATORS (§ 478\*)  
—ACCOUNTING—CHARGES—COMPOUND INTEREST.**

Where settlement of the estate is long delayed, merely because of the administrator's fraudulent claim to the land and consequent litigation, and he used it for his own benefit, he should be charged compound interest on the rental value.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2063; Dec. Dig. § 478.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 478\*)  
—ACCOUNTING—CHARGES—INTEREST.**

The rule that interest, as such, cannot be allowed where the amount of damages is unliquidated and incapable of being made certain applies only in an action for damages, and not in fixing, on accounting, the liability of a delinquent administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2063; Dec. Dig. § 478.\*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of David J. Piercy, deceased. From an order settling the account of Edward M. Piercy, as administrator, Andrew J. Piercy, administrator, appeals. Modified and affirmed.

John E. Alexander, of San Francisco, and Beasley & Fry and Fry & Jenkins, all of San Jose, for appellant. Rogers & Bloomington, of San Jose, for respondent.

SLOSS, J. This is an appeal by Andrew J. Piercy from the same order which was under review in *Estate of Piercy* (S. F. No. 6819), 145 Pac. 88, just decided. In the former case the administrator appealed from the order settling his account. Here the opposing party appeals from that part of the order refusing to charge the administrator with compound interest on the rental value of the land of the estate. There is a separate transcript covering the present appeal, but many of the important facts are stated in the opinion filed in S. F. No. 6819, 145

Pac. 88. The record shows further that, with the exception of personal property appraised at \$142.50, the entire estate of David J. Piercy consisted of the real estate which was the subject of the litigation between Mary Piercy and Edward M. Piercy. The bill of exceptions sets forth that at the hearing of objections to the account filed by the respondent evidence was introduced showing that, ever since his appointment as administrator, said Edward M. Piercy had been guilty of neglect of the estate; had claimed all the estate as his own; had used and conducted all the business and property thereof as his own; and had used the rents, issues, and profits thereof in his own business and for his own benefit.

[1,2] We think the appellant is right in his contention that the court should have charged respondent with interest at the legal rate, compounded with annual rests, upon the amount found due from him as the rental value of the real property of the estate. This is the ordinary rule where a trustee has used the trust property for his own benefit. If any loss occurs, the loss must be borne by him, while the beneficiaries are entitled to any profits realized. *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290. "The true rule in equity in such cases is to take care that all the gain shall go to the cestui que trust." 2 Story, Eq. Jur. (13th Ed.) §§ 1277, 1278. Where, as here, the settlement of the estate has been long delayed, and the administrator has himself used funds belonging to the estate, the heirs will not be fully compensated unless they receive compound interest upon the property of the estate thus withheld. These views are sustained by an unbroken current of authority. *Estate of Stott*, 52 Cal. 408; *Estate of Clark*, 53 Cal. 355; *In re Hilliard*, 83 Cal. 423, 23 Pac. 293; *In re Eschrich*, 85 Cal. 98, 24 Pac. 634; *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639; *Estate of Cousins*, 111 Cal. 441, 44 Pac. 182; *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; *Estate of Hamilton*, 139 Cal. 671, 73 Pac. 578; *Glassell v. Glassell*, 147 Cal. 510, 82 Pac. 42; *Estate of McPhee*, 156 Cal. 335, 104 Pac. 455, Ann. Cas. 1913E, 899.

That the distribution of the estate was unjustifiably delayed—a circumstance which has been regarded as having an important bearing on the question of liability for compound interest (*In re Hilliard*, supra)—can hardly be questioned. There was but one heir. The claims were not of large amount. The necessary proceedings for administration could have been speedily concluded. The only reason for the long delay was that the administrator asserted a claim to the lands against the estate. This claim was adjudged to be based upon his own fraud and undue influence. The fact that he set it up and litigated it cannot entitle him to any special consideration. It is equally clear

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the administrator violated his trust by using the property of the estate for his own benefit in conjunction with property belonging to him. There may be cases in which the trial court may, in the exercise of a sound discretion, grant or deny compound interest. Here, however, the misconduct of the administrator was so clearly shown that there was no room for the play of discretion. It is suggested by appellant that the trial court based its conclusion on the view that it could not allow interest, simple or compound, on the rental value, because such value was unliquidated and, until the making of the order, unascertained. But we think this consideration has no bearing on the question. It has often been held that, in actions for damages for tort or breach of contract, interest as such cannot be allowed where the amount of damage is unliquidated and incapable of being made certain. *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; *Swinerton v. Argonaut L. & D. Co.*, 112 Cal. 375, 44 Pac. 719; *Macomber v. Bigelow*, 123 Cal. 532, 56 Pac. 449. But this rule has no application here. It is a rule governing the allowance of interest in actions for damages. Civ. Code, § 3287. Other considerations must govern a court in fixing the liability of a delinquent trustee. In such cases the primary consideration is the equitable one that the trustee must be compelled to fully compensate the beneficiary for the unauthorized use of the trust estate. As we have already indicated, compensation would not be complete if interest were withheld.

The order is remanded, with directions to the court below to modify it by charging the respondent with interest upon the rental value of the land of the estate at the rate of 7 per cent. per annum, compounded annually, from April 10, 1901, to October 8, 1912.

As so modified, the order appealed from will stand affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(168 Cal. 722)

**SHERWIN v. SOUTHERN PAC. CO.**  
(L. A. 3344.)

(Supreme Court of California. Dec. 8, 1914.)

**1. ABATEMENT AND REVIVAL (§ 68\*)—DEATH OF PARTY PENDING NEW TRIAL.**

In a personal injury case, the death of plaintiff pending a motion for a new trial after judgment in his favor does not abate the action, but the judgment stands, and is enforceable by the deceased plaintiff's representatives, unless finally vacated on an appeal.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 346-348; Dec. Dig. § 68.\*]

**2. APPEAL AND ERROR (§ 438\*) — EFFECT OF GRANTING NEW TRIAL—VACATION OF JUDGMENT.**

While an appeal from an order granting a new trial is pending, the order is subject to the condition that, if it be reversed, its effect to vacate the judgment is annulled, and the judgment will then stand as though the order had not been made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2196; Dec. Dig. § 433.\*]

**3. NEW TRIAL (§ 140\*) — GROUNDS — AFFIDAVITS—SUFFICIENCY.**

Where affidavits in support of a motion for new trial because of a juror's false statements on his examination voir dire did not show that the movant and its counsel were ignorant of the facts complained of until the rendition of the verdict, it was error to grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 284-287, 289, 302, 306; Dec. Dig. § 140.\*]

**Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.**

Action by Ida M. Sherwin, executrix of the estate of B. E. Sherwin, deceased, against the Southern Pacific Company. From an order granting a new trial, plaintiff appeals. Reversed.

Grant Jackson, Wm. L. Jarrott and J. S. Jarrott, all of Los Angeles, for appellant. J. W. McKinley, Frank Karr, R. C. Gortner, Henry T. Gage, W. I. Foley, and W. I. Gilbert, all of Los Angeles, for respondent.

SHAW, J. The appeal is from an order granting the defendant's motion for a new trial. The action was begun by the decedent, B. E. Sherwin, in his lifetime, to recover damages caused by bodily injuries received by him through the negligence of the defendant. There was a trial, resulting in a verdict and judgment in his favor. Proceedings for a new trial were immediately instituted by the defendant, but before the hearing of its motion the plaintiff died, and the present plaintiff, his executrix, was substituted as plaintiff. Thereafter, the court below granted the motion and ordered a new trial. There was no appeal from the judgment.

[1, 2] The respondent makes the preliminary objection that the action abated upon the death of the original plaintiff. The objection is based on the theory that the granting of the new trial vacates the judgment, and upon the familiar rule that a right of action for damages for personal injuries to the plaintiff caused by negligence of the defendant does not survive the death of the plaintiff. It is contended that the order granting a new trial sets the matter again at large without a judgment, to as full extent as if there had been no judgment. We think the objection is untenable. It is well settled that the death of the plaintiff in such an action after a judgment in his favor, and while the judgment stands, does not abate the action or affect the validity of the judgment. Such judgment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

becomes a part of his estate, and may be enforced by his representatives. Accordingly, it has been held that the death of the plaintiff after such judgment and while a motion for a new trial is pending, or during the pendency of an appeal by the defendant from an order denying a new trial, does not abate the action, and that in such a case the judgment stands until it is vacated on the appeal, and that if the order is affirmed, the original judgment is good. *Fowden v. Pacific C. S. Co.*, 149 Cal. 154, 86 Pac. 178. The question of the effect of an order granting a new trial, in such a case, when the death occurs after the judgment and either before or after the granting of the new trial, has not been heretofore presented to this court, so far as we are advised.

But the right of appeal from the order is given and we think the conclusion is inevitable that if, upon such appeal, the order is reversed, the judgment will remain or be restored to its original condition as if the order vacating it had not been made. The order, in such a case, is vacated, and the original judgment stands. An order granting a new trial does not absolutely vacate the judgment; it is absolutely vacated only when such an order becomes a finality. *Puckhaber v. Henry*, 147 Cal. 425, 81 Pac. 1105. In *Pierce v. Birkholm*, 110 Cal. 672, 43 Pac. 205, speaking of an order granting a new trial, the court said:

"While its ultimate effect, if unappealed from, or if sustained upon the appeal where one is taken, is to vacate the judgment and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. In this respect it is not distinguishable from any other order or judgment from which an appeal is given. Pending an appeal therefrom it is \* \* \* set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. \* \* \* 'The reversal of an order granting a new trial leaves the verdict and judgment standing.' Hayne on New Trial and Appeal, § 229." *Rev. Ed.*, § 3, p. 16.

The effect of these principles is that during the time within which an appeal may be taken from such an order, and while the appeal therefrom, if taken, is pending, the order is subject to the condition that if it is reversed, its effect to vacate the judgment will be annulled, and the judgment will then stand as if no order granting a new trial had been made, or as if the motion had been denied and such denial had become final or had been affirmed on appeal. The appellant is therefore entitled to prosecute this appeal, in order to produce this result and restore the judgment to its original vigor if the appeal is successful.

[3] The only matter urged as ground for a new trial occurred during the examination of the jurors upon the voir dire. One C. C. Horton was called and sworn to answer questions. After having been examined and passed by the plaintiff, the following colloquy

occurred during his examination by the attorneys for the defendant:

"Q. Were you ever injured in a railroad accident? A. No, sir. Q. Any member of your family ever injured in a railroad accident? A. No, sir. Q. Never had any suits against the railroad company? A. No, sir."

After some further questions on other subjects, he was accepted by both parties, sworn as a juror, and sat in the trial of the cause. The defendant exercised its four peremptory challenges upon other persons called to serve as jurors. After the verdict the defendant asked for a new trial on the ground that Horton had given untrue answers to the last two of the aforesaid questions. In support thereof affidavits were filed showing that at the time of the trial an action was pending in that court wherein Harold Johnson, a minor, by C. C. Horton, his guardian ad litem, was plaintiff and the Southern Pacific Company was defendant; that it was an action to recover damages for personal injuries to Johnson alleged to have been caused by the negligence of said defendant; that Johnson was the grandson of the wife of Horton; that the attorneys for the defendant who conducted the trial were ignorant of the fact that Horton was acting as the guardian ad litem of Johnson in said action, or of his relation to Johnson, and did not discover the same until after he was accepted as a juror in the cause, and that if they had been aware of said facts they would have challenged Horton for cause, as a juror, and, if necessary, would have excluded him from the jury by a peremptory challenge, and that they exhausted their peremptory challenges on other jurymen.

The affidavits in support of the motion for a new trial merely show that the attorneys conducting the trial for the defendant were not aware of the facts aforesaid at the time the impanelment of the jury was completed. They do not show that they did not discover said facts afterwards during the trial and before the rendition of the verdict. It may be conceded that the conduct of the juror Horton in giving a false answer to the questions put to him constituted misconduct or irregularity on his part sufficient to warrant the granting of a new trial therefor. See *Hayne on New Trial and Appeal* (*Rev. Ed.*) § 45. But where misconduct or irregularity of this character is relied on as ground for new trial, the affidavits of the moving party must show affirmatively that both he and his counsel were ignorant of the facts constituting the misconduct or irregularity charged until the rendition of the verdict. 12 *Ency. of Pl. & Pr.* 558, and cases there cited; *State v. Barrington*, 198 Mo. 93, 95 S. W. 235. If the defendant or its attorneys had discovered these facts at any time during the trial, it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and thereupon offer a challenge to the juror guilty of the misconduct.

In failing to show that they did not acquire such knowledge during the course of the trial after the jury was sworn, the defendant failed to present sufficient ground for a new trial for that cause. The order granting a new trial was therefore erroneous.

The order is reversed.

I concur: SLOSS, J.

I concur in the judgment: ANGELLOTTI, J.

(168 Cal. 762)

**SOUTHERN TRUST CO. v. CITY OF LOS ANGELES** et al. (L. A. 3264, 3265, 3267, 3271.)

(Supreme Court of California. Dec. 11, 1914. Rehearing Denied L. A. 3271, Jan. 9, 1915.)

**LICENSES (§ 7\*)—OCCUPATION TAX ON BANKING BUSINESS.**

An occupation tax imposed by a city ordinance on the right to do a banking business was invalid under Const. art. 13, § 14, providing for the taxation of the capital stock of all banks doing business within the state and declaring that such tax shall, with certain exceptions, be in lieu of all other taxes and licenses upon the stock and property of such banks.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Actions by the Southern Trust Company, a corporation, the Security Savings Bank, a corporation, the Germania American Savings Bank, a corporation, and the Los Angeles Trust & Savings Bank, a corporation, against the City of Los Angeles, a municipal corporation, and others. From judgments for defendants, plaintiffs appeal. Reversed and remanded.

Haas & Dunnigan, Shankland & Chandler, and Gibson, Trask, Dunn & Crutcher, all of Los Angeles, for appellants. John W. Shenk, Albert Lee Stephens, and Myron Westover, all of Los Angeles, for respondents.

**HENSHAW, J.** The appeals in the above-entitled cases involve the same question, namely, the validity of the municipal ordinance of the city of Los Angeles imposing an excise or occupation tax upon the right of these banking corporations to conduct their business, which excise or occupation tax is fixed as follows:

"Sec. 20. For every person, firm or corporation carrying on the business of banking, a monthly license of one and one-half cents for each one thousand dollars of the total amount of loans and discounts of such person, firm or corporation."

The Constitution of this state (article 13, § 14) provides for the taxation of the capital stock of all banks doing business within the state, and declares that the tax in the Constitution prescribed "shall be in lieu of all

other taxes and licenses, state, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided." It should be said that these cases were decided by the trial courts in advance of the decisions of this court in the cases hereinafter named. Respondents upon these appeals seek to draw the distinction that the occupation tax of the city of Los Angeles imposed upon banking institutions is not a tax or license upon their shares of stock or upon their property. This argument, and, indeed, all of respondents' contentions as to the validity of the tax, are disposed of against their position by the cases of City and County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 Pac. 971, Hartford Insurance Company v. Roberts et al., 142 Pac. 839, and Pacific Gas & Electric Co. v. Roberts, 143 Pac. 700. A reference to these decisions relieves from the necessity of any discussion of the matter. For the reasons therein given this tax is invalid and the judgments are reversed and the causes remanded.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

(168 Cal. 764)

**HUGHES v. CITY OF LOS ANGELES** et al. (L. A. 3266.)

(Supreme Court of California. Dec. 11, 1914.)

**LICENSES (§ 7\*)—OCCUPATION TAX ON INSURANCE AGENTS—VALIDITY.**

An occupation tax, imposed by city ordinance on the agents of insurance companies, is invalid under Const. art. 13, § 14, subd. "b," requiring that every insurance company within the state pay a certain tax on the receipts from its business within the state, which tax shall, with certain exceptions, be in lieu of all other taxes or licenses on the property of such companies.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. S. Hughes against the City of Los Angeles, a municipal corporation, and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

Haas & Dunnigan, of Los Angeles, for appellant. John W. Shenk, of Los Angeles, for respondents.

**HENSHAW, J.** By the Constitution of this state (article 13, § 14, subd. "b") every insurance company within the state is required to pay an annual tax of 1½ per cent. upon the amount of the gross premiums received by it upon its business done in the state, and the Constitution declares "this tax shall be in lieu of all other taxes or licenses, state, county and municipal upon the property of such companies, except county and municipal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taxes on real estate, and except as otherwise in this section provided."

A revenue ordinance of Los Angeles in sections 82 and 83 declares as follows:

"Sec. 82. For every person, firm or corporation conducting, managing, or carrying on the business of local fire insurance agent, solicitor or broker, whether the insurer be a corporation, mutual company or individual, \$10 per quarter for each such insurer represented by such agent, solicitor or broker.

"Sec. 83. For every person, firm or corporation conducting, managing or carrying on the business of a general or local insurance agent, whether for life, accident, plate glass, bicycle, liability, fidelity, automobile, or other insurance except fire insurance, whether the insurer be a corporation, mutual company, or individual, ten dollars per quarter; provided, that one license issued under the provisions of this section shall entitle the licensee to conduct any or all or any part of the businesses in this section enumerated."

Under the authority of Los Angeles Trust Company v. City of Los Angeles (L. A. No. 8271), 145 Pac. 94, this day decided, no doubt can be entertained but that if this privilege tax were imposed upon the insurance companies themselves it would be invalid. The distinction sought to be drawn in this case is that this particular license fee is not imposed upon the companies but upon the agents of the companies. This is true, but upon the other hand it is equally true that every insurance corporation must act through agents and can act only through agents, and that, therefore, in a direct and immediate sense a tax upon such agents for the right to do business is a tax upon the corporation's right to do business. The agents of corporations are the means whereby the corporations live and in opposition to a tax upon their agents the corporations may well be heard to voice Shylock's expostulation:

"You take my house when you do take the prop  
That doth sustain my house; you take my life  
When you do take the means whereby I live."

But in exposition of the fact that this principle does not rest upon the authority of Shakespeare alone, a reference may be made to *McCall v. People of California*, 136 U. S. 109, 10 Sup. Ct. 881, 34 L. Ed. 391; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 629, 38 L. Ed. 719; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 444, 6 L. Ed. 678; *Tennessee v. Scott*, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; *Kansas City v. Oppenheimer*, 100 Mo. App. 527, 75 S. W. 174.

It follows, therefore, that the imposition of this occupation tax upon the agents of insurance corporations does violation to article 13, section 14, of the Constitution of this state, and may not be enforced.

The judgment is reversed and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

(168 Cal. 736)

BERRI v. ROGERO et al. (S. F. 6203.)

(Supreme Court of California. Dec. 10, 1914.)

# 1. JUDGMENT (§ 92\*)—DEFAULTS—POLIOT OF LAW.

It is the policy of the law to have every litigated case tried on its merits, and default judgments are viewed with disfavor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. § 92.\*]

# 2. JUDGMENT (§ 162\*)—DEFAULTS—VACATION.

Where one in default makes reasonable application to be relieved and files an affidavit of merits alleging a good defense, and plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice by the delay, or that injustice will result from a trial on the merits, very slight evidence is necessary to warrant vacation of the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.\*]

# 3. APPEAL AND ERROR (§ 957\*)—JUDGMENT (§ 139\*)—OPENING DEFAULT.

Trial courts have a wide discretion in vacating defaults, and their ruling will not be reviewed unless an abuse appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957; \* Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

# 4. JUDGMENT (§ 143\*)—DEFAULT—VACATION—ABUSE OF DISCRETION.

Where plaintiff made no counter showing, it was not an abuse of discretion for the trial court to set aside a default judgment against the defendants, who asserted that they had a good defense, and that their ignorance of the English language and of the necessity for verifying their answer prevented them from calling on their attorney and filing a proper answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.\*]

# 5. APPEAL AND ERROR (§ 907\*)—REVIEW—PRESUMPTIONS.

Where evidence is omitted from the record, the appellate court must presume that the omitted evidence fully justified the order appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Bernardo Berri against Maria Rogero and another. From an order setting aside and vacating a default judgment, plaintiff appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant. S. J. Hankins and H. J. Hankins, both of San Francisco, for respondents.

SULLIVAN, C. J. Appeal from an order setting aside default and vacating judgment. Plaintiff, Bernardo Berri, sued Maria Rogero and Pietro Rogero to recover \$1,000 for

alleged malicious acts of Maria Rogero and malicious prosecution by her of a civil action. The facts alleged in the complaint and out of which the cause of action arose are, in brief, as follows: Berri had commenced an action against Pietro Rogero in the justice court of San Francisco to recover \$200 on Pietro's promissory note; a writ of attachment was issued in the case, and a levy was made by the sheriff upon one computing scale and one cash register in the possession of Pietro. In his complaint against the defendants herein the plaintiff alleged that Maria Rogero, maliciously intending and contriving to annoy and injure plaintiff and without probable cause, claimed the property attached as her own, thereby compelling Berri to furnish the sheriff an indemnity bond in the sum of \$500 to hold the levy. He further alleged that thereafter Maria Rogero maliciously and without probable cause, in her individual capacity, and as guardian ad litem of four infants, brought an action against himself and the sheriff for the recovery and possession of the property attached, or the value thereof, \$200, in case delivery could not be had, and \$50 damages. This action, it is alleged, terminated in favor of Berri and his codefendant, the sheriff. By reason of the aforesaid acts, Berri claimed in his complaint that he "was greatly annoyed and was caused great inconvenience and much loss of time and put to considerable money outlay in defending said actions of defendant herein, Maria Rogero," to his damage in the sum of \$1,000, for which amount he prayed judgment against both defendants. No cause of action whatever is alleged in the complaint against Pietro. He is not charged with any wrongful act, but, as stated by plaintiff in his complaint, "all of the aforesaid acts were done by the defendant Maria Rogero maliciously, without probable cause," etc. From the affidavits used on motion to set aside the default it appears that Pietro is the husband of Maria, but the plaintiff did not in his complaint allege that fact, nor did he allege any fact from which the relation of husband and wife between defendants could be inferred. The complaint was verified. The summons in the action was duly served on defendants in April, 1911. After time to plead had been repeatedly extended, the defendants, on the 31st day of May, 1911, by their attorney, filed an unverified answer to the complaint, containing a general denial and nothing more. Thereafter the plaintiff moved for an order striking from the files the unverified answer. This motion was met by a counter motion, made through the same attorney, for leave to file a verified amended answer. In support of this motion the attorney filed an affidavit in which he stated that he had written twice to the defendants, requesting them to call at his office to verify their answer; that he had received no reply from them, or either of them, and that defendants failed to call at

his office because, as he believed, the letters were lost in the mail, or the defendants, through ignorance of the English language and of the laws of this state, did not realize the necessity for verifying their answer. On the 23d day of June, 1914, the motion to strike out the unverified answer was granted and leave to file a verified amended answer was denied. In the order denying the motion the court ordered a stay of proceedings for 10 days "to allow counsel for defendants to bring defendants into court and show why the order denying leave to file a verified answer should be set aside and vacated." The record does not disclose that counsel for the defendants did within the 10 days specified or at all, bring or attempt to bring his clients into court to show cause as provided in the order, or that he communicated or tried to communicate with them concerning the case. Judgment by default was rendered on July 24, 1911, in favor of plaintiff and against both the defendants for the sum of \$500. Thereafter each of the defendants, through substituted attorneys, separately moved the court to set aside the default and judgment taken against them. The motions were heard on the 25th day of August, 1911. In each instance the motion was based upon inadvertence, surprise, and excusable neglect, and in the case of Pietro upon the additional ground that the complaint failed to state any cause of action against him. It appears from the affidavits used on the motion that the defendants are foreigners, Italian-Swiss, and utterly unable to understand, read, or write the English language; that Maria Rogero called once at the office of her original attorney and requested him to defend the action; that the defendants are unacquainted with legal procedure and judicial proceedings, and that they did not know that it was necessary for another call to be made upon the attorney; that they did not know and were not informed that any other act upon the part of either was necessary to present a defense to the action. They each deposed that if their attorney sent any letter to the affiant, the same was not read by either by reason of their ignorance of English; that no letter from him was read to either by any one; and that the contents of any letter from him were not made known to either. The usual affidavit of merits accompanied the moving papers. No counter affidavit was filed by or on behalf of Berri in opposition to the motions. The court set aside the default and judgment and imposed terms upon the defendants by requiring them to pay the plaintiff his costs of action amounting to \$27.70. The record comes before this court upon a bill of exceptions. Evidently oral testimony was heard upon the motion, for the order setting aside the default and judgment recites, among other things, that upon a hearing of the motion, "*oral and documentary evidence* being introduced, and the affidavits of the defendants

herein and all the records, files and proceedings in said action being duly read and considered, and after argument by respective counsel, said cause was, on the said 25th day of August, 1911, duly submitted to the court for consideration and decision," etc. No evidence, however, appears in the record other than the affidavits above mentioned found in the bill of exceptions.

[1-4] We cannot say that the lower court, upon the showing made by the defendants in their uncontradicted affidavits, committed error in setting aside the default and judgment. The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice, or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default. A broad discretion is allowed to courts in granting relief, against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action. Counsel for appellant and respondents in their briefs agree, and this court agrees with them, that the following is a correct statement of the rule applicable to courts in dealing with defaults:

"It is largely a matter of discretion, to be liberally exercised by the court in the furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will do so only where it clearly appears that there has been a plain abuse of discretion."

In *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105, this court thus lays down the rule upon the subject:

"In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion; but it is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made."

In view of the rule thus admitted and declared, if the lower court had before it only the affidavits of the defendants upon the hearing of their motion, this court could not say that it had abused its discretion in setting aside the default and judgment. But it appears from the order itself that, in addition

to the affidavits of the defendant, oral evidence was heard upon the motions and that upon this evidence, as well as upon the affidavits, the order was made. That being so, this court must presume, even if it be conceded that the affidavits in themselves were insufficient to sustain the order, that the oral testimony introduced upon the hearing warranted the court in setting aside the default and judgment.

[5] It is a well-settled rule of law that where evidence is omitted from the record this court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient.

It follows from the foregoing that the order appealed from must be and the same is hereby affirmed.

We concur: HENSHAW, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

(168 Cal. 742)

BECKWITH v. SHELDON et al. (Sac. 2063.)

(Supreme Court of California. Dec. 10, 1914.)

# 1. CONTRACTS (§ 235\*)—OPTIONS—PAYMENT OF COMPENSATION.

A contract to convey to the first party "fifty thousand dollars" in bonds at par of a corporation to be formed by the second parties is not an agreement to deliver bonds, but a promise to pay money, with an option to pay in bonds, and on failure to act under the option the money became due, and recovery could be had, without alleging or proving the value of the bonds.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1101-1116; Dec. Dig. § 235.\*]

# 2. NOVATION (§ 10\*)—PARTIES — SUBSTITUTED PARTY—EXTENT OF OBLIGATION.

A substituted second party to a contract, who receives the consideration furnished by the first party and undertakes to perform the obligation of the second party, is bound to the same extent as an original party.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 10; Dec. Dig. § 10.\*]

# 3. EQUITY (§ 57\*) — PRINCIPLES — THINGS WHICH OUGHT TO BE DONE.

Under the principle that equity will regard as done that which ought to be done, where a party agrees to give a mortgage or lien on a valuable consideration received, and imperfectly attempts to execute the same, equity will create and enforce a specific lien on the property.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 179; Dec. Dig. § 57.\*]

In Bank. Appeal from Superior Court, Yolo County; M. T. Dooling, Judge.

Action by B. De La Beckwith, administrator of the estate of Byron D. Beckwith, deceased, against Willard M. Sheldon and others. Judgment for plaintiff, from which he appealed, and it was affirmed, and defendants appeal from an order denying a new trial. Affirmed.

Frank H. Gould, of San Francisco, Frank Freeman, of Willows, and Frank H. Short, of Fresno (Vincent Surr, of San Francisco, of counsel), for appellants. A. L. Shinn, of Sacramento, J. W. Dorsey and R. M. F. Soto, both of San Francisco, E. Weyand, of Colusa, S. C. Denson, of San Francisco, and A. C. Huston, of Woodland, for respondent.

SHAW, J. This action was begun by the decedent, Byron D. Beckwith, in his lifetime, to enforce certain trusts set forth in the complaint. Upon the first trial the defendants recovered judgment. Upon appeal this judgment was reversed. See 154 Cal. 393, 97 Pac. 867. Upon the second trial the plaintiff recovered judgment, declaring a lien upon the property of the Central Canal & Irrigation Company for \$50,000, and also a personal judgment against the said company for that sum. The plaintiff, believing he was entitled to greater relief, appealed from the judgment, but it was affirmed. See 165 Cal. 319, 131 Pac. 1049. The present appeal is by the defendants from an order denying their motion for a new trial.

The opinions above referred to contain elaborate statements of the facts involved in the controversy. It will not be necessary here to state them at great length. The sole proposition now urged for reversal is that the decision is against law, because of the failure to find the value of the \$50,000 in bonds that were to be issued to Beckwith; the theory being that this issue is material and that the judgment for \$50,000 cannot be supported, in the absence of a finding that said bonds were worth that sum.

After the reversal of the first judgment, the plaintiff filed a fourth amended complaint. The second judgment was given after a trial upon this complaint. The judgment for the plaintiff was based on a compromise agreement executed on April 8, 1903, between Beckwith, as first party, and Sheldon and Schuyler, as second parties. Sheldon and Schuyler held certain water rights which had been conveyed to them by Beckwith in trust to be conveyed to a corporation which was to carry on the irrigation enterprise contemplated in the agreement. This agreement first provided that a former agreement should be canceled and annulled. It then proceeded to declare that in consideration of said cancellation, and of certain conveyances by Beckwith to Sheldon, or to a corporation, Sheldon and Schuyler would organize a corporation to be named "Sacramento Canal Company," with a capital stock of \$1,000,000, which company should provide for and authorize a bond issue of \$1,000,000, secured by a trust deed of all its property. To this corporation, when organized, all the property held by all the parties for the purposes of the scheme was to be conveyed. The agreement then closed with the following clause:

"And the parties of the second part further promise and agree that they will cause such proceedings to be had as that there shall be paid to party of the first part, in consideration of the rights which he has theretofore conveyed to parties of the second part, and which he will convey to said corporation, the sum of \$50,000 in said bonds of the Sacramento Canal Company, at par, which shall be in full extinguishment and payment of all rights and demands of the party of the first part upon the said corporation, or upon the parties of the second part, or upon the property or rights so to be conveyed to the said corporation."

Prior to the execution of this agreement Sheldon and Schuyler had formed the defendant corporation, the Central Canal & Irrigation Company. The parties, including said company, thereupon agreed that it should be substituted for the Sacramento Canal Company, proposed in said agreement as the corporation to carry out the purposes of the agreement of April 8th, and that it should assume the obligations and perform the duties therein imposed on the proposed Sacramento Canal Company, and should take and hold the property agreed to be conveyed to said Sacramento Canal Company. Thereupon the property referred to was conveyed to said defendant, Central Canal & Irrigation Company, and said corporation accepted the same, and in consideration thereof undertook to perform the obligations and carry out the purposes of said agreement, including the issuance of bonds to Beckwith. Thereafter said company, in pursuance of the agreement, provided for a bond issue of \$1,000,000 secured by a trust deed of its property, and set apart \$50,000 thereof, at face value, duly signed, for delivery to Beckwith in discharge of the obligation of the agreement as above set forth; but it refused to deliver them, neither said bonds nor any other bonds were ever delivered or issued to him, and said obligation remains unperformed and unsatisfied.

The defendants' argument is that the portion of the agreement above quoted was, in effect, an agreement by Schuyler and Sheldon to deliver the bonds of the defendant corporation to Beckwith, and that upon the failure to deliver the bonds of the defendant corporation to Beckwith the measure of damages would be the value of the bonds at the time delivery was due, or afterwards, at plaintiff's option. Civ. Code, §§ 3309, 3336. If this were the true aspect of the case, it would be conceded that a finding of the value of the property to be sold would be essential to a recovery of damages, and such value should be alleged and proved. There is neither allegation nor finding of the value. Mr. Freeman, in his note to *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63, in 21 Am. Dec. 425, says that there is some diversity of opinion as to how agreements to pay a sum of money in specific articles at a fixed rate shall be construed, in case of failure to furnish the articles within the time specified; that "one line of authorities holds that such



contracts are agreements for the delivery of specific property," in which case the remedy of the promisee is by action for damages, and the value of the articles is material. To this view he cites seven cases. Of these only five are to the point, namely, *Mattox v. Craig*, 2 Bibb (Ky.) 584, *Cole v. Ross*, 9 B. Mon. (48 Ky.) 393, 50 Am. Dec. 517, *McDonald v. Hodge*, 5 Hayw. (Tenn.) 85, *Meason v. Philips*, Add. (Pa.) 346, and *Edgar v. Boies*, 11 Serg. & R. (Pa.) 445, to which we add *Starr v. Light*, 22 Wis. 433, 99 Am. Dec. 55. Of the other two cases cited, *Justrobe v. Price*, Harper (S. C.) 111, was an agreement to "deliver" rice, not to pay money, and *Wilson v. George*, 10 N. H. 445, merely decides that, under the technical rules of the common law as to forms of action, a recovery on such contract cannot be had in an action for money had and received. Other New Hampshire cases hold that such recovery may be had in a declaration specially upon the contract. *Odiorne v. Odiorne*, 5 N. H. 315; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307. In Pennsylvania, Tennessee, and South Carolina, later cases state the doctrine that such contracts become payable in money if the payor fails to deliver the articles. *Roberts v. Beatty*, supra; *Choice v. Moseley*, 1 Bailey (S. C.) 136, 19 Am. Dec. 661; *Bloomfield v. Hancock*, 1 Yerg. (9 Tenn.) 101. Mr. Freeman proceeds to say that the greater weight of authority is in favor of the doctrine that, upon the failure of the payor to deliver the articles within the time provided, the contract becomes an obligation to pay the sum of money mentioned, and may be sued on as such. He cites to this effect cases from the states of Virginia, Connecticut, Indiana, Illinois, New York, Vermont, Texas, Kansas, and Massachusetts. Mississippi, Maine, Ohio, Alabama, North Carolina, Oregon, Louisiana, and Nebraska also follow this doctrine. The citations to the cases may be found in Mr. Freeman's note aforesaid, and in volume 11 of the Century Digest, tit. Contracts, §§ 1105, 1106. In California also this doctrine has been adopted. *Marshall v. Ferguson*, 23 Cal. 69; *Cummings v. Dudley*, 60 Cal. 385, 44 Am. Rep. 58.

[1, 2] Looking to the terms of the agreement, it is easily seen that it is not a mere agreement for the delivery of the bonds. The promise is "that there shall be paid to" Beckwith "the sum of \$50,000." This is not an agreement to sell or deliver bonds, but a promise to pay money. The addition of the words "in bonds of the \* \* \* company, at par" does not change it into an agreement solely for the delivery of the bonds, but merely gives the payor the option or privilege of making such payment by delivering the bonds as specified when the time of performance arrived. The defendant Central Canal & Irrigation Company, having received the

consideration furnished to the enterprise by Beckwith, and having undertaken to perform the obligation to him set forth in the agreement, was bound thereby to the same extent as if it had been a party thereto. When it thereupon refused to perform the obligation, the promise became an absolute money obligation, and the value of the bonds was immaterial, or at all events the payment in money became immediately due (*Brown v. Foster*, 51 Pa. 173), and the payee could sue thereon as upon a money obligation, and recover without alleging or proving the value of the bonds. Much more is its character as a money obligation apparent when the nature of the thing to be substituted for money in payment is considered. The company was to deliver its own bonds for \$50,000, its promises to pay that sum, in satisfaction of the amount which Beckwith was to receive in the settlement. Its debt would remain the same; the only advantage to it would be that the time of payment would be postponed. For these reasons, we are of the opinion that the omission of a finding of the value of the bonds is immaterial.

[3] With regard to that part of the judgment which declares a lien on the property of the company, we need only say that, under the well-established principle of equity that that which ought to have been done will be deemed to have been done, it is held that where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same. *Daggett v. Rankin*, 31 Cal. 327; *Racoullat v. Sansavain*, 32 Cal. 339; *Love v. Sierra, etc., Co.*, 32 Cal. 653, 91 Am. Dec. 602; *Remington v. Higgins*, 54 Cal. 623; *Peers v. McLaughlin*, 88 Cal. 297, 26 Pac. 119, 22 Am. St. Rep. 306; *Higgins v. Manson*, 128 Cal. 470, 58 Pac. 907, 77 Am. St. Rep. 192; *Hall v. Cayot*, 141 Cal. 18, 74 Pac. 299; *Krelling v. Krelling*, 118 Cal. 419, 50 Pac. 546.

We are therefore of the opinion that the motion for a new trial was properly overruled.

The order denying a new trial is affirmed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.

(168 Cal. 747)

In re SCHMIERER'S ESTATE. (S. F. 6997.)  
(Supreme Court of California. Dec. 10, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 315\*)—  
DISTRIBUTION — INTEREST — CONCLUSIVENESS OF DECREE.

Any claim of right to interest on a legacy prior to the decree of distribution of the estate should be asserted in the proceeding for distribu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion, so that the decree distributing to one only the amount of her legacy is conclusive against collateral attack, Code Civ. Proc. § 1666, providing it shall state the part of the estate to which each person is entitled, and declaring it conclusive of rights, subject to appeal only.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Gottlieb Schmierer, deceased. From an order in favor of Christina Lee Sturgeon, J. H. Richards and another, executors, appeal. Reversed.

G. Gunzendorfer, of San Francisco, for appellants. Henry G. W. Dinkelspiel, of San Francisco, for respondent.

SLOSS, J. The will of Gottlieb Schmierer bequeathed \$300 to Christina Lee Sturgeon. It gave certain other legacies, and contained a devise and bequest of the residue. The testator died on June 4, 1908, and his will was admitted to probate on July 22, 1908, J. H. Richards and George Schmierer being appointed executors. On March 21, 1913, the executors filed their final account and petition for distribution. On April 7, 1913, the court made its decree settling the final account and distributing the estate. By the decree all of the property remaining in the hands of the executors was ordered distributed pursuant to the terms of the will. Various pecuniary legacies were ordered distributed to the respective legatees, and the residue was ordered distributed to the residuary legatees and devisees. To Christina Lee Sturgeon was distributed \$300, the amount of her legacy. In her case, as in that of other legatees, there was no mention of interest on the legacy. In August, 1913, Christina Lee Sturgeon filed a petition alleging that her legacy had not been paid, and praying that the executors be cited to appear and show cause why they should not pay the sum of \$300, together with interest thereon, from the 4th day of June, 1909, this date being one year after the testator's death. The citation was issued and the executors appeared. Pending further proceedings, the executors paid to petitioner the sum of \$300, the principal of the legacy bequeathed, and there was submitted to the court the question of her right to receive from the executors interest on such legacy from the expiration of one year after the death of the testator. This submission took place on January 27, 1914. The court thereafter made its order determining that the petitioner was entitled to interest on the legacy from the 4th day of June, 1909, ordering the executors to pay to her such interest amounting to \$96, and directing that she have execution against the executors for said

sum. From this order the executors appeal.

It will be observed that the interest claimed, or the greater part thereof, had accrued prior to the making of the decree of distribution. This decree had become final before the making of the order appealed from. If the legatee was entitled to interest on the legacy (Civ. Code, §§ 1368, 1369), her claim could and should have been asserted in the proceeding for distribution.

"The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled." *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; Code Civ. Proc. § 1666.

If such decree is erroneous, the remedy is by appeal. *Daly v. Pennie*, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61. No appeal was taken from the decree of distribution in this case, and such decree was therefore a final and conclusive adjudication of the rights which might be claimed by any person as legatee or devisee under the will. Code Civ. Proc. § 1666. By distributing to the respondent the sum of \$300 without interest the court determined that she was not entitled to interest. This adjudication is not subject to collateral attack. No direct attack is here made and the petitioner is foreclosed.

Whether the legatee would be entitled to interest during the brief period intervening between the making of the decree of distribution and the payment of the principal of the legacy is a question that is not here raised. At any rate she is not entitled to interest for the time elapsing prior to the making of the decree.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

(168 Cal. 759)

In re WALDEN'S ESTATE. (L. A. 3777.) (Supreme Court of California. Dec. 11, 1914.)

1. APPEARANCE (§ 20\*)—EFFECT OF VOLUNTARY APPEARANCE.

By express provision of Code Civ. Proc. § 416, voluntary appearance of a defendant is equivalent to personal service, as regards acquiring jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 91-102; Dec. Dig. § 20.\*]

2. APPEARANCE (§ 8\*)—ACTS CONSTITUTING.

It is a voluntary appearance, giving jurisdiction, where a defendant appears and asks relief which can be granted only on the hypothesis of the court having jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. § 8.\*]

3. DESCENT AND DISTRIBUTION (§ 71\*)—DETERMINATION OF HEIRSHIP—PARTIES.

Defendants, in a proceeding to establish heirship, having appeared and presented their claim, are bound by the adjudication adverse to them, irrespective of other possible claimants not having been brought before the court.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229-236; Dec. Dig. § 71.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**4. APPEAL AND ERROR (§ 151\*)—PARTY AGGRIEVED.**

Unattacked findings, in a proceeding to establish heirship, that appellant defendants are not related to decedent, and have no interest in the estate, are a bar to their right to attack findings as to kinship and interest of plaintiff and successful defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.\*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Matilda Walden, deceased. From a decree in favor of Martha Munro, in proceedings by her to establish heirship, and from an order denying a new trial, defendants Rachel P. Maher and another appeal. Affirmed.

Leland S. Bowen, of Los Angeles, for appellants. C. M. Stephens, George P. Adams, and Wm. T. Kendrick, all of Los Angeles, Claude R. Ball and James F. Ball, both of Montgomery City, Mo., and Trusten P. Dyer, J. W. Mowell, Elon G. Galusha, Benjamin E. Page, Williams, Goudge & Chandler, F. C. Austin, and C. C. Davis, all of Los Angeles, for respondent.

SLOSS, J. This is an appeal from a decree establishing heirship, entered in a proceeding under section 1664 of the Code of Civil Procedure. The proceeding was instituted by Martha Munro, claiming to be one of the heirs of the decedent. Upon her motion, the court made an order directing service of notice on certain nonresidents by publication, and publication was made. Various persons, including Rachel Maher and Paralle Costa, appeared and filed answers asserting claims as heirs. The default of others was entered, and the matter was heard by the court. The court found that the plaintiff, Martha Munro, and the defendants Wilhelmina Wilson Johnston, Martha Moodie, Sarah Jane Molloy, Robert Ross, and Andrew Ross are the only heirs and next of kin of Matilda Walden, the decedent. It found, further, that neither of the defendants Rachel P. Maher or Paralle Costa was or is in any way related or akin to Matilda Walden, or an heir of said decedent, or entitled to any part of her estate. The particular degree of kinship of the plaintiff and the successful defendants was found, and a decree declaring their rights accordingly was entered. See *Estate of Walden*, 106 Cal. 446, 137 Pac. 35. From this decree and from an order denying their motion for a new trial the defendants Rachel P. Maher and Paralle Costa appeal. The record on both appeals is embodied in a bill of exceptions.

[1-3] The jurisdiction of the court below is assailed by the appellants, who question the regularity of every step in the proceedings leading up to the publication of notice. But since the appellants themselves appeared

in the action, and filed a pleading in which they asked judgment that they were entitled to have the estate distributed to them, they are in no position to make these objections, even if it be assumed that the points urged are meritorious in themselves. Voluntary appearance is equivalent to personal service. Code Civ. Proc., § 416. "Where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process." 2 Enc. Pl. & Pr., 625; *Loan, etc., Co. v. Boston, etc., Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Zobel v. Zobel*, 151 Cal. 101, 90 Pac. 191. Whether other possible claimants were properly brought before the court is no concern of these appellants. They presented their claim to the court for adjudication as fully as the plaintiff did hers (*Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522), and, having invoked the jurisdiction, they are bound by its exercise, whether the result be favorable or adverse.

[4] The appellants also attack the various findings which declare the kinship and heritable rights of the plaintiff and the successful defendants, and assert that the court erred in admitting evidence bearing on these findings. There is, however, no specification of insufficiency of evidence to support the finding that these appellants themselves are not related to the decedent and have no interest in her estate. This finding stands, therefore, as an insuperable bar to their right to question the propriety of the determination that others are entitled. Having no interest themselves, they are not aggrieved by a judgment which will result in the estate being awarded to the respondents. *Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522; *Estate of Blythe*, 110 Cal. 231, 42 Pac. 643; *Williams v. Sav. & L. Soc.*, 133 Cal. 360, 65 Pac. 822; *Estate of Piper*, 147 Cal. 607, 82 Pac. 246; *Estate of Walker*, 148 Cal. 162, 82 Pac. 770; *Estate of Fleming*, 162 Cal. 524, 123 Pac. 284.

These considerations dispose of every contention of the appellants.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(168 Cal. 727)

ELLIOTT v. SUPERIOR COURT OF SAN BERNARDINO COUNTY et al.

(L. A. 3949.)

(Supreme Court of California. Dec. 4, 1914. Supplemental Opinion, Dec. 15, 1914.)

**1. PROHIBITION (§ 25\*)—PETITION—DEMURRER.**

A demurrer to a petition for writ of prohibition admits that the allegations of the petition are true.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 74; Dec. Dig. § 25.\*]

## 2. CORPORATIONS (§ 557\*) — RECEIVERS — APPOINTMENT BEFORE DISSOLUTION.

Under Civ. Code, § 305, providing that the corporate powers, business, and property of all corporations formed under the act must be exercised, conducted, and controlled by a board of not less than three directors, courts have no jurisdiction to appoint a receiver of the entire assets of a corporation, in an action for the price of goods sold and delivered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.\*]

## 3. CORPORATIONS (§ 557\*) — RECEIVERS — APPOINTMENT BEFORE DISSOLUTION—CONSENT.

Consent of the corporation to the appointment of a receiver of the entire assets of the corporation, in a suit for price of goods delivered, void under Civ. Code, § 305, does not validate the appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. § 557.\*]

## 4. COURTS (§ 97\*)—STARE DECISIS—FEDERAL AND STATE DECISIONS.

The state Supreme Court is not bound by decisions of the federal Supreme Court, except in cases where the judgment might be reviewed as arising under the Constitution and laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

## 5. PARTIES (§ 46\*) — INTERVENTION — WHAT CONSTITUTES—"INTERVENER."

In an action against a corporation for the price of goods sold, in which a receiver was appointed on behalf of plaintiff and others similarly situated, a petition styled a petition in intervention, asking that a trustee, in a deed of trust on the property of the corporation in favor of petitioner, be allowed to sell the property pursuant to the power therein contained, does not make petitioner an intervener, under Code Civ. Proc. § 387.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 72; Dec. Dig. § 46.\*]

For other definitions, see Words and Phrases, First and Second Series, Intervener.]

## 6. PARTIES (§ 40\*)—INTERVENTION—"INTEREST."

The "interest" mentioned in Code Civ. Proc. § 387, providing that at any time before trial any person who has an interest in the matter in litigation may intervene, must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 60-63, 65-67; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, First and Second Series, Interest.]

## 7. PROHIBITION (§ 3\*)—ADEQUATE REMEDY AT LAW—RIGHT OF INTERVENER.

A petitioner, for leave to sell under a power in a trust deed in a suit against a corporation for goods sold, in which a receiver was appointed, who is not technically an intervener, and hence has no right to appeal from the order appointing the receiver, has no adequate remedy at law defeating his right to a writ of prohibition to set aside the appointment.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

In Bank. Petition for prohibition by O. Edgar Elliott against the Superior Court of the State of California for the County of San Bernardino and S. F. Kelley. Writ

granted on condition that an issue of fact, to be determined later, is found against respondents.

Tyrrell, Abrahams & Brown, of Los Angeles, for petitioner. William B. Ogden, of Los Angeles, for respondents.

SULLIVAN, C. J. The petitioner has applied to this court for a writ of prohibition to arrest proceedings in a certain action pending in the superior court of San Bernardino county, wherein a receiver was appointed. The action, an ordinary one at law, entitled "Brookings Lumber & Timber Co., a Corporation, Plaintiff, v. Gibraltar Investment & Home Building Co., a Corporation, Defendants," was brought to recover \$876.56, alleged to be due from the defendant to plaintiff for goods sold and delivered. Hereinafter the plaintiff in the action will be referred to as the Brookings Company and the defendant as the Gibraltar Company.

At the time it filed its complaint the plaintiff moved the court for an order appointing a receiver of the assets of the defendant for the benefit of itself and all other persons similarly situated. The grounds of the motion were "that the plaintiff has no adequate remedy at law, and that the fund out of which the plaintiff and other creditors must look for the payment of their claims is in danger of waste, loss, and destruction." On the same day that the complaint was filed the defendant also applied for the appointment of a receiver. Thereupon the court appointed respondent S. F. Kelley receiver of all of the property, real and personal, belonging to the Gibraltar Company, and directed its officers to deliver to the receiver all of its assets of every kind, including real and personal property, moneys, drafts, bills of exchange, checks, or other evidences of indebtedness, and all books of account, deeds, bonds, mortgages, etc. Pursuant to the order appointing him, the receiver duly qualified and took into his custody all of the assets belonging to the defendant. The Gibraltar Company is a California corporation engaged in the business of buying and selling land, operating nurseries, and propagating and selling nursery stock, plants, and trees. Its business, carried on in several counties in the southern part of the state, is very extensive. Its gross assets exceed in value \$1,000,000. It is financially involved, is unable to meet its obligations, secured or unsecured, and is, in fact, insolvent. The petitioner claims to be the owner and holder of two notes of the corporation for the sum of \$30,000 each, payable on January 1, 1914, executed in favor of the Midas Fruitland Company, and assigned and indorsed by that company to the petitioner. The petitioner alleges that there is due to him on these notes the sum of \$57,956.30 principal and an additional amount in excess of \$8,000, represent-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing interest, expenses, and attorneys' fees; that these notes are secured by a deed of trust held by the Citizens' Trust & Savings Bank, covering certain land in San Bernardino county, and including water certificates representing water rights appurtenant to the land. These properties are in the possession of the receiver. It is also alleged in the petition that the Citizens' Trust & Savings Bank, trustee, acting under the advice of its counsel, has refused to sell or offer for sale, under the power of sale contained 'in the deed of trust, the property held as security, so long as the same remains in the custody and possession of the receiver; "that upon this property are prior and superior mortgage liens held by divers other creditors of the defendant, aggregating \$60,000; that the defendant has defaulted in the payment of interest upon the indebtedness secured by these mortgages; and that one of the mortgagees has already commenced foreclosure proceedings. The existence of these prior mortgages and the default of the mortgagor in the payment of interest thereon, it is alleged by the petitioner, has placed his rights and interests in jeopardy. He alleges that he is in danger of losing all of his rights and interest in said property and will be put to great expense unless the property described in the deed of trust is sold under the power of sale contained therein. It is further alleged that the receiver has incurred, and is now incurring, and will continue to incur, great expense in holding, caring for, and maintaining the properties of the Gibraltar Company, and that he is now exercising, and will continue to exercise, control thereof. After the appointment of the receiver, the petitioner herein filed in the superior court of San Bernardino county, in the action brought by the Brookings Company against the Gibraltar Company, an application styled by himself "Petition in Intervention," in which he prayed that the court "grant and give to him and to the Citizens' Trust & Savings Bank, the trustee named in said deed of trust, permission to exercise the power of sale granted in said deed of trust and to satisfy the indebtedness secured thereby," etc. This petition was filed by leave of court and was set for hearing at a later date. What action has been taken by the court on this petition does not appear. To the petition for the writ of prohibition the respondents have filed a demurrer specifying several grounds, all of which may be considered as embraced in the general statement "that the petition does not state facts sufficient to constitute a ground for the issuance of a writ of prohibition." The demurrer must be overruled for the reasons herein stated.

[1] Assuming that the allegations of the petition are true, and for the purposes of the demurrer they must be taken as true, the superior court of San Bernardino county had no jurisdiction to appoint a receiver of the assets of the Gibraltar Company. The order

appointing the receiver is void, and all of his acts performed in pursuance of his illegal appointment are necessarily void.

[2] Section 305 of the Civil Code, found in title 1, pt. 4, of that Code, and which title contains provisions applicable to all corporations formed under the laws of this state, provides:

"The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three directors."

The court, through the appointment of a receiver, exercises the powers, conducts the business, and controls the property of the corporation, which, by virtue of this section, can only be exercised, conducted, and controlled by a board of directors. There is no law of this state, nor can any decision of our Supreme Court be found, which authorizes a court, through a receiver, to take charge of the business and property of a corporation before dissolution, dispose of its assets, and wind up its affairs. On the contrary, this court has repeatedly and consistently held for more than 50 years last past that the courts have no jurisdiction to appoint a receiver of the entire assets of a corporation in a suit prosecuted by a private party. *Neall v. Hill*, 16 Cal. 151, 76 Am. Dec. 508; *French Bank Case*, 53 Cal. 495; *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *Smith v. Los Angeles & P. R. Co.*, 4 Cal. Unrep. 237, 34 Pac. 242; *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561. As stated by this court in the *French Bank Case*, supra:

"There is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation, for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management and substitutes its own. \* \* \* There is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management and placing it in the hands of a receiver."

If, as stated in this, a court of equity has no power to appoint a receiver of the assets of a corporation, certainly a court, in a common-law action for goods sold and delivered, has no such power.

[3] The fact that the Gibraltar Company consented to the appointment of a receiver is immaterial. Such consent did not and could not confer jurisdiction upon the court to make the appointment. A corporation cannot in this indirect manner destroy itself. It cannot put beyond its reach the power to do that for which it was created. It is the creature of the law, and its powers must be exercised in the manner prescribed by law and not otherwise. If it wishes to die, it

may do so, but only in the way ordained by law. It must first satisfy and discharge all claims and demands against it. Two-thirds of its members or stockholders must resolve upon dissolution, and the provisions of title 6, pt. 3, of the Code of Civil Procedure, relating to the voluntary dissolution of corporations, must be complied with. If it must be put to death against its will, then the state, and not a private party, must institute proceedings with that object in view. In *Smith v. Superior Court*, supra, this court was asked to review an order of the superior court of Los Angeles county appointing a receiver in an action brought by the California Bank against the Los Angeles & Pacific Railroad Company to recover judgment upon an unsecured promissory note. As in the case now under consideration, the plaintiff in that case applied for and the defendant consented to the appointment of a receiver, and the court made the appointment. Yet this court held that the order appointing the receiver was void and in excess of the jurisdiction of the superior court. In passing upon the application for a writ of certiorari, referring to the order appointing the receiver, this court (Department 2), speaking through Justice De Haven, said:

"We are unable to distinguish the action in which the order under review was made from that of the *French Bank Case*, 53 Cal. 495. It was there held that the appointment of a receiver in such an action was unauthorized and void, and should be annulled on certiorari. The only relief to which the plaintiff in the case of *California Bank v. Los Angeles & Pacific Railway Co.*, was entitled to was a judgment against the defendant railroad company for the amount alleged to be due upon the promissory notes of which the plaintiff therein was alleged to be the owner, and in such an action, upon the facts before it, the court was without power to appoint a receiver. The allegations of the complaint, to the effect that the corporation was insolvent, and that other creditors were threatening to sue the defendant railroad, and that said defendant had no property out of which the plaintiff would be able to satisfy any judgment it might obtain, and that the action was brought in behalf of the plaintiff and all other creditors of the defendant railroad who were willing to come in as plaintiffs, did not change the essential character of the action from one at law to recover upon an unsecured indebtedness to one in which, according to the usages of courts of equity, a receiver may be appointed; nor would the consent of the defendant railroad to the appointment of the receiver at all affect the right of any creditor aggrieved thereby to have the order appointing such receiver annulled in a proceeding of this character."

In *Smith v. Los Angeles P. R. Co.*, supra, referring to the same order appointing a receiver made in *California Bank v. Los Angeles & P. R. Co.*, this court said:

"The order being void, it may be disregarded. If the order is absolutely void, it is a nullity, and can be attacked in any proceeding. That it is absolutely void was clearly demonstrated when the matter was before the court in department in *Smith v. Superior Court*, supra."

[4] In support of their contention that the superior court had jurisdiction to appoint the receiver, the respondents cite a number

of cases wherein the federal courts have decided that in an ordinary action at law an insolvent corporation may confer jurisdiction upon the court to appoint a receiver by merely consenting to the appointment. These authorities are not binding upon the courts of this state. Our state Supreme Court is not even bound by the decisions of the Supreme Court of the United States, except in cases where the judgment of this court may be reviewed by writ of error to the United States' Supreme Court. Such review is permissible only in cases arising under the Constitution and laws of the United States. The case of *Brookings Co. v. Gibraltar Co.* presents no question which can possibly come within the exception. Under the circumstances, this court is bound to decide according to its own judgment and follow its own decisions, regardless of the decisions of the federal courts.

[5] It is claimed by respondents that inasmuch as the petitioner herein filed a "petition in intervention" in the superior court in the action commenced by the Brookings Company against the Gibraltar Company, wherein he prayed for an order authorizing the sale by the trustee of the property described in the deed of trust given to secure the notes alleged to be held by him, that he thereby became a party to the action, and that his only remedy was by appeal from the order appointing the receiver, and which right he has lost by the lapse of time. There is nothing in this contention. The petitioner here did not intervene in the action in the court below in the sense in which the word "intervention" is used in our Code. His petition, though styled a petition in intervention, is improperly so called. By filing the same he did not become a party to the action. A person may intervene in an action who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both plaintiff and defendant. Section 387, Code Civ. Proc. The petitioner did not have any interest in the matter in litigation, to wit, plaintiff's claim for goods sold, or in the success of either of the parties, or an interest in the matter against both. He did not dispute the plaintiff's claim, which may or may not be due. He did not ask to join with the plaintiff in claiming what the plaintiff sought in his complaint, nor did he ask the right to unite with the defendant in resisting the defendant's claim, nor did he demand anything adversely to both plaintiff and defendant as to the subject of the action. He therefore did not intervene or become a party to the action.

Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101.

[6] The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

[7] As the petitioner did not become a party to the action by intervention or otherwise, he had no right to appeal from the order appointing a receiver. Having no such right, respondents' contention that petitioner's application must be denied because he had a plain, speedy, and adequate remedy in the ordinary course of law by appeal to the Supreme Court is unfounded. Even if the petitioner had by intervention become a party to the proceeding in the superior court, and had a right to appeal from the order appointing the receiver, yet his remedy by appeal would not, under the circumstances of this particular case, have been plain, speedy, and adequate, and a writ of prohibition would lie. *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450; *Glide v. Superior Court*, 147 Cal. 21-29, 81 Pac. 225; *Dungan v. Superior Court*, 149 Cal. 98-103, 84 Pac. 767, 117 Am. St. Rep. 119.

It follows from the foregoing that the demurrer to the petition for a writ of prohibition must be, and the same is, overruled.

This opinion is not to be construed as an authority opposed to the appointment of a receiver of specific property of a corporation, where such appointment would be proper under section 564 of the Code of Civil Procedure in certain actions between private parties. Our views must be taken as applying to an action of the kind now before the court and not as applicable to all kinds of cases against corporations.

At the time the respondents filed their demurrer, they also filed an answer to the petition. The answer fails to state facts sufficient to constitute a defense, except in one particular. The petitioner alleges that he is the owner and holder of two certain promissory notes of the Gibraltar Company for \$30,000, payable by the terms thereof to the Midas Fruitland Company, and by the latter indorsed and assigned to the petitioner. The respondents in their answer, for want of information or belief upon the subject, deny this allegation. An issue of fact is thus raised. To determine this issue, the court will take testimony on the 14th instant in San Francisco. If the issue be determined adversely to respondents, then a peremptory writ of prohibition will issue as prayed for. But, if the issue be determined against the petitioner, then his petition will be denied

for his failure to show any beneficial interest in the subject-matter of the litigation.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

#### Supplemental Opinion.

PER OURIAM. In the above-entitled proceeding the court, in its opinion heretofore filed, overruled respondents' demurrer to the petition herein and decided that the answer of the respondents to said petition, filed with their demurrer, with one exception did not state facts sufficient to constitute a defense. That exception arose out of the allegation, contained in the petition and denied in the answer, that the petitioner was the owner and holder of two certain promissory notes of the Gibraltar Investment & Home Building Company for \$30,000 each, described in the petition. The trial of the issue as to the ownership of these notes was set for the 14th inst. Before the day set the petitioner and respondents filed a stipulation effective for the purposes of this proceeding only in which they agreed that the petitioner is the owner and holder of the notes in question.

Now, therefore, in accordance with our opinion heretofore filed herein, it is by the court ordered and adjudged as follows:

1. That the order of the superior court of the county of San Bernardino made in that certain action pending in that court entitled "The Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. The Gibraltar Investment & Home Building Company, a Corporation, Defendant," appointing S. F. Kelley receiver of the assets of said Gibraltar Investment & Home Building Company, is null and void, and was made by said superior court without and in excess of its jurisdiction.

2. That all acts performed by said court or by the judge thereof in relation to said receiver, his appointment or duties, and all acts of said S. F. Kelley performed under or by virtue of said order of appointment as such receiver, are and each of them is void.

3. That a peremptory writ of prohibition issue out of this court, directed to the Superior court of San Bernardino county and the judge thereof and said S. F. Kelley, arresting all proceedings in said action entitled "The Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. The Gibraltar Investment & Home Building Company, a Corporation, Defendant," in so far as they relate to said receiver, his powers and duties, and absolutely restraining said superior court and the judge thereof, and said S. F. Kelley, from doing any act or thing or performing any function whatever by reason or by virtue of or under said order appointing said receiver.

(25 Cal. A. 645)

**PEOPLE v. DRENNAN.** (Cr. 265.)

(District Court of Appeal, Third District, California. Oct. 31, 1914.)

**1. RAPE (§ 52\*)—ASSAULT WITH INTENT TO RAPE—SUFFICIENCY OF EVIDENCE.**

On a trial for assault with intent to rape a girl eight years old, her testimony that she protested against accused's conduct supported a jury finding that his acts were against her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.\*]

**2. RAPE (§ 60\*)—ASSAULT WITH INTENT TO RAPE—ELEMENTS.**

A conviction for assault with intent to rape was supported by jury findings that accused attempted to have sexual intercourse with a girl eight years old, and that his acts were against her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 101; Dec. Dig. § 60.\*]

Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Robert Drennan was convicted of assault with intent to commit rape, and he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

**HART, J.** The defendant was charged by information filed in the superior court of Sacramento county with the crime of rape upon a female under the age of 18 years, and upon a trial for said offense was convicted of the crime of assault with intent to commit rape. He appeals from the judgment and the order denying him a new trial.

The record before us consists entirely of the clerk's transcript, embracing the minutes of the court, the instructions, verdict, etc., and a transcript of the testimony. No briefs on behalf of either the appellant or the respondent have been filed nor was the cause orally argued.

We have, however, taken the pains to examine the testimony, the instructions, and the rulings of the court upon questions involving the admissibility and nonadmissibility of certain testimony, to the allowance of which objections were made and exceptions reserved, and our conclusion is that the defendant was in all respects given a fair and legal trial, and that the verdict appears to be justified.

[1, 2] The record discloses that, although the prosecutrix was but a little over eight years of age, she protested against the conduct of the defendant, which formed the basis of the charge in the information. From this testimony the jury were justified in finding that the defendant's acts were against the consent of the prosecutrix, and such finding, together with the finding that the defendant actually attempted to have sexual intercourse with the child, if, indeed, he did not succeed in doing so, is a sufficient pred-

icate of the conclusion reached by the jury that the crime committed by the accused was that of an assault with intent to commit rape. *People v. Akin*, 143 Pac. 795.

The judgment and the order are affirmed.

We concur: **CHIPMAN, P. J.**; **BURNETT, J.**

(25 Cal. A. 638)

**ADAMS v. GERIG.** (Civ. 1255.)

(District Court of Appeal, Third District, California. Oct. 30, 1914.)

**1. ACCOUNT STATED (§ 19\*)—ACCOUNT—FRAUD—FINDINGS—SUFFICIENCY OF EVIDENCE.**

In an action on an account stated, evidence held to support a finding that the account was fairly stated, and there was no fraud or false representations by plaintiff.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.\*]

**2. ACCOUNT STATED (§ 11\*)—ACTION—MISTAKES—CORRECTION.**

In an action upon an account stated, evidence of omissions and errors therein is admissible, and the specific items questioned may be adjusted without reopening the whole account.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61-72; Dec. Dig. § 11.\*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Elvin Adams against C. Gerig on an account stated. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Rankin, of Susanville, for appellant. Pardee & Pardee, of Susanville, for respondent.

**BURNETT, J.** An examination of the record shows justification for the following statement of facts made by respondent:

"Plaintiff and his wife were hired by the defendant to work upon the latter's farm in Lassen county, the plaintiff to do general farmwork, and his wife to do housework. They commenced work under this employment April 8, 1909, and continued, with some intervals of lost time, until September 21, 1911. The agreed wages for Mrs. Adams were \$15 per month, or 50 cents per day, at all times except during haying and harvesting, when she was to have \$30 per month, or \$1 per day. There is some conflict as to plaintiff's ordinary wages; he says the agreement was \$40 per month while defendant asserts the wages were to be \$35 per month. But there is no dispute that his pay was to be \$2 per day during haying and \$2.50 per day during harvest. In October, 1911, after the termination of the employment, the parties attempted to settle at the defendant's farm; but they could not agree as to the state of their accounts, and at the suggestion of the defendant they went, on October 23, 1911, to Bieber's store at McArthur, in Shasta county, to have R. E. Dunlap, the manager of that store, help them to settle. So they submitted their various memoranda to Mr. Dunlap, and he prepared for them a statement of the account, showing a balance due the plaintiff of \$1,192.73. Dunlap was entirely disinterested, and did not influence, or attempt to influence, either party. Defendant signed the statement of account, certifying that he owed the plaintiff the balance therein stated, his signature being by mark and witnessed by Dunlap."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



There was a clerical error of \$25 in the account, and some items were inadvertently omitted from the settlement. These items are mentioned in the findings and were taken into account in arriving at the amount of judgment given to plaintiff. "After the statement of the account, and before the plaintiff sued, the sum of \$426.40 was paid on account by the defendant. The plaintiff commenced his action August 9, 1912, basing it on the account stated."

Defendant by his answer denied that the account was stated, and alleged that plaintiff and Dunlap presented the account to defendant and requested him to sign it and, upon his objection, urged and persuaded him to sign it, and falsely and fraudulently represented to him that it was true and correct. It is further alleged that the account is not correct; "that mistakes were made in the computation of wages of plaintiff and his wife; that it does not contain all the cash or merchandise received by plaintiff from defendant; and that many items of account were omitted therefrom." The cause was tried upon the issues as thus presented, the fullest opportunity being afforded to show the inaccuracy of said account or that fraud or improper influence was practiced, and the court gave judgment to plaintiff for \$723.12, and found that "the account was stated as alleged by plaintiff; that it was fairly stated, and no fraud was perpetrated, and no false representations were made by plaintiff or any one acting for him; but that all mistakes were mutual."

[1] The appeal is from the judgment. The finding of the court as to the absence of fraud and the fairness of the transaction culminating in the said statement of account is abundantly supported. Indeed, as claimed by respondent, the testimony of the defendant himself would be sufficient for that purpose, and the account of the settlement and of the surrounding circumstances given by Mr. Dunlap, an entirely disinterested witness, could lead the court to no different conclusion.

[2] The only other question of moment is whether it was proper for the court, upon an action for account stated, to allow evidence of omissions and errors therein and to find in favor of plaintiff in accordance with the developed facts. As to this, under the decisions, there can be no kind of doubt.

The rule is, as stated in *Branger v. Chevalier*, 9 Cal. 353, as follows:

"Accounts stated may be opened, and the whole account taken de novo, for gross mistake, in some cases. \* \* \* But this can only be done when the gross error affects all the items of the transaction." When "the clear mistake only affects a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. And when the party who seeks to go behind the stated account goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand."

In *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787, the same question was considered, and the court said:

"We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake."

It is useless to multiply quotations, but, as sustaining the same doctrine, we may mention the following additional authorities: *Tuggle v. Minor*, 76 Cal. 100, 18 Pac. 131; *Conville v. Shook*, 144 N. Y. 688, 39 N. E. 405; *Story's Equity* (13th Ed.) §§ 523 to 525; 1 R. C. L. p. 220.

Under the issues as made by the complaint and answer, the court very properly allowed, therefore, said account to be surcharged and falsified, and directed judgment in favor of plaintiff for \$723.12, instead of \$766.40, as claimed.

The findings of fact are supported, they are within the issues, and they in turn support the judgment, and we have discovered no reason for interfering with the conclusion of the lower court.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(25 Cal. A. 641)

ASBESTOS MFG. & SUPPLY CO. v. AMERICAN BONDING CO. OF BALTIMORE et al. (Civ. 1317.)

(District Court of Appeal, Third District, California. Oct. 30, 1914.)

STATUTES (§ 267\*)—RETROACTIVE OPERATION—CHANGE IN PROCEDURE.

St. 1911, p. 1422, extending the time within which a person claiming under a bond given for the construction of municipal improvements shall file his statement of claim and institute suit thereon, applies in a case where the bond was executed before the amending act was passed, but the work was completed and the claim filed thereafter, since it was a mere change in procedure not affecting the right or the remedy.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Asbestos Manufacturing & Supply Company against the American Bonding Company of Baltimore and others. Judgment for plaintiff, and defendant American Bonding Company of Baltimore appeals. Affirmed.

H. A. Van C. Torchiana, of San Francisco, for appellant. Mastick & Partridge, of San Francisco, for respondent.

BURNETT, J. The action is against appellant American Bonding Company of Baltimore as surety upon a bond given by the

Lennig-Rapple Engineering Company for the doing of public work in the city and county of San Francisco. The bond was given pursuant to a statute enacted in 1897 requiring that the person seeking relief under the bond shall file with the board of public works a verified statement of his claim within 30 days from the time such work is completed, and providing, further, that suit may be filed by such claimant within 90 days after the filing of such claim. The work here was completed prior to February 28, 1912, but the claim was not filed until April 12, 1912, and the suit was begun July 18, 1912. But, while the statute in force at the time of the execution of the contract required the filing of the claim and the commencement of the action as stated above, in 1911 (Stats. 1911, p. 1422) the said act was amended and said respective periods were extended, and it is conceded by said appellant "that if the act of 1911 is operative in this case, the claim was properly filed and the suit commenced within proper time." It is insisted, however, that "the amendatory act of 1911 should not be construed as being retroactive and the provisions of the act in force when the bond was executed should be considered the sole criterion."

Respondent, though, calls attention to several decisions directly in point that support the view taken by the trial court. Appellant has not seen fit to notice any of these cases, although it is stated that they were relied upon in the trial court. We content ourselves with specific reference to only three of those cited.

In *Bear Lake v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327, the question involved an amendment providing an extension of time for the foreclosure of a mechanic's lien and Mr. Justice Peckham, delivering the opinion of the court, said:

"The mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or of the remedy, as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute."

It was therefore held that the new act applied to plaintiff's case. In this instance it may likewise be said that the enlargement of the time for filing the claim and beginning

the action was made before the time had arrived in which either of said steps could be taken under the old statute, and in principle the two cases are not distinguishable.

A later case is *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 Sup. Ct. 17, 57 L. Ed. 221. Therein the action was brought on a bond, under a Minnesota statute, providing that the parties executing the bond shall be liable, with the condition that the claimant serve notice within 90 days after he finishes his work. After the bond had been executed and delivered, the statute was amended so that time for service of the notice was extended. The claimant served a notice which was late according to the time limit provided in the original statute but was within the time limit as extended by the amendment. The United States Supreme Court held that the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract, the court saying:

"The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges, or modifies the obligation of a contract and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself. \* \* \* In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond affects the remedy and not the substantive agreement of the parties, and although the statute as it stood when the bond was given \* \* \* must \* \* \* be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore the subsequent statute \* \* \* effected merely a change in the remedy, without substantial modification of the obligation of the contract."

The case of *Kerckhoff-Cuzner Mill Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648, involved the construction of a statute shortening the time within which a mechanic's lien could be filed. The court said:

"We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true, it *shortened* the time which the respondent would otherwise have had to file its claim and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left."

We think the foregoing cases properly state the rule and are decisive of the controversy here.

There is no more merit in the contention of appellant that the bond does not conform to the requirement of the statute. It seems to follow closely the language of the statute, and specifies that the bond is given as required by an act of the Legislature, entitled "An act to secure the payment of the claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27, 1897." St. 1897, p. 201.

The foregoing are the only points made by appellant and, as they seem untenable, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(25 Cal. A. 647)

PEOPLE v. CREITSER. (Cr. 262.)

(District Court of Appeal, Third District, California. Oct. 31, 1914.)

1. CRIMINAL LAW (§ 1130\*)—APPEAL—BRIEFS.

Under Supreme Court rule 5 (160 Cal. xlv, 119 Pac. x), declaring that an appeal may be dismissed if the transcript or points and authorities are not filed within time, accused's appeal may be dismissed, where no record of the testimony or briefs were filed when the case was called and there was no appearance on behalf of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.\*]

2. CRIMINAL LAW (§ 977\*)—SENTENCE—WAIVER OF ERRORS.

Accused pleaded guilty, but was not sentenced within the time prescribed by Pen. Code, § 1191. Thereafter, having withdrawn his plea of guilty and requested that his case be set down for trial, accused again pleaded guilty waiving time for the pronouncement of judgment. Held, that he could not assert that the court erred in failing to sentence him on his first plea within the time prescribed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. § 977.\*]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Otto Creitsler was convicted of crime, and he appeals. Affirmed.

E. M. Frost, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant pleaded guilty, in the superior court of Del Norte county, to an information charging him with the crime of rape upon a female under the age of consent, May Bartol by name—a name by no means unfamiliar to this court, its possessor having been the victim of similar mistreatment to that charged against the defendant by four other parties, who were convicted of the offense, and who unavailingly appealed their cases to this court. See *People v. Bartol*, 142 Pac. 510; *People v. Hoosier*, 142 Pac. 514; *People v. Horn*, 144 Pac. 641; *People v. Taggart*, 144 Pac. 1197, the opinion in which was filed in this court on October 27, 1914.

The present appeal is from the judgment and the order denying the defendant a new trial, "and from each and every order of said superior court made after pronouncing judgment in the above-entitled cause."

[1] There has been no record of the testimony filed in this court, nor are there any briefs on file herein. There was no appearance in behalf of the defendant when the cause was

regularly called on the calendar at the last regular term of the court, and the Attorney General, therefore, submitted the case on the record, such as it is, now before us. Under these circumstances, we would be justified in ordering the appeals herein dismissed. Rule 5, Supreme Court (160 Cal. xlv, 119 Pac. x); *People v. Perry*, 16 Cal. App. 772, 117 Pac. 1036. But the record is brief, and therefore, while not deemed necessary, we have gone to the trouble of examining it carefully, and have discovered nothing therein which would warrant us in sustaining any of the appeals, if, indeed, it may be said that any has been properly taken.

[2] It appears that the defendant's case was called for trial on November 12, 1913, and the same was then proceeded with. Before completing the jury panel the defendant withdrew his plea of not guilty theretofore interposed, and entered a plea of guilty to the charge alleged in the information. The court thereupon fixed Saturday, November 15, 1913, as the time for pronouncing the judgment of sentence. Thereafter the court continued the matter of sentencing the defendant from time to time until the period elapsing between the day upon which he pleaded guilty and the day upon which sentence was finally pronounced comprehended over 100 days.

It appears from the affidavit of counsel for the defendant that, after entering a plea of guilty, and after the several postponements by the court of the time for passing sentence, as above explained, the defendant withdrew his plea of guilty and asked that his case be set down for trial. The matter of fixing a date for the trial of the case was continued until February 24, 1914, at which time the defendant again entered a plea of guilty to the information, and declared to the court that he desired to dispense with any further services of his attorney. The defendant, upon entering his plea of guilty at said time, waived time for the passing of sentence, and the court thereupon and immediately pronounced its judgment.

Thus we have presented all the important facts disclosed by the record of this case as filed in this court.

Although, as stated, no brief was filed or oral argument presented on behalf of the defendant, we may assume that the point upon which the defendant claims the right to a reversal is that (so he might claim), the sentence having been pronounced long after the time within which the law provides that such act shall be performed (section 1191, Pen. Code), the court lost the right or the legal authority to pronounce sentence or judgment at all. That section provides that after a plea or verdict of guilty the court must appoint a time for pronouncing judgment—

"which must not be less than two nor more than five days after the verdict or plea of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided further, that the court may extend the time not more than twenty days in any case where the question of probation is considered, in accordance with section twelve hundred and three of this Code. If in the opinion of the court there is a reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in chapter six, title ten, part two of this Code."

Referring to said section, the Supreme Court, in *Rankin v. Superior Court*, 157 Cal. 189, 191, 106 Pac. 718, 719, says:

"The effect of this section is that the court has no authority to fix the time for pronouncing judgment for a day later than 5 days after the verdict; that, if a motion for a new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for 10 days, and that, where the question of probation is considered, the court may, for that purpose, extend the time 20 days. These two provisions for extension of time are not cumulative, and the latest date to which the court is authorized to extend the time for rendering judgment, where present insanity is not involved, is a day not more than 25 days after the date of the return of the verdict." See, also, *People v. Flavin*, 21 Cal. App. 244, 246, 131 Pac. 321.

But, assuming that there is a legal appeal here, it is readily obvious that, while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time expressly limited by the statute, that point cannot now be urged by the defendant, since it appears, as we have shown, that he withdrew his plea of guilty after the matter of pronouncing judgment had been postponed from one date to another until the statutory period had been passed, and that, after so withdrawing said plea, he again entered a plea of guilty, waived time for the pronouncing of judgment, and the court thereupon and at once pronounced its judgment of sentence. The court, therefore, in passing sentence was obviously within the time limit prescribed by the statute for pronouncing judgment upon what seems to have been at that time the only plea to the information before it.

The judgment and all the orders appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(19 N. M. 472)

### BACA v. CITY OF ALBUQUERQUE. (No. 1692.)

(Supreme Court of New Mexico. Nov. 30, 1914.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 745\*)—OFFICERS—LIABILITY FOR TORTS—OPERATION OF STATUTE.

Section 1, c. 67, Sess. Laws 1905, construed. Held, that such section does not relieve

the member or officer of such corporation from liability for tortious acts done by him in the discharge of his official duties, and cast such liability upon the city, unless such tortious act is done by authority of such corporation, or in execution of its orders.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1566; Dec. Dig. § 745.\*]

Appeal from District Court, Bernalillo County; H. W. Reynolds, Judge.

Action by Elfego Baca against the City of Albuquerque. From judgment for defendant, plaintiff appeals. Affirmed.

H. B. Jamison, of Albuquerque, for appellant. John C. Lewis and T. N. Wilkerson, both of Albuquerque, for appellee.

ROBERTS, C. J. Appellant instituted this suit in the court below against the appellee, the city of Albuquerque, to recover the sum of \$5,000 alleged to be due by reason of damages done appellant's person and property, through the careless and negligent driving of a fire wagon belonging to defendant and driven by agents of the appellee, in responding to a fire alarm. Appellee did not demur to the complaint, but filed an answer denying many of the allegations of the complaint, and alleged contributory negligence on the part of appellant. To this answer plaintiff replied, denying all the affirmative allegations thereof. Upon the issue so framed the cause proceeded to trial to a jury. Upon the conclusion of appellant's opening statement, the court instructed the jury to return a verdict for appellee, upon the theory that the appellant, neither by his opening statement of facts nor his complaint, presented facts sufficient to constitute a cause of action. Upon the verdict so returned, judgment was entered dismissing the complaint, from which this appeal is prosecuted.

The only question involved in this appeal is the proper construction of section 1, c. 67, S. L. 1905, which reads as follows:

"No personal action shall be maintained in any court of this territory against any member or officer of any municipal corporation in this territory for any tort or act done, or attempted to be done, by such member or officer, when done by authority of such municipal corporation, or in execution thereof; in all such cases the municipal corporation shall alone be responsible; and any such member or officer may plead the provisions of this act in bar of such action, whether the same be now pending or hereafter commenced."

Appellant admits that under the common law he could not maintain this action against the city, but he contends that the above quoted statute makes the city liable, in all cases and under all circumstances, for any tortious act done by a city official or employé, when such officer or employé is acting in his official capacity for such city. In other words, it is his contention that the above statute takes away his remedy against the city employé driving the wagon in question,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and makes the city liable to him for the acts of such driver in this case. We do not believe the language of the statute justifies such construction. The act says the member or officer shall not be liable for any tort or act done or attempted to be done by such member or officer, "when done by authority of such municipal corporation or in execution of the orders thereof." This, we think, exempts the member or officer from liability, and casts the same upon the city only in those cases where the tortious act was done by authority, or in execution of the orders of the municipal corporation. For illustration, suppose the city council should instruct the chief of police to tear down a building, or to close a ditch, and pursuant to such order he should do so. In such a case the statute says he shall not be individually liable for such act, but that the liability shall rest upon the city. The city authorizes the closing of a street, and under such authority the marshal proceeds to do so. The marshal would not be liable, as he acted under the authority of the city, but the city would be liable under the statute, if damages were recoverable. The statute does not undertake to change the common-law rule, except in those cases where the specific tortious act was done under direction of the city, or by its authority.

As appellant does not contend that the city would be liable, independent of the statute, no further discussion of the case is necessary.

For the reasons stated, the judgment of the district court will be affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

(19 N. M. 640)

In re RENEHAN. (No. 1607.)

(Supreme Court of New Mexico. March 21, 1914. On Motion for Rehearing, April 20, 1914.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 45\*) — DISBARMENT—GROUNDS—RELATION BETWEEN PARTIES.

In a proceeding looking to disbarment, where the evidence fails to show that the relation of attorney and client existed, an attorney at law in his dealings with a party in a business transaction is under no greater obligation to the party with whom he deals than a person not an attorney would be.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 63; Dec. Dig. § 45.\*]

2. ATTORNEY AND CLIENT (§ 53\*) — DISBARMENT PROCEEDINGS — CONFLICTING EVIDENCE — DISMISSAL.

Where the court in a disbarment proceeding finds upon conflicting evidence that the case has not been established against the respondent by a preponderance of evidence, the charges against respondent will be dismissed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.\*]

Proceedings looking to the disbarment of A. B. Renehan. Information dismissed.

This is a proceeding on an information against Alois B. Renehan for disbarment, filed by the Attorney General in accordance with the recommendation of the State Board of Bar Examiners of the State of New Mexico, under and by virtue of chapter 53, Session Laws of 1909 of New Mexico. The information contains three charges, all of which allege that said Renehan, being at all times therein specified duly admitted to practice law before this court and the inferior courts of the state of New Mexico, has practiced mischief and deceit, has been unfaithful to the court and his clients, is unworthy of public confidence, and has not demeaned himself as an attorney in the courts of this state uprightly and according to law, and has committed acts to which disbarment, as a consequence, is attached.

The first charge, in effect, alleges: That by virtue of a certain decree of the district court of Rio Arriba county, in cause No. 624, entitled Jose Isabel Martinez et al. against George Hill Howard et al., which was an action to quiet title and to partition the Juan Jose Lovato grant, and that in said suit the east three-fourths of the south half of said grant was set apart to the heirs and legal representatives of said Juan Jose Lovato in fixed proportions. Said charge further alleges that all of said heirs executed a power of attorney to one George Hill Howard empowering him to sell their interests in said grant; and that the said Howard in executing said power of attorney conveyed to the New Mexico Irrigated Lands Company, for the sum of \$20,000, the east three-fourths of the south half of the Lovato grant, hereinafter called the "heirs' tract"; and that said company mortgaged said tract to said Howard to secure the payment of the purchase price; that upon the death of said George Hill Howard, by his will and subsequently by decree of court, his son, G. Volney Howard, was substituted as trustee for his deceased father; that said G. Volney Howard is still acting as such substituted trustee and has never been discharged. It further alleges: That said entire Lovato grant was sold to Messrs. Tutt & Skinner of Colorado Springs, and that out of the proceeds of said sale the sum of \$24,000 was to be applied to the purchase of the heirs' tract, and that said amount was to be distributed among the heirs in the proportions stated in the decree of partition in said cause No. 624 in the district court of Rio Arriba county. That said George Hill Howard and his successor in trust, G. Volney Howard, were bound by the terms of the trust to pay to each of the cestui que trustent his or her full share of the trust fund created by the sale of the said heir's tract without diminution. That said Renehan, the respondent, represented said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Tutt & Skinner, the purchasers, as their New Mexico attorney, and was fully acquainted with all of the foregoing facts. That thereafter, during December, 1908, January, February, and March, 1909, said Renehan fraudulently, corruptly, and by misrepresentations, contrary to his duty and obligations to his clients, and contrary to his oath of office as an attorney, caused and procured certain of the heirs of Juan Jose Lovato to employ him as their attorney and to execute to him assignments of their interests in said trust fund, by falsely and fraudulently representing to them that said George Hill Howard did not intend to deal fairly with them and did not intend to pay them all that was due them; and that he, said Renehan, controlled the grant and could easily obtain the money for them; that it was necessary for them so to assign their interests in the fund to him in order to collect the money due them as heirs and assigns of Juan Jose Lovato. That he, the said Renehan, well knowing the falsity of these statements, being fully aware and advised that under the terms of the trust the substituted trustee, G. Volney Howard, was compelled to pay said heirs without diminution and would do so without the intervention of any attorney whatsoever. That said Renehan, the respondent, "prepared the assignments so procured by him to be signed by his clients as aforesaid, and falsely and fraudulently represented to them that each was entitled to a certain sum as his or her proportionate amount of the total realized from the sale of the grant \* \* \* with intent to cheat and defraud them, and inserted in each assignment false amounts, whereas, in truth and in fact, his clients were entitled to amounts" much larger than those inserted in said assignments, "concerning which said Renehan was fully informed when he made such false and fraudulent representations and inserted the said false and fraudulent amounts in the assignments; and that his said clients, relying on his statements, without any knowledge of their falsity, and believing them to be true, and acting under his advice as their attorney, did each sign, execute, and deliver to him during the months of January and February, 1909, an assignment of the amount due as represented to them by him. That said Renehan during the months of January and February, 1909, personally or through his agents furnished a list of the heirs and assigns of the said Juan Jose Lovato, purporting truthfully to set forth the names of the said heirs and the amounts due each of them, \* \* \* whereas, in truth and in fact, the amounts listed were falsified and were much less than the actual amounts due them, and said Renehan having prepared assignments in the same manner and form and with the same fraudulent amounts inserted as above alleged, did procure through the efforts of T. B. Catron, an attorney at law of Santa Fé, N. M., and

by means of the same false and fraudulent representations, assignments of nearly all of the remainder of the Lovato heirs, and having thereby secured said assignments, together with those of his clients, without the knowledge, authority, or consent of the assignors, and with intent to defraud them, did fraudulently, wrongfully, and unlawfully raise \* \* \* the amounts of said assignments, "and thereupon presented them to G. Volney Howard, substituted trustee as aforesaid, on or about the 28th day of April, 1909, and said substituted trustee thereupon paid over to said Renehan, as assignee of the heirs named in said assignments, and as assignee for Antonio Faustin Lovato and others, the sum of \$17,664.25; and that at the time said G. Volney Howard was without any knowledge of the false and fraudulent practices of said Renehan as hereinabove set forth, by virtue of which said assignments had been obtained, and paid said amounts to said Renehan in complete ignorance of the fact that the assignors had been so deceived, defrauded, and cheated."

"That in the case of the assignments procured by said Catron, said Renehan, having procured the money paid him as aforesaid, and having deducted therefrom the difference between the amounts originally upon the assignments and the amounts to which he had raised said assignments, fraudulently, unlawfully, and without right retained for, and appropriated to, his own use and benefit said difference, and the balance left, after said deduction, said Renehan paid to said Catron during the month of May, 1909; and as to the remaining assignments said Renehan, without the knowledge of his clients, fraudulently, unlawfully, and without right appropriated to his own use and benefit the difference between the amounts originally shown in the assignments and the sums to which he raised said assignments as hereinbefore set out, and utterly failed to account to his clients for the amounts so unlawfully appropriated by him to his own use and benefit. That said respondent represented, as his attorney, one Antonio Faustin Lovato, whose interest in the said grant as an heir amounted to the sum of \$750, and who had acquired an additional interest by purchase from one Jose Maria Lovato of \$6,000, and that said Renehan, well knowing and being fully informed that the said amounts were due to the said Antonio Faustin Lovato, represented to him that he could not recover the same without employing him, and that there was due him by virtue of his heirship the sum of \$400, and by virtue of his purchase the sum of \$3,200, and that by the same false and fraudulent representations he prevailed upon him to employ him (respondent) to collect the amount due him, and having compromised and settled the claim without suit with the said G. Volney Howard, who as attorney at law represented Jose Maria Lovato with respect to the amount due Antonio Faustin Lovato on account of his purchase from Jose Maria Lovato of his interest, for the sum of \$5,000, and having collected said amount, and having also collected the amount due the said Antonio Faustin Lovato in behalf of his heirship interest in said fund, in all amounting to \$5,750, did pay to the said Antonio Faustin Lovato the sum of \$2,000, and falsely and fraudulently represented to him that that amount was all that was due him after deducting his fee, and that said Renehan, contrary to his duty and obligation to his client, and contrary to all right and equity, retained and withheld from his client Antonio Faustin Lovato, and appropriated to

his own use, the sum of \$3,740. That by the aforesaid false and fraudulent representations, and by said deceitful and corrupt practices, said Renehan fraudulently converted to his own use the sum of about \$2,840, which came into his possession by virtue of his employment as attorney, \* \* \* and unlawfully appropriated to his own use about the sum of \$1,900 from those who made assignments to him through the efforts of T. B. Catron, as above alleged, and that by means of said false and fraudulent representations he fraudulently converted to his own use the sum of \$3,750 which came into his possession by virtue of his employment as an attorney by Antonio Faustin Lovato, as above set forth."

The second charge need not be set out in full, but, so far as it is material to this case, alleged that:

"As an attorney at law said Renehan was employed on the 15th day of December, 1909, by one Arthur H. Gossett, to represent the said Gossett in the district court of Rio Arriba county upon a charge of murder, the grand jury of said district court having indicted said Gossett for the said offense in the June, 1910, term of said court. That the said Gossett informed the said Renehan in the month of June, 1911, just prior to the trial of his cause at the 1911 term of the district court of Rio Arriba county, that there was a certain contract in existence which was executed on the 8th day of June, 1910, by one Silvano Roibal, who was then and there the duly elected, qualified, and acting sheriff of said county, for a money consideration, offered and paid him by one Elias Clark, of Alcalde, N. M., by virtue of which said contract the said Silvano Roibal certified and declared that he would see said Gossett free and acquitted of the charge of murder then pending against him as aforesaid. That the said Renehan well knew that the intent of said contract and agreement was that the said Silvano Roibal should corruptly, unlawfully, and improperly influence the jurors who were selected, impaneled, and sworn to try the said Gossett upon the charge of murder, as aforesaid, and said Renehan, as an attorney at law, and the duly sworn officer of said court, well knew that such corruption and bribery of said officer of this court was unlawful and in contempt of said court, and, by his failure to disclose said corruption and bribery to said court prior to the trial of said Gossett, thereby took an unlawful and corrupt advantage of said court, contrary to his oath of office as an attorney at law and in contempt of the dignity and authority of said court; it being then and there the duty of the said Renehan, attorney at law, to uphold and sustain the dignity and authority of said court and to prevent the corruption and bribery of an officer of said court, and then and there to disclose an attempt to corrupt the jury by such means, and especially not to take advantage of such corruption and bribery by remaining silent upon the discovery of the fact, and that the said Renehan by his failure to disclose said conditions, and by going to trial with full knowledge of the existence of the contract and of its intents and purposes, gave his consent to it and to the corruption of an officer of the court, and took advantage of it, contrary to his oath of office and in contempt of that court."

Said second charge further alleges:

"That the trial in the month of June, 1911, resulted in a mistrial, and the cause did not come up for trial again until November, 1912, and during all the time from June, 1911, until November, 1912, said Renehan was fully informed and knew of the existence of the contract, but prior to the November, 1912, term of the court E. P. Davies, an attorney at law and former partner of the said A. B. Renehan, disclosed to the district attorney, Alexander Read, the fact of the existence of the contract, \* \* \* and said Alexander Read went to said A. B.

Renehan and told him that he knew about the contract, and stated that he would discharge the petit jury which had been impaneled for the term; whereupon the said A. B. Renehan went to the said Gossett and advised him of the facts, and that the first panel of the petit jury had been discharged because of the discovery by the district attorney; that thereafter a new panel was called, which upon the trial of the cause found the said Gossett not guilty, and the court discharged him accordingly."

The third charge alleged unprofessional conduct and prayed disbarment on account of certain actions of said respondent in the cause of *Retsch v. Renehan*, No. ——— in the district court of Santa Fé county, afterwards appealed to this court, cause No. ——— in said court (16 N. M. 541, 120 Pac. 897). This charge was demurred to on the grounds, among others, that nothing therein showed unworthiness or infidelity as an attorney which would subject respondent to the penalty of disbarment. This demurrer was at a former hearing of this cause sustained and is not now before us for consideration.

The respondent answered the first charge alleging, in effect, that he was not the attorney for the parties in question, but acted only as a broker of Messrs. Tutt & Skinner, who had purchased the Lovato grant, and that he took from the various heirs absolute assignments of their interests at prices agreed upon with them. Respondent further answered that he practiced no deceit upon said Catron nor upon said Howard in his transactions with them regarding the assignment of these interests, and that further as to the heirs of the Lovato grant, who were his (the respondent's) clients, he made a full and fair disclosure of all the facts in relation to his purchase of their interests and entered into a new contract with them for the sale of their interests in the grant.

The respondent demurred to the second charge of the information on the ground that the knowledge of said corrupt bargain was received by him as a privileged communication between attorney and client. This demurrer was overruled, and the defendant answered denying that he had any knowledge of such corrupt bargain prior to the first trial of the case at the June term, 1911, and further alleging that upon learning of it after such term he informed the district attorney, and through him the court, of such corrupt bargain, and that the jury panel at the next trial of the cause was dismissed in consequence of such information. Upon the trial of the issue raised by the second charge, the state's witness Gossett was unable to testify positively that he informed the respondent of the aforesaid corrupt bargain before the first trial, but testified that he could not say positively whether he so informed Renehan before or after the first trial. Upon the failure of said Gossett to testify as to Renehan's knowledge of the corrupt bargain before the first trial of the case, the Attorney General dismissed the second charge against the respondent.

This, then, leaves only the first charge for the consideration of the court at this time.

Frank W. Clancy, Atty. Gen., for the State. J. H. Crist, of Santa Fé, E. A. Mann, of Albuquerque, and Edward R. Wright, of Santa Fé, for respondent.

RAYNOLDS, District Judge (after stating the facts as above). The charges in this case arose out of the sale of the Juan Jose Lovato grant. The undisputed evidence shows that the title to this grant had been confirmed and the south half set apart to the legal heirs and representatives of Juan Jose Lovato; that later a suit for partition of the grant was brought, and that one-fourth of the south half was given to the attorneys as a fee for prosecuting such suit, thus leaving the east three-fourths of the south one-half of the grant to the heirs, whose fractional interests were shown by the decree of the court in said action. It further appears that all the heirs and assigns of Juan Jose Lovato gave to George Hill Howard a power of attorney to sell their interests in said east three-fourths of the south half known as the "heirs' tract," at a certain price per acre, and that, after several attempts, said Howard finally sold the said heirs' tract to the New Mexico Irrigated Lands Company for the sum of \$20,000, and took a mortgage from said company to secure the payment of the money. The New Mexico Irrigated Lands Company never paid the purchase price, and at the time the entire grant was bought by Messrs. Tutt & Skinner, about December 1, 1908, the mortgage and interest thereon amounted in round figures to the sum of \$24,000. At the time of the purchase of the grant by Tutt & Skinner the purchasers did not pay cash, but gave their notes payable in one year, and also assumed the \$24,000 mortgage on the heir's tract.

The first charge may properly be divided into three divisions, in regard to the respondent's relations to the Lovato heirs: First, as to those heirs who were neither clients of respondent nor clients of Catron & Catron; second, as to such heirs as were clients of Catron & Catron; and, third, as to those heirs who were respondent's clients.

As to the first set of Lovato heirs, the respondent testified that he acted, not in the capacity of an attorney at law for them, but simply as a broker of Messrs. Tutt & Skinner, the purchasers of the grant, who had by such purchase assumed the mortgage of the New Mexico Irrigated Lands Company; that the purchasers had given their notes for the purchase price, due in one year, and that they were desirous of discounting those notes and closing out the matter for the smallest amount of money possible; that there was some discussion in regard to a proposed foreclosure of the mortgage, but that it was finally decided to purchase the interests of

the mortgagees, and, to effect this plan, the respondent undertook to buy the outstanding interests of the Lovato heirs under the mortgage. The testimony of the respondent as to the agreement with Messrs. Tutt & Skinner is corroborated by other witnesses and is not disputed, and in furtherance of this agreement, and to carry out the plan made with Messrs. Tutt & Skinner, the respondent sent letters to his agents, inclosing blank forms of assignment for execution by the heirs. These assignments purported to convey to him the entire interest of the heir in the mortgage for which the heir agreed to accept a certain amount, which was inserted in the assignments. These assignments were all in the same form, one of which reads as follows:

"Whereas, the undersigned was awarded an interest in that part of the Juan Jose Lovato grant which was allotted by the decree of the court to the heirs of the grantee and his assigns, and is commonly known as the 'heirs' tract'; and whereas, the undersigned afterwards gave a power of attorney to George Hill Howard to sell and dispose of such interest; and whereas, afterwards said Howard disposed of and sold such interest but did not obtain the money for which it was sold; and whereas, there is due to me after paying fees and commissions the sum hereinafter stated: Now, therefore, in consideration of the premises, I, the undersigned, hereby assign and get over to A. B. Renehan, all my right, title and interest in the said 'heirs' tract' and any moneys due to me by said Howard, directly or indirectly, for and on account thereof, and hereby empower him to collect and recover and adjust the same in such manner as he may be advised, in my name or otherwise, at his election, on condition as follows, to wit:

"(1) That this writing shall be deposited in the First National Bank of Santa Fé, New Mexico, by me, with directions to deliver the same to the said Renehan, or his order, when within ten days of the date of such deposit, he deposits or causes to be deposited to my credit in said bank, the sum of \$287.50.

"(2) In order to identify myself as the person rightfully entitled to said payment and share, I further certify that my father's name was Polito Lovato, that my mother's name was Maria Antonio Garcia de Lovato, that the name of my paternal grandfather was Ysidro Lovato, that the name of my paternal grandmother was Beatris Lovato, that the name of my maternal grandfather was Antonio Urvan Garcia, and that the name of my maternal grandmother was Maria Dolores Garcia.

"(3) I hereby certify that I have not sold or assigned my rights as against said Howard to any other person than the said Renehan, and I admit that the said sum of money, when deposited by the said Renehan, shall have been deposited by him to my credit on the strength and in reliance upon the declarations in paragraphs 2 and 3 hereof.

"(4) The deposit by me of this writing with the said First National Bank of Santa Fé, New Mexico, shall be sufficient instruction to it to carry out the purpose hereof.

"In witness whereof, I have hereunto set my hand this 24th day of February, 1909.

"[Signed] Marcelino Lovato.  
Territory of New Mexico, County of Rio Arriba—ss.:

"On this 24th day of February, 1909, before me personally appeared Marcelino Lovato to me well known to be the same person described in and who executed the foregoing instrument and



acknowledged to me that he executed the same as his free act and deed.

"In witness whereof, I have hereunto set my hand and notarial seal the day and year first written in this certificate.

"[Signed] Quinby A. Woodward,  
Notary Public.

"We hereby certify that we know the person whose name is signed to the foregoing assignment to be the same person he pretends to be.

"[Signed] Q. Woodward.  
"[Seal.] [Signed] Tom Lovato.

"Dec. —, 1908."

An inspection of the above assignment shows that it is an absolute conveyance or sale to the respondent, which the owners of the respective interests in the grant had a right to make if they so desired, and, the evidence as to this transaction showing no relation of attorney and client between respondent and said heirs, the respondent was not charged with any duty, when purchasing from these heirs, to make disclosure to them of the facts then within his knowledge.

[1, 2] The court is of the opinion that, although the amounts due the respective heirs under the mortgage could probably have been collected from the substituted trustee, G. Volney Howard, without discount when the notes should become due and the mortgage paid, nevertheless these heirs had the right to sell their interests for cash at a discount to the respondent or any other person for the amount he was willing to pay them and that they were willing to accept, and his purchase from the heirs of their interests in the mortgage, which Tutt & Skinner had assumed, is in no way improper and not ground for disbarment.

As to those heirs who were the clients of Catron & Catron, there appears to be a conflict in the evidence as to just what took place. It is admitted that copies of the assignments, as set forth above, were sent by the respondent and his agents to the various Lovato heirs; that some of the heirs who had received these forms of assignments from respondent and his agents, not caring to deal directly with the respondent, employed the firm of Catron & Catron to look after their interests in this behalf. It further appears that these heirs came to the office of Catron & Catron, bringing with them the form of the assignment set forth above; that two of their number were sent by Mr. Catron to the office of Mr. Renehan for the purpose of obtaining a list of the heirs and the amounts due them. There is a conflict in the evidence as to what happened from this point on. The witness T. B. Catron testified that he understood from Renehan that he (Renehan) was paying Catron's clients the full amounts of their claims, and further testified that he did not look at the amounts set out in the assignments, but assumed from what Renehan had said to him that the amounts which his clients were to receive from Renehan, as shown by the list, were the full amounts due, without deductions, for their proportionate shares in the grant as

fixed by the decree in the partition suit. He further testified that he knew that Renehan was the agent of the purchaser, and that the money for the purchase of the grant was being paid through him, and that he did not, owing to representations made to him by Renehan, read over the assignments carefully, nor look at the decree in the case to learn what the fractional interests were, nor make any calculations as to the amounts of money coming to his clients thereunder. The respondent, on the other hand, testified that he made no representations whatever as to the amounts on the lists being the full amounts that were due the clients of Catron & Catron, but merely that these amounts were the sums he was willing to pay for the interests of those heirs. He testified as to a conversation with Catron in which the latter said: "Is this all you are paying for these interests?" And, on being informed that it was, that Mr. Catron stated, "See that the payment is made through me," and respondent further denied that he in any way misled Mr. Catron by any statement, or that he made any representations to him that were false.

As to those heirs who were the clients of respondent, the respondent testified, and there is no direct evidence except inference which might be drawn to the contrary, that he fully informed all of them as to just how much money they could receive from the substituted trustee, when the notes matured, and how much if they would accept the cash payment immediately, instead of waiting until the notes of Tutt & Skinner should mature, which was a period of about one year. We find, in the absence of any direct testimony to the contrary, that respondent's clients fully understood the situation, signed the assignments, and accepted from him the cash set forth therein as the amounts due them, and that the consideration of such acceptance of a smaller amount than they would otherwise have received was the fact that the money was to be promptly paid in cash.

The above statement, as to those heirs admitted to be clients of respondent, applies to all of them, except Antonio Faustin Lovato, who was also concededly a client of respondent. As to the transaction between the respondent and Antonio Faustin Lovato, there is a direct conflict of testimony. It appears that Antonio Faustin was a client of two separate rights in the Lovato grant, one in his own name and one as assignee of Jose Maria Lovato; the latter being the owner of a very large interest in the grant and who had assigned it to Antonio Faustin for a small sum of money. It appeared that G. Volney Howard represented, as attorney at law, Jose Maria Lovato, and that he was attempting to set aside this assignment to Antonio Faustin on the ground of fraud, and to obtain a larger sum of money for his client, Jose Maria. The respondent testified

that in his conference with his client Antonio Faustin Lovato, in which this matter was fully discussed, he informed Antonio Faustin of all the facts in the case; that is, that Howard, as the attorney for Jose Maria, was attacking the validity of the assignment, and if suit were instituted it was impossible to tell how much Antonio Faustin would be able to obtain under this assignment from Jose Maria. Respondent further testified that he made full disclosure of the situation to Antonio Faustin, and that Antonio Faustin, rather than take any chances on losing all under the assignment in a contest between himself and Jose Maria, agreed with the respondent to accept the sum of \$2,000 and to sell his own interest and also his claim under the Jose Maria assignment to the respondent, and to allow the respondent to obtain what he could on them for himself, whether it was more or less than the sum of \$2,000. This understanding, as testified to by the respondent and the full disclosure therein made to Antonio Faustin, is denied by the latter, who testified that he did not know what the amount of his interest was, nor that of his assignor, Jose Maria, and that he accepted the \$2,000 believing it was the total amount due him in his own right and as assignee without any deduction. He testified further that the assignments were not read over to him. The testimony of Antonio Domingo Lovato, the brother of Antonio Faustin, who was present at this conversation, is the only other testimony on this point bearing upon the agreement, and it is not directly corroborative of either that of the respondent or of Antonio Faustin. He testified, however, that the assignments and papers in question were read over to Antonio Faustin in his presence. There was also a letter put in evidence from the daughter of Antonio Faustin, who had, by his authority, charge of his correspondence generally, acknowledging the receipt of the \$2,000 and expressing entire satisfaction with the transaction.

As a part of the charge in this case, it is alleged that the amounts originally entered in the assignments, and which amounts were paid to the various Lovatos, were subsequently raised by the respondent to correspond to the amounts they were rightfully entitled to receive with deduction, and that these assignments, so changed, were presented to G. Volney Howard, substituted trustee, and by him paid, and that thereby the substituted trustee was deceived into paying to said Renehan the full amounts of said claims.

The only evidence to support this charge is found in the testimony of the substituted trustee, which states that he did not observe the amounts inserted in the assignments when checking over the same with the respondent, saying that he examined them only as to the form. The witness further testi-

fied that he had no mind or memory for figures or ability to make calculations, and that he had turned the entire matter over to the First National Bank of Santa Fé, assuming that the figures inserted in the assignments were the correct ones, and that the Lovato heirs were obtaining the full amount that they were entitled to, without deductions. The respondent testified that, subsequently to the payment of these amounts to him on such assignments, he was requested by the substituted trustee, G. Volney Howard, to raise the amounts so that they would correspond with the amounts actually due the Lovato heirs under the mortgage, in order that these assignments would stand as receipts for the amounts that the substituted trustee had paid out under the mortgage for the Lovato heirs. The witness Howard did not deny that such in truth was the case, although he was examined at length and in detail concerning it. In this state of the evidence, the court can come to but one conclusion, which is that the figures in the assignments were not raised as alleged, but were raised at the request, and for the purposes, of the substituted trustee subsequent to the time of the payment of the assignments.

There is a charge that the respondent solicited persons to employ him as an attorney, but the evidence, on the contrary, we think showed that, as to those Lovatos who were admittedly his clients, they had written to him and employed him on account of their dissatisfaction with the other counsel, which dissatisfaction was based on the delay in obtaining the money for their interests in the grant. As to the others, the evidence, we think, does not support the contention that the respondent solicited any of them to employ him as an attorney; his dealings with them being as hereinbefore set forth—that is, as a purchaser of their interests in the grant.

The evidence in this case was voluminous and cannot be set out at any length in this opinion. It was heard by the court in the first instance, and when transcribed was read and carefully considered. The decision of the court in a case of this kind necessarily rests upon the weight given to the evidence adduced. The authorities in disbarment proceedings are not uniform as to whether such a suit is civil or criminal, and also as to the amount of proof necessary to sustain the charges. By some courts it is held that, being criminal, the charge should be proven beyond a reasonable doubt, and by others it is held that all that is required is that the charge be established by a preponderance of evidence, like any civil case. Some of the courts attempt to take a middle ground, as to the amount of proof required, using such phrases as "clear preponderance of evidence" and the like; but whatever view is taken of the character of the proceed-

ing, whether civil, where the case should be established by a preponderance of the evidence, or criminal, where it should be established beyond a reasonable doubt, or some middle ground, the court is of the opinion, under all the evidence submitted to it and after carefully weighing and considering it, that a case for disbarment has not been established.

We approve of the language used in the case *In re Hamilton Baluss*, 28 Mich. 508, where the Supreme Court, speaking through Justice Cooley, says:

"While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal. The majority of the court are not satisfied that the evidence gives such clear support to the charges as should be required in such cases."

Again, in the case of *In re Haymond*, 121 Cal. 388, 53 Pac. 900, the court said:

"This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent. \* \* \* A construction favorable to innocence must be given, if possible."

This court, in the case *In re Catron*, 8 N. M. 253, 43 Pac. 724, in passing upon the question of the amount of proof required in a disbarment proceeding, lays down the law as follows:

"But a result so humiliating in its effect and so disastrous in its consequences to him [the respondent] should not be reached upon circumstances that appear merely suspicious, but only upon that credible and convincing testimony which will lead with reasonable certainty to the establishment of his guilt. \* \* \* This right and privilege (of his profession) should not be destroyed or taken from him, and he be deprived of its benefits, and driven in humiliation and disgrace from his profession, unless upon reliable proof—such proof as would be sufficient to satisfy the mind of the court in determining questions involving the liberty and property of the citizen."

It would be useless to multiply authorities where the law is plain, and the question for the court is the weight to be given to the evidence, and we shall content ourselves with the above quotations.

Whether respondent is civilly liable to any of the parties who claim to have been injured by him, we do not decide. It may be that the circumstances shown in this case might authorize a recovery from the respondent by some of the parties with whom he dealt. Where a transaction between an attorney and his client, of advantage to the attorney, is called in question, in an ordinary civil action, the burden is upon the attorney to show that, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger, and slight evidence of overreaching in such a case will justify a rescission of the con-

tract. Whether the facts in this case, however, would authorize a recovery from the respondent, is not for us to decide.

Where, however, such a transaction is called in question in disbarment proceedings, where all intendments are in favor of the accused, the rule above stated does not apply, but the burden is upon the state to clearly establish the wrongdoing of the attorney. The charges relied upon for disbarment, not having been clearly established and sustained, the information will be dismissed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

#### On Motion for Rehearing.

RAYNOLDS, District Judge. The real facts in this case, as we understand them, may be briefly stated as follows:

The respondent, in June, 1908, was employed by one Antonio Faustin Lovato, in behalf of himself and his four brothers, to collect the amount of money due them under the \$20,000 mortgage. The respondent had not solicited this employment, and had not theretofore had any relation with these five Lovatos, and he did not even know them. It was proposed by these Lovatos, and agreed at that time, that he should receive one-third of the amount of the recovery. The fund out of which the recovery was to be had was a mortgage for \$20,000, executed in February, 1905. At that time it was assumed that Antonio Faustin Lovato had acquired the interest of Jose Maria Lovato by deed, and that he would be entitled, consequently, to one-fourth of the entire fund, by reason of this conveyance. If this arrangement had been carried out, the respondent would have received \$2,916.66, being made up of one-third of the Jose Maria Lovato interest, netting \$5,000, after paying Mr. Howard \$1,000, which would amount to \$1,666.66, and one-third of \$750 coming to the said Faustin for an interest he inherited, and one-third of \$750 for each of his four brothers, amounting to \$1,250. The respondent finally received \$3,750 out of the transaction; but there were three other brothers not his clients from whom he received \$350 each, by purchase of the interests, amounting to \$1,050, making a total of \$3,966.66. The respondent never, at any time, bore any relation of attorney to any of the other Lovato heirs.

In June, 1908, Messrs. Tutt & Skinner, of Colorado Springs, took an option to purchase all of the Lovato grant for the sum of \$175,000. This option ran until the 15th day of October, 1908, and was afterwards renewed, and was finally exercised by Messrs. Tutt & Skinner, on the 7th or 8th of December, 1908.

At that time, George Hill Howard, trustee for the Lovato heirs, and to whom the mortgage had been executed for the \$20,000, his

son G. Volney Howard, and afterwards substituted trustee, the respondent, Messrs. Tutt & Skinner, and Judge Ira Harris, met in Colorado Springs and effected a sale of the property to Messrs. Tutt & Skinner. The entire purchase price for the grant was either paid or arranged for at that time, except the money to pay off the \$20,000 mortgage.

The testimony is not entirely clear as to what the understanding was between the parties as to just when this mortgage was to be paid, but all of them agreed that at that time the mortgage was to be assumed and paid. The respondent testified that it was agreed that the purchasers might take one year within which to pay off this mortgage, if they so elected, and that it was understood that they were not to pay any attorney's fees or costs, but simply the amount of principal and interest. This mortgage at this time was, of course, long past due, but the Lovato heirs were represented by their trustee, and, if he agreed that the purchasers might take a year to pay off the mortgage, it was probably binding upon them. Confirmation of the testimony of the respondent is to be found in paragraph 2 of the option, which provided that, upon the election to purchase, \$105,000 should be paid, and \$35,000 in 6 months thereafter, and \$35,000 in 12 months thereafter.

While in Colorado Springs, a discussion was had between the parties as to the best method of collecting this money for the Lovato heirs. The respondent, representing his five clients, at first talked a foreclosure for them as a means of enforcing the payment of the mortgage. It was finally agreed by the parties, and the respondent accepted employment from Messrs. Tutt & Skinner to undertake to purchase and acquire assignments of the interests of all of the Lovato heirs which he could get, at as cheap a price as possible. He testifies that he wrote Antonio Faustin, the only one of his clients with whom he had had any correspondence, the full details of this arrangement from Colorado Springs. He was unable to produce a copy of the letter, but that he did write from Colorado Springs is evidenced by the fact that he received a reply dated December 12, 1908, written by the daughter of Antonio Faustin, acknowledging the receipt of his letter, and the fact that he left Colorado Springs and went directly to California and did not return until after the 12th of December, 1908. In this letter of acknowledgment reference is made to the fact that the respondent had asked Antonio Faustin to send his deeds for interests of his brothers, and a statement is made that he had not bought the interests of his brothers, but that he had bought Jose Maria Lovato's share, and that the deed was in Mr. Howard's possession.

Upon the return of the respondent to Santa Fe, and on the 29th day of December, he prepared and sent out a large number of documents to Antonio Faustin Lovato, which are

the assignments shown in this case. In the letter of transmittal, he asked Antonio Faustin to have Jose Maria Lovato sign on the back of an assignment an indorsement in Faustin's favor. He stated that such indorsement would be sufficient, under the circumstances, to enable him to collect the money, even in the absence of the deed which Jose Maria had given to Antonio Faustin, and which had been delivered to Mr. Howard, trustee.

In this letter of transmittal, the respondent failed to state the true amount, or any amount, to which his clients were entitled, respectively, out of the fund evidenced by the \$20,000 mortgage. In this letter he says:

"It is your interest and the interest of the several owners in money which you will obtain by executing the enclosed papers."

These papers were sent out with amounts in money inserted therein as the purchase price for the respective interests. The four brothers of Antonio Faustin owned a  $\frac{1}{12}$  interest, which would produce and be worth \$750 to each. In those assignments the sum of \$400 is inserted. He had a contract for one-third of the amount recovered, which would be \$250, leaving the net amount, due the heirs, of \$500. This state of affairs existed as to the four brothers of Antonio Faustin.

As to Antonio Faustin, there is much confusion in the testimony, but an assignment was produced in evidence in which the sum of \$2,600 was inserted. The respondent was unable to account for this, as he says that \$2,600 bore no relation to any proposition which was ever discussed or written about between himself and Antonio Faustin.

These circumstances would be, standing alone, sufficient to cast a doubt upon the fair dealing of the respondent with his clients.

In explanation of this situation, the respondent states that he assumed that the trustee had informed the Lovato heirs of their rights under the mortgage. It was certainly his duty to do so, and there is no reason to doubt that he had performed that duty. The respondent further states that these assignments were sent out for the purpose of facilitating the preliminary arrangements for paying off the Lovato heirs, and were not final in character. This explanation seems reasonable, in so far as his own clients were concerned. He had not yet settled with his clients, and still retained the power to settle with them according to his original contract with them, and if his intentions were correct no harm had yet been done. He testifies that he had not accepted the assignments as a definite basis of settlement with his clients until his interview with Antonio Faustin of January 21, 1909, and that it was then agreed by the latter that his brothers should pay the same rate as the other heirs. Independently of any representations or the absence of explanation by the trustee or by the respondent, it is difficult for us to believe that, out of nearly 50 persons, all of them

should be ignorant of their rights under the mortgage. This mortgage had run nearly four years; was for \$20,000; the estate had been partitioned and the fractional interests therein of each claimant specifically set out, to which decree these Lovato heirs were parties. They had become dissatisfied at the long delay and had seen fit voluntarily to employ counsel to enforce their rights. Antonio Faustin indicates, in his first letter in which he employed respondent for himself and brothers, that he knew the amount of acreage he owned in this tract. It does not seem to be within the domain of reasonable probability that all of these people could have been so ignorant and so devoid of intelligence as to be unable to ascertain for themselves the amount which was due them.

We therefore believe that they must have known what their rights were, independent of any information or lack of information from the trustee or the respondent.

In regard to Antonio Faustin Lovato, it was discovered by the respondent that the interest of Jose Maria Lovato for which he had a deed had not been allowed to him by the decree of partition, but it had been awarded to Jose Maria Lovato, notwithstanding the fact of the deed. Jose Maria Lovato was represented by G. Volney Howard, trustee, who was claiming the entire interest for his client. Upon this discovery, the respondent wrote to Antonio Faustin, induced him to come to Santa Fé for a conference, which was had on the 21st day of January, 1909. In that conference the respondent testifies that he stated to his client that he thought, under the circumstances, one-third was not a sufficient fee; that the claim was doubtful and quite possibly would require litigation, which litigation was of doubtful result, owing to the laches of his client in allowing the matter to rest in that form for a long period of years. They discussed a compromise with Mr. Howard, as attorney for Jose Maria, but did not come to terms, and the respondent testified that they finally agreed upon a new contract and relation, whereby respondent absolutely obligated himself to purchase his interest and to pay Antonio Faustin \$2,000, in any event; a part of said agreement being that his brothers should take the same rate as the other heirs, viz., \$400 for a  $\frac{1}{32}$  interest. It was stated above that the assignments were sent out with the purchase price filled in, but it is established by the evidence of a handwriting expert that neither respondent nor any one for him in his office wrote the figures in the documents. Just who filled them in is not shown by the proofs. This is unimportant, however, as respondent does not claim that he did not intend to have the amounts filled in for his clients, relying upon his explanation that the same were not intended to be acted upon by him until he had a conference with his clients.

As before stated, Antonio Faustin was the only one of his clients who employed respondent, and the employment was for himself and his four brothers. There were three more brothers whose interests were acquired by respondent for \$400 each, but the relation of attorney and client is not shown to exist as to them.

In view of the foregoing facts, it would seem that there is a lack of that clear and convincing evidence of deceit of his clients in the first instance as to the amounts due them which is necessary to disbar or punish an attorney therefor. We therefore find that this charge is not sustained in this particular.

It is now apparent that the whole case as to respondent's conduct toward his clients turns upon what occurred at the conference of January 21, 1909, between the respondent and Antonio Faustin, and his brother Antonio Domingo Lovato. Antonio Faustin denied in toto the version of respondent as to what occurred. He says that respondent told him that the interest of Jose Maria Lovato which he had acquired was worth \$3,200, and that respondent was to collect this amount for him. He denies the making of any contract for the payment of \$2,000 to him in full for his interests. This witness is an old and infirm man, and shows throughout his testimony that his memory is unreliable. He is almost totally blind. He discloses gross discrepancy in his testimony as to given facts at different times during his examination. He does impress us, however, with his intention to tell the truth so far as he is able to remember it.

Antonio Domingo Lovato, the brother, was also present at this conference. He confirms Antonio Faustin in his statement that the respondent told Antonio Faustin that the Jose Maria Lovato share was worth \$3,200. He contradicts Antonio Faustin in an important particular, however, namely: Faustin testified that no paper was read over to him, while Domingo testified that the paper was read over to Faustin, and that he (Domingo), at Faustin's request, signed the latter's name to the same. The paper referred to was an affidavit in regard to the circumstances attending the purchase of Jose Maria Lovato's interest, and of the delivery of the deed of conveyance to Mr. Howard. This affidavit was procured by the respondent for the purpose of attempting to recover this interest from Jose Maria. Generally speaking, there is an unusual identity of statement and form of expression by both of these Lovatos as to what occurred at the interview above mentioned. Again, in March, 1910, Domingo admits that a man by the name of Kutz informed him that he had not received the full amount of his money. Nothing was done by him or any of the other Lovatos until the fall of 1911. In the meantime, Domingo had been arrested, and wired the respondent to

employ him in that matter. In the fall of 1911, Silviano Roybal, a bitter enemy of the respondent, became interested in informing the Lovatos of the fact that they had not received their just proportion of this fund, and assisted in the procurement of affidavits from many of them to that effect.

When respondent remitted to Antonio Faustin, he received a letter of acknowledgment, thanking him for his services in procuring the money. While this acknowledgment is not absolutely conclusive, Antonio Faustin knew, according to his own testimony, that the Jose Maria Lovato interest was worth \$3,200, he claiming that the respondent had so informed him, and he knew that he also had an inherited interest of  $\frac{1}{32}$ , which was worth, at the rate the others were receiving, \$400. It therefore appears that he must have known that the respondent should have remitted to him two-thirds of \$3,200, which would be \$2,133.33, and \$400, which would make a total of \$2,533.33. Notwithstanding this, his daughter, Sadie Lovato, who attended to all of his business and correspondence, and with whose actions he was shown to be familiar, wrote a letter of acknowledgment, expressing satisfaction at the receipt of \$2,000, and with the services of respondent. This fact is strongly confirmatory of the respondent's version of the interview of January 21st. Antonio Faustin necessarily must have known upon the receipt of the remittance that it was for \$533.33 less money than he had been informed by the respondent he was entitled to. This called for immediate inquiry on his part and explanation on the part of respondent.

From the foregoing circumstances and many others which might be extracted from the evidence, we do not feel justified in finding that the version of the respondent of the interview of January 21st is untrue. It may, of course, be true that Antonio Faustin and Antonio Domingo did not fully understand the proposals and their agreements thereto on that occasion. It may be true that they might be entitled to recover this money from the respondent. But, on the other hand, we do not believe that the respondent has fabricated his version of this affair, designed as it must be, in that case, to cover up what would otherwise be a treacherous and fraudulent transaction. To so hold would be to condemn him upon evidence which, under the circumstances, we do not consider of sufficient reliability. To so hold would be to convict him of being one of the most brazen crooks in the profession. He knew that all of the data from which computations of the amounts due each of the Lovatos were made was a matter of public record, and he knew that many different persons, including the trustee, whose duty it was to give the information to his beneficiaries, knew absolutely all of the facts. To convict him un-

der the circumstances would be to convict him of being not only a rascal, but a fool, more brazen than the highwayman or the thief. This we do not believe, and therefore find that the charge in this particular is not sustained.

We cannot dismiss this portion of the case without a criticism of the methods employed. An attorney for the sake of his own good name, if for no other, should not allow a matter of this importance to rest in human memory, which is, as we all know, subject to so many frailties. A contract of this kind, if it is to be made at all, should be reduced to writing so that the terms of the same may always be established. An attorney's dealings with his client being always subjected to the closest scrutiny of the courts, and justly so, ought to be expressed in no uncertain terms. He owes this to himself and to the profession to which he belongs, as well as to the courts in which he practices. It injures the legal profession and the administration of justice in the opinion of the people to have such questions as these arise.

We have now arrived at the point where we have found that the respondent practiced no deceit, either in the first instance, or on the occasion of the interview of January 21, 1909.

There still remains the further question of whether the conduct of the respondent in dealing with his clients at all, under the circumstances, was justifiable. His dealings with his clients prior to the interview of January 21st has been heretofore treated, and it has been found by us that up to that time he had never treated the assignments from them as a complete and executed matter, and had obtained them simply for the purpose of facilitating the final settlement of the whole matter, at which time a proper settlement was to be made with his own clients. It nevertheless remains true that, after having accepted employment from Messrs. Tutt & Skinner in Colorado Springs, in December, 1908, he did, on January 21, 1909, contract with his clients for their interests in this fund, at a reduced rate from that which they would receive under his original contract of employment with them. If it is true, as stated by respondent, that he had found Antonio Faustin's claim to be of such a doubtful nature as that it would require litigation, with possible or probable failure as a result, and if he fully explained this to Faustin, and Faustin agreed to a proposition to take \$2,000 in any event for his interests, we know of no rule of law which prohibited such a transaction. It is not illegal for an attorney to buy his clients' property, no matter how impolitic it may be.

As to the interests of Antonio Faustin's four brothers, the same situation exists. The respondent bought their interests for \$100 less to each than originally agreed, through Antonio Faustin, who had originally em-

ployed him for them, and who was their agent and representative at the interview of January 21, 1909.

We have heretofore found that these clients of respondent knew what they were doing when they made these assignments. There was nothing, therefore, illegal in what the respondent did, and he should not be disbarred for the same. The situation, then, is that respondent, without deceit on his part, purchased his clients' interests in this fund, at a profit to himself and others, with whom he was associated.

The Attorney General urges that this conduct is deserving of punishment for the reason that it is violative of the ethics of the profession, in that he charged his clients for services which were not necessary, and charged them in excess of the value of the service rendered.

As to Antonio Faustin, we have heretofore seen that, with his doubtful claim in regard to the Jose Maria interest, the respondent rendered him valuable service in assuring him of \$2,000 in any event, at a time when the validity of the claim was greatly in doubt. It is clear that Faustin was greatly in need of the aid of an attorney at this time, in this matter. The amount of discount was very large, but the character of the claim was certainly very doubtful. As to the inherited interests of Faustin and his four brothers, however, it was not necessary for them to pay more than they had already agreed to pay, viz., \$250 each, leaving a net \$500 to each of them. Respondent bought these interests for \$400 each. The only basis upon which this transaction can be placed is the assumption of risk by respondent in promising Faustin the \$2,000 at all events. But this arrangement in no way concerned Faustin's four brothers, and he had no right to use it against their interests. If he did not desire to assume the risk, he need not have done so. It was therefore a purchase of his client's interests in the fund at \$100 less than he had contracted to get for them in the first instance, and there was no reason to make the charge. There was no controversy about their claim, and the money had already been provided to pay them. It required no labor on respondent's part to get the money for them, except to receive it and to disburse the same to them.

We cannot refrain from putting our stamp of disapproval upon such a transaction. We deem it without the ethics of the profession, as properly understood by the better class of its members, to overcharge a client, or to charge him for services which were not in fact rendered, even where there is no actual deceit as to the facts, as in this case.

The opportunities for overreaching are so great, and the client is usually so helpless, that attorneys must be held, by the better opinion of the profession, to fairness, not only as to the facts concerning his client's

rights, but as to the amount of a reasonable charge for his services. But in this case the sum total of respondent's wrongdoing was the taking of \$100 from each of Faustin's four brothers. As before seen, it was not illegal to do so, but it was certainly not in accordance with the best standard of ethics. On the other hand, it is to be seen that the amounts taken were insignificant in comparison with the amount involved in the whole transaction. Respondent's conduct is not shown by the facts in this case to be an habitual and persistent course of conduct. It appears to be, simply, a sporadic instance of overreaching his clients. It furnishes no basis for the belief that his character is of such a nature as to render him an unsafe man to be clothed with the high powers of an attorney at law. If he habitually mistreated his clients in this way, showing thereby his lack of moral character and unfitness to be intrusted with their interests, in that event some basis for the action desired by the Attorney General might be discovered. We find no such fact exists.

This disposes of all the transactions of respondent with his clients, and we hold that in that regard no sufficient cause for disbarment has been shown.

As to all of the other parties whose interests in this fund the respondent acquired, he owed them no duty as an attorney; no such relations existing as to them. He acted as an ordinary broker as to them.

As to this part of the transaction, some of the same considerations heretofore mentioned would seem to apply. They were all represented by a trustee, and many of them by specially employed attorneys. The circumstances are such, as heretofore pointed out, that it seems impossible for any considerable number of them to be devoid of knowledge of what their rights were. He sent out the assignments to be executed for a given sum in each case. He did not in so many words say to them that their interests were worth some particular sum, and that he desired to purchase the same at a certain reduced price. He left them to their own option to accept or refuse. Some did refuse until they had consulted counsel.

The Attorney General urges that this transaction deserves punishment, in that it shows such a want of moral character as to render the respondent unfit to continue as a member of the profession. The position of the Attorney General is, in a nutshell, that, knowing that the money was forthcoming to pay these claims, and that the parties needed no attorney to collect them, the respondent had no right to purchase them at a profit to himself and his associates. If we understand this contention, it means that an attorney at law is held to a higher degree of ethics in his dealings with his fellow man, when the relation of attorney and client does not exist, than the ordinary citizen is,

in the ordinary business transactions of life. The mere fact that a man is an attorney at law would seem, under the contention of the Attorney General, to surround him with restrictions not binding upon the ordinary business man. We do not so understand the law. An attorney at law, by reason of the confidence reposed in him by his client, is bound to the utmost fairness and the utmost integrity in safeguarding his interests. If he violates this duty, he is subject to disbarment. This disbarment is not for the purpose of punishing an attorney, but it is for the purpose of protecting the public against a man who, by reason of his confidential relations with his clients, has the power to impose upon them and to defraud them in a way and to an extent which the ordinary citizen could not do. But when an attorney steps aside from his duties as a member of the profession, engages in business affairs of any character with persons who repose no special confidence in him, and to whom he owes no personal obligations, we know of no rule of law which compels him to be more careful than the ordinary business man. It was not intended by the original opinion to lay down the proposition that, in dealing with persons not his clients, an attorney was at liberty to disregard all the obligations of an honest man. If the court is satisfied that the conduct of a lawyer is governed by such a low moral standard that he is unfit to practice law, he should be disbarred, whether his dealings are with his clients or others. But such conduct by the respondent is not shown here.

Of course, in the profession of the law, there are degrees of professional ethics. One member of the profession may govern his life by the highest and most refined rules of conduct; another in the same profession, by reason of his origin, his environment, and his education, may view things from an entirely different standpoint. It is highly desirable that all members of the profession should be guided by the principles first mentioned.

It is, however, a fact patent to every observer of human nature that no absolute standard of ethics is to be established by any court or by any board or governing body of any profession. We have, as a matter of law, no code of ethics. It therefore remains with each member of our profession to govern himself according to his own light, and it is only when he violates some law, and brings thereby upon himself and upon the profession to which he belongs, and upon the administration of justice in which he is engaged, disgrace and ridicule, and when his general conduct renders him unsafe to deal with the public, clothed as he is with the great powers which he possesses as a member of the bar, that courts are authorized to expel him from this membership.

The Attorney General urges that the respondent's alleged misconduct toward a brother member of the bar, Thomas B. Catron, is not only established by a preponderance of the evidence, but is such as to require punishment of the respondent. We do not so understand this record. We do not desire to find, and we do not find, that a reputable member of the bar has misrepresented the facts in this case; but we are compelled to say that the testimony bears some internal evidence of mistake, and, under the circumstances, we do not deem it sufficient to disbar any attorney practicing in this court. The facts are that the data, from which the rights and interests of the clients of Mr. Catron could have been ascertained, rested in public documents which it was his duty to inspect before he made any settlement in their behalf. He had no right to take the word or assurance of any other person. It became his duty, when he was employed by his clients, to examine into their rights, and the means were at hand which would furnish complete evidence on the subject. Mr. Catron knew at the time he dealt with the respondent that respondent's interests were antagonistic to his, and that he was employed by Messrs. Tutt & Skinner to acquire the interests of his (Catron's) clients. It therefore devolved upon Mr. Catron to satisfy himself from the records, and not from some person representing interests opposed to his clients, as to the amount to which they were entitled in this settlement. The interviews had between Mr. Catron and the respondent were of Mr. Catron's seeking, and not of the respondent's. It was the duty of Mr. Catron to see to it that no imposition was practiced upon his own clients, and he had no right to rely upon the respondent. For these reasons, as was pointed out in our former opinion, we do not deem it necessary to pursue this branch of the case further. We pointed out in our former opinion that the respondent denied all of the material facts testified to by Mr. Catron, and stated that he made no representations to Mr. Catron whatever as to the true amount due each of the Lovato heirs.

Of course, if it is true that the respondent deceived Mr. Catron as to his (Catron's) clients' rights, it shows a low order of morals and one most unbecoming a member of our profession. But we cannot believe, under all the circumstances, the respondent was so devoid of discretion as to place himself in such a position as is claimed. As has been pointed out heretofore, he knew that the evidence of the rights of these clients of Mr. Catron rested in public documents, that numerous persons knew of their contents, and that his deceit, if he practiced deceit, must very soon come to light. It seems therefore that it is unreasonable to believe that he made these representations to Mr. Catron, and it is believed by us that the controversy between the



parties is the result of a mistake, rather than a deliberate fraud on the part of the respondent.

All of these matters we discussed in our former opinion, in a somewhat more general form; but the urgent insistence by the Attorney General that we had made a mistake in our conclusions seemed to us to warrant this further discussion.

On the whole record, as indicated in our former opinion, we fail to find that the charges of fraud and deceit have been maintained by the quantum of evidence required in such a case. As we pointed out in the opinion, the question as to whether a recovery might not be had by the Lovato heirs, or some of them, against the respondent, is not for determination in this proceeding. In the particulars pointed out herein we do find that respondent's conduct was not governed by the highest and most correct rules of professional ethics. We do determine, however, as we did in our former opinion, that the alleged causes for disbarment have not been established to our satisfaction, and do not exist, and we therefore adhere to our former opinion.

ROBERTS, C. J., and PARKER, J., concur.

(19 N. M. 565)

McBEE v. O'CONNELL et al. (No. 1603.)  
(Supreme Court of New Mexico. Dec. 4, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 1096\*)—SUBSEQUENT APPEAL—MATTERS REVIEWABLE—LAW OF THE CASE.**

Upon a second or subsequent appeal, nothing will be considered, except the proceedings occurring after remand; the former decision being the law of the case, whether right or wrong, so that a question which could have been considered on the former appeal will not be considered on the subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353-4357; Dec. Dig. § 1096.\*]

**2. VENDOR AND PURCHASER (§ 232\*)—INTEREST OF VENDOR—NOTICE—EQUITY.**

A person who purchases an estate in the possession of another than his vendor is in equity (that is, in good faith) bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.\*]

**3. VENDOR AND PURCHASER (§ 232\*)—POSSESSION OF TENANT—INTEREST OF LANDLORD—CONSTRUCTIVE NOTICE.**

The possession of the tenant is sufficient to put an intending purchaser from a third person upon inquiry as to the landlord's rights and to charge him with constructive notice thereof if he fails to make such inquiry.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.\*]

**4. VENDOR AND PURCHASER (§ 233\*)—UNRECORDED INSTRUMENT—CONSTRUCTIVE NOTICE.**

An exception to the rules stated should be made where the subsequent purchaser shows that he pursued an inquiry with proper diligence, and failed to obtain the knowledge of the unrecorded instrument or of the right of the parties claiming under it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. § 233.\*]

Appeal from District Court, Curry County; G. A. Richardson, Judge.

Ejectment by W. D. McBee against Pat O'Connell and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

This is an action in ejectment in which the plaintiff seeks to recover from the defendants possession of lot 5 in block 20 in Clovis, Curry county, N. M., together with damage for its detention. Plaintiff's claim to ownership of the said lot is based on an executory contract of sale, entered into between the Santa Fé Land & Improvement Company and one J. M. Ray on June 27, 1907, which contract was subsequently assigned by said Ray to the plaintiff on October 3, 1907. On October 30, 1907, the said Ray receipted to plaintiff for an amount stated to be in full payment of his entire interest in the lot in question and house thereupon erected, and thereafter, or some time during the month of October, the plaintiff entered into possession of the said lot and improvements thereupon, and through an agent, one J. S. Fitzhugh, secured a tenant for the property, who entered into the possession thereof, and continued in possession of the same until the defendants entered upon the property, taking possession thereof as purchasers on the 9th day of March, 1908, from the said J. M. Ray, for a valuable consideration, of the above-described lot and its improvements, and claiming by their answer in this cause to be without knowledge of any interest, equity, right, or title of the plaintiff in or to the said property, conveyance being made to the defendant Annie L. O'Connell, herein designated as Mrs. Pat O'Connell, who was joined with her husband in this action as parties defendant.

The tenant, one Leeper, continued in possession of the premises up to the time that the agent, Fitzhugh, learned that the defendants were claiming the property, which is fixed as about the fall of 1908; and it is uncontroverted that the defendant Pat O'Connell occupied a part of the house situate upon the lot in question as a subtenant of Mr. Leeper during a portion of the time that Leeper remained in possession of the property as the tenant of the plaintiff.

The assignment from Ray to plaintiff of his contract with the land company was acknowledged before a notary public of Roosevelt county, the assignment being written up-

on the same sheet of paper containing said contract, and was filed for record in the office of probate clerk of Roosevelt county on December 7, 1907, and duly recorded by such clerk.

A former trial of this cause resulted in a verdict for the plaintiff, appellant here, and said cause having been appealed to the territorial Supreme Court, being reported as *McBee v. O'Connell*, 16 N. M. 469, 120 Pac. 734, the territorial Supreme Court reversed and remanded the cause upon the principal ground that the acknowledgment of the assignment on the back of the executory contract for the sale of the real estate in question, to which the assignment refers for particulars and description, was not under the circumstances an acknowledgment of the contract itself, and, although the contract was copied in the land records by the proper recording officer, that did not make it of record and thereby constructive notice to a subsequent purchaser, having no actual knowledge of it. After some slight amendments in the answer and reply, the case was again tried by the district court of Curry county of September, 1913, before a jury, and, at the conclusion of the testimony of the plaintiff, the defendants moved for a directed verdict upon the ground that there was no evidence in the case to show that the defendants or either of them had actual knowledge of plaintiff's claim under his assignment from said Ray, and because the plaintiff's evidence of title was not constructive notice under the laws of New Mexico, and the purchaser did not have actual knowledge of the instrument, and other grounds not necessary to refer to.

The motion was granted by the trial court upon the theory that the decision of the territorial Supreme Court in the first appeal of this cause was the law of the case and controlling upon the trial court. To which action of the trial court the plaintiff saved his exception and, after his motion for a new trial had been overruled, sued out this appeal.

W. A. Havener, of Clovis, R. E. Rowells, of Hugo, Okl., and H. D. Terrell, of Silver City, for appellant. George L. Reese, of Portales, for appellees.

HANNA, J. (after stating the facts as above). There are seven assignments of error, which present but two points for our consideration; the first being that:

"The court erred in granting the motion of defendant to strike from plaintiff's amended reply the following allegation, to wit: 'And had said contract and assignment made a matter of record in the office of the probate clerk and ex officio recorder of Roosevelt county, N. M., which made same notice to all persons of plaintiff's equity and right in and to said property.'"

[1] The first, second, fifth, and sixth assignments of error have to do with the first proposition contended for by the appellant and is to be briefly disposed of by us upon

the ground that the question involved was presented by the first appeal to the territorial Supreme Court, and has become the law of the case, so far as we are now concerned.

As was held in a late opinion of the territorial Supreme Court in the case of *Davisson v. Citizens' Nat. Bank*, 16 N. M. 689, 120 Pac. 804:

"Upon a second or subsequent appeal, nothing will be considered, except the proceedings occurring after remand, the former decision being the law of the case, whether right or wrong, so that a question which could have been considered on the former appeal will not be considered on the subsequent appeal."

The second point requiring our consideration is raised by the third, fourth, and seventh assignments of error, which are as follows:

"(3) The court erred in refusing to permit plaintiff to introduce evidence showing that defendant had constructive notice of plaintiff's right, title, and interest in and to said property."

"(4) The court erred in instructing the jury 'that there is not sufficient evidence in the case to charge the defendants, or either of them, with knowledge or notice of the interest of the plaintiff under the assignment from J. M. Ray to him of the property in question, and for that reason, under the direction of the court, you will find the issues in favor of the defendants.'"

"(7) The court erred in taking from the jury the fact of possession of the property by plaintiff through his tenant Leeper and his agent Fitzhugh. Thus holding in effect that the possession of the property by plaintiff through his tenant Leeper and his agent Fitzhugh, at the time defendants claim to have purchased the property from J. M. Ray, was not notice to defendants of plaintiff's interest in the property, and the court further erred in taking this fact and evidence from the jury."

[2] The proposition of law involved is briefly whether the occupancy and possession of plaintiff's tenant was such as would put the defendants upon notice of plaintiff's rights, or be such constructive notice of those rights as will negative defendants' claim of good faith as a bona fide purchaser. This particular point has received the attention of numerous courts, and there is a great preponderance of authority in favor of appellant's position upon the question, although the authorities are not uniform on the question. It is, of course, to be conceded, in the existing status of this case, that, unless the defendants were put upon inquiry as to plaintiff's title and right to possession by the occupancy of the tenant, the defendants must prevail and the judgment of the trial court be affirmed.

One of the best considered cases to which our attention is directed is that of *Randall et al. v. Lingwall*, 43 Or. 383, 73 Pac. 1. The Supreme Court of Oregon, following the rule as stated by Mr. Justice Cole in *Dickey v. Lyon*, 19 Iowa, 544, held that:

"A person who purchases an estate in the possession of another than his vendor is, in equity, that is, in good faith, bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity

charges him with notice of all the facts that such inquiry would disclose."

[3] The Oregon court further held that the possession of the tenant is sufficient to put an intending purchaser from a third person upon inquiry as to the landlord's rights and to charge him with constructive notice thereof if he fails to make such inquiry.

We believe these conclusions receive the sanction of the great weight of American authority, and therefore adopt the rule contended for by appellant. The Oregon case collects and considers numerous authorities which we have considered but do not cite in support of this opinion. Other later cases to the same effect are the following: *Penrose v. Cooper*, 86 Kan. 597, 121 Pac. 1103; *Wood v. Price*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 1210; *Brady v. Sloman*, 156 Mich. 423, 120 N. W. 795. See, also, *Pomeroy's Equity Juris.* § 625.

[4] An exception to the rules stated should be made where the subsequent purchaser shows that he pursued an inquiry, with proper diligence, and failed to obtain the knowledge of the unrecorded instrument or of the right of the parties claiming under it. *Penrose v. Cooper*, 86 Kan. 597, 121 Pac. 1103. We do not overlook the fact that appellee contends that the second proposition as to constructive notice by possession and occupancy of tenant was disposed of by the first appeal, but we do not consider this to be true. The appellee here was the appellant in the former appeal and did not raise the question, and it was not incumbent upon the appellee in the former case to there raise the point now raised upon this appeal by him.

As pointed out in this opinion, the former appeal in this case turned upon the record title of the appellant on the appeal; he having prevailed upon that issue in the trial court, but suffered a reversal in the Supreme Court because of a defective acknowledgment. Upon the retrial of the case he relied upon a contention that the possession of his tenant was constructive notice to a subsequent purchaser of his rights in the premises, and this issue is presented to the appellate court for the first time and was not involved in the first appeal.

The judgment of the district court is reversed, and the cause remanded; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(19 N. M. 456)

STATE v. CHACON. (No. 1633.)

(Supreme Court of New Mexico. Nov. 28, 1914.)

(Syllabus by the Court.)

1. CONTEMPT (§ 66\*)—RIGHT OF APPEAL—CRIMINAL CONTEMPT.

Under section 47, c. 57, Sess. Laws 1907, which grants the right of appeal to the Su-

preme Court in criminal cases in the following language, "In all cases of final judgment rendered upon any indictment, an appeal to the Supreme Court shall be allowed if applied for during the term at which such judgment is rendered," the right of appeal is limited to final judgments rendered upon an indictment, and no right of appeal will lie from a judgment of the district court committing a person to jail for a criminal contempt.

[Ed. Note.—For other cases, see *Contempt*, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

2. COURTS (§ 203\*)—RIGHT OF APPEAL—CONSTITUTIONAL PROVISIONS.

Section 2, art. 6, of the state Constitution, which provides that "the appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all final judgments and decisions of the district courts," simply defined the appellate jurisdiction of the Supreme Court, and does not undertake to grant to a litigant a right of appeal to that court.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 203.\*]

3. COURTS (§ 203\*)—APPELLATE JURISDICTION—SUPREME COURT.

Although the Constitution creates a court with general appellate jurisdiction as to all final judgments and decisions of district courts, such jurisdiction may only be invoked pursuant to a statute or constitutional provision conferring the right of appeal and prescribing the procedure.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 203.\*]

Neblett, District Judge, dissenting.

Appeal from District Court, San Miguel County; D. J. Leahy, Judge.

F. M. Chacon was adjudged in contempt of court, and appeals. Appeal dismissed.

Veeder & Veeder, of Las Vegas, for appellant. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

ROBERTS, C. J. The judge of the district court of San Miguel county, some time prior to June 10, 1913, became cognizant of an article published in *La Voz del Pueblo*, a newspaper published in San Miguel county by appellant herein, and having a general circulation. The court's attention having been called to the contemptuous nature of the article, S. B. Davis, Jr., W. J. Lucas, and A. T. Rogers, Jr., three members of the bar, were appointed and designated to investigate the matter of the publication and circulation of such paper and article, and to take such action thereon as in their judgment was warranted. Thereafter, on the 14th day of June, 1913, an affidavit by the three members of the bar so appointed was filed in the office of the clerk of said court, in which it was charged that the appellant, at the time of the publication and circulation of the article, had the management and control of said newspaper, and that, in publishing the article in question, he was guilty of contempt of said court, in that the said article was intended to influence the said court in its decision of a pending cause, and tended to bring into disrepute, and was calculated and

intended to bring into disrepute the district court aforesaid, and the judge thereof, and to lessen the respect due to the said court, and to impede the administration of justice. Upon the filing of such affidavit the court ordered that an attachment issue for the arrest of appellant, and that he show cause why he should not be punished as for contempt of court as charged in the affidavit filed by such committee. Upon issue joined, a trial was had before the court on the 26th day of June, 1913, and the appellant was adjudged in contempt of court, fined \$50, and sentenced to 30 days' imprisonment in the county jail of said county. From the judgment, appellant prosecutes this appeal. The Attorney General has filed a motion to dismiss the same, on two grounds, stated as follows:

"(1) That this court has no appellate jurisdiction in said cause, in that there exists no constitutional or statutory authority to entertain said cause in this court.

"(2) That this court cannot take jurisdiction in said cause, in that no right of appeal exists therein, either by Constitution, statute; or otherwise."

[1] It is the contention of the Attorney General that the information filed by the committee charged the appellant with a criminal contempt, and this is not controverted by appellant. Without further consideration of the nature of the case, we will treat it upon this assumption, which is undoubtedly correct.

The provision for appeals in criminal cases is found in section 47, c. 57, S. L. 1907, and the right is granted in the following language:

"In all cases of final judgment rendered upon any indictment, an appeal to the Supreme Court shall be allowed if applied for during the term at which said judgment is rendered."

[2] This section is a re-enactment verbatim of section 3408, C. L. 1897, which was construed by the territorial Supreme Court in the case of *Marinan v. Baker*, 12 N. M. 451, 78 Pac. 531. In that case the court held that an appeal would not lie from a judgment of the district court committing a person to jail for a criminal contempt, as the statute only conferred a right of appeal in criminal cases from a final judgment "rendered upon any indictment." Appellant does not deny the correctness of the holding in that case, which could not well be done, as it is amply fortified by authority and logic, but he contends that the section of the statute upon which it was based was amended by section 2, art. 6, and section 4, art. 22, of the state Constitution. The latter section continued in force all laws of the territory in force at the time of the admission of New Mexico as a state which were not inconsistent with the Constitution, and made certain other provisions not material here, however. Section 2, art. 6, reads as follows:

"The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and

shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law."

Appellant argues that section 4 of article 22 of the Constitution contemplates that such laws of the state as may be in existence at the time of the adoption of the Constitution as are in some particulars only in conflict therewith shall stand as modified or changed or amended by the Constitution, so as to bring into existence one harmonious and consistent system of laws upon the various subjects provided for by the Constitution and the state statutes, and that it was not intended, where a part only of any particular section of the statute was inconsistent with the Constitution, that thereby the whole section should be repealed, but that such part should stand as amended, by eliminating the conflicting portion of the section or act in full force and as modified to the extent of the conflict. Applying this argument to the present case, it is contended that section 2, art. 6, confers and grants a right of appeal to this court from all final judgments, and therefore amends and alters the provisions of section 47, c. 57, S. L. 1907, which only granted a right of appeal in criminal cases from a "final judgment rendered upon any indictment." In support of the proposition that the statute is to be considered as amended by the Constitution, the following cases are cited: *Cleveland v. Calvert*, 54 S. C. 83, 31 S. E. 871; *State v. Evans*, 47 S. C. 418, 25 S. E. 219; *Butler v. Lewiston*, 11 Idaho, 393, 83 Pac. 235; *Farmers' Development Co. v. Rayado Land Co.*, 134 Pac. 217, decided by this court. It must be apparent, however, that this doctrine would not apply to the statute under consideration, unless it be true that section 2, art. 6, of the Constitution confers upon litigants a right of appeal from all final judgments.

[3] Appeals are creatures of statute, and, when not guaranteed by constitutional provisions, or specifically provided for by statute, no power of review is afforded to a litigant in a cause determined by an inferior court. The Supreme Court of this state has only such jurisdiction as is conferred by the Constitution, and the laws of the state not in conflict therewith. When the framers of the Constitution said, "The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all final judgments and decisions of the district courts," were they attempting to declare and limit the jurisdiction of the court only, or did they intend, after so declaring and limiting such jurisdiction, to also confer upon litigants an affirmative right to invoke such jurisdiction in all cases which passed to final judgment in the district courts of the state? That the former, only, was intended is, we believe clearly manifest. They were creating a court of both appellate and original jurisdiction. Sec-

tion 2 of said article attempted to define its appellate jurisdiction, which was declared to be coextensive with the state and to extend to all final judgments and decisions of the district courts. It was declared to have appellate jurisdiction throughout the confines of the state, thereby prohibiting the Legislature from limiting such jurisdiction to certain counties or districts, and such appellate jurisdiction was limited to "final judgments and decisions," with such additional appellate jurisdiction of interlocutory orders as the Legislature might see fit to confer upon it. By the next section (section 3, art. 6) it was given original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions, and other named powers were conferred upon it. But nowhere is a right granted to litigants, by appeal, to avail themselves of the jurisdiction thus conferred upon the court. No procedure is provided by which such jurisdiction is to be invoked, and, as the right of appeal is purely statutory, it is clear that, notwithstanding the fact that a court is created with appellate jurisdiction over all final judgments, such jurisdiction may only be invoked pursuant to a statute conferring the right and prescribing the procedure. This being true, the Legislature may grant or withhold the right; it may grant the right in one class of cases and withhold it in another; it may confer the right of appeal from all judgments rendered upon indictments, and deny it to all other judgments. This being true, there would be no inconsistency between the statute and the constitutional provision, and the doctrine contended for by appellant, if sound, would have no application.

Our position is fully supported by the adjudicated cases. In the case of *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 508, 107 N. W. 500, 513, the court construed the following constitutional provision:

"Circuit courts shall have \* \* \* appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to \* \* \* give them a general control over inferior courts and jurisdictions."

The court said:

"That, it is argued, grants appellate jurisdiction and, by necessary implication, the right of review as upon an appeal. Counsel fail to distinguish between appellate jurisdiction and the right of appeal. The former only is granted by the Constitution; the latter is a mere legislative creation. The Legislature is supreme in the matter. It may grant the right of appeal from some inferior courts and not from others, or from courts only, or from courts and tribunals exercising quasi judicial authority as well; or may grant the right in some cases and not in others, and, having granted it, take it away. Without legislative action creating the right in any given case in plain language, or by necessary implication, it would be usurpation for the court, on the mere faith of its constitutional grant of appellate jurisdiction, to entertain an

appeal. The appellate power of circuit courts must remain in abeyance, except just in so far as it has been, or shall be, given vitality by legislative authority. *Mitchell v. Kennedy*, 1 Wis. 511; *Lancaster v. Barr*, 25 Wis. 560; *Eureka S. H. Co. v. Sloteman*, 87 Wis. 118, 30 N. W. 241; *State ex rel. Tewalt v. Pollard*, 112 Wis. 232, 87 N. W. 1107."

If the right of appeal is granted by the language of our Constitution, it necessarily is granted by the Wisconsin Constitution; for the provision there is as broad as our own, now under consideration.

In Michigan, the court, in the case of *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263, construing a provision of the Constitution vesting in the Supreme Court general superintending control over all inferior courts with power to issue original and remedial writs, and providing that "in all other cases it shall have appellate jurisdiction only," said:

"The appellate jurisdiction in 'all other cases' is as plainly conferred by this section as is the appellate jurisdiction of the circuit courts in all cases over inferior tribunals."

The court further said:

"When article 6, § 8, of the Constitution clothed the circuit courts with appellate jurisdiction, it used that term in its known signification. It referred to such cases as the Legislature should provide for appealing and retrial in the circuit court. As there is no writ of appeal, or process by which the circuit court can bring the cause up from the inferior court for a retrial, it is evident that this provision of the Constitution contemplated legislative action in order to bring the cause within the jurisdiction of the circuit court to retry."

In *Cady v. Manufacturing Co.*, 48 Mich. 137, 11 N. W. 841, Mr. Justice Campbell, stating the law as to the right of appeal under the Constitution of that state, said:

"No appeal lies in any case except where given by statute."

In the case of *Mau v. Stoner et al.*, 14 Wyo. 183, 83 Pac. 218, the Supreme Court of Wyoming, in interpreting section 2 of article 5 of the Constitution of that state, which provided:

"The Supreme Court shall have general appellate jurisdiction, coextensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law"

—said:

"Section 2 merely defines and limits the jurisdiction of the Supreme Court without attempting to define the manner of appeals or the class of cases in which appeals may be taken."

Section 2 of article 5 of the Constitution of South Dakota reads as follows:

"The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations \* \* \* as may be prescribed by law."

In the case of *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289, the Supreme Court of that state said:

"Whether the qualifying clause 'under such regulations and limitations as may be prescribed by law' applies to the first clause relating

to appellate jurisdiction, as well as to the clause relating to the general superintending control of inferior courts, as contended by counsel for respondent, we do not deem it necessary to decide, for the reason that that section does not attempt to define or prescribe in what cases an appeal may be taken to the Supreme Court. The object and purpose of the section seems to be to define and limit the jurisdiction of the Supreme Court, and not in any manner define the class of cases in which an appeal might be taken. The language of the section, defining and limiting the jurisdiction of the Supreme Court, cannot, by any fair construction, be held to confer upon parties the right of appeal in all cases of which the Supreme Court has been given jurisdiction."

In the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, the same rule is followed, in construing a similar constitutional provision.

In the case of *Clark v. Raymond*, 26 Mich. 415, it was held that, as the statute made no provision for bringing the proceeding into court for review, the appellate court had no jurisdiction, and that, without further legislation, there was no way by which a review could be had of such a proceeding, which clearly shows that the court assumed that necessary machinery must be provided in order to confer the right of appeal upon a suitor.

In the case at bar no statutory machinery is provided. The question would arise, were this court to say that an appeal was permitted, as to the time within which appellant could perfect his appeal—whether within one or five years. When must he apply for the appeal? What steps must he take? There is no authority to invoke the procedure prescribed for other cases.

Appellant relies upon the cases of *State v. Leftwich*, 41 Minn. 42, 42 N. W. 598, *State v. Webber*, 38 Minn. 397, 37 N. W. 949, *Whittem v. State*, 36 Ind. 196, and *State v. Dent*, 29 Kan. 416, for support. In the case of *State v. Webber*, supra, the Minnesota court held that a constitutional provision (section 2, art. 6) of that state which provided that the Supreme Court should have "appellate jurisdiction in all cases, both in law and equity," was generally understood to mean that, "in all judicial proceedings, the judgment which finally determines the rights of the parties is subject to review by this court, and we so hold," but the court further said:

"The Legislature may prescribe the mode by which a cause is to be brought to this court, either by appeal or otherwise, and either directly from the court first determining it, or after a rehearing before some other court; but it cannot deprive a party of the right to bring the cause in some manner to this court. If no other mode is given by statute, this court may assert and exercise its appellate jurisdiction by means of the writ of certiorari."

This case, however, is contrary to the weight of authority, and no argument is advanced to sustain the position of the court, except the general understanding. But it will be observed that the court held that the statute regulating appeals did not apply to the

case under consideration, and that the party desiring to invoke the jurisdiction of the court could only do so by certiorari. In that state it will be noted that they have a very broad statute (section 4823, Gen. St. 1894), which was in force at the time this decision was rendered, giving to the Supreme Court power to issue the writ of certiorari "where necessary to the furtherance of justice and the execution of the laws," so that this case and the case of *State v. Leftwich*, supra, could hardly be considered as directly in point.

The Indiana case cited held that there was a right of appeal in that state, in cases of criminal contempt, under the provisions of a statute which gave the right "from all final judgments in criminal cases," and clearly this case has no application here, where our statute contains no such provision. The same is true of the Kansas case, where the statute gave the defendant the right to appeal in a criminal case, "as a matter of right, from any judgment against him."

For the reasons stated, we are compelled to hold that there is no right of appeal from the judgment in criminal contempt, and that the motion by the Attorney General to dismiss the appeal was well taken, and must be sustained; and it is so ordered.

PARKER, J., concurs.

NEBLETT, District Judge (dissenting). I must dissent from the conclusion reached in this case, for the reason that, in my opinion, the limitation of the appellate jurisdiction of this court in criminal cases fixed by the territorial Legislature in section 47 of chapter 57 of the Laws of 1907, through the use of the words "upon any indictment," is wholly inconsistent with the provision of the state Constitution which provides, "The appellate jurisdiction of the Supreme Court \* \* \* shall extend to all final judgments and decisions of the district courts" (article 6, § 2), and such words of limitation must therefore be treated as nullified.

Prior to the adoption of the Constitution, the Legislature had provided for appellate procedure from the district courts to the Supreme Court in "civil and criminal cases." Chapter 57, Laws 1907. The procedure in criminal cases was clearly set forth; only appeals in criminal cases were limited to cases of final judgment of the district courts "rendered upon any indictment." If the words "rendered upon any indictment" be eliminated from section 47 of chapter 57, Laws 1907, the time within which any appeal in any criminal case could be perfected, as well as the manner of perfecting such appeal, is clearly prescribed. It is clear to my mind that the framers of the Constitution were well aware of the words of limitation, and it was their purpose in employing the phrase "shall extend to all final judgments and decisions of the district courts" to ex-

pressly repeal any words of limitation of the statute upon the right of appeal in criminal cases. If it be necessary for legislative action before an appeal in a criminal case of contempt could lie, it would only devolve upon the Legislature to expressly repeal the words "upon any indictment," in section 47, c. 57, Laws of 1907, and then the right of appeal in such a criminal action would clearly attach.

Prior to the adoption of the Constitution the right of appeal in civil actions extended to any person aggrieved by any final judgment or decision of any district court, and in criminal cases it extended only to final judgments upon any indictment. The Constitution expressly extends the appellate jurisdiction in criminal cases to all final judgments and decisions of the district courts. Should the Legislature enact a law limiting the right of appeal from the final judgments and decisions of the district courts in civil cases to a certain class only, would not such enactment be clearly unconstitutional and therefore void? If this be so, then is it not equally true that any statute existing at the time of the adoption of the Constitution limiting the appellate jurisdiction of the Supreme Court in criminal cases only to final judgments rendered upon any indictment equally inconsistent with the Constitution, and likewise void?

I cannot agree that the provision of the Wisconsin Constitution cited in the majority opinion is as broad as our own. Neither do I so consider the articles cited from the Constitutions of the states of Wyoming and South Dakota.

(19 N. M. 537)

VAN KIRK v. BUTLER. (No. 1627.)

(Supreme Court of New Mexico. Dec. 12, 1914.)

*(Syllabus by the Court.)*

**1. MASTER AND SERVANT (§§ 101, 102\*)—INJURY TO SERVANT—SAFE PLACE TO WORK—DUTY OF MASTER.**

It is the duty of the master to exercise reasonable care and skill to the end that the place where he requires his servant to perform labor shall be as reasonably safe as is compatible with its nature and surroundings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**2. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT—DEFECTS—NOTICE.**

The master is chargeable with knowledge of defects in material or appliances, even though such defects be latent, or not plainly and clearly observable if by the exercise of reasonable care the master could have discovered the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**3. MASTER AND SERVANT (§§ 203, 226\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EXTRAORDINARY RISK.**

The servant assumes all the ordinary risk of the service and all of the extraordinary risks—i. e., those due to the master's negligence—of

which he knows and the dangers of which he appreciates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543, 659-667; Dec. Dig. §§ 203, 226.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—"EXTRAORDINARY RISK."**

An "extraordinary risk" is not one which is uncommon or unusual, in the sense that it is rare, but is one that arises out of unusual conditions, not resulting in the ordinary course of business, as by reason of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

For other definitions, see Words and Phrases, Second Series, Extraordinary Risk.]

Error to District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by Herbert Van Kirk against E. C. Butler. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

The complaint, in this case, sets up a claim for damages sustained by plaintiff when a portion of the defendant's building, upon which plaintiff was working, fell, causing the injuries complained of.

The cause of action is predicated upon the alleged negligence of the defendant, and the facts upon which this is based are set out in the complaint, in the following language:

"That the said fall of the building and the consequent injuries to this plaintiff were caused and produced by the carelessness and negligence of the defendant in failing to supply a safe place where this plaintiff was to work, in that the support of timber which broke and precipitated the brick, timber, etc., upon this plaintiff was insufficient to stand the weight put upon the same and proper timber to support the roof and materials placed above the same."

The answer admitted that the plaintiff was working upon the building as an employé of the defendant, and alleged that the plaintiff well knew the condition of the timbers, which broke as a result of carelessness and neglect of plaintiff, who had failed to construct and place the supports of the roof in a workmanlike manner, as directed to do by defendant's foreman in charge of that portion of the construction of the building. The plaintiff made a general denial of these allegations, and the cause came on for trial, upon the issues so joined. After counsel for plaintiff had made his opening statement of the facts which he intended to prove, defendant's counsel moved for a directed verdict upon the statement of counsel for plaintiff, upon the ground that the facts offered to be shown demonstrated that an accident had occurred in the construction of a building for which the defendant was not responsible, the risk being an assumed one, and that no fact of the opening statement would warrant a judgment in favor of the plaintiff. Ruling upon this motion was withheld,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.-9



and after the introduction of some testimony, on behalf of plaintiff, counsel for defendant made further objection upon the ground that the complaint did not state a cause of action, in that it stated no facts to show any negligence upon the part of the defendant. As a result of the argument upon this objection, counsel for plaintiff offered to restate into the record the facts as he expected to prove them, which, with the consent of the trial court, he proceeded to do in the following language:

"The plaintiff expects to show in support of the action which he has set up substantially the following facts:

"That the defendant, Mr. Butler, was the owner of a lot in the city of Albuquerque, upon which he designed to erect a building for an automobile garage; that he procured from an architect plans and specifications for the erection of this building, but did not employ the architect to superintend or supervise the construction, instead assuming that duty himself in person; that in pursuance of that erection he employed Mr. Dye, foreman, whose duty it was to employ and discharge his carpenters and other laborers necessary in the erection of the building, and Mr. Dye, under that authority from the defendant, did employ this plaintiff as an ordinary carpenter to work in the erection of this building, to do the particular things that were assigned to him to do, in accordance with his business as a carpenter; that the plans and specifications of the architect provided for a building 75 feet in width and about 142 feet in length, to be used as an automobile garage, and a portion of the interior work—there were to be trusses running crossways over this 75 feet, and 50 feet of these trusses were to be self-supporting, being supported in the remainder by iron standards, or posts, located 25 feet from the west wall of the building; this 50-foot stretch of trusses that were self-supporting, was to be sustained by iron truss rods, which passed through the wooden trusses at the posts and at the opposite wall, running down and being drawn tight with a screw, and supporting the wood truss at intervals by bridges running from the bottom of the truss to this rod and acting as supports. This cross-truss—these cross-trusses were all to be supported in this manner, except the last one at the rear, and as the plan of the building provided for an entrance at the rear left-hand corner, in order to omit the posts under that crosspiece which was to be located 25 feet from the wall, and provide a free passageway for the automobiles, where the posts stood, a support was designed under the last wooden truss or stringer, of another minor truss running lengthwise of the building in the line of the iron supports, one end resting upon the iron supports under the truss, the second from the rear wall, and the other end being imbedded in the rear wall itself. This was designed to pass under the first cross-truss, supporting it at the same place that the iron support would have stood had it been placed. This cross-truss taking the place of the iron support was designed in its turn to be strengthened and supported by a like truss rod, fastened into each end of the wooden truss, running down in truss form and separating the wooden truss itself by bridges at intervals.

"I present a small diagram showing more definitely the arrangement designed for this building, the outline representing the walls of the building itself, the last truss from which the iron strand was omitted being marked *a,a*, the point at which the iron standard was omitted marked *d*, and the wooden truss supporting it marked *b,b*. The rod designed to strengthen and hold it is marked *e,e,e*, and the bridge-work running from this rod to the supports,

marked *f,f,f*; the dotted line *c,d* being the place of the omitted iron support. We expect to show that the defendant proceeded with the work of erecting this building himself, personally superintending the work, and under him the foreman, being constantly upon the work directing it and superintending it, and that his foreman, who was under him, in entire charge of the work, and with the right to hire and discharge men, directed the men in making these cross-trusses to make them support on sticks or pieces of 2x6 timber until they were completed and ready for the iron rods, the cross-trusses being made in place and the iron rods to be put in later, in the meantime the timbers supported by the sticks; that in like manner the foreman directed the wooden truss *b,b* on the diagram, to be built of boards nailed together, composing, when so nailed, a stick of timber approximately 10 inches square, and directed the carpenters to place under this stick of timber at the point marked *c,d*, being the point directly under which it supported cross-trusses, one of these stick supports, which was to take temporarily the place of the rods thereafter to be added to the stick to support it, and some of the carpenters so employed, the exact one we will be unable to show, placed the support at *c,d* under the stick *b,b*.

"We will show that as designed, and had the rods been put into this timber as soon as it was erected, it was amply strong enough and would have sustained fully all the weight that was designed to and had been placed upon it at the time that it fell. We will further show that all these upper trusses were in place, as I have stated, including the cross-truss supporting the truss *a,a*; that the plaintiff, together with the foreman and some other men, proceeded to put in these iron trusses, commencing first at the trusses *a,a* and proceeded from that one in the rear, the large cross-trusses successively towards the front of the building; that in the meantime, by the direction of the defendant, the work of putting on the roof on top of these trusses proceeded without interruption, and without waiting to complete the works of putting in the iron trusses; that when the plaintiff and the foreman had finished putting the iron rod trusses on the wooden trusses that run through the building, and started back to put the truss on the cross-piece *b,b*, they were—that the foreman and the plaintiff were called away and directed to stop that work by the defendant himself, and directed to instead complete some work in the front of the building—putting up the large heavy steel girder over the door in order that the work of construction should not be impeded; that the work of placing this heavy iron girder in the form occupied some days, two approximately as I now recollect, and in the meantime the work of putting up the roof and piling additional weight upon the weak spot in the rear, continued by direction of the defendant unabated, and among other things that the defendant caused to be unloaded at the rear point directly over the place where this stick support sustained the iron rods heavy green lumber, adding additional weight upon that point to that which the building itself carried. We will show that this stick support was insufficient in itself to sustain the weight placed upon it by the roof, and that after the plaintiff and the foreman had finished putting the steel girder in the front, which work they had been doing by direction of the defendant himself, they started back to continue the work and put these iron rods under the support *b,b*, and after they had put in a few pieces of the scaffolding designed for the workman to stand upon, and to work upon, in putting in this iron truss the stick *c,d* broke and gave way, allowing the cross-piece *b,b* and the stringer *a,a* resting upon it in turn to break, and these, turning over the various crosspieces that ran through the building from front to rear, so that the weight would



come upon their side instead of upon the point of the support by the trusses, one after another they broke and fell until the entire top of the building had been precipitated into the basement, dragging with it some of the brickwork of the wall and a portion of the walls themselves, substantially collapsing the entire building, with the exception of the lower part of the brickwork upon the walls; that the plaintiff in the process of this fall was covered with bricks and debris that came from above, and in that manner received the injuries for which we bring this suit. His injuries consist of a broken arm, bruises, and other physical injuries. Now upon that statement we expect to recover in this case."

After the foregoing statement of the case the court intimating that it was his conclusion that the complaint, even including the statement as made, did not state facts sufficient to constitute a cause of action, whereupon leave was asked by counsel for plaintiff to amend the complaint so as to state specifically the grounds or particulars of negligence contained in the opening statement. The complaint was thereupon treated as amended to include the facts set out in the opening statement and a verdict directed in favor of the defendant upon the ground that plaintiff had no right of action.

Marron & Wood, of Albuquerque, for plaintiff in error. A. B. McMillen, of Albuquerque, for defendant in error.

HANNA, J. (after stating the facts as above). As indicated by the statement of the facts, the one proposition before this court for consideration is whether the complaint, as enlarged or amended by the opening statement of counsel for plaintiff, states a cause of action.

Counsel for appellee, in an able brief, takes issue with appellant's position that the court ordered the complaint to be deemed amended to include the facts of the opening statement, and contends that an objection was interposed to such course of procedure. Counsel did object, and stated as his reason therefor that he desired to meet the complaint when amended, and could not proceed further at the time because he desired to be prepared to meet whatever allegations should be made. After some discussion between counsel and the court, it would appear that counsel for appellee, in effect, withdrew his objection, and, subsequently, upon request again made by counsel for appellant, leave to amend was granted by the court, to which no objection was interposed by appellee. It is therefore necessary to treat the complaint as amended, by the opening statement of facts, as was done in the district court; any other course would be unfair to appellant as presenting an issue different from that upon which the case was decided in the court below.

[1,2] We, therefore, turn to the main question for consideration, i. e., the existence of the relation of master and servant being conceded, is there a breach of duty set out in

the complaint and statement of facts, resulting from the negligence of the defendant and not growing out of a risk assumed by the servant in the course of his employment, or, in short, has a cause of action been stated?

The appellant stands upon the general rule that it is the duty of the master to exercise reasonable care and skill to the end that the place where he requires his servant to perform labor shall be as reasonably safe as is compatible with its nature and surroundings. 4 Thompson, Neg. § 3873. Appellee, while not questioning this general rule, and aside from his attack upon the sufficiency of the pleading, contends that a servant, engaging for the performance of specified services, takes upon himself the ordinary risks incident thereto, and that the general rule requiring a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty toward them of keeping a building which they are employed in erecting in a safe condition at every moment of the work, so far as its safety depends upon the due performance of that work by them and their fellows.

It has been held that the doctrine of reasonably safe place does not apply to the construction of buildings or other situations where the character of the place is constantly changing, with the same force as it does to the completed structure or other permanent and fixed place. Lewinn v. Murphy, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 433. Other cases could be cited to the same effect, but it is well settled, as stated by Labatt's Master and Servant, § 924, that where the instrumentality which caused the injury was still incomplete at the time of the accident, and the injured servant was engaged in the work of bringing it to completion, the question whether the master was in the exercise of due care is determined with reference to a lower standard than that which is applied in the case of instrumentalities which have been put into a finished condition and are in regular use in the normal course of business. As stated by the same author, in the same section, in many cases the rule requiring the master to exercise ordinary care to provide a reasonably safe place to work for his servant is held not to apply to cases in which the work in which the servants are engaged is of such nature that the conditions of the place are constantly changing. This text is supported by the case of Davis v. Trade Dollar Cons. Min. Co., 54 C. C. A. 636, 117 Fed. 122, among others, which case is cited by appellee in his brief, in support of his contention upon the proposition that plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant.

[3] The consideration of the last principle stated, without recognizing any qualification thereof, would seem to be conclusive upon

the question before us for determination. Like so many other rules, however, the principle is not without its qualification. The theory of law upon which the principle is based is that, as to the class of risks referred to, the risk is assumed by the servant upon the principle that it is an ordinary and natural incident of the work to be done. *Labatt's Master and Servant*, § 1177. Therefore we take it to be a true statement of the law that if the facts of the case should disclose that the risk is not of an ordinary kind, even though arising in the course of the construction of the building, but was of an extraordinary character, the rule as to assumption of risk by the servant should not apply. And in this connection we find *Labatt's Master and Servant*, at section 1178, discussing the principle in the following language:

"A servant is *prima facie* not chargeable with an assumption of extraordinary risks—risks, that is to say, which may be obviated by reasonable care on the master's part."

This, like every other element of the subject under consideration, seems to be subject to still further qualification, and we find the same author, in section 1179, declaring the principle that extraordinary risks are deemed to have been assumed by the servant if the risk was known to and comprehended by him.

A countless number of cases might be cited by us in support of these several legal principles enunciated. We have examined numerous authorities, and find that most of the cases have arisen in connection with accidents resulting from improper methods of carrying on the business, or from negligence in respect to the use and management of instrumentalities or materials.

[4] An extraordinary risk, in the sense in which we use this term, is not one which is uncommon or unusual in the sense that it is rare, but is one that arises out of the unusual conditions, not resulting in the ordinary course of the business, as by reason of the master's negligence. The reason why the doctrine of the servant's nonassumption of extraordinary risk has arisen, as an exception to the common-law rule of assumed risk, or accepted risk, as it is designated by some authors, may be said to rest primarily upon the consideration that as the master has control of the conditions which affect the servant's safety, he is the party who ought in fairness, to be held responsible if those conditions are not such as a prudent man would maintain under the circumstances. It is also said that extraordinary risks are not assumed because they are not the natural and ordinary incidents of the servant's work. *Labatt's Master and Servant*, § 1181. We, therefore, find that there are two classes of risks referred to, namely, ordinary and extraordinary risks, and *Labatt's Master and Servant*, § 1186a, summarizes the rule as to the assumption of risk in the following language:

"The servant assumes all the ordinary risks of the service and all of the extraordinary risks—i. e., those due to the master's negligence—of which he knows and the dangers of which he appreciates."

This is a comprehensive statement of the rule which thus qualified the general rule that it is the duty of the master to provide a reasonably safe place for the servant to work.

Appellant by his statement of the case has sought to show that the condition out of which this injury grew was not an ordinary risk, but that the master personally in charge of the work, through his foreman, directed that the cross-truss, which subsequently gave way, should be temporarily supported "on sticks or pieces of 2x6 timber until they were completed and ready for the iron rods"; that before the iron rods were installed, the work of putting on the roof proceeded, under direction of the defendant; that when the plaintiff and foreman were about to put in the iron rods, or truss, to support the cross-piece (that gave way) they were called away from this work and directed, by the defendant himself, to complete some work in the front of the building, which work occupied two days, in the meantime, under direction of the master, additional weight had been piled upon "the weak spot in the rear," and when the plaintiff returned to continue the work of reinforcing the truss, temporarily supported as aforesaid, and while erecting a scaffolding to stand upon for the purpose, the supporting timber, or "stick" broke, allowing the truss in turn to break, and resulting in the collapse of the building and the injury of the plaintiff. Thus appellant has endeavored to make out a case of negligence on the part of the master, who was defendant in the court below.

It may be urged that the master could not have foreseen the result that followed from his departure from the plans of construction, which was but a temporary condition, and that the defect in the construction, in this particular, was equally apparent to master and servant, and therefore assumed by the servant. As heretofore stated, each case is dependent upon its facts, and we have found it difficult to find analogous cases, although the following have some points in common with the present case, and, we believe, support the conclusion that the master is chargeable with knowledge of defects in material or appliances, even though such defects be latent, or not plainly and clearly observable, if by the exercise of reasonable care the master could have discovered same: *Twomey v. Swift*, 163 Mass. 273, 80 N. E. 1018; *Flynn v. Union Bridge Co.*, 42 Mo. App. 531; *Johnson v. First Nat. Bank of Ashland*, 79 Wis. 414, 48 N. W. 712, 24 Am. St. Rep. 722; *Nat. Ref. Co. v. Willis*, 143 Fed. 107, 74 C. C. A. 301.

The last case cited is one where a scaffold broke and may be considered as similar in

point of logic to the case under consideration. The scaffold proved of insufficient strength, as did the truss which gave way under the load put upon it. The truss was designed by the plans to be reinforced by iron rods, but the master delayed the work of so doing and, it is said, directed the continuance of work upon the roof, which resulted in piling up of weight upon the truss, temporarily supported, until it gave way.

On the other hand, could the master by the exercise of reasonable diligence have discovered the defect? It is apparent from the facts alleged that he knew that the trusses were to be reinforced by iron rods or trusses, and that he stopped this work of reinforcing at the point where the trouble afterwards developed and at the same time permitted and directed the continuance of work which resulted in the extra weight over the unreinforced truss. This would not seem to be a case of defective material, as was the case in the scaffold referred to, but rather a deliberate course of procedure, out of the ordinary and in violation of plans for the building with every reason to anticipate some such result as occurred. This would at least amount to carelessness and negligence, and constitute a violation of the general duty to provide a safe place for the servant to work in.

It is our conclusion that the state of facts here presented for our consideration did not constitute an ordinary risk, but rather an extraordinary one, resulting from the negligence of the owner and master, and, as the case is now presented to us, it does not appear that the servant knew of the condition, and therefore assumed the risk, for which reason we necessarily conclude that the trial court was in error in directing a verdict for the defendant, the judgment of the district court being, therefore, reversed, and the cause remanded for a new trial; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(19 N. M. 586)

HASBROUCK et al. v. CARR.  
(No. 1732.)

(Supreme Court of New Mexico. Dec. 7, 1914.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 147\*)—CONTRACT INDEMNIFYING BUILDING CONTRACTOR'S SURETIES—LIABILITY OF INDEMNITORS—CREDITORS OF CONTRACTOR.

A surety company, having executed a bond for the benefit of subcontractors, laborers, and materialmen, received a contract of indemnity from the principal contractor and one Carr, providing that they would at all times indemnify and save the surety harmless from and against every claim, demand, judgment, etc., and that they would place the surety in funds to meet every claim, demand, judgment, etc., against it by reason of such suretyship and before it should be required to pay thereunder.

Held, that the contract was one of indemnity solely, and, in a suit against Carr for the benefit of the creditors of Anson, no recovery could be had, where it appeared from the complaint and answer that the surety company was insolvent; that it had no assets; that it had paid no part of such judgments, and could not be required to pay, by reason of its insolvency.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402-412; Dec. Dig. § 147.\*]

2. PRINCIPAL AND SURETY (§ 147\*)—RIGHTS OF CREDITORS—INDEMNITY—SUBROGATION.

Where the security is given by a stranger and is merely personal to the surety, and cannot be construed as a pledge for the security of the debt, if the surety is discharged from liability the creditor cannot afterwards take anything by subrogation to his rights. If, on the other hand, the security is a pledge for the payment of the debt as well as a personal indemnity for the surety, the discharge of the surety will not deprive the creditor of a claim on the security for the payment of the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402-412; Dec. Dig. § 147.\*]

3. INDEMNITY (§ 11\*)—CONTRACT INDEMNIFYING SURETY COMPANY—RIGHT TO ENFORCE INDEMNITY.

Where a stranger undertakes to indemnify a surety, and the surety thereafter becomes bankrupt so that it cannot pay any of its suretyship obligations and is dissolved and its corporate capacity and right to do business terminated, the legal representative of such surety cannot enforce the indemnity, because such surety lost nothing, and was not damaged, and cannot be damaged.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21-25; Dec. Dig. § 11.\*]

4. INDEMNITY (§ 1\*)—"INDEMNITOR"—"INDEMNIFY."

An "indemnitor" is a person who indemnifies, and to "indemnify" is to "save harmless; to secure against loss, damage, or penalty; to make good to; to reimburse; to compensate."

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, First and Second Series, Indemnify.]

Appeal from District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by Frank Hasbrouck, Superintendent of Insurance of the State of New York, as successor in office of William T. Emmett, for the use and benefit of James B. Clow and others, against Clark M. Carr. From judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions to dismiss.

Andrew W. Anson was a contractor residing in the city of Albuquerque, and entered into a contract with the United States government for the erection of the Albuquerque post office, and, in order to qualify as such contractor, made application to the Empire State Surety Company to furnish bond to secure the faithful performance of his contract. The first application was made on March 16, 1908, and the second one on December 19, 1908. The applications are in substantially the same form, and it will be necessary to consider but one of them. In

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pursuance of such applications, the Empire State Surety Company executed bonds, with Andrew W. Anson as principal, to the United States of America. The applications referred to described Andrew W. Anson as applicant, Sarah Anson as wife, and Clark M. Carr as indemnitor. Clark M. Carr, the appellant, was not the contractor and was not interested directly or indirectly in Anson's contract, and was not a party to the bonds given by Anson and the Empire State Surety Company to the United States government. The parties for whose benefit this suit was brought became creditors of Anson on account of labor and materials furnished in the erection of the post office building. Anson became unable to pay these creditors, and thereafter, in a suit instituted in the United States court against Andrew W. Anson and the Empire State Surety Company, judgment was recovered against them for the respective amounts claimed by the several creditors. The appellant, Clark M. Carr, was not a party to that suit, and was not a debtor to the creditors of Anson or in any way responsible to them, unless the application to the Empire State Surety Company which he signed as indemnitor made him responsible. The judgments recovered against Andrew W. Anson and the Empire State Surety Company have never been paid. The Empire State Surety Company never paid any of the judgments against it by Anson's creditors and is wholly insolvent and unable to pay its debts or any part thereof, and has been dissolved and its corporate capacity and right to do business as a corporation terminated, and the superintendent of insurance of the state of New York was directed to take possession of its assets and liquidate its business. William T. Emmett, at the time of the commencement of this action, was superintendent of insurance of the state of New York, and Frank Hasbrouck is his successor and was duly substituted as such in this cause. It is alleged, among other things, in the complaint, that the payment by the Empire State Surety Company of the several judgments rendered against it and the said Anson became impossible by reason of the insolvency of the said Empire State Surety Company. Appellant filed a demurrer to the complaint, which was overruled by the court, whereupon he filed an answer, setting up the fact that the Empire State Surety Company was insolvent, and unable to pay its debts or any part thereof, and that it had been dissolved and its corporate capacity and right to do business as a corporation terminated; that it had not and cannot pay said judgments or any part thereof; and that it had not and could not suffer any loss, etc., by reason of said judgments. And likewise it was alleged that the insurance commissioner had not paid such judgments, and that such officer had no funds with which he could pay such judgments; consequently the indemnitee was not and

could not be damnified. Other allegations were contained in the answer, which, however, need not be set forth. After answer appellee moved for judgment upon the pleadings, which motion was sustained by the court, and judgment was entered in favor of Frank Hasbrouck, superintendent, etc., for the use and benefit of the creditors named in the complaint, and for the respective amounts due each of such creditors, against appellant. From such judgment, this appeal is prosecuted.

Alonzo B. McMillen, of Albuquerque, for appellant. Neill B. Field, of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). [1] The bond or contract to enforce which this suit was filed is a combined application for a contract bond and an indemnity agreement, usually, it is evident, only intended to be signed by the applicant for such bond. It is designated, on the face of the paper, "Application for a contract bond." This is followed by a blank space for the place and date of execution, and 18 questions to be answered by the applicant for the bond. None of these questions have any relation whatever to any other signer of the bond, save the applicant. These questions are immediately followed by the following printed paragraph:

"Should the Empire State Surety Company, hereinafter called the surety, execute or procure the execution of the bond hereinbefore applied for, the undersigned, hereinafter called the indemnitor, do in consideration thereof, jointly and severally undertake and agree."

This is followed by 13 numbered paragraphs, setting forth the agreements of the indemnitor, and so designating him, practically all of which only refer to the applicant. The fourth paragraph, upon which appellant's liability rests, if at all, reads as follows:

"That the indemnitor will perform all the conditions of said bond on the part of the indemnitor to be performed, and he will at all times indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever, and will place the surety in funds to meet every claim, demand, liability, cost, charge, expense, suit, order, judgment or adjudication against it by reason of such suretyship and before it shall be required to pay thereunder."

The bond was signed by Anson, the contractor, his wife, and Clark M. Carr, the appellant.

[2] Appellant contends that paragraph 4 of the indemnity agreement, quoted supra, has no relation whatever to him, but refers solely to Anson, the contractor. But in view of the fact that the undertaking was a joint and several one, it might reasonably be held that the undertakings and promises contained in such paragraph were joint and several, and applied to and bound all the signers of the contract. Assuming that Carr was

bound by the provisions of said paragraph, we will pass to a consideration of his liability to the use plaintiffs in this case. This liability depends upon whether the agreement signed by him was intended solely for the indemnification of the Empire State Surety Company, and was personal to it, or whether it was an agreement, by Carr, to pay the debts contracted by Anson, the payment of which was secured by the bond signed by the Empire State Surety Company. The rule is well stated in Brandt, Suretyship and Guaranty (3d Ed.) § 362, as follows:

"Where the security is merely personal to the surety, and cannot be construed as a pledge for the security of the debt, if the surety is discharged from liability the creditor cannot afterwards take anything by subrogation to his rights. The obvious reason for this rule is that the surety being discharged cannot be damaged, and the creditor claiming only through the surety, and occupying his place, can have no greater rights than he. If, on the other hand, the security is a pledge for the payment of the debts as well as a personal indemnity for the surety, the discharge of the surety will not deprive the creditor of a claim on the security for the payment of the debt."

It will be noted that Carr did not undertake to pay the claims, judgments, etc., but only to place the Empire State Surety Company in funds to meet such claims and judgments, before it should be required to pay the same. Was this covenant intended only for the protection of the surety, or was it a direct undertaking on the part of Carr to pay the creditors? Obviously this provision was inserted to secure the Empire State Surety Company against loss by reason of its suretyship for Anson. This is more manifest when we consider the situation of the parties to the contract at the time the agreement was entered into, and examine the entire contract. Anson had been awarded the contract for constructing certain extensions and additions to the Albuquerque post office. His answers to the questions contained in the application showed that he was solvent. The Empire State Surety Company was also solvent and authorized to transact business in New Mexico. The insolvency of neither Anson nor the Empire State Surety Company was contemplated. The company, as is usually the case, was desirous of protecting itself against loss by reason of such suretyship. It knew that Anson might default in some of the conditions of the bond, in which event it would be called upon to respond, under the bond which it proposed to execute for him in damages. In order to protect itself against such liability, it required Carr to join in the indemnity agreement with Anson, before it would execute the bond. The only object which the company had in view was its protection against the payment of judgments which might be obtained against it by reason of its suretyship for Anson, and costs, charges, and expenses which it might incur. To bet-

ter insure this protection, the clause was inserted requiring the indemnitors to place it in funds to meet every such claim, judgment, etc., by reason of its suretyship "and before it shall be required to pay thereunder." This clause was evidently not inserted for the benefit of the creditors and claimants under the surety bond, but solely for the indemnification of the surety. It did not require the surety company to apply this money, so paid by the indemnitors, to the liquidation of such claims and judgments. There is no promise on the part of Carr that he will, in discharge of his obligation, pay any money to the creditors of Anson, who might be able to resort to the surety bond. He simply agreed that he would place the surety company in funds, to pay any claim, judgment, etc., before it should be required to pay the same. Both the complaint and answer in this case show conclusively that the Empire State Surety Company is insolvent; that it has not paid the judgments, for which a recovery is sought in this case; that it has no assets whatever, and cannot pay any part of such judgments; that it has been dissolved and has ceased to exercise any corporate functions. In other words, the pleadings show that it cannot be required to pay the whole or any part of any such judgments. This being true, no recovery can be had in this case.

By paragraph 4 Carr undertakes to place the company in funds to meet every "claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever," and "before it shall be required to pay thereunder." Suppose, for illustration, that the Empire State Surety Company was insolvent; that A., a creditor of Anson, should file a claim with the surety company that Anson was insolvent; that the surety company should file suit against Carr, to compel him to place the surety company in funds to pay such claim. Would it not be a complete defense for Carr, if he should allege and prove that there was no liability on the part of the company? Most assuredly and, if this be true, has he not pleaded a complete defense in this case, when he shows that the company, by reason of its insolvency, cannot be required to pay any money on the judgments in question?

In the case of MacArthur Bros. Co. v. Kerr, 155 App. Div. 690, 140 N. Y. Supp. 527, the court was called upon to construe the provisions of an indemnity agreement, very similar to that now under consideration. In that case the provision was:

"That said Mary Grace shall and will at all times indemnify and keep indemnified and save harmless the said company from and against all loss, damage, cost, charges, counsel fees and expense whatsoever which said company shall or may for any cause, at any time sustain or incur by reason or in consequence of said company having executed or agreed to execute said instrument; and do further covenant and agree to pay to said company or its representatives

all damages for which said company or its representatives shall become responsible upon the said bond or undertaking before said company or its representatives shall be compelled to pay the same, any sum so paid, however, to be applied to the payment of such damages."

The court said:

"If this agreement is simply one of indemnity, then the nonsuit was right, as there is no proof in the record that the surety company has suffered any loss whatever, and it affirmatively appears that there now remains no further liability against it upon this judgment. If, on the other hand, the agreement goes further and is an absolute promise to pay, dependent only upon the arising of the liability against the surety company by the rendition of the judgment, such an agreement is valid and enforceable. See *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82. The determination of the question depends upon the meaning given to the wording of the last phrase of the above question. It is to be noted that the obligation to pay is by the express wording limited to payment preceding the time when the surety company is compelled to pay. Up to this time the surety company has not been compelled to pay anything, and so far as appears from the record has not paid a dollar. It is further to be noted that all that is paid to the surety company is to be devoted to the payment of the damages, which the surety company was obligated to pay. This further evidences to me that the real purpose of the clause was to compel the indemnitor, Mary Grage, to furnish to the surety company in advance the necessary funds with which to liquidate such damages as it might be compelled to pay under its bond. If I am right in this construction, then the contract was purely one of indemnity, and, until such time as loss occurred to the surety company, there were no damages arising under the Grage agreement."

[3] Where a stranger undertakes to indemnify a surety, such undertaking does not create a trust in favor of creditors, nor can they be subrogated to the surety's rights, and, likewise, where a stranger undertakes to indemnify a surety, and the surety thereafter becomes bankrupt so that it cannot pay any of its suretyship obligations and is dissolved and its corporate capacity and right to do business terminated, the legal representative of such surety cannot enforce the indemnity, because such surety lost nothing and was not damaged, and cannot be damaged by such judgment. *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719; *Seward v. Huntington*, 94 N. Y. 104; *Taylor v. Farmers' Bank*, 87 Ky. 398, 9 S. W. 241; *Leggett v. McClelland*, 39 Ohio St. 625; *Macklin et al. v. Northern Bank of Ky.*, 83 Ky. 314; *Stearns on Suretyship*, § 272.

[4] That this was simply a contract of indemnity is made more evident by the designation of the parties. Throughout the contract Anson, his wife, and Carr are referred to as indemnitors. Webster's International Dictionary defines "indemnitor" as "a person who indemnifies." The same authority defines the verb "indemnify" as follows: "(1) To save harmless, to secure against loss, damage or penalty. (2) To make good to, to reimburse, to compensate." And the same

authority defines "indemnitee" as "a person who receives or is to receive indemnity." It is therefore clear, under these definitions, that the indemnity was to protect the surety; that is to say, the debtor, and not the creditors, of Anson. Consequently, unless there is some express language in the agreement signed by Carr as indemnitor, by which he binds himself to pay the creditors of Anson, we may reasonably suppose that the word "indemnitor" as descriptive of Carr was used in its natural sense, and that his undertaking was only for the benefit of the party with whom the contract was made.

Appellee quotes, in his brief, a statute of the United States (Act Feb. 24, 1905, 33 Stat. c. 778, p. 811 [U. S. Comp. St. 1913, § 6923]) which gives to creditors of a contractor, entering into a formal contract with the United States for the construction of public buildings, etc., a right to resort to the bond given the United States by the contractor, to recover for materials furnished and work done on such building, etc., and argues that this statute applies to the indemnity agreement executed by Carr to the surety company. As we view it, this statute has no relation whatever to this case. This is not a suit on the bond referred to in the statute, and it is not pointed out in what particular, if any, it could affect Carr.

For the reasons stated, the judgment of the district court will be reversed, and the cause remanded, with instructions to dismiss the complaint, and it is so ordered.

HANNA and PARKER, JJ., concur.

(19 N. M. 450)

HUNT v. GRAGG et al. (No. 1600.)

(Supreme Court of New Mexico. Nov. 28, 1914.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 154\*)—RENEWAL—PURCHASERS IN GOOD FAITH.

The words "in good faith," in section 2362, Comp. Laws 1897, construed to apply to purchasers of mortgaged chattels.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 263, 269; Dec. Dig. § 154.\*]

2. CHATTEL MORTGAGES (§ 154\*)—RENEWAL—"GOOD FAITH"—"WITHOUT NOTICE."

The words "good faith," used in this section, are synonymous with "without notice."

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 263, 269; Dec. Dig. § 154.\*]

For other definitions, see *Words and Phrases*, Second Series, Without Notice; also *First and Second Series*, Good Faith.]

3. CHATTEL MORTGAGES (§ 155\*)—FAILURE TO REFILE—VALIDITY AGAINST SUBSEQUENT PURCHASER—NOTICE.

The omission to refile a copy of a chattel mortgage as provided by section 2362, Comp. Laws 1897, does not affect its validity as against a subsequent purchaser with actual notice of the existence of such mortgage and that it is unsatisfied.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 264, 270; Dec. Dig. § 155.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

*(Additional Syllabus by Editorial Staff.)***4. SALES (§ 234\*)—RIGHTS OF PARTIES—"PURCHASER IN GOOD FAITH."**

A purchaser in good faith is one who buys honestly, for a valuable consideration, and without notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. § 234.\*]

For other definitions, see Words and Phrases, First and Second Series, Good Faith.]

Appeal from District Court, Quay County; T. D. Leib, Judge.

Replevin by Charles L. Hunt against Oscar O. Gragg, special master, and another. From judgment for plaintiff, defendants appeal. Reversed, with directions to enter judgment for defendants.

Allredge & Saxon, of Tucumcari, for appellants. Reed Holloman, of Santa Fé, for appellee.

NEBLETT, District Judge. This is an action in replevin. The case was tried below upon the following stipulation of facts:

"It is agreed by and between the parties to this action that the facts therein are as follows, to wit: That heretofore the defendant Lucinda Jordan had a chattel mortgage upon the property described in the plaintiff's complaint; that suit was brought by said Lucinda Jordan against the maker of said chattel mortgage, to wit, J. B. Whittaker, and Mrs. J. B. Whittaker; that judgment was obtained by said Lucinda Jordan against the said J. B. Whittaker and his wife foreclosing said chattel mortgage; that afterwards Oscar O. Gragg was appointed special master to sell said property under order of the court; that Charles L. Hunt, the plaintiff in this cause, was not a party to that action; that Oscar O. Gragg took possession of said property as such special master, having an order of the court to take possession of said property, and to sell the property and satisfy the judgment; that at the time said Oscar O. Gragg took possession of said property said property was in the possession of, and under the control of, said Charles L. Hunt; that all of said property that was taken by said Oscar O. Gragg was in the possession of, and under the control of, Charles L. Hunt; that on the 18th day of March, A. D. 1912, J. B. Whittaker sold to said Charles L. Hunt all of the property described in the complaint, executing a bill of sale therefor; and that on said date Charles L. Hunt paid to J. B. Whittaker for said property the sum of two hundred fifty-four <sup>87</sup>/<sub>100</sub> (\$254.37) dollars.

"It is admitted that plaintiff, Charles L. Hunt, had actual knowledge that there was of record a chattel mortgage against said property that had not been satisfied at the time of the transfer of the said property to said Charles L. Hunt, which said mortgage is the one that has been heretofore mentioned in this finding of fact; that the suit to foreclose said mortgage was filed on the 1st day of April, A. D. 1912, being subsequent to the date of the purchase of the said property by said Charles L. Hunt; that said mortgage was filed and recorded on the 16th day of March, A. D. 1910, and that the same was never renewed by filing any affidavit or statement whatsoever of record as provided by law for the renewal of chattel mortgages. It is admitted that the mortgage became due one year after date; that the bill of sale of said property to Charles L. Hunt was made on the 18th day of March, A. D. 1912; that

the first suit to foreclose said mortgage was filed on the 1st day of April, A. D. 1912; that the first time any attempt was ever made to renew said mortgage by filing any statement of record was on the 19th day of April, A. D. 1912."

Upon this agreed statement of facts the trial court rendered judgment for the plaintiff, Charles L. Hunt, that the property described in the complaint is the property of said plaintiff, and that he is entitled to the possession thereof, and that he recover his costs.

[1] Counsel for the appellee in his brief says:

"The decision of this case rests upon the construction of section 2362, C. L. 1897. The appellee in this case purchased the property involved from a mortgagor, knowing at the time of the purchase that the mortgage was unsatisfied. However, the mortgage was more than one year old, and had been on record for more than one year, and had never been renewed as provided by section 2362."

The statute on renewals of chattel mortgages (section 2362 of the Compiled Laws of 1897) is as follows:

"Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers, or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty (30) days next preceding the expiration of the term of one year from such filing, and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if such mortgage is to secure the payment of money, the amount yet due and unpaid; such affidavit shall be attached to, and filed with the instrument or copy on file to which it relates."

Section 2363 provides:

"If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon in good faith, it shall be as valid to continue in effect such mortgage, as if the same had been made and filed within the period above provided."

The agreed statement of fact upon which the case was tried specifically admits that defendant in error, at the time he purchased the property covered by the mortgage held by Lucinda Jordan, knew of the existence of such mortgage and that it had not been satisfied. It is admitted that he had actual knowledge of such facts. The failure to record a chattel mortgage is not fatal to the instrument, nor does it affect its validity as between the parties or those with actual notice thereof. *Kitchen v. Shuster*, 14 N. M. 176, 89 Pac. 261. It being conceded, therefore, that defendant in error had actual notice of the existence of the mortgage, as well as of the fact that it was unpaid at the time he made the purchase of the property in question, it only remains to be determined whether or not, by reason of the failure to refile such mortgage, the mortgage lien of Lucinda Jordan was thereby rendered invalid as to him.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

By C. L. § 2361, instruments having the effect of a mortgage on personal property are to be acknowledged and recorded in the same manner as conveyances affecting real estate. C. L. §§ 3955 and 3960, declare that the effect of failure to record the latter is simply that the instrument shall not be valid as against purchasers and mortgagees in good faith without notice. 14 N. M. 176, 89 Pac. 261. There is no specific statute providing that a chattel mortgage must be recorded to retain its priority over a subsequent attaching or execution creditor, or over a subsequent purchaser or mortgagee in good faith, but it must be unqualifiedly admitted that in this jurisdiction such recordation is necessary. *Vorenberg v. Bosserman*, 17 N. M. 433, 130 Pac. 438. In the light of these observations, what was the legislative intent in enacting section 2362? A filing or refiling chattel mortgage act is clearly not for the purpose of continuing the mortgage lien as between the parties, but is for the protection of creditors and bona fide purchasers without notice. *Sanford v. Munford*, 31 Neb. 792, 48 N. W. 876. The mere fact that a comma follows the word "purchasers," in section 2362, cannot operate to cause a strained and unnatural construction of that section, to the effect that the words "in good faith" must apply only to subsequent mortgagees. Any subsequent mortgagee would become a creditor of his mortgagor, but would be a secured creditor. To hold that the intentment of the statute, then, is that a failure to file validates the instrument as to subsequent mortgagees with actual notice, but invalidates it as to subsequent purchasers with like notice, would be an absurdity. Such was clearly not the intent of the Legislature, and, omitting the comma after the word "purchasers," such meaning cannot be read into the statute. Punctuation is not part of a statute, and, in construing statutes or deeds, courts should read them with such stops as will give effect to the whole. *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1113; *Sedgwick Stat. and Const. Law* (2d Ed.) 223. In *Hamilton v. Hamilton*, 16 Ohio St. 428, it was said:

"But for the punctuation as it stands, there could be but little doubt but that this was the meaning of the Legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation or repunctuate, if need be, to render the true meaning of the statute."

It is therefore our conclusion that, in order for this statute to be effective as to a subsequent purchaser, such purchaser must be a purchaser in good faith.

[2, 4] A purchaser in good faith is one who buys honestly for a valuable consideration and without notice. *Redewill v. Gillen*, 4 N. M. (Gild.) 78, 12 Pac. 872.

"The words 'good faith,' in a statute, are \* \* \* synonymous with 'without notice.'" *Riederer v. Pfaff* (C. C.) 61 Fed. 872, 873.

[3] The defendant in error having admitted that he had actual knowledge, at the time of his purchase of the mortgaged property, that a chattel mortgage existed covering the same, and that such mortgage had not been paid or satisfied, he is precluded from the protection afforded by said section 2362.

The judgment of the lower court is reversed, and the district court of Quay county is directed to enter judgment in favor of the appellant; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(19 N. M. 572)

**TURKNETT v. WESTERN COLLEGE OF NEW MEXICO CONFERENCE OF METHODIST EPISCOPAL CHURCH, SOUTH.** (No. 1685.)

(Supreme Court of New Mexico. Dec. 7, 1914.)

(Syllabus by the Court.)

1. COURTS (§ 206\*)—JUDGMENT (§ 343\*)—SUBSCRIPTIONS (§ 19\*)—RELIEF AGAINST JUDGMENT.

A judgment was obtained upon a subscription contract for the support of a college, the consideration of said contract being the maintenance of said college at the place designated for the period of 20 years. Subsequent to judgment and affirmance of the same in this court, the college authorities allowed a mortgage to be foreclosed upon the property, quitclaimed its equity of redemption in the same, abandoned the enterprise, and became insolvent. *Held*, the defendant is entitled to relief in this court against the enforcement of the judgment.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 206; \* *Judgment*, Cent. Dig. §§ 672, 677; Dec. Dig. § 343; \* *Subscriptions*, Cent. Dig. §§ 22, 24; Dec. Dig. § 19.\*]

2. AUDITA QUERELA (§ 1\*)—RELIEF AGAINST JUDGMENT—PROCEDURE IN SUPREME COURT.

While this court refuses to hold that the ancient writ of audita querela is not still available in this jurisdiction, the better practice is held to be an application to the court by motion for the relief required.

[Ed. Note.—For other cases, see *Audita Querela*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Proceeding by J. Turknnett against the Western College of the New Mexico Conference of the Methodist Episcopal Church, South, a corporation, to restrain the enforcement of a judgment affirmed in 17 N. M. 275, 125 Pac. 1085. Execution quashed, and judgment declared unenforceable.

J. B. Atkeson, of Artesia, for plaintiff.

PARKER, J. The defendant secured an affirmance in this court of a judgment against the plaintiff. 17 N. M. 275, 125 Pac. 1085. The judgment was upon a subscription contract, the consideration whereof was that the defendant was to establish a Methodist college in or near Artesia, N. M., and to



equip, maintain, and operate the same for a period of 20 years. It did erect a building and did maintain a school at the place designated prior to and at the time of the trial in the district court, but the same was not a college, and was devoted to the teaching of the primary grades. Plaintiff alleges that, at the time of the trial he was ignorant of the true facts, and was deceived by the fraud, concealment, and perjury of the defendant's witnesses in that regard. It is further alleged that subsequent to the trial the defendant allowed a mortgage to be foreclosed upon its property, and quitclaimed its equity of redemption therein, and gives out that it has permanently abandoned the said enterprise, that the defendant is insolvent; that it is threatening to enforce the said judgment by execution, and that plaintiff has no remedy except to apply to this court for a writ of *audita querela*.

[1] 1. We issued an order to show cause, and the defendant has defaulted, having made no return to the order. We may therefore assume the facts as alleged in the verified complaint to be sufficiently established, for the purpose of the proceeding, without further proof.

It appears from the foregoing brief statement that plaintiff's claim to relief rests upon two grounds: First, facts existing prior to and at the trial, viz., the alleged fraud, deceit, and perjury as to the character of the school being maintained by defendant; and, second, facts occurring after the trial, viz., the abandonment of the enterprise by the defendant, thus destroying the consideration for the promise of the plaintiff. Whether the first ground mentioned is available to plaintiff or not, under the facts as pleaded, it is not necessary for us to decide. It may have been the duty of the plaintiff to ascertain for himself the character of the school being maintained rather than rely upon representations of the defendant.

But the second ground seems to be well founded. The contract of subscription of plaintiff to the defendant provided that, as a consideration for the subscription, the defendant would equip, maintain, and operate the said college for 20 years. At the time of the trial the defendant was maintaining and operating the school, and the facts of the defense now put forward did not exist and could not be presented. After the trial the defendant abandoned the enterprise, sold its equity of redemption in the property, and became insolvent. If the trial were now to be had, it is clear no recovery could be awarded against the plaintiff upon his subscription; the consideration therefor having wholly failed. While the claim and judg-

ment were valid when the judgment was rendered, the defense has arisen since the judgment, which renders it unjust to enforce the collection of the same. This state of affairs authorizes the court to interfere in behalf of the plaintiff and prevent execution of the judgment.

[2] 2. The plaintiff has proceeded by complaint as for the ancient writ of *audita querela*. In most of the states, either by statute or decision, this writ has fallen into disuse or has become obsolete. The remedy now administered, most generally, upon motion with notice to the adverse party. There may be cases, however, where the facts are complicated and disputed and where a motion might be inadequate to present in due form all the issues arising, and where there must be pleadings and a regular trial. In such cases the remedy by *audita querela*, at least in the absence of some other available remedy, would seem to be required. We, therefore, decline to hold that the remedy is not still available in this jurisdiction. For a discussion of the remedy generally, see 2 *Ruling Case Law*, 1159; 4 *Cyc.* 1058; 3 *Blackstone Com.* 405; 1 *Freeman on Judgments*, § 95; 1 *Black on Judgments*, § 299. See, also, 4 *Pom. Eq. Juris.* § 1364, as to equitable interference in such cases, also 23 *Cyc.* 999. *Blackstone* says it is—

"a writ of the most remedial nature, and seems to have been invented, lest in any case there could be an oppressive defective justice, where a party who hath a good defense is too late to make it in the ordinary forms of law."

He states that it is in the nature of a bill of equity to relieve against oppression. But even in *Blackstone's* time that writ had been almost driven out of practice by the more simple practice of awarding the same relief upon motion. That a proceeding upon motion is the better practice, even where the ancient writ of *audita querela* is still permissible, see 2 *Ruling Case Law*, 1162.

The proceeding in this case, whether treated as a proceeding as for the ancient writ of *audita querela* or as a motion, is ample to meet the requirements. It requires no citation of authority to show that the defense of the plaintiff in this proceeding to the judgment obtained against him is complete and perfect. It would be unconscionable to allow the judgment now to be enforced.

For the reasons stated, the execution heretofore issued will be quashed, and the judgment heretofore rendered in this court will be declared to be unenforceable against the plaintiff by execution or otherwise; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(16 Ariz. 283)

**DAGGS v. HOWARD SHEEP CO.**  
(No. 1287.)

(Supreme Court of Arizona. Dec. 22, 1914.)

**1. NEW TRIAL (§ 119\*)—MOTION—TIME OF FILING.**

Civ. Code 1901, par. 1478, providing that motions for new trial shall be made within five days after verdict or judgment if the term of court continues so long, and, if not, before the end of the term, is mandatory, and a motion filed out of time may be either stricken from the files or overruled.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. § 119.\*]

**2. NEW TRIAL (§ 124\*) — MOTIONS — REQUISITES.**

Civ. Code 1901, par. 1473, requiring every motion for new trial to be in writing specifying the grounds on which it is founded, is mandatory, and the court may not pass on an oral motion in anticipation that a written one will be filed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.\*]

**3. APPEAL AND ERROR (§ 300\*)—QUESTIONS REVIEWABLE—RECORDS.**

Where motion for new trial was filed out of time, the court on appeal can only consider the questions presented by the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1740-1742; Dec. Dig. § 300.\*]

**4. WATERS AND WATER COURSES (§ 140\*)—APPROPRIATION OF WATER—STATUTORY PROVISIONS.**

The right to appropriate water under Civ. Code 1901, par. 4169, depends on whether the water is unappropriated and on the purpose for which the water is to be applied after appropriation, and a person first in time who uses unappropriated waters for any of the statutory purposes acquires the better right, and may, when necessary or convenient, construct and maintain reservoirs, dams, canals, ditches, flumes, or other ways.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 140.\*]

**5. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—PRIOR RIGHTS—PLEADINGS.**

A plaintiff suing to establish rights in waters and to restrain defendant from diverting the same must state facts from which it may reasonably appear that plaintiff has appropriated to some beneficial use some of the unappropriated waters or surplus or flood waters prior to the time defendant did an adverse act of appropriation in his own right, and that defendant performed or threatened to perform some act depriving plaintiff of a right acquired by appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**6. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—PRIOR RIGHTS—PLEADINGS.**

A complaint, in an action to establish rights to flood waters and to restrain the diversion thereof, which alleges that for about 15 years plaintiff has maintained a dam and ditch, that flood waters to the amount of the carrying capacity of the ditch during that period have been diverted and used by plaintiff to furnish his sheep with water, and that recently defendant constructed a dam which diverted all of the water, states a cause of action against a demurrer.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**7. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—PRIOR RIGHTS—PLEADINGS—DECREE.**

Where, in a suit to establish rights to flood waters and to restrain the diversion thereof, the general verdict and findings of fact by the court established the truth of the complaint that plaintiff was entitled to flood waters to the amount of the carrying capacity of a ditch, and the verdict and findings were sustained by the evidence, a decree awarding to plaintiff flood waters to the amount of the carrying capacity of the ditch was in conformity to the pleadings, evidence, and verdict, and gave to him the relief he was entitled to within Civ. Code 1901, par. 1428.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**8. APPEAL AND ERROR (§ 635\*)—RECORD—REVIEW.**

Where a special verdict is not in the abstract of record, it cannot be considered in determining the correctness of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

Appeal from District Court, Fourth District; Edward M. Doe, Judge.

Action by the Howard Sheep Company against J. F. Daggs. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Jones, of Flagstaff, for appellant. T. A. Flynn, of Phoenix, and Ellinwood & Ross, of Bisbee, for appellee.

O'CONNOR, Superior Judge. The appellee, Howard Sheep Company, commenced this action to establish its rights to the waters flowing in Spring Valley Wash at flood seasons, and impounded by it in Howard Lake and appropriated to use in stock raising, and for the purpose of restraining the appellant, J. F. Daggs, from diverting such flood waters from plaintiff's ditch used by plaintiff for conveying such waters from the said wash to said lake. The defendant demurred to the complaint, assigning a number of grounds for demurrer, among which he specifies that the complaint fails to state facts sufficient to constitute a cause of action, because the facts stated do not authorize the court to grant the relief sought, or any relief, because the complaint fails to show that the water was ever appropriated by plaintiff to a beneficial use, and because the complaint fails to show that defendant is not entitled to a reasonable use of water on his lands, but seeks to enjoin such use. The defendant answers with denials of the allegations of the complaint, and also sets forth his rights in the nature of an affirmative defense presenting his title to a part of the flood waters in question. The court overruled the demurrers, and the issues of fact were submitted to the jury generally and upon special interrogatories. The jury returned a general verdict for the plaintiff and answered the interrogatories submitted by the court. Upon the coming in of the verdicts of the jury, the court made and filed its findings of facts in accordance

with the verdicts of the jury and made conclusions of law therefrom, and ordered judgment entered accordingly for the plaintiff. The judgment was rendered and entered on the 16th day of January, 1912. A motion for a new trial was made on February 27, 1912, and considered made, filed, and overruled as of January 16, 1912, by stipulation of counsel entered into in open court on January 16, 1912. The stipulation so made was to the effect that defendant was allowed 40 days additional time to the time given by the statute in which to prepare and file a motion for a new trial. The motion for a new trial was actually filed February 27, 1912. When filed it was deemed overruled as of January 16, 1912, in accordance with the said stipulation. The defendant appeals from the judgment and from the order refusing a new trial.

[1] The appellee on this appeal contends that appellant has failed to present his appeal in accordance with the rules of this court relating to the matter of assigning errors, and for that reason we are precluded from the consideration of any errors requiring an examination of the evidence; that we can only consider the questions raised by the demurrer, and such fundamental errors as manifestly appear upon the judgment roll, because no other error is assigned. Aside from the fact that the errors are not sufficiently assigned to meet the requirements of our rules, the contention of appellee must be sustained upon another ground. The record discloses that the motion for a new trial was not made and filed until February 27, 1912, although the judgment was rendered on January 16, 1912, 42 days prior. Paragraph 1478, R. S. A. 1901, provides:

"All motions for new trials in arrest of judgment or to set aside a judgment shall be made within five days after the rendition of verdict or judgment, if the term of court shall continue so long; if not, then before the end of the term."

The terms of this law are mandatory and must be obeyed by the courts as well as by the parties. As was said by the court in *Gill v. Rodgers*, 37 Tex. 628, before Arizona adopted this statute:

"We know of no exception to this requirement of the statute, which will allow parties litigant to come in after the expiration of the time limited by law, with a simple motion for a new trial."

*Gill v. Rodgers*, supra, was followed in *Svea Ins. Co. v. McFarland*, 7 Ariz. 131, 60 Pac. 936, and the same rule approved in *White v. Springfield, etc., Ins. Co.*, 3 Ariz. 352, 29 Pac. 1006, and *Walker v. Blake*, 13 Ariz. 1, 108 Pac. 221.

Counsel cannot stipulate to disregard the mandatory requirements of a statute, and thereby nullify its provisions. The text in 29 Cyc. 927, which is fully supported by the authorities, is as follows:

"In most jurisdictions statutes or rules of court having the form of statutory enactments

provide that an application for a new trial must be made within a certain number of days after the rendition of the verdict or decision, or within some other fixed time. The statutory provisions must be strictly complied with. Where a motion is not filed until after the time therefor has expired, the effect is the same as if no motion were filed at all. A motion filed out of time may be either stricken from the files or overruled, and the reviewing court cannot correct the errors which are grounds for new trial."

[2] Par. 1473, R. S. A. 1901, provides that: "Every motion for new trial shall be in writing, and shall specify generally the grounds upon which the motion is founded. \* \* \*"

A set of facts like the facts in this case was before the court in *Carmack v. Erdenberger*, 77 Neb. 592, 110 N. W. 315, and it was said by the court:

"The appellant contends that the record with respect to a motion for a new trial discloses a common practice—that is, that the courts frequently, during the hurry incident to the closing days of the term, rule on a motion in anticipation of one to be filed subsequently—and that, where this is done, the defeated party by custom is allowed to file his motion at any time within three days from the adjournment of the term. The trouble with that contention is that the alleged custom runs counter to the statute. Section 317, Code Civ. Proc., provides that the application for a new trial must be by motion, upon written grounds, filed at the time of making the motion. Under the statute there is no such thing as an oral motion for a new trial, because the statute is mandatory that the application must be made by motion, upon written grounds, filed at the time of making the motion. The court has no authority under the statute to pass on a motion that has not been filed, or in anticipation of one being filed."

[3] The cause stands for review in this court as on appeal upon the judgment roll, and such questions only as the judgment roll presents may be considered.

Appellant assigns as error the order of the court in overruling his demurrer to the complaint, because of the alleged failure of the complaint to state facts sufficient to constitute a cause of action. Appellant contends that the complaint must allege facts showing the beneficial use to which the water has been applied, the quantity of water so used, and the time it has been used. In order to show a right of action the plaintiff must allege facts showing that plaintiff has appropriated to a beneficial use a definite quantity of the public waters of the state prior to any use of the waters made by the defendant, and that defendant by some subsequent act is depriving the plaintiff of some part of such definite quantity of water therefore appropriated by plaintiff. Appellant correctly asserts that the necessary facts and not conclusions of law must be pleaded.

[4] The rights in unappropriated waters or the surplus or flood waters are acquired by any person or corporation for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock, or any other beneficial purpose, by appropriation of such waters. " \* \* \* The person or persons, company or corporation first appropriating water for the purposes herein mentioned shall

always have the better right to the same." Paragraph 4169, R. S. A. 1901. The right to appropriate the waters depends upon whether the water is unappropriated and upon the purpose for which the water is to be applied after appropriation. The person first in time who uses the unappropriated waters of the state for any of the purposes mentioned in the statute, *supra*, acquires the better right to the water so used. If, in order to use or appropriate the water for any of the purposes mentioned, it becomes necessary or convenient, the appropriator is given by the said statute the right to construct and maintain reservoirs, dams, canals, ditches, flumes, and any and all other necessary waterways.

[5, 6] In order to state a cause of action in this kind of case, such facts must be stated as from them it is made reasonably to appear that the plaintiff has appropriated to some beneficial use some of the unappropriated waters, or surplus or flood waters at a time prior to the time the defendant has performed any adverse act of appropriation of the waters in his own right, and that defendant has performed or threatens to perform some act that will deprive the plaintiff of some right acquired by such appropriation. An examination of the complaint discloses that for a period of about 15 years prior to the commencement of this action the plaintiff has maintained a dam on Spring Valley Wash, and a ditch from such dam to Howard Lake; that the flood waters to the amount of the carrying capacity of the ditch, during that period of time, have been diverted by said dam and conveyed by said ditch to Howard Lake and stored in said lake; that during said period of time the waters thereby diverted, conveyed, and stored have been used by the plaintiff for the purpose of furnishing its sheep with water; that, in order to furnish a sufficient amount of water for such use, the dam, ditch, and storage reservoir are necessary. These facts appearing in the complaint, the prior appropriation of the flood waters of Spring Valley Wash for a beneficial purpose unquestionably appear. Plaintiff thereby shows a better right to the amount of water his ditch will carry from the dam to the reservoir lake. The complaint then alleges, in brief, that during August, 1910, the defendant constructed a diversion dam across said Spring Valley Wash at a point about 1½ miles above plaintiff's said lake and about 1 mile above plaintiff's said diversion dam, and proceeded to construct from his said diversion dam a ditch through which all of the waters of said Spring Valley Wash might be diverted and conducted into another lake; that said dam and ditch constructed by the defendant did divert all of the water thereafter flowing in said wash into said other

lake. From these facts the clear inference must be drawn that the defendant by means of his said dam and ditch has deprived plaintiff of the use of the amount of the flood waters of Spring Valley Wash that his ditch would carry from plaintiff's dam to Howard Lake; in other words, the acts of defendant have deprived plaintiff of its right to the amount of water appropriated by it to the purpose of furnishing water for its sheep. What amount of water is necessary or required for such purpose is specified by plaintiff in its complaint as the amount its ditch will carry from the dam to Howard Lake. That statement is sufficiently specific for the purposes of a pleading, and the exact amount of water appropriated may readily be arrived at from evidence of the size of the ditch, the velocity of the flow, and other like facts.

It is clear that the facts stated in the complaint are sufficient to set forth a cause of action when attacked by a general demurrer as here interposed.

[7, 8] The general verdict of the jury is responsive to the issues raised in the pleadings. The special verdict—that is, the interrogatories submitted and answers thereto—is not included in the abstract of record, and for that reason they may not be considered in this case. The findings of fact by the court cover all the material facts necessary to support a decree for the plaintiff under the pleadings. The decree is responsive to the allegations of the complaint, following the verdict of the jury and the findings of fact, quieting plaintiff's title to the waters appropriated and used, and enjoining perpetually the defendant from any and all future interference with plaintiff's rights, and defendant is commanded to restore the conditions in the vicinity of plaintiff's dam and ditch "so that all of the waters which would have flowed into Howard Lake before the construction of defendant's dam and ditch may henceforth continue to flow therein." Such a judgment the court is authorized to enter, *viz.*, one that conforms to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Paragraph 1428, R. S. A. 1901.

We find no reversible error in the record. The judgment is affirmed.

CUNNINGHAM and ROSS, JJ., concur.

N. B.—Judge FRANKLIN being disqualified, and announcing his disqualification in open court, the remaining Judges, under section 3 of article 6 of the Constitution, called in Hon. W. A. O'CONNOR, judge of the superior court of the state of Arizona in and for the county of Santa Cruz, to sit with them in the hearing of this cause.

(16 Ariz. 323)

In re ILER. (No. 1409.)

(Supreme Court of Arizona. Dec. 29, 1914.)

**1. GUARDIAN AND WARD (§ 10\*) — APPOINTMENT OF GUARDIAN—PETITION.**

Under Civ. Code 1913, par. 1106, providing that the appointment of a guardian may be made on the petition of a relative or other person in behalf of the minor, and paragraph 1122 providing that, in making the appointment, the court shall be guided by what appears to be for the best interests of the child, where a child's mother and paternal grandmother filed separate petitions, each asking that she be appointed guardian, the court can appoint the child's father, though he filed no petition for such appointment before the hearing.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. § 10.\*]

**2. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT — APPOINTMENT OF GUARDIAN.**

In proceedings for the appointment of a guardian, the determination as to whose appointment will be best for the child is one of fact, which will not be disturbed on appeal, if supported by any substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Petition by Bessie Anna Iler for appointment as guardian of Henry Le Roy Dillman. From a judgment appointing Howard Fay Dillman as guardian of the minor, petitioner appeals. Affirmed.

Bessie Anna Iler filed a petition in the superior court alleging that she is the mother of Henry Le Roy Dillman; that Howard Fay Dillman is the father of said child; that petitioner and Howard Fay Dillman were married, and that they were divorced by decree of the court; that Henry Le Roy Dillman is a child of six years of age, and praying that she be appointed guardian. By an order of the court previously made, the custody and care of such minor was awarded to Josephine Dillman and H. C. Dillman, her husband. These parties are the parents of Howard Fay Dillman and the grandmother and grandfather of the child. The grandparents reside in Cochise county. The mother, after the said divorce was granted, remarried to John W. Iler. She resides with her husband in Gila county. Howard Fay Dillman is unmarried and resides in Maricopa county.

Josephine Dillman filed her petition praying for an order appointing her guardian of the child. The interested parties appeared before the court and announced ready to proceed. The court proceeded to hear the proofs offered by the contesting parties. Upon the close of the evidence, the cause was submitted to the court for consideration and decision. Before the decision was announced, Howard Fay Dillman filed his petition pray-

ing the court to appoint him guardian of the child, upon the grounds that he is the father of the child. The mother and other relatives of the child were present and had actual notice of the filing of the last petition. The contesting parties agreed that the evidence given upon the hearing of the prior petitions might be considered as given upon this last petition. The former matter was treated as reopened by the court and resubmitted with the last petition, and the three petitions were considered together. The court rendered its judgment appointing Howard Fay Dillman, the father of the child, its guardian, and requiring him to give bond in the sum of \$100, and imposed the condition that the child should be maintained in the home of Josephine and H. C. Dillman. A motion for a new trial was denied Bessie Anna Iler, and she appeals from the order appointing the guardian and from the order refusing a new trial.

J. T. Kingsbury, of Tombstone, for appellant. Doan & Doan, of Douglas, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The appellant contends in argument that under the law and the evidence the appellant should have been awarded the guardianship of the child, for two reasons: First, because the evidence tends to show that the father, Howard F. Dillman, expressed a willingness that the mother should have the child before he filed his petition; and that he ought not to have been permitted to file his petition after the issues raised on the first petition had been submitted. The appellant's assignment of errors are: First, that the court erred in denying appellant's motion for a rehearing. The assignment evidently refers to the motion for a new trial. The grounds set forth in the motion are practically the same as the remaining alleged errors assigned, viz.: (2) The court erred in refusing to appoint the appellant as the guardian of the minor; (3) that the court erred in appointing Howard F. Dillman as the guardian of said minor; (4) the court erred in permitting the said Howard F. Dillman to file his petition after the case was closed and submitted. These assignments can have but one meaning; that is, that the court erred in making the selection of a guardian for the minor child by selecting and appointing Howard F. Dillman, for the reason Dillman had not filed a petition praying such appointment in time to be heard with the appellant's petition.

[1] "The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardians legally appointed by will

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or deed, and who are inhabitants or residents of the county. \* \* \* Such appointment may be made on the petition of a relative or other person on behalf of the minor. \* \* \* Paragraph 1106, Revised Statutes of Arizona 1913 (Civ. Code).

The mother's petition, when filed, was sufficient to invoke the jurisdiction of the court to exercise the power of selecting and appointing a guardian for the child under this statute. No further petition for that purpose is necessary to empower the court to act in such matter. The petition filed by the mother prays that she be appointed the guardian. The petition of the grandmother, filed later, prays that she be appointed guardian. When the evidence was heard, no other petitions were filed. No petition then on file prayed for the appointment of Howard Fay Dillman as guardian of the child. His petition praying for his appointment was filed after the evidence was closed on the hearing of the former petitions. The question is: Was a prayer requesting the appointment of a certain person necessary to authorize the court to select and appoint? Paragraph 1122, Rev. St. Ariz. 1913 (Civ. Code), lays down the rule that must be followed by the court in such case as follows:

"In awarding the custody of a minor, or in appointing a general guardian, the court is to be guided by the following considerations: (1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. (2) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but, other things being equal, if the child be of tender years, it should be given to the mother; if

it be of an age to require education and preparation for labor or business, then to the father. (3) \* \* \*

The vital question for determination is the best interests of the child—the child's welfare. In selecting and appointing a guardian, one which, when appointed, will, in the judgment of the court, best promote the child's welfare, the court is not limited in such selection of a guardian to the suggestions found in the pleadings. The person appointed must, of course, in some manner make known to the court that he or she will accept the trust, but that fact may be made known after the appointment with equal force as if made known before the order is entered. When the court has selected and appointed a general guardian for a minor child having no guardian appointed by will or by deed, and the guardian so selected and appointed appears to be one of the parents of the child, and such appointment was made upon the hearing of a petition of a relative of the child filed for that purpose, the irresistible presumption arises therefrom that the court determined from the evidence that the best interests of the child would, in its judgment, be promoted by the appointment of the particular person named.

[2] Such determination is a determination of a fact from the evidence considered. An appellate court will not disturb an order based upon a determination of a fact from evidence, if any substantial evidence appears in the record which fairly tends to support the conclusion reached by the trial court. Ample evidence sustaining this determination reached appears in this record.

The order is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(25 Cal. A. 723)

## PEOPLE v. SIMONS. (Cr. 538.)

(District Court of Appeal, First District, California, Nov. 10, 1914. Rehearing Denied Dec. 10, 1914; Denied by Supreme Court Jan. 9, 1915.)

## 1. CRIMINAL LAW (§ 384\*)—EVIDENCE—RE-MOTENESS.

Remoteness may affect the weight of evidence, but it does not ordinarily affect its admissibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.\*]

## 2. CRIMINAL LAW (§ 342\*)—EVIDENCE OF MOTIVE ADMISSIBLE TO SHOW IDENTITY.

In a criminal action, motive may be shown when there is any doubt as to the identity of the perpetrator of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 773, 774; Dec. Dig. § 342.\*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

John C. Simons was convicted of assault with intent to murder, and appeals. Conviction affirmed.

A. L. Frick and Gehring & Wyman, all of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

**PER CURIAM.** In this case an appeal is taken from the judgment of conviction and from the order denying defendant's motion for a new trial. The points made in support of the appeal are that certain evidence introduced by the prosecution for the purpose of showing the motive of the defendant for the commission of the crime was too remote; that the district attorney was guilty of misconduct in his argument to the jury; and that too wide a latitude was allowed in the cross-examination of the defendant.

[1] Remoteness may affect the weight of evidence, but it does not ordinarily affect its admissibility.

[2] We are satisfied that the evidence complained of was admissible under the general rule that motive may be shown where there is any doubt about the identity of the perpetrator of the offense; or that motive may be shown generally, although not necessary to be shown in every case. In the present case, if there was a likelihood that the complaining witness was in any way an obstacle to the sexual gratification of the defendant, that might be a motive for assaulting the complaining witness with the intent to murder him. If that be so, the testimony assigned as erroneously admitted was proper for the purpose of showing motive, and also for the purpose of clearing up any doubt there might have been as to the identification of the person guilty of the assault.

We do not think there was any misconduct on the part of the district attorney sufficient to warrant particular mention. As to the cross-examination of the defendant, we are

satisfied it was legitimate and within the rule.

The judgment and order appealed from are affirmed.

(25 Cal. A. 675)

## WADE et al. v. CITY AND COUNTY BANK. (Civ. 1414.)

(District Court of Appeal, First District, California, Nov. 5, 1914. Rehearing Denied Dec. 5, 1914. Denied by Supreme Court Jan. 4, 1915.)

## 1. TRUSTS (§ 34\*)—EXPRESS TRUST—OWNER'S CHECK TO DISCHARGE MECHANICS' LIEN.

Plaintiffs performed labor and furnished material for a building, for which they were not paid. They filed a lien, and served on the owner notices to withhold payments to the building company. Thereafter the owner delivered to defendant bank, where she had a deposit, a check, with direction to pay the building company on its production of satisfactory release of the plaintiff's lien and notices, which was certified by defendant bank and remained in its possession for three years, during which time the building company notified the bank that it had no interest in the check. No demands were made on the bank, which thereafter applied the check upon the drawer's indebtedness. *Held*, that there was no trust as between the plaintiffs and the bank, and the transaction did not constitute a trust in plaintiff's favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.\*]

## 2. ASSIGNMENTS (§ 49\*)—EQUITABLE ASSIGNMENT.

Such transaction did not constitute equitable assignment of the amount due to the plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85-98; Dec. Dig. § 49.\*]

## 3. ESTOPPEL (§ 54\*)—CONDUCT—KNOWLEDGE.

Such transactions would not be construed as an estoppel in favor of the plaintiffs, where they knew nothing of it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.\*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by William Wade and others against the City and County Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Jesse H. Steinhart, of San Francisco, for appellant. F. W. Sawyer and Arthur H. Barendt, both of San Francisco, for respondents.

**RICHARDS, J.** This action was brought by plaintiffs to obtain judgment against defendant for funds claimed to be held in trust by defendant for the benefit of plaintiffs. Plaintiffs had judgment, from which, and from an order denying a new trial, defendant appeals.

The facts upon which the alleged trust arose are as follows:

[1] In March, 1907, Carolina Taubles entered into a contract for the construction of a building with the Yerba Buena Building Company. At that time she was a depositor with the defendant bank. Plaintiffs each per-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index: 145 P.—10

formed labor upon and furnished material for the construction of the building, for which they were never paid. The plaintiffs filed liens upon the building, and also served on the owner notices to withhold payments to the building company. For the purpose of settling with the contractor, the owner delivered, in March, 1907, to defendant bank a certain check, drawn upon it, with instructions to pay it to the building company on the production of satisfactory releases of the liens and notices to withhold, executed by plaintiffs. The check was subsequently certified by the defendant bank, and remained in its possession for nearly three years, during which time no demand whatsoever was made upon the bank by any one for the funds represented by it. In February, 1910, the construction company served notice upon the defendant bank that it no longer held any interest in the check. In March, 1910, a creditor of the owner, Carolina Taubles, endeavored to levy execution on her account with the defendant bank; and thereupon the bank applied the amount of the money represented by the check upon an indebtedness of said Carolina Taubles to it under its bankers' lien. Subsequently, and on December 8, 1911, plaintiffs herein filed a suit against the bank, claiming that it held the amount of their liens in trust for them. In their argument in support of the judgment, it is claimed by respondents that the transaction between Carolina Taubles and the defendant bank created a trust in their favor. This contention cannot be maintained. There is no evidence to show that the transaction was made for the benefit of plaintiffs. The check was made payable to the Yerba Buena Building Company. Defendant was directed to pay to said company the amount of the deposit upon the production of certain releases of liens and withhold notices. The arrangement in no manner directed the payment to plaintiffs of the amount of their claims, nor was there any duty assumed by the defendant under the arrangement toward plaintiffs or any recognition of their rights. Merely accepting the check under the given directions in itself created no obligation on the part of the bank toward plaintiffs. There was no contractual obligation between them. Whatever rights plaintiffs had were based upon the mechanics' lien law. This right was initiated by plaintiffs by the filing of their liens. For some reason which the record does not disclose, they failed to pursue this right; but nowhere does the evidence show that their action in this respect was due to the fact that the owner had made the arrangement with the defendant bank for the payment of their claims. The money was not received by defendant for the benefit of plaintiffs, but was received, if for the benefit of anybody, for the benefit only of the building company.

The instructions to the bank were to pay the money to the Yerba Buena Building Com-

pany only when it produced satisfactory releases mentioned. The building company never presented any releases or demand for the money; but on the contrary, about three years afterward, they disclaimed any interest in the fund.

Upon no theory is there any privity between the plaintiffs and the defendant; and no ground exists upon which plaintiffs can claim any right in the fund involved.

There is no evidence to show that plaintiffs relied in any manner upon the deposit thus made or were in any way prejudiced by it. So far as the evidence shows, they did not rely upon the transaction for the payment of their claims; and in fact there is no testimony indicating in the slightest degree that they ever knew anything about it; nor is there any evidence to show that plaintiffs did a single thing that demanded recognition or that defendant recognized their rights or did anything upon which a liability might be created.

[2, 3] The transaction did not constitute a trust or, as is claimed, an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in favor of the plaintiffs, for, so far as the record shows, they knew nothing of it. The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor, in which the plaintiffs were in no manner privies to or in any manner affected by it. *Bluthenthal & Bickart v. Silverman*, 113 Ga. 102, 38 S. E. 344.

There being no evidence to support the findings that the deposit was made for the benefits of plaintiffs and that they held such fund in trust for them, it follows that the judgment must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(25 Cal. A. 732)

HARTFIELD v. ALDERETE. (Civ. 1652.)  
(District Court of Appeal, Second District,  
California. Nov. 11, 1914.)

1. APPEAL AND ERROR (§ 348\*)—TIME TO APPEAL—STATUTE.

Under Code Civ. Proc. § 941b, providing that notice of appeal must be filed within 60 days after the notice of entry of judgment, and in any case within 6 months of entry of judgment, an appeal taken within 6 months is taken in time, where no notice of entry of judgment was served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900-1904; Dec. Dig. § 348.\*]

2. APPEAL AND ERROR (§ 348\*)—TIME TO APPEAL—STATUTE—WHAT IS NOTICE.

Where a written notice of entry of judgment is needed to start the running of the time to appeal or to request the transcript of the evidence, the fact that the party has actual notice of the entry of judgment will not suffice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900-1904; Dec. Dig. § 348.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



### 3. APPEAL AND ERROR (§§ 348, 411\*)—TIME TO APPEAL—WRITTEN NOTICE—STATUTES.

Under Code Civ. Proc. § 1010, the notice of intent to appeal, which Code Civ. Proc. § 953a, requires shall be served in ten days after notice of entry of judgment, must be in writing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904, 2100; Dec. Dig. §§ 348, 411.\*]

### 4. APPEAL AND ERROR (§ 505\*)—TIME TO APPEAL—WAIVER OF NOTICE—RECORD.

Waiver of written notice of entry of judgment must appear from the record, and the mere fact that appellant filed a bond to stay execution, prior to taking an appeal, appearing dehors the record, is not a waiver of the written notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2313; Dec. Dig. § 505.\*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by A. J. Hartfield against Frank Alderete. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Motion denied.

J. Marion Wright, of Los Angeles, for appellant. Lester E. Hardy, of Los Angeles, for respondent.

SHAW, J. Plaintiff, who is respondent, moves to dismiss the appeal upon the ground that notice thereof and request for a transcript was not filed within 10 days after notice to the defendant of the entry of judgment. The appeal was taken under the alternative method. No notice of the entry of judgment was served upon defendant. After the entry of judgment defendant, as shown by the certificate of the clerk, prior to taking any steps to appeal therefrom, filed a bond the purpose of which was to stay execution of the judgment; and respondent contends that actual notice of the entry of judgment must be deemed implied from the filing of such stay bond.

[1] The judgment was entered on July 2, 1914, and the notice of appeal was filed July 27, 1914. Section 941b, Code of Civil Procedure, provides that such notice of appeal "may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after notice of entry of said judgment, order or decree has been served upon the attorneys of record appearing in said cause or proceeding, provided, however, that if no notice of entry of judgment be given the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree." Since no notice of the entry of judgment was served upon the attorneys of record for the defendant, the 60 days within which the appeal must be taken, where such service is had, did not begin to run, and, the appeal having been taken prior to the giving of such notice and within 6 months after the entry of judgment, it follows that the appeal was taken within the time prescribed therefor.

[2] It is the service of the notice which starts the 60 days to running, and not the fact that defendant may have had actual notice of the entry of judgment. In discussing a like question in the case of Title Insurance & Trust Co. v. California Development Co., 143 Pac. 725, it is said:

"But the 60 days for taking an appeal under section 941b runs from and after 'notice of entry \* \* \* has been served upon the attorneys of record. \* \* \* This implies, as is intimated in Estate of Keating, 158 Cal. 100 [110 Pac. 109], 'that the notice \* \* \* contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing.' Parol evidence that a party knows a fact, or his written statement from which such knowledge may be inferred, is not equivalent to service upon him of written notice of the fact."

See, also, Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294, and Huntington Park Improvement Co. v. Park Land Co., 165 Cal. 429, 132 Pac. 760.

[3] Section 953a, Code of Civil Procedure, having reference to the preparation of a transcript of the evidence in lieu of a bill of exceptions, provides that the party adopting such method in bringing up the record shall file "with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken \* \* \* be made up and prepared." "Said notice must be filed within ten days after notice of entry of the judgment, order or decree." One of the grounds urged by respondent for dismissal of the appeal is that this notice and request for transcript was not filed within 10 days after notice to defendant of the entry of judgment; and, although the appeal was taken in time, it is insisted that the act of the clerk in preparing the transcript was unauthorized, by reason of the fact that the request therefor was not made within 10 days after defendant had actual notice of such entry. The notice of entry of the judgment contemplated by this section, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice. As stated, no written notice of entry of the judgment was at any time served.

[4] While a party entitled to written notice may waive the same, evidence of such waiver must appear from the record. Gardner v. Stare, 135 Cal. 118, 67 Pac. 5; Mallory v. See, 129 Cal. 356, 61 Pac. 1123. There is nothing in either the clerk's or the reporter's transcript disclosing any fact tending to show that appellant had any notice of the entry of judgment. The fact that prior to taking the appeal defendant filed a stay bond is evidenced by matter dehors the record. The bond was a mere loose sheet of paper, performed no function whatever, and hence the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

act of filing it was a nullity. It cannot, in our opinion, be considered as evidence of a waiver of the written notice of the entry of judgment to which defendant was entitled.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; JAMES, J.

(25 Cal. A. 666)

MONTGOMERY v. DORN et al. (Civ. 1295.)

(District Court of Appeal, Third District, California. Nov. 5, 1914.)

**1. TRIAL (§ 396\*)—FINDINGS—CONFORMITY TO PLEADING—PRINCIPAL AND AGENT.**

In an action on a contract to pay the debt of another, the variance between a finding that R., through his agent, D., entered into the contract and an allegation of the complaint that D. and R. promised to pay the debt was not material; it being sufficient, in an action on a contract executed by an agent, to charge the act as that of the principal, without disclosing the fact of the agency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.\*]

**2. PRINCIPAL AND AGENT (§§ 145, 146\*)—CONTRACT BY AGENT—LIABILITY.**

Where a contract is made by an agent within the scope of his employment, ordinarily both the agent and the undisclosed principal, when discovered, are liable, and may be joined as defendants.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520, 521-527; Dec. Dig. §§ 145, 146.\*]

**3. PRINCIPAL AND AGENT (§ 173\*)—CONTRACT BY AGENT—EVIDENCE—RECEPTION OF BENEFITS.**

In an action on a contract executed by an agent, binding the principal to pay the debt of another, testimony as to the execution and delivery of the note evidencing the debt and as to the property pledged therefor, and that the consideration for the contract made by the agent was the sale of such property to the principal, was properly admitted.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659-661; Dec. Dig. § 173.\*]

**4. PRINCIPAL AND AGENT (§ 21\*)—EXISTENCE OF AGENCY—TESTIMONY OF AGENT.**

In an action on an agent's contract, executed for a valuable consideration, and binding his principal to pay the debt of another, the agent was competent to testify to the fact of his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.\*]

**5. PRINCIPAL AND AGENT (§ 23\*)—CONTRACT BY AGENT—IDENTITY OF PRINCIPAL—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action on an agent's contract binding his principal to pay the debt of another, held to show that his principal was a certain individual, and not a company of which such individual was a member.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

**6. FRAUDS, STATUTE OF (§ 116\*)—AUTHORITY OF AGENT—NECESSITY OF WRITING.**

Since the parol promise of a transferee, made in consideration of the executed transfer, to assume an indebtedness of the transferor to a third person is binding, Civ. Code, § 2309, providing that authority to make a contract required to be in writing can only be given by an instrument in writing, does not require that the

authority of the transferee's agent to contract for him be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\*]

**7. BILLS AND NOTES (§ 527\*)—PROOF OF NON-PAYMENT.**

The production of a promissory note showing no indorsement of payment was prima facie evidence of nonpayment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.\*]

**8. CONTRACTS (§ 187\*)—ENFORCEMENT—PARTIES—"EXPRESSLY FOR THE BENEFIT" OF A THIRD PERSON.**

An agent's contract, binding his principal, in consideration of property received by the principal, to pay a debt due from the other contracting party to plaintiff, was a contract made "expressly for the benefit" of plaintiff, within Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George S. Montgomery against Walter E. Dorn and others. From judgment for plaintiff and denial of new trial, defendant A. J. Rankin appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. R. H. Cross, of San Francisco, A. F. St. Sure, of Alameda, and L. W. Lovey, of San Francisco, for respondent Montgomery.

CHIPMAN, P. J. In plaintiff's amended complaint it is alleged that defendant Fitch executed his promissory note to plaintiff September 26, 1908, for the sum of \$1,360, payable 90 days after date, with interest after maturity, secured by certain shares of Home Circle Cash Store & Mail Order House, a corporation; that, after the execution of said promissory note, and prior to the commencement of the action, defendants Dorn and Rankin "expressly and in writing undertook, agreed, and promised the said Chas. A. Fitch, for a good and valuable consideration moving to them, and to each of them, to pay the said promissory note and the whole thereof for the express benefit of plaintiff herein, and said undertaking, agreement, and promise has at no time been rescinded." The prayer is for judgment against defendants for \$1,360, with interest at 7 per cent. after December 26, 1908, and that said pledged property be sold and the proceeds applied to the payment of said indebtedness, and for general relief.

Defendant Rankin interposed a general and special demurrer to the amended complaint, which, being overruled, he answered by expressly denying its averments. Defendant Dorn answered, and, on information, denied most of the averments of plaintiff's amended complaint, and, by way of answer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereto, set forth what he alleged to be the facts in the transaction, to wit: That, on or about September 7, 1909, as agent and attorney of Rankin, and not otherwise, he entered into a written agreement (plaintiff's Exhibit 3) to purchase for Rankin from defendant Fitch and one H. McDonald certain shares of said corporation, referred to in plaintiff's complaint, and, in consideration of the transfer of said stock by Fitch and McDonald to Rankin, the said Rankin promised and agreed to pay for said shares certain cash to Fitch, and to liquidate certain designated claims, and among them the said claim of plaintiff; that, in pursuance of said contract, said shares were transferred to Rankin, and Rankin paid to Fitch the amount agreed—to wit, \$150—and one other claim, but did not pay certain other claims, nor did he pay the said claim of plaintiff; that he (Dorn) acted solely as agent and attorney of Rankin, and so informed defendant Fitch and said McDonald, and "that said defendant A. J. Rankin was the principal in said contract, and that the defendant, Walter E. Dorn, was but the agent and attorney for said party"; that, in pursuance of said contract, said Rankin became the sole owner of said stock of said corporation.

The court gave judgment for plaintiff against defendants Fitch and Rankin for the sum of \$1,360, and interest at 7 per cent. from December 29, 1908, and directed that the said shares be sold and the proceeds applied to the payment of said amount, and that the action be dismissed as to defendant Dorn. Defendant Rankin alone appeals from the judgment and from the order denying his motion for a new trial.

Upon sufficient evidence the court found that the averments of the amended complaint were true, and that the averments of defendant Rankin's answer were not true. Specifically, and on sufficient evidence, it found that Fitch executed the promissory note as alleged, and pledged the said shares as alleged and as testified to by defendant Fitch, and that no part of said promissory note has been paid; that the transaction by which defendant Rankin became liable for the payment of said promissory note was substantially as alleged in defendant Dorn's answer and as testified to by him; that Dorn was acting solely as Rankin's agent and attorney and by his direction and with his knowledge and consent, and that, pursuant to said written agreement entered into by Dorn, Rankin paid certain of the claims therein agreed by him to be paid, but that he did not pay plaintiff's said claim; that Dorn received no profits or benefits from said transaction, and that "defendant A. J. Rankin received all the benefits and profits accruing from said contract, and was and is the principal thereunder; that defendant A. J. Rankin received valuable and sufficient considerations for the execution of said contract of October 7, 1909,

as hereinafter set forth." Finding numbered 7 is as follows:

"That defendant A. J. Rankin, after the said execution and delivery of said promissory note, \* \* \* to wit, on or about October 7, 1909, expressly and in writing undertook, agreed, and promised the said Charles A. Fitch, for a good and valuable consideration moving to him, to pay the said promissory note owing from said C. A. Fitch to plaintiff and the whole thereof for the express benefit of plaintiff herein, and said undertaking, agreement, and promise has at no time been rescinded."

[1] 1. Appellant's first proposition is that there is a fatal variance between paragraph 4 of the complaint and the findings thereon; namely, finding 7, supra. This paragraph stated that Walter E. Dorn and A. J. Rankin "expressly and in writing undertook, agreed and promised the said Charles A. Fitch, for a good and valuable consideration moving to them, and to each of them, to pay said promissory note and the whole thereof, for the express benefit of the plaintiff." The claim is that "both Dorn and Rankin undertook in writing to pay said promissory note and that both received consideration therefor, while the findings, based upon the evidence as it was viewed by the court, are that A. J. Rankin alone 'expressly and in writing undertook, agreed, and promised' to pay said promissory note"—citing *People v. Cummings*, 117 Cal. 497, 49 Pac. 576. In that case the indictment charged that the note was obtained by false pretenses, describing the notes as having been executed by one person as maker, but the proofs showed that the note was executed by two persons as joint makers, and the variance was held material. No such case appears here. It was not alleged that Dorn and Rankin jointly executed the agreement and it was not found that Rankin "alone" entered into the agreement, but rather that he, through his agent, Dorn, entered into it.

[2] Dorn was, on the face of the agreement, a principal, while, in fact, he was the agent of the undisclosed principal. "The general rule is that, where the contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants thereon." 81 Cyc. p. 1624. It was not necessary to aver the fact of agency, "it being sufficient to charge the act as that of the principal, without disclosing the fact of the agency" (Id. p. 1626); and where "the proof is that such acts were done or knowledge obtained by his authorized agent, there is no variance" (Id. p. 1638). Rankin was shown by the evidence to have been the undisclosed principal, and was properly joined with Dorn as party defendant, and as to Rankin a good cause of action was stated. Rankin was therefore not prejudiced, whether or not a judgment went against Dorn. *Allen v. Globe Grain & Milling Co. et al.*, 156 Cal. 286, 291, 104 Pac. 305.

[3, 4] 2. In making his proofs plaintiff introduced testimony as to the execution and delivery of the note; also as to the pledging of the shares of the corporation; also as to the contract for the sale of certain of these shares—to all of which defendant Rankin objected, on the ground that his name did not appear on the note or in the contract, and that each transaction was *res inter alios acta*. The testimony was relevant when offered as to the other defendants, and the testimony later along in the trial fully connected Rankin with the transactions. We discover no error in admitting this or any of the evidence offered. It was competent to show who received the benefits of the transaction, and it was competent to show by Dorn for whom he was acting. "While the statements or admissions of one not as a witness that in a certain transaction he acted as agent for another are not competent to prove the fact of agency, yet, if he is called as a witness, his testimony, not only that he acted as the agent of the party, but as to the fact of agency, \* \* \* where it rests in parol, is as competent as that of any other witness." *McRae v. Argonaut Land & Development Co.*, 6 Cal. Unrep. Cas. 145, 54 Pac. 743; *Mechem on Agency*, § 101.

[5] 3. Some further points are presented on motion for nonsuit which will be briefly noticed. It is claimed that the evidence showed that the contract was the obligation of A. J. Rankin & Co., and not that of Rankin. Dorn testified that, to the best of his knowledge, Rankin was a member of the said company, and that he represented the company in the negotiations. The evidence was that Rankin was the only person disclosed as principal. Dorn testified that Rankin received the benefits and profits of the contract, and that he was acting for Rankin throughout the transaction, and that Rankin became the owner of the stock "in pursuance of the contract." Rankin was a witness in his own behalf. Neither in his answer nor in his testimony did he claim that his firm was a party to the transaction. The testimony of defendant Fitch, as well as that of Dorn, shows that the transaction was for Rankin's individual benefit.

[6] Appellant further contends that the contract was invalid, because it was an agreement to pay the debt of another, and was not signed by Rankin, and that Dorn had no authority in writing to act for Rankin, citing sections 1624 and 2309, Civ. Code. "The promise of a transferee of property, made in consideration of the transfer, to assume and discharge an indebtedness of the transferor to a third person, is obligatory on him although resting in parol." 20 Cyc. 174; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705; *Tevis v. Savage*, 130 Cal. 411, 62 Pac. 611; *Doe v. Allen*, 1 Cal. App. 560, 82 Pac. 568. Inasmuch as the agreement was one not required to be in writ-

ing, it was not essential that Dorn's authority to act for Rankin should be in writing, and section 2309 of the Civil Code has no application.

It is also claimed that Dorn's authority was "expressed in general terms" and hence he had no authority "to act in his own name," citing section 2322 of the Civil Code. Dorn was asked by appellant's attorney to state why he had not presented the contract to Rankin to be signed. He answered:

"For the reason that Mr. Rankin did not want to buy the stock in his own name, as he said to me, and he said he didn't want to buy it in his own name for the reason that, he being in the grocery business, the creditors of the Home Circle Cash Store were so numerous, and it was Mr. Rankin's opinion if they knew he was the purchaser they would insist on being paid in full, and it was his idea that, by purchasing it in my name, I would be able to make a settlement with the creditors for a less amount than 100 per cent. on the dollar."

He testified directly that Rankin requested him (Dorn) to execute the contract in his own name.

[7] 4. The production of the promissory note showing no indorsement of payment was *prima facie* evidence of nonpayment. *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; *Hurley v. Ryan*, 137 Cal. 461, 70 Pac. 292; *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.

[8] 5. Finally, it is contended that the contract, plaintiff's Exhibit 3, is not the contract contemplated by section 1559 of the Civil Code, which provides as follows:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Dorn was the party of the second part in the contract and by its terms it was agreed:

"That the party of the second part shall assume and pay or liquidate the following claims against the parties of the first part (C. A. Fitch and A. H. McDonald) or either of them, to wit: The claim of A. J. Rankin Company, and his assignee, B. B. O'Reilly, for the sum of \$2,600.00 or thereabouts. The claim of Morris Bros. Company for the sum of \$350.00 or thereabouts. The claim of George S. Montgomery, for the sum of \$1,360.00, or thereabouts, together with interest. Pay to C. A. Fitch between \$100.00 and \$150.00 immediately upon a transfer of all of the stock."

There was evidence, and the court found, that Rankin, in accordance with said contract, paid Fitch the sum of \$150, and Morris Bros. Company \$350, but did not pay plaintiff as by said contract he agreed to do. The contention of appellant is that plaintiff, Montgomery, was to receive under this contract "nothing more than a mere incidental benefit" and that, applying the recognized definition of the word "expressly," the conclusion "is inescapable that the same [the contract] was never intended for the 'express benefit' of plaintiff, Montgomery, in this action, and is therefore not within the provisions of section 1559 of the Civil Code." Cases are cited, of which *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100, is an example, where the court said:

"The general rule applicable to cases of this kind is that, when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other."

Is this such a case? In our opinion, the contract cannot be so construed. The contract reads:

"That the parties of the first part [Fitch and McDonald] sell, and the party of second part [Dorn] buys [describing the shares of stock] upon the following terms and conditions, to wit: That the party of the second part shall assume and pay," etc., as quoted above.

In addition to the promise to pay the claims mentioned, Dorn (Rankin) was to give Fitch a position in case Dorn (Rankin) succeeded in reorganizing the corporation whose stock he was buying, and Fitch was to receive some of the shares of this new corporation if organized. There is nothing in the contract, however, that gives the slightest ground for the contention that plaintiff's interest in it was merely incidental. The payment of the claims mentioned was the chief consideration for the transfer of the stock, and when we substitute Rankin for Dorn, as the evidence fully warrants our doing, it seems to us very clear that the contract was made "expressly for the benefit" of plaintiff. Dorn testified that in making the sale of the stock Fitch insisted that certain claims against him should be paid, among them the claim of Montgomery evidenced by the note in suit. Hence the provision in the contract for the payment of this claim. Dorn delivered the contract to Rankin, who must be presumed to have known what his obligations were under it. He discharged part of them pursuant to the contract, and we can see no reason for holding that he should not discharge the one here involved. Many cases might be cited to show that section 1559 is not confined in its application to the case of a sole or primary beneficiary. *Washer v. Independent Mining Dev. Co.*, 142 Cal. 702, 78 Pac. 654, *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71, and *Goff v. Ladd*, 161 Cal. 257, 118 Pac. 792, are among such cases. The principle here involved is further illustrated in cases such as *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858. There defendant agreed to pay a certain amount to a creditor of one Murray, who was engaged in running logs for defendant. It was held that an original indebtedness was thus created in favor of the creditor of Murray, and that, if a contract be for the benefit of a third person, even though he be not cognizant of it when made, the promisee, if adopted by him, is deemed to have been made to him, and he may sue thereon, though the whole consideration moved to the promisor from the original promisee; and it is no objection to such action that the original promisee might also sue upon the promise.

This principle was applied where the grantee of a mortgagor assumed the payment of the mortgage debt. *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27. See, also, *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Tevis v. Savage*, 130 Cal. 411, 62 Pac. 611.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(25 Cal. A. 729)

PEOPLE v. AMADIO. (Cr. 540.)

(District Court of Appeal, First District, California. Nov. 11, 1914.)

1. CRIMINAL LAW (§ 553\*)—EVIDENCE—SUFFICIENCY.

Contradictions and inconsistencies in the testimony of prosecutrix do not make her testimony inherently improbable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

2. CRIMINAL LAW (§ 1159\*)—EVIDENCE—SUFFICIENCY.

That conflict appears in the testimony of the prosecution or on the whole case is not ground for a reversal of a conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

3. WITNESSES (§ 380\*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

The district attorney may, in attempting to impeach accused as a witness, call his attention to his testimony on a prior trial, though what was said and done by the district attorney on the former trial was to trap accused into an inadvertent answer.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.\*]

4. CRIMINAL LAW (§ 1171\*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

Personal references by the district attorney to counsel for accused made in the heat of trial are not prejudicial to accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

5. CRIMINAL LAW (§ 1137\*)—ELECTION OF OFFENSE—EFFECT.

Where the district attorney, at the suggestion of counsel for accused, elected to rest his case on a particular transaction, and accused, through his counsel, acquiesced in the election, accused could not complain because the district attorney selected a date different from that alleged in the information.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

6. CRIMINAL LAW (§ 1032\*)—ELECTION OF OFFENSE—EFFECT.

Where the criminal act is shown to have been committed prior to the filing of the information and within the period of limitations, complaint cannot be made on appeal on the ground of variance between the date alleged in the information and the date proved, and accused, complaining of a variance, must show that he suffered thereby or was taken by surprise, and that injury resulted to him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. § 1032.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, Alameda County; L. S. Church, Judge.

Antonio Amadio was convicted of crime, and he appeals. Affirmed.

Eric G. Scudder, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

**PER CURIAM.** We are satisfied that none of the points made in support of the appeal is sufficient to warrant a reversal.

[1] The contention that the testimony is inherently improbable is based entirely upon claimed contradictions and inconsistencies in the testimony of the prosecutrix. Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability.

[2] The best that can be said in favor of the argument in support of the appeal is that there is a pronounced conflict in the testimony offered upon behalf of the prosecution, but it is only a conflict; and, whether it appear in the evidence offered on behalf of the people or in the evidence adduced upon the whole case, it will not constitute a ground in this court for a reversal of the judgment.

[3] We see no prejudice to the defendant in the conduct of the district attorney that will justify this court in reversing the judgment. Whatever was said and done by the district attorney in the first trial of the case may or may not have been by way of trapping the defendant into an inadvertent answer; but, however that may be, the district attorney was within his rights when, in an attempt at impeachment, he called the attention of the defendant upon the second trial of the case to his testimony given upon the prior trial.

[4] The district attorney's references to counsel were purely personal, and evidently made in the heat of battle, and we fail to see how they operated to prejudice the defendant.

[5] With reference to the contention that the proof adduced at the trial is at variance with the allegations of the information with respect to the date of the commission of the alleged offense, we are satisfied that the district attorney had the right to elect, and did elect, upon the suggestion of the counsel for the defendant, to rest upon a particular transaction as the foundation of his case, and that the defendant, through his counsel, acquiesced in that election. No particular harm, therefore, came to the defendant by reason of selecting a date different from that alleged in the information.

[6] Moreover, we believe it to be the general rule that, if the act is shown to have been committed prior to the filing of the information and within the period of the statute of limitations, no complaint can be made here upon the ground of a variance. Even

if a variance had occurred, it was incumbent upon the defendant, in view of the election made, to show that he had suffered by that variance or was taken by surprise, and that injury to him resulted therefrom.

We are satisfied from a review of the evidence, direct and circumstantial, that it is sufficient to warrant the verdict of the jury.

The judgment and order appealed from are affirmed.

(25 Cal. A. 727)

**PEOPLE v. McALPINE. (Cr. 515.)**

(District Court of Appeal, First District, California. Nov. 10, 1914.)

**1. CRIMINAL LAW (§ 1137\*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY—INVITED MISCONDUCT.**

The misconduct if any of the district attorney in asking questions of a witness invited by prior questions asked by accused's counsel cannot be complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

**2. CRIMINAL LAW (§ 1171\*)—APPEAL—MISCONDUCT OF DISTRICT ATTORNEY—CURING BY CONDUCT OF COUNSEL FOR ACCUSED.**

The misconduct of the district attorney in asking a witness questions is cured by subsequent questions of counsel for accused, put to him when a witness in his own behalf, and bringing out the identical matter embraced in the questions complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 8127; Dec. Dig. § 1171.\*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

C. W. McAlpine was convicted of crime, and he appeals. Affirmed.

Geo. J. McDonough, of Oakland, and Henry B. Lister, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and John J. Barrett, of San Francisco, for the People.

**PER CURIAM.** The defendant in this case was charged with the crime defined by section 593 of the Penal Code. He was convicted, and has appealed from the judgment and the order denying his motion for a new trial.

The points made in support of the appeal are the misconduct of the district attorney in asking certain questions, and that the evidence is insufficient to support the verdict and judgment.

[1, 2] There is no merit in the claim that the district attorney was guilty of misconduct. Perhaps he should not have asked the questions complained of, but the record shows fairly enough that the questions complained of were invited by previous questions of counsel of the defendant. Moreover, whatever harm resulted from the asking of those questions was cured and condoned by the subsequent question of counsel for the defendant, put to the defendant when a witness in his own behalf, which brought out very emphatically and distinctly the identi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cal matter embraced in the questions complained of. It is the settled rule that error, if any, of the kind complained of is cured by the bringing out of the same subject-matter by defendant's counsel.

As to the next contention, the court entertains no doubt that the proof on the part of the prosecution in the trial court abundantly establishes the fact that the complaining corporation was authorized to do business at its location at the time of the commission of the offense, and that it was so doing business under proper legal authority. It is contended that the evidence is further insufficient to establish the fact that the defendant was the perpetrator of the offense; but we are satisfied that the evidence upon the whole case, direct and circumstantial, amply supports the verdict and judgment in this respect.

For the reasons stated, the judgment and order appealed from are affirmed.

(25 Cal. A. 726)

**PEOPLE v. LUX. (Cr. 531.)**

(District Court of Appeal, First District, California. Nov. 10, 1914.)

**WITNESSES (§ 268\*)—CROSS-EXAMINATION OF ACCUSED—SCOPE OF DIRECT EXAMINATION.**

Where accused testified on her direct examination relative to her possession of the pistol with which the homicide was committed, it was proper to permit her to be cross-examined as to what she did with the pistol prior to the shooting and where she carried it on her person.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Hazel Lux was prosecuted for murder, and appeals from a judgment of conviction. Affirmed.

Gehring & Wyman, of Oakland (A. L. Frick, of Oakland, of counsel), for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

**PER CURIAM.** It is conceded that the evidence upon the whole case is sufficient to support the verdict; and the only point made is the alleged error in the cross-examination of the defendant. The direct examination of the defendant upon one particular point related to her possession, prior to her going to a moving picture show, of a pistol—the pistol with which it was alleged she committed the crime of murder charged against her. The direct examination unequivocally referred to this pistol and the defendant's possession of it. The court is satisfied that the cross-examination on that point was germane to the direct examination. The people were entitled to know what she did with the pistol prior to the shooting and where she carried it on her person. There is no doubt at all in our minds but that the cross-examination on that subject was legitimate and proper

and without any prejudice to the defendant; and, that being the only point in the case, the judgment and order appealed from are affirmed.

(25 Cal. A. 724)

**PEOPLE v. AH FONG. (Cr. 525.)**

(District Court of Appeal, First District, California. Nov. 10, 1914.)

**STATUTES (§ 114\*)—TITLE AND SUBJECT—PRACTICE OF MEDICINE.**

The title of St. 1913, p. 722, regulating the practice of medicine and surgery, held sufficient to indicate the entire subject-matter of the act within the requirements of the Constitution.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Ah Fong was convicted of violating the act for the regulation of the practice of medicine and surgery, and he appeals. Affirmed.

William H. Schooler, of Chico, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen. (Louis H. Ward, of San Francisco, of counsel), for the People.

**PER CURIAM.** The record shows that this is an appeal from a judgment of conviction and from an order denying the motion of the defendant for a new trial, in a case wherein the defendant was charged with violating an act for the regulation of the practice of medicine and surgery, etc., approved June 2, 1913. *Stats.* 1913, p. 722.

There is no merit in the contention that the statute under which the defendant was prosecuted and convicted is unconstitutional. In our judgment, the title of the act indicates with sufficient detail the entire subject-matter of the act; and we are satisfied that there is not in the body of the statute in question anything which is in conflict with its title or not included within the scope thereof.

We are also satisfied, from a reading of the entire evidence in the case, that it is sufficient to sustain the verdict and the judgment.

For these reasons, the judgment and order appealed from are affirmed.

(25 Cal. A. 696)

**TYSON et al. v. REINECKE. (Civ. 1387.)**

(District Court of Appeal, First District, California. Nov. 7, 1914. Rehearing Denied by Supreme Court Jan. 5, 1915.)

**1. GUARANTY (§ 56\*)—DISCHARGE OF GUARANTOR—CHANGE IN OBLIGATION—"DUE DATE."**

One interested in a corporation receiving material executed an instrument whereby he guaranteed the payment at "due date" of all accounts for goods already delivered and to be delivered to the corporation by the seller. At the time of the execution of the instrument, the seller extended to the corporation 60 days' credit. Subsequently the period of credit was changed to 30 days, with the option to the corporation at the expiration of that time to give notes

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for 30 or 60 days. Notes for 30 or 60 days were given. *Held*, that since, by the terms of the guaranty, credit was not restricted as to time, any reasonable change as to the length of credit did not relieve the guarantor from liability, unless materially changing the contract of guaranty, and the adoption of the new period of credit and execution of notes did not release the liability of the guarantor; the words "due date" meaning, in commercial transactions, that an account will be paid at the time fixed for its payment.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 67; Dec. Dig. § 56.\*]

## 2. SALES (§ 191\*)—PAYMENT—NOTES—EVIDENCE.

Mere receipts for notes given by a buyer to the seller and entries in the books of account of the seller referring to them as received in payment do not make the notes absolute payment when it was not the intention of the parties that the notes should be accepted in satisfaction of the accounts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 506; Dec. Dig. § 191.\*]

## 3. ATTACHMENT (§ 154\*)—WRIT OF ATTACHMENT—AFFIDAVIT—AMENDMENTS.

A motion to dismiss a writ of attachment on the ground that the writ was issued for a greater amount than that stated in the affidavit may be denied, and the court may, as authorized by Code Civ. Proc. § 558, permit an amendment of the writ to conform to the affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 432-443; Dec. Dig. § 154.\*]

## 4. GUARANTY (§ 1\*)—COLLATERAL CONTRACT—"CONTRACT OF GUARANTY."

A contract of guaranty is a collateral contract for the direct payment of money, and it is immaterial whether the obligation is principal or collateral.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by James Tyson and others, as trustees, against S. W. Reinecke. From a judgment for plaintiffs, and from orders denying a new trial and refusing to discharge an attachment, defendant appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant. Denson, Cooley & Denson, of San Francisco, for respondents.

**RICHARDS, J.** This is an action on a guaranty. The appeal is by defendant from a judgment and from an order denying him a new trial. Defendant also appeals from an order refusing to dissolve an attachment.

Plaintiffs are assignees of Gage, Mills & Co., a partnership, and the action is brought for the reasonable value and the alleged contract price of lumber alleged to have been sold and delivered by said partnership to the Metropolis Construction Company, a corporation, and is founded upon a written instrument of guaranty signed by defendant in the words and figures as follows:

"San Francisco, Cal., Dec. 21, 1909.

"*Mrs. Gage Mills & Co., No. 2005 Market St., City—Gentlemen:* In consideration of having delivered lumber & other materials & that you will continue to deliver same to the Metropolis Construction Co. of No. 24 Cal. St.—I hereby guarantee the payment—at due date—of all the accounts for goods already delivered & to be delivered to the above Construction Co. in the future. Yours truly, A. W. Reinecke.  
"Witness: Louis P. Schwerdt."

The answer admits the execution by the defendant of the said instrument of guaranty, but denies all the other material allegations of the complaint, and pleads exoneration of the guaranty under section 2819 of the Civil Code.

After trial, the court found in favor of the plaintiffs on all the issues, and judgment was accordingly entered against the defendant for the sum of \$6,319.91, being the amount of plaintiffs' demand and interest from the time of commencing suit to the rendition of judgment. The defendant owned one share of stock in the Metropolis Construction Company. He was also, as he termed it, "accommodation treasurer" of the corporation, but performed none of the duties of that office. The partnership had been selling lumber to the corporation for several weeks, when W. L. B. Mills, a member of the partnership, prepared the instrument of guaranty here declared on, and sent it by Louis P. Schwerdt, a salesman of the partnership, to the defendant, with the request that the defendant should sign the same, which the defendant did. Originally, and for several months after the guaranty was made, the partnership was selling to the corporation "cash on 60 days." Subsequently, the corporation being slow in its payments, the partnership refused to give the corporation 60 days' time to pay its bills; and it was accordingly arranged between them that 30 days' time should be given the corporation when, if it could not pay, notes at between 30 days and 60 days would be accepted. Under this arrangement, the partnership accepted a series of notes from the corporation, commencing in May, 1910, and ending in November, 1910, which notes were payable in 30, 35, 45, and 60 days after date. The notes given by the corporation to the partnership to and including September, 1910, were all paid by the corporation at maturity. A note given October 31, 1910, payable in 30 days, was also paid at maturity. The corporation, however, gave, and the partnership accepted, two notes which are unpaid for goods sold in September, 1910, also two notes for goods sold in October, 1910, which are not paid. These notes were given and accepted by the partnership in each instance 30 days after the sale and for a sufficient number of days to make the day of payment in each instance more than 60 days after the sale.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



[1] It is the contention of the defendant that these four notes, aggregating \$5,100, extended the time of payment of the amount, and that the acceptance of such notes by the partnership, under the terms of section 2819 of the Civil Code, exonerated the defendant pro tanto from the guaranty.

There can be no doubt that, if what was done in this case as to each of the notes would amount to an extension of the time of payment thereof beyond what was understood by the parties to be meant by the term "due date," the defendant was exonerated, and plaintiff cannot recover. *Daneri v. Gazzola*, 139 Cal. 418, 73 Pac. 179; 20 Cyc. 1443. The question then to be decided calls for a construction of the term "due date." There seems to be no judicial interpretation of the meaning of the term; but it is clear that in commercial transactions, generally speaking, it means that an account will be paid at the time fixed or agreed upon for its payment. In this case, at the time the guaranty was executed, the copartnership was selling to the corporation goods upon a credit of 60 days; but there is no circumstance in the case that would warrant the conclusion that there was a usage of trade or a contract between the parties, under which the corporation was entitled to a credit upon all sales at 60 days. *Schwerdt*, the salesman for the partnership, who took the guaranty to the defendant to be signed, had no authority to bind the partnership to give the corporation 60 days' credit; nor did anything he said on that occasion have that effect. What he said there amounted to no more than a statement that at that time the partnership was giving the corporation 60 days' credit on all sales. *Mills*, who acted exclusively for the partnership concerning these matters, testified that the conversation between *Schwerdt* and the defendant as to the 60 days' credit was not reported back to him. If this was true, there is nothing in the record to show that the partnership knew that defendant was aware of the length of credit that was being extended to the *Metropolis Construction Company*; so, from the facts in the case, we hold that, even if the defendant had knowledge that the corporation was receiving 60 days' credit on all deliveries at and before the execution of the guaranty, there being no usage or understanding to the contrary, the partnership was authorized to extend the corporation credit for any reasonable length of time, and that some length of credit was contemplated by all the parties concerned.

But, as by the terms of the guaranty the credit was not limited or restricted in any respect as to time, we think that any reasonable change as to the length of the credit would not relieve the guarantor from his liability thereunder, unless such term of credit materially changed the contract of guaranty.

It is not claimed that the terms, as changed, were unreasonable.

When the guaranty was executed, the period of credit was 60 days. Subsequently, in order that the corporation and the partnership might continue business relations, that period of credit was changed and a new date of payment was agreed on, namely, that 30 days' credit should be given, at the expiration of which the account was to be paid or at the option of the corporation it was to give its note for some period of time, varying according to circumstances from 30 to 60 days. Under these facts, it is apparent that the giving of the notes was a part of the new arrangement which did not, in any material respect, change the contract of guaranty, and they marked the period of credit within which the payments were to be made. This brings the guarantor within the terms of his guaranty, namely, that the accounts would be paid at "due date," and his liability follows.

[2] Coming now to the proposition of whether or not the notes may be regarded as having been given and accepted as absolute payment, little need be said. Receipts for the notes and entries in the books of account kept by the partnership refer to the notes as having been received in payment. This, with other evidence in the record, would be sufficient, no doubt, to support a finding that the notes were accepted by the partnership as payment (*Jenne v. Burger*, 120 Cal. 444, 52 Pac. 706), but *Mr. Mills*, who, as before stated, acted throughout these transactions for the partnership, denied that the notes were so accepted, and it is also in evidence that, in looking over the books of account of the concern and observing that the notes were entered therein as payment, *Mills* told the concern's bookkeeper that those entries were incorrect, and in the future to enter them as notes. In brief, it appears quite clear from a reading of the whole record that it was not the intention of the parties that the notes should be accepted in satisfaction of the accounts. In any event, it is certain there is a conflict in the evidence on this branch of the case, and for this reason we cannot, even if we were so inclined, disturb the finding of the court, which was against the defendant.

[3] As to the appeal from the order denying a motion to dissolve the writ of attachment issued in the above-entitled action, it appears that the ground of the motion was that the writ of attachment issued for a greater amount than that stated in the affidavit. Assuming that this was true, in which event the motion would be well founded (*Finch v. McVean*, 6 Cal. App. 272, 91 Pac. 1019; *O'Connor v. Roark*, 108 Cal. 173, 41 Pac. 465), still, as the court, under the terms of section 558 of the Code of Civil Procedure, as amended in 1909, permitted an amendment of the writ which made it and the affidavit

therefor agree in amount, and as we think in so doing the court acted within the authority vested in it by that section, it follows that its order cannot be disturbed.

[4] Taking up the last point made by defendant, we think it equally clear that a contract of guaranty is a contract "for the direct payment of money." It is a collateral contract for a "direct payment of money." If the payment is "direct," it is immaterial whether the obligation is principal or collateral. *Hathaway v. Davis*, 33 Cal. 161, 167; *San Francisco v. Brader*, 50 Cal. 506; *County of Monterey v. McKee*, 51 Cal. 255; *McKee v. Monterey County*, 51 Cal. 275.

It follows from what has been said that the appeal from the judgment and from the order refusing a new trial, as well as the appeal from the order refusing to dissolve the attachment, should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(25 Cal. A. 651)

In re KELLY et al. (Civ. 1279.)

(District Court of Appeal, Third District, California. Nov. 4, 1914.)

1. ADOPTION (§ 3\*)—ABANDONED CHILDREN—STATUTES—CONSTRUCTION.

Civ. Code, § 224, defining an abandoned child, which may, without the parent's consent, be adopted, whereby the natural relation between parent and child is destroyed, is to be strictly construed.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 7-10; Dec. Dig. § 3.\*]

2. ADOPTION (§ 7\*)—"ABANDONED CHILD"—ABANDONMENT.

Within Civ. Code, § 224, defining as an "abandoned child," which may be adopted without consent of the parents, a child deserted by both parents or left in the care and custody of another by its parents, without agreement or provision for its support, for the period of one year, mere failure of parents of a child, in the care and under the custody of another, to contribute, while it is in such custody and care, to its support and maintenance for a year, does not constitute abandonment.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 7-10; Dec. Dig. § 7.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Abandon*.]

3. ADOPTION (§ 7\*)—ABANDONED CHILDREN—"ABANDONMENT."

To constitute an abandonment within Civ. Code, § 224, as to adoption of abandoned children, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor; that is an absolute relinquishment by the parents of custody, and control of it; and thus the laying aside by them of all care for it must be shown.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 7-10; Dec. Dig. § 7.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Abandon*.]

4. ADOPTION (§ 7\*)—ABANDONED CHILDREN—ABANDONMENT—INTENTION.

Abandonment, within Civ. Code, § 224, as to adoption of abandoned children, is a ques-

tion of intention, which must be shown by a clear, unequivocal, and decisive act of the parent, showing a determination not to have the benefit of the right to which he is entitled.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 7-10; Dec. Dig. § 7.\*]

5. ADOPTION (§ 13\*)—ABANDONED CHILDREN—ABANDONMENT—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show abandonment, within Civ. Code, § 224, as to adoption of a child abandoned by its parents.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. § 23; Dec. Dig. § 13.\*]

6. ADOPTION (§ 7\*)—ABANDONED CHILDREN—"AGREEMENT FOR SUPPORT."

Though not kept, a promise by the father to compensate, when able to do, persons for taking care of and supporting his child, constitutes the "agreement or provision for its support," absence of which Civ. Code, § 224, makes essential to a child being abandoned, as regards right to adopt it.

[Ed. Note.—For other cases, see *Adoption*, Cent. Dig. §§ 7-10; Dec. Dig. § 7.\*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

In the matter of the petition of William P. Kelly and another to have Mary Louise Donahoo, a minor child, declared an abandoned child. From a judgment for petitioners, the parents of the child appeal. Reversed.

Rowan Hardin, of Sonora, for appellants. Crittenden Hampton, of Sonora, for respondents.

HART, J. This proceeding, as its title readily indicates, was instituted by the above-named petitioners, in the superior court of Tuolumne county, for the purpose of securing the judgment of said court that one Mary Louise Donahoo, a minor, is an abandoned child within the purview of section 224 of the Civil Code; the ultimate object of the judicial declaration so sought herein being to enable said petitioners to adopt said minor. The petition alleges facts sufficient to state a case of abandonment under the section of the Civil Code above mentioned, and the same was answered and contested by the parents of the minor. At the hearing of the proceeding, evidence for and against the claims of the petition was taken, the court found that said child had been abandoned by its parents within the contemplation of said section 224 of the Civil Code, and rendered and caused to be entered judgment in accord with said finding. This appeal is prosecuted by the parents of said minor from said judgment.

The single question submitted on this appeal is whether the said minor is an abandoned child within the meaning and intent of the Code section above referred to.

Among other provisions, said section contains the following:

"Any child deserted by both parents or left in the care and custody of another by its parent or parents, without any agreement or provision

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for its support, for the period of one year, is deemed to be an abandoned child within the meaning of this section. \* \* \*

It is claimed and the petition avers that the parents of the minor concerned here left said minor in the care and custody of the petitioners, without having made any agreement or provision for its support, for a period of more than one year.

The salient facts upon which this controversy is to be determined are practically undisputed, and may be briefly stated as follows:

The minor involved in this controversy is one of twins—a boy and a girl—born to the contestants, Mr. and Mrs. M. J. Donahoo, on the 22d day of January, 1909. The mother of the twins was, after the birth thereof, left in such delicate health that she became apprehensive that she could not properly take care of and maintain both the infants, and the parents therefore came to the conclusion that the infants would fare the better by placing one in the custody and under the control of a sister of the father of the children, a Mrs. Emma Swanson, then residing in the city of Sonora. To this end, and some three weeks after the birth of the infants, the father and mother completed arrangements whereby Mrs. Swanson took the custody and assumed the responsibility of caring for and maintaining the girl baby. Shortly after the infant was given into the custody of Mrs. Swanson, and, while yet in such custody, the Donahoos departed for Los Angeles, where they took up their residence. The infant remained with Mrs. Swanson until the month of June, 1912—a period of over three years—when the latter was taken so seriously ill as to have suffered mental derangement to a degree which required her removal to and, for a brief period, incarceration in the state hospital for the insane at Stockton.

The petitioners were near neighbors of Mrs. Swanson, and so became aware of her illness immediately upon the happening thereof. They gave her much attention and did all that lay within their power to make her as comfortable as she could be made under the circumstances. They took charge of and ministered to the wants and necessities of the baby girl during Mrs. Swanson's illness and prior to her removal to the asylum. They communicated the fact of Mrs. Swanson's illness to the Donahoos, and informed them that she was greatly embarrassed financially. Upon receiving that information, the father of the child forwarded to the petitioners, for the use and benefit of Mrs. Swanson, the sum of \$30. After Mrs. Swanson had been committed and taken to the asylum, the petitioner, William P. Kelly, addressed a letter to the parents of the child in which he declared that he and his wife had become greatly attached to the baby, that they had no children of their own, and that they desired to adopt the infant.

To that proposition no response was made by the Donahoos, so far as the record discloses. The petitioners retained custody of the child after Mrs. Swanson was sent to the asylum and for over a year cared for and supported her. During that period a number of letters was written by the Donahoos to the petitioners concerning Mrs. Swanson and the child. In one of said letters the father of the baby explained that he had just suffered the loss of several hundred dollars through the failure of a concern for which he had been working, but that he was then working for another company, and that, "as soon as I get a pay day, I will send you more money, and as often as I do get one." He further stated in said letter that "if anything should happen to sister (referring to Mrs. Swanson) we will arrange about Louise," referring to the baby. The other letters above referred to as having been written to the Kellys by the Donahoos disclose a commendable degree of parental solicitude for the child, and, while they contained no direct statements indicative of an intention on the part of the Donahoos to compensate the petitioners for caring for and supporting the baby, the general tenor of their language does not support the conclusion that the parents intended to abandon or relinquish their right to its custody.

It appears that, a few months after being committed to the asylum, Mrs. Swanson sufficiently recovered her physical and mental health to justify her discharge from that institution, and so, in the month of December, 1912, she left the asylum and went to Fresno, where she remained until July, 1913, when, at the request of the Donahoos, she went to Sonora for the purpose of regaining possession of the child. Mrs. Swanson testified in part as follows:

"As soon as I regained my health (after she was released from the asylum), I was in communication with Mrs. Kelly all the time relative to the welfare of the little girl. In June, 1913, arrangements were made with Mr. Donahoo to send me to Sonora to get the child, as shown by the letter from Mr. and Mrs. Donahoo to me, dated the 16th day of June and the 23d day of June, 1913. I came to Sonora about the 10th day of July for the purpose of getting the little girl, acting in behalf of Mr. and Mrs. Donahoo. I did not know that any proceedings had been commenced at that time to have the child declared an abandoned child. I was informed of such proceedings by Mr. Kelly after I reached Sonora. From my knowledge of the conditions surrounding Mr. and Mrs. Donahoo in this matter I know neither of the parents had any intention at any time of abandoning the little girl. At one time I tried to get the consent of the father and mother to adopt the little girl, but they refused to consider the matter at all. When I came to Sonora in July, 1913, Mr. Kelly told me that Mr. Donahoo had promised to pay for the care of the child, but that he had failed to keep his promise. I have recollections during lucid moments of my sickness in July, 1912, of Mrs. Kelly telling me that she and her husband would care for the child and that Mr. Donahoo had promised to pay for the care of the child. At the time I was taken sick, Mr. Donahoo was living in Los Angeles. After I

regained my health, I knew Mr. Donahoo's financial condition during the latter part of the year 1912 and the early part of the year 1913, and knew that he was out of work a portion of the time and that he had sickness in the family and was unable to pay his bills. The sum of money I had in my possession at the time I was taken sick was money sent me by Mr. Donahoo. \* \* \* Mr. Donahoo sent me money for the support of the child, and whenever I requested it he sent me money for my support."

M. J. Donahoo testified that, during the time the child was with his sister, Mrs. Swanson, he paid for its support and maintenance and at times paid for the support of Mrs. Swanson. He said that, prior to the receipt from William P. Kelly of a telegram on June 3, 1912, telling him of the illness of Mrs. Swanson, he was unaware of the latter's physical and mental condition. At that time his wife was ill in Los Angeles and he was unable to collect money which was due him, and for these reasons he did not go to Sonora to take possession of his child and to render succor to his sister.

"I knew," he continued, "the child was in good hands with Mr. and Mrs. Kelly and was satisfied that I could make settlement with them afterwards for the trouble in caring for the child, when I had means to do so. Prior to the writing of the letter of July 7th, the petitioners' Exhibit A, I wrote to Mr. Kelly asking him to contribute for the child and that I would contribute to him for it as soon as I was able. The money which I mentioned being sent in the letter marked petitioners' Exhibit B was intended to apply toward the support of the child, and in compliance with my promise to reimburse Mr. Kelly for his trouble and expense in caring for the child. At no time did I have any intention of abandoning said child, and it was my intention to come and get the child and reimburse Mr. Kelly as soon as my finances would permit. \* \* \* I am in a position now to pay Mr. Kelly a reasonable sum per month to reimburse him for his trouble in caring and providing for said child, and I am desirous of obtaining the child and caring and providing for her. As soon as these proceedings were commenced, I tendered money to Mr. Kelly, being the sum of \$10, as testified to by Mr. Kelly herein."

Both Mr. and Mrs. Kelly testified that when Mrs. Swanson was taken ill, as above explained, they found that the child had been very much neglected; that she was weak and emaciated for want of sufficient food; that she was without proper raiment and unclean of body. They declared that they had never been remunerated by her parents for the care and support they had given the child for a period of over one year, and that no provision had been at any time made by the parents for the child's care and maintenance.

The foregoing constitutes a statement in substance of all the facts and some of the testimony upon which the judgment appealed from was founded. As stated, and as must readily be observed from an examination of the above statement, there is in reality no dispute as to the facts, and the sole question is: Was the court legally justified in declaring and adjudging upon said facts that the minor involved here was an abandoned child

within the meaning of section 224 of the Civil Code, supra?

We cannot persuade ourselves that the conclusion of the learned trial judge is sustainable.

[1] In the first place, it is to be remarked that a statute which authorizes, upon a showing of the existence of certain designated facts or conditions, a court to make a decree or an order whereby the natural relation between parent and child is destroyed, must be strictly construed, and is therefore to be applied in those cases only in which the precise facts or conditions prescribed by such statute are shown to exist. As is said in the case of *Matter of Cozza*, 163 Cal. 514, 522, 126 Pac. 161, 164 (Ann. Cas. 1914A, 214):

"The adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their children was against its policy and repugnant to its principles. It had its origin in the civil law and exists in this state only by virtue of the statute which, as above stated, expressly prescribes the conditions under which adoption may be legally effected. Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is expressly dispensed with, the court has no jurisdiction in the matter."

While the effect of an adjudication that a minor is an abandoned child under the terms of section 224 of the Civil Code is not to directly sever the relation of parent and child, still, since the result of such adjudication under said section is to enable a third party to adopt such child without first procuring the consent of its parents, thus practically depriving the parents of any voice in the matter of an adoption, in case a proceeding for that purpose be inaugurated, that section is also to be subjected to a strict construction when its application is invoked.

[2] In the second place, we are persuaded to say that the mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of said section of the Code. If the rule were otherwise—that is, if an adjudication of abandonment could legally be predicated on the mere failure by the parents to support their minor children—the result, in innumerable instances, would be to work a manifest wrong upon parents. It is not difficult to conceive of circumstances wholly beyond the control of parents having the deepest affection for their children which would render it impossible for them to support their children or care for them in a proper way. It would, indeed, be a harsh rule which would, under such circumstances, au-

thorize a judicial determination by which the natural right of the parents to the custody and control of their children would be forever severed.

[3, 4] To constitute an abandonment under said section of the Code, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor. In other words, there must be shown an absolute relinquishment of the custody and control of the minor, and thus the laying aside by the parents all care for it. *Crabb on Synonyms; Pidge v. Pidge*, 44 Mass. (3 Metc.) 257, 265; *Sikes v. State* (Tex.) 28 S. W. 688, 689; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17; *Dikes v. Miller*, 24 Tex. 417, 424; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054, 1058. And abandonment is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled. *Breedlove v. Stump*, 11 Tenn. (3 Yerg.) 257, 276.

[5] We have been unable to perceive in the evidence adduced at the hearing of this proceeding a single fact which may fairly be said to indicate an intention in the parents of the child concerned here to desert said minor or relinquish their natural right to her custody, care, and control. To the contrary, according to our interpretation of the proofs, the parents not only manifested a desire to perpetuate all the consequences of the natural relation subsisting between them and the infant, but displayed commendable anxiety for its welfare.

The evidence, without dispute, shows that, fearful lest the delicate physical condition of the mother was such that she could not properly nourish the two infants born at the same time to her, the parents arranged with the sister of the father to take custody and care of the infant girl; that the father, during the period that the child was with his sister and until the latter became ill and unable to bestow proper care upon the baby, paid the custodian of said child for the service of caring for it; that, after Mrs. Swanson became ill, the father sent to the petitioners the sum of \$30 which, while intended to be used for the benefit of the sick woman, was doubtless in part or perhaps in full payment of her services in caring for the infant; that the general tenor of the language of the letters from both the father and mother of the child to the petitioners, after the latter had voluntarily taken the custody of the infant, clearly indicated an intention on the part of the parents to reimburse the petitioners for their services in looking after and attending to the welfare of the child; that, as a matter of fact, the father agreed to compensate the petitioners for their services to the

child whenever he found himself financially able to do so.

Under the facts as thus recapitulated, and which, as stated, stand uncontradicted, it is difficult to conceive how an adjudication that the minor in controversy is an abandoned child, or was abandoned by its parents, within the meaning of the language of section 224 of the Civil Code, can be upheld.

[6] The promise by the father of the child that he would compensate, when able to do so, the petitioners for taking care of and supporting it, constituted the "agreement or provision for its support" contemplated by said section, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement.

It may be true that the child, now approaching her sixth year, and having been with the Kellys for over a year, has formed a strong attachment for the petitioners, as they no doubt have for the child. It may also be true that the Kellys are better circumstanced than are her parents for bestowing upon her proper care. But, while these considerations might, perhaps, be of more or less importance in disposing of a guardianship proceeding, they cannot, obviously, enter into the determination of the question of adoption against the consent of the parents or of a proceeding, like the present, which, if sustained, would render it legally unnecessary to consult the desires or wishes of the parents in a proceeding looking to the adoption of their minor children by another.

We conclude that the learned trial judge erred in the conclusion crystallized in the judgment from which this appeal is prosecuted, and said judgment is therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(25 Cal. A. 678)

KLAMATH LUMBER CO. v. CO-OPERATIVE LAND & TRUST CO. (Civ. 1261.)

(District Court of Appeal, Third District, California. Nov. 5, 1914.)

1. FRAUDS, STATUTE OF (§ 26\*)—ORIGINAL OR COLLATERAL PROMISE—CREDIT TO PROMISOR.

Where the agent of a land company, accompanied by a purchaser of land from such company, in negotiating for the purchase of potato crates for the use of such purchaser, asked for credit, whereupon the seller said that, if the land company would pay him, he would do it, and the land company's agent said that that was all right, and they would do that, and the seller understood that he was selling to the land company and looked entirely to it for payment, the land company was not merely the principal debtor, but the only debtor, and there was no question of a guaranty under the statute of frauds (Civ. Code, § 1624, subd. 2).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 35–42½; Dec. Dig. § 26.\*]

2. CORPORATIONS (§ 425\*) — AUTHORITY OF AGENTS—ESTOPPEL.

Where a seller of chattels, for which the agent of a corporation agreed that the corporation would pay, though they were to be used by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a third party, was told by the person having control of the corporation's business that the agent was handling the matter, and that the seller should take the matter up with him, and whatever he did would be all right, and in reliance thereon the chattels were sold, the corporation was precluded from denying the agent's authority to bind it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

### 3. SALES (§ 52\*)—ACTIONS FOR PURCHASE PRICE—EVIDENCE.

In an action for the purchase price of chattels, in which defendant claimed that the sale was made to a third party, evidence that such third party was in Oregon in explanation of plaintiff's failure to call him as a witness was properly admitted, especially where the facts sufficiently appeared without objection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

### 4. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the purchase price of goods, in which defendant claimed the sale was made to a third party, the admission of a question asked the seller's president as to whether he had any agreement with defendant, though technically objectionable, was without prejudice, where, from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with defendant and the testimony made it obvious that such was the opinion of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

### 5. TRIAL (§ 203\*)—INSTRUCTIONS—ISSUES.

An instruction that plaintiff brought the action to obtain a judgment against defendant for \$600 alleged to be due plaintiff from defendant for the sale of potato crates, for which plaintiff alleged defendant promised to pay at the rate of 15 cents per crate, no part of which sum plaintiff alleged had ever been paid, was not improper, though it was probable that the jury had already been advised of the claim of each party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

### 6. SALES (§ 364\*)—ACTIONS FOR PRICE—INSTRUCTIONS.

Such instruction was not objectionable because of the failure to refer to a delivery as well as a sale, as any one would understand that "sale" implied a delivery, especially where there was no question as to the delivery of the crates; the only question being as to the party to whom they were sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.\*]

### 7. SALES (§ 364\*)—ACTIONS FOR PRICE—INSTRUCTIONS.

In an action for the purchase price of goods, in which defendant claimed that the same was made to a third party, where there was evidence supporting plaintiff's theory of the transaction, an instruction defining an original obligation and a principal debtor and embodying plaintiff's theory was properly given, as either party has a right to an instruction based upon his theory of the case, if there is any evidence to support it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.\*]

### 8. SALES (§ 364\*)—ACTIONS FOR PRICE—INSTRUCTIONS.

In an action for the purchase price of goods which defendant claimed was sold to a third

party, an instruction that if the jury were satisfied from all the evidence that defendant's promise, if any was made, was an original promise to pay for the goods, and not a conditional one, it was their duty to find that fact in favor of plaintiff could not have been understood as meaning otherwise than that they should find that the promise was an original promise, if they were satisfied from the evidence that an original promise was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.\*]

### 9. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

Though the instruction embodied a truism and was unnecessary, it could have done no harm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

### 10. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action for the purchase price of goods which defendant claimed were sold to a third person, where it was admitted that they were "furnished" to the third person in the sense that they were shipped to him for use on land purchased by him from defendant, and it was defendant's contention that they were not only furnished to him, but that he alone was liable, an instruction that the fact that the goods were furnished to a third person by plaintiff was not of itself absolutely sufficient to show conclusively that the promise of defendant to pay, if any was made, was a conditional one was not prejudicial because of the reference to the furnishing of the goods to the third person as a fact, especially as such reference was favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

### 11. SALES (§ 53\*)—PARTIES—QUESTIONS FOR JURY.

That potato crates sold for use by a purchaser of land from defendant as the result of negotiations between plaintiff, such purchaser, and defendant's agent were shipped to such purchaser was not conclusive that defendant's promise to pay was not an original promise, but only a conditional promise to pay, if the purchaser did not, but was merely a circumstance for the jury, and an instruction that it was not conclusive, though somewhat argumentative, was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. § 53.\*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Klamath Lumber Company against the Co-operative Land & Trust Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

F. G. Ostrander, of Merced, for appellant.  
F. W. Henderson, of Merced, for respondent.

BURNETT, J. The action was to recover the sum of \$600 for certain sweet potato crates alleged to have been sold and delivered to defendant. The main controversy is as to whether the crates were sold to defendant or to a certain Mr. Gutman, the evidence being sharply conflicting on this point. Closely related to the foregoing is another contention by appellant that if it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ever made any promise to pay plaintiff for the crates it was a conditional one—that is, it would pay if Gutman did not—and, the proviso not being in writing, it was void by reason of subdivision 2 of section 1624 of the Civil Code.

[1] Preliminarily we may mention certain facts that are undisputed. Plaintiff was engaged in the business of retailing lumber and box materials, and the defendant principally in colonizing land, although organized for the purpose also of buying and selling personal property. One of the latter's customers was George Gutman, to whom it had sold a tract of land; the payment therefor to be made out of the crops raised. Said crops were to be marketed in the name of the corporation and the proceeds divided, one-half to be Gutman's and the other to be applied, first, on the interest, and the balance on the purchase price. Among defendant's employes was a salesman by the name of V. H. Gerard, who testified that during the time in controversy one Mr. Cone had control of defendant's business at Merced, where the crates were sold. As to the sale itself, we must, of course, accept the account that favors respondent's contention. Therefore we refer specifically to the testimony of J. H. Routt, the president and manager of plaintiff:

"About September the 5th to the 10th, in 1909, Mr. Gerard came to my office with a stranger that he introduced as Mr. Gutman, and said, 'We want to get your price on sweet potato crates,' and said that the Co-operative Land & Trust Company had sold Mr. Gutman a piece of land. \* \* \* He spoke of Mr. Gutman as being a model farmer; the amount of crop was then growing; and I then gave him prices on sweet potato crates, car load lots to be delivered at Atwater or Livingston. The price named was 15 cents per crate. Mr. Gerard then said to me, 'There will be no money available to pay for those crates until they have made a shipment and we have received the returns, and we would like 30 days' time.' I told Mr. Gutman the prices quoted were very low and were cash prices; but I says, 'If you people [referring to the Co-operative Land & Trust Company] will pay me, I will give you the time;' and Mr. Gerard said, 'That is all right; we will do that;' and stated something of the conditions of the contract, it being a crop contract, and the money would come through their hands. Mr. Gutman had very little to say. Mr. Gerard said, 'We are not ready to close the deal with you to-day or at this time, as we want to get prices from the Merced Lumber Company, and wherever we can buy them the cheapest we will have to place the order.' They left my office, and in the afternoon I was anxious about the sale, and I went to the Co-operative Land & Trust Company's office and inquired for Mr. Gerard, but did not see him, and Mr. Cone told me that Mr. Gerard was out just then, but would possibly be in soon. I stated to Mr. Cone what I would like to see Mr. Gerard for, and I told him my conversation with Mr. Gerard at my office, and what he had said to me about Mr. Gutman farming the land and crops, and so forth, and Mr. Cone also praised Mr. Gutman very highly and seemed to think he was one of the best customers they had sold land to; \* \* \* but Mr. Cone said: 'Mr. Gerard is handling this matter. You take the matter up with him, and whatever he does will be all

right.' \* \* \* Later I telephoned from the Klamath Lumber Company's office to Mr. Gerard. He was in the Co-operative Land Company's office and asked him about the order. He says: 'Mr. Gutman has gone home, and we have not decided just what we will do. We have quotations from the Merced Lumber Company just the same as yours, 15 cents per crate, but I will try to favor you with the business. I will turn it your way if I can. I am going out to see Mr. Gutman to-morrow morning, and I will let you know after I return.' In the afternoon of the following day Mr. Gerard called me up on the telephone and says, 'Mr. Routt, you can ship a car load of sweet potato crates to Mr. Gutman at Livingston. I asked him how many I should ship, and told him that '3,000 would make a minimum car, but we usually ship 3,500 to 4,000 crates to a car;' and he said, 'Ship 4,000;' that he would probably want more than that. \* \* \* I ordered the crates by telephone from Sonora, and they were shipped, and when the 30 days had expired, possibly a few more, I went to Gerard and told him that the time was up, and that I would like to have our money. 'Well,' he says, 'I will see Mr. Gutman in a day or two; I don't think he has any returns or there has been any returns on the shipment of sweet potatoes.' I said, 'All right;' and in a few days after that I saw him again, and he made the same excuse; and I said: 'Mr. Gerard, I need my money and have to pay for those crates. You pay me, and then you can get your money from Mr. Gutman. I understand you get a portion of the crop anyway, and you can secure yourself. He is a stranger to me, and I am looking to you for my money, and not to Mr. Gutman. 'All right,' he said, 'we will soon get that adjusted.' \* \* \* I never presented any bill to Mr. Gutman in the matter; never went to see him. I make out all the bills in the office. I never wrote to him. I made no attempt to collect from Mr. Gutman, because I had an agreement with the Co-operative Company people, with Mr. Gerard, and I did not look to Mr. Gutman at all. The reason I entered up the bill in my book against Gutman is that Mr. Gerard told me to ship the shucks to Gutman. \* \* \* I thought they were all in a sense parties to the deal, because Mr. Gerard had explained to me that the money—they had the handling of the money from the crops to some extent at least—and I expected that if there was anything due from Mr. Gutman they would collect it, and of course they, being obligated to me for the payment, would pay me. It was not my idea that I was selling to both of them. I understood that I was selling to the Co-operative Land Company for Mr. Gutman."

It would be difficult to select more apt language than the foregoing to express an agreement of sale to the defendant. The contract was made entirely with Mr. Gerard, who assumed to represent appellant. Mr. Routt declared that, "If you people (referring to defendant) will pay me, we will give you the time;" and Gerard thereupon said, "That is all right; we will do that." Furthermore it appears that Routt understood that he was selling to the Co-operative Land & Trust Company, and that he looked entirely to it for payment. It thus appears that the creditor parted with value and entered into the obligation in terms and under circumstances such as to render defendant not simply the principal debtor but the only debtor in the case.

It is equally plain that, according full

credit to the testimony of Mr. Routt, no question of guaranty would arise.

[2] The only other consideration remaining as to the obligation of defendant to pay the purchase price of the crates involves the authority of Gerard to make the contract for defendant. There is no doubt, however, that Cone had full power in the premises, and his statement to Routt would bind the company and preclude any denial of Gerard's authority after plaintiff, in reliance upon it, had sold the crates.

In view of the foregoing, we do not see how it can be seriously argued that the evidence is insufficient to support the conclusion that the crates were sold to defendant; that it promised to pay for them; and that upon such promise, plaintiff relied in delivering said property.

[3] The alleged errors in the admission and rejection of testimony are hardly of sufficient gravity to merit specific notice. It was proper for plaintiff to show that Gutman was in Oregon in explanation of the circumstance that he was not called as a witness. Besides, the fact sufficiently appeared without objection.

[4] The following question was asked of Mr. Routt:

"And as president of the corporation, as the manager of the plaintiff in this action, Mr. Routt, did you have any agreement with the defendant in this action in the year 1909?"

Technically speaking, the question probably was objectionable, but the answer was entirely without prejudice, as, from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with defendant, and said testimony made it obvious that such was the opinion of the witness.

[5, 6] We can see no valid objection to this instruction, given by the court on request of plaintiff:

"Plaintiff brings this action to obtain a judgment against defendant for the sum of \$800, alleged to be due plaintiff from defendant for the sale of 4,000 sweet potato crates, for which plaintiff alleges defendant promised to pay; that defendant promised to pay it at the rate of 15 cents per crate, no part of which sum plaintiff alleges has ever been paid."

It was proper for the court thus to state the nature of the action although it is quite probable that the jury had already been fully advised of the claim of each party. There could be no reasonable apprehension that any sensible man would fail to understand that the term "sale" implied a "delivery" of the property. Besides, there was no controversy as to the delivery of the crates; the only question being as to whom they were sold.

[7] The instruction as to an original obligation and the principal debtor is substantially in the language of section 2794 of the Civil Code and, as a principle of law, is unobjectionable. That it embodied the theory of plaintiff as to the character of the transaction in question cannot be doubted, and that

there was evidence to support that theory has already appeared. It is well settled, of course, that either party has the right to have an instruction given to the jury, based upon his theory of the case, if there is any evidence to support it. *Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804.

[8, 9] We think it is plain enough to what fact the court referred in this instruction:

"If you are satisfied from all of the evidence adduced in this case that the promise of defendant, if any was made, was an original promise to pay for the crates and not a conditional one, I charge you it is your duty to find that fact in favor of plaintiff in this action."

It could hardly be understood as meaning otherwise than an instruction to find that the promise of defendant was "an original promise to pay for the crates," if the jury were satisfied from the evidence that an original promise was made by defendant. This was the important issue in the case, and while the instruction, embodying, as it does, such a truism, was not necessary, it could have done no harm. It may be said in this connection that the distinction between a guaranty and an original promise was fully set forth in instructions given by request of defendant, and nothing was left uncertain as to the meaning of those terms.

[10, 11] As we view it, the only ground for plausible criticism as to the instructions is afforded by this direction:

"The fact that the crates in question were furnished to Gutman by the plaintiff is not of itself absolutely sufficient to show conclusively that the promise of defendant, if any were made, was a conditional one."

As to the statement of fact in the first part of the instruction, it may be said that there was no dispute that the crates were "furnished" to Gutman. They were shipped to him for use on the land that he had purchased from appellant. In fact, it was the contention of defendant throughout the trial, not only that the crates were furnished to Gutman, but that he alone was liable for the purchase price. The reference to said circumstance as a fact could not therefore be prejudicial, independent of the consideration that said fact was favorable to appellant. It is true also, as a matter of law, that said fact was "not of itself absolutely sufficient to show conclusively that the promise of defendant, if any, was a conditional one." If "absolutely conclusive," all the foregoing discussion would be idle, as no other alternative would have been left the lower court but to direct a verdict for defendant. The truth is, of course, that said fact was a circumstance to be considered by the jury in determining whether defendant was primarily liable for the purchase price of the crates, but it is not at all conclusive of the question.

There is more reason for contending that the instruction is somewhat argumentative, and for that reason should have been omitted, but it is entirely apparent from the whole charge, full, fair, and complete as it



was in its entirety, that the jury were not misled by the court in any respect.

We feel satisfied that there is no substantial merit in any of the points made by appellant, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(25 Cal. A. 714)

**ARENS v. UNITED RAILROADS OF SAN FRANCISCO.** (Civ. 1379.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

**1. APPEAL AND ERROR (§ 1002\*)—VERDICT ON CONFLICTING EVIDENCE—JURY.**

Where, in an action for injuries to a traveler in a collision of a street car, the traveler and his companion testified that the car gave no signal before it was about 40 feet away, rapidly approaching, and the car men testified that the usual signals were given, there was a conflict in the evidence on the issue of signals, so that the finding of the trial court would not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**2. COURTS (§ 91\*)—CONTROLLING DECISIONS—DECISIONS OF SUPREME COURT.**

A decision of the Supreme Court on the law of the road and last clear chance by street car men to avoid collisions with travelers is conclusive on a District Court of Appeal, where the facts in the two cases are almost exactly identical.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.\*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Albert J. Arens against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley W. Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

**RICHARDS, J.** This is an action brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between his wagon, upon which at the time the plaintiff was riding, and a street car of the defendant being operated by its employés on Twenty-Fourth street, in the city of San Francisco.

The evidence showed that on the 11th day of October, 1906, about 2:30 o'clock in the afternoon, the plaintiff was driving his one-horse wagon on Douglass street, in that city, and turned into, and proceeded easterly along and down, Twenty-Fourth street, which at that point has a considerable downward grade. The latter street was at that time in the course of improvement, and its sides were so torn up in preparation for bituminizing as to leave the only available place for

driving the space occupied by the tracks of the defendant. When the plaintiff turned into Twenty-Fourth street he looked up the street and saw the car of the defendant which traverses that street standing at the top of the grade, which is also the terminus of the car line. According to the plaintiff's testimony his attention was next directed to the car by his companion, and he then observed it within about 40 feet of his wagon, coming rapidly down the hill. There is a conflict in the evidence as to whether any bell was rung or other signal given before the plaintiff thus observed the car; both the plaintiff and his companion asserting that they heard no such signal, while the employés in charge of the car asseverate that the usual signal was rung all the way down the hill. The plaintiff, upon discovering the approaching car, undertook to turn out sufficiently to permit it to pass, but failed or was unable to do so in time, and, his wagon being struck by the car, he was thrown out and injured.

Upon the trial of the case before the court without a jury the court found that the defendant was guilty of negligence in the respects averred in the complaint, and that the plaintiff was not guilty of contributory negligence, and it thereupon rendered judgment in favor of the plaintiff for the sum of \$2,000, from which judgment, and from the order of the court denying a new trial, the defendant appeals.

[1] The first proposition insisted upon by the appellant is that the finding of the court that the defendant was guilty of negligence in approaching the plaintiff at too high a rate of speed is not sustained by the evidence in the case. Counsel for the appellant argues at some length and with much force that the evidence upon the point is not sufficiently in conflict for the application of the familiar rule. We think, however, that a careful reading of the record shows that counsel's zeal has led him into error in this respect, and that the proofs of the plaintiff show sufficiently that the car was proceeding at a more rapid rate down the hill toward the plaintiff in plain view, and with only a limited area in which to turn aside and avoid the collision, than its operator should have gone, and hence that the finding of the court in this respect is justified by the proofs in the case.

We think also that the same is true with respect to the finding as to the warning signals given or neglected to be given. There is a sufficient conflict in this respect to require the application of the rule that the finding of the trial court will not be disturbed.

[2] The court also found in favor of the plaintiff upon the issue of contributory negligence; and upon this branch of the case counsel for both parties have presented elaborate arguments, citing many authorities dealing with the law of the road and the "last clear chance" of avoiding the collision. We

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are of the opinion, however, that the Supreme Court of this state has relieved this court of the necessity of an exhaustive review of the cases cited by respective counsel herein by its recent decision in the case of *O'Connor v. United Railroads of San Francisco*, 141 Pac. 809. This was a case almost exactly identical with the case at bar, and in which counsel for the respective parties were the same, and in which also practically the same line of authorities was cited and relied upon on each side. The law laid down by the Supreme Court as controlling that case must be regarded by this court as controlling this one in every essential particular relied upon by the appellant herein.

It follows that the judgment and order denying a new trial must be, and they are hereby, affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(25 Cal. A. 711)

**HATFIELD v. PEOPLE'S WATER CO.**  
(Civ. 1377.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

**1. WATERS AND WATER COURSES (§ 201\*) — PUBLIC SERVICE CORPORATIONS—RATES FOR WATER.**

A public service corporation supplying water to the inhabitants of a city must furnish water on the payment or tender of the established legal rates.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 275; Dec. Dig. § 201.\*]

**2. WATERS AND WATER COURSES (§ 203\*) — PUBLIC SERVICE CORPORATIONS—RATES—ACTIONS—PLEADINGS.**

A complaint, in an action against a water company for charging excessive water rates, which alleges that the city council fixed water rates for a year, commencing July 1st, that during the following six months plaintiff was furnished water by the predecessor in interest of the company and charged an excessive rate, that subsequent to the charging and collecting of the excessive rate, the company, as successor in interest, continuously attempted to collect rates in excess of the rate fixed by the council each year thereafter and during the present year, and threatens to and will, unless restrained, refuse to supply water to plaintiff until the rate demanded is paid, states no cause of action as against a demurrer, for failing to allege the establishment by the city of legal rates for the time specified.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**3. WATERS AND WATER COURSES (§ 188\*) — PUBLIC SERVICE CORPORATION—EXACTING EXCESSIVE WATER CHARGES—EFFECT.**

A violation by a public service corporation supplying water of Const. art. 14, §§ 1, 2, prohibiting the collection by public service corporations of a rate for water in excess of that fixed by a city council, does not, ipso facto, work a forfeiture of the works and franchises of the corporation, and it may thereafter collect some charges for supplying water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.\*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by William M. Hatfield against the People's Water Company. From a judgment for defendant, plaintiff appeals. Affirmed. See, also, 144 Pac. 800.

R. M. F. Soto, of San Francisco, H. A. Luttrell and Milton Shephardson, both of Oakland, for appellant. McKee & Tasheira, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a judgment entered in favor of the defendant after the refusal of the plaintiff to amend his complaint in compliance with an order of the court below sustaining the defendant's demurrer. Plaintiff's cause of action is based upon an alleged violation by the defendant of those constitutional provisions (Const. art. 14, §§ 1, 2), which prohibit the collection by a public service corporation of a rate for water in excess of that fixed by a city council. The action is for damages, and the prayer of the complaint is for an injunction restraining the defendant from shutting off the plaintiff's water supply and prohibiting the collection of any rate whatsoever from the plaintiff.

[1, 2] The demurrer was properly sustained. The complaint in part and in substance alleges that the plaintiff is the owner of certain premises in the city of Oakland; that the city council passed a resolution fixing water rates for the year commencing July 1, 1906; that during the six months' period from July 1, 1906, to January 2, 1907, he was furnished water by the Contra Costa Water Company, the predecessor in interest of the defendant, and charged at the rate of \$2.30 per month; that by the resolution of the city council fixing water rates only \$1.69½ per month could be lawfully charged and collected, and that therefore the plaintiff had paid for water served to him during the six months mentioned an excess rate aggregating the sum of \$3.62; that subsequent to the charging and collecting of such excess rate the defendant, as the successor in interest of the Contra Costa Water Company, has been continuously attempting to collect "rates of compensation in excess of the rate fixed by said council each year thereafter and during the present year," and that said defendant "during the present year" threatens to and will, unless restrained, refuse to supply the plaintiff with water until he pays the rate demanded. Undoubtedly it was the duty of the defendant to furnish the plaintiff with water upon the payment or tender of the established legal rates, and clearly, therefore, the fact of the establishment of those rates was an indispensable element of the plaintiff's cause of action. It will be noted that the plaintiff's complaint does not allege that the city council, subsequent to the year in which the alleged excess was charged and

collected ever passed a resolution announcing the rates for the succeeding years, and furthermore it is impossible to ascertain from the allegations of the complaint what, if any, were the fixed legal rates for those years. The general allegation of the complaint that "during the last three years and more" the defendant has been attempting to collect rates in excess of the rates fixed each year, without specifying what such fixed rates were, is a mere conclusion of the pleader, which cannot be availed of to initiate and invite an issue of fact.

[3] The complaint does not state a cause of action sufficient to support a judgment enjoining the defendant from making and collecting any water rate at all for water served to the plaintiff subsequent to the alleged collection of the excess rate from the plaintiff. On this phase of the case it is the plaintiff's contention that the mere charging and collecting as alleged of a rate for water in excess of the rate permitted by the Constitution ipso facto operated as a forfeiture of the works and franchises of the defendant, and that, therefore, the right thereafter to collect any rate at all should be denied the defendant. The contention was by this court in effect decided adversely to the plaintiff in the case of *Hatfield v. People's Water Co.*, 144 Pac. 300, where it was held that the identical conduct complained of in the present case did not ipso facto operate to produce a forfeiture of the works and franchises of the defendant. If we were correct in the conclusion reached in the case cited, it follows that the complaint in the present case does not state a cause of action sufficient to support an injunction prohibiting the defendant from charging and collecting any water rate whatsoever upon the theory that its right to do so expired with the forfeiture of its franchises and works.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(25 Cal. A. 706)

PARRY v. AMERICAN MOTORS CALIFORNIA CO. (Civ. 1366.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

**1. PRINCIPAL AND AGENT (§ 87\*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION—SALES AFTER TERMINATION OF AGENCY.**

Under an exclusive agency contract entitling the agent to a commission on all automobiles sold within a certain territory, the agent was not entitled, in the absence of bad faith, to a commission on a sale made after termination of the contract, though the agent, during the life of the contract, had made an unsuccessful attempt to sell a car to the same purchaser.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 204; Dec. Dig. § 87.\*]

**2. PRINCIPAL AND AGENT (§ 87\*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION.**

That such agent, by selling a car during the life of the contract, had caused the purchaser

to become acquainted with the principal did not entitle the agent to commission on cars sold by the principal's successor, after termination of the agency, to such purchaser's father.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 204; Dec. Dig. § 87.\*]

**3. PRINCIPAL AND AGENT (§ 81\*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION.**

Where a manufacturer of automobiles gave an agent the exclusive sale of its cars within a given county, this did not, in the absence of any trade usage to the contrary, entitle the agent to a commission on a sale made by the manufacturer wholly outside of such county to a resident thereof.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. § 81.\*]

Appeal from Superior Court, Alameda County; Wm. M. Finch, Judge.

Action by W. J. Parry against the American Motors California Company, a corporation. From judgment for defendant and denial of new trial, plaintiff appeals. Affirmed.

Langan & Mendenhall, of Hayward, for appellant. Street & Street, of Oakland, for respondent.

RICHARDS, J. This is an action to recover \$2,400, and interest thereon, for commissions alleged to be due the plaintiff upon sales of automobiles.

On May 26, 1911, the San Francisco branch of the American Motors Company, by agreement in writing, appointed the plaintiff and one F. E. Romie its exclusive representatives for Alameda county for the sale of the "American" automobile, under the terms of which appointment it is claimed that the San Francisco branch of the American Motors Company and the defendant became indebted to said Romie and plaintiff in the sum of \$2,400. Subsequently, and prior to the commencement of this action, defendant took over the business of the San Francisco branch of the American Motors Company and assumed all its liabilities. Prior to the commencement of this suit F. E. Romie assigned to plaintiff his interest in the alleged demands of Parry and himself against the San Francisco branch of the American Motors Company and defendant. The findings of the trial court were against the plaintiff, and judgment accordingly went in favor of the defendant. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The contract upon which the action is based, and which was entered into by the assignor of the defendant as party of the first part and the plaintiff and his assignor as parties of the second part, provides, among other things, as follows:

"First. We hereby appoint second parties as our exclusive selling representative for Alameda county, state of California, for the purposes of handling American cars therein, and we agree:

"Second. To allow said second parties a discount of 15% from the regular current catalogue list price for the various models of cars manu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

factured by the American Motors Company at Indianapolis, Indiana, said price to be f. o. b. the factory. \* \* \*

"Fourth. In view of the fact that the above territory lies so close to San Francisco, it might be deemed expedient at times for some of the selling force of the first party to enter into said territory and make a sale therein, in which case second parties are to receive 7½% commission on said sale, provided same is made at regular retail price established by the factory. In case a sale is made at a less price the commission payable to second parties shall be agreed upon specially each time in advance of any such sale. \* \* \*

"Seventh. To allow said second parties the privileges of selling in open territory whenever possible."

The regular retail price of the three types of cars involved here was agreed at the trial to be as follows: The 50 H. P. car, \$4,250; the 1912 model, 30 H. P. car, \$2,400, and the 1913 model, 30 H. P. car, \$2,475. It is also admitted that the defendant and his predecessor sold to residents of Alameda county during the term of plaintiff's contract, as follows: To Herman Hess, a 50 H. P. car, for \$3,583.95, the retail price being \$4,250; to W. S. Heywood, a 50 H. P. car, for \$2,785.32, the retail price being \$4,250; to Stanley Gaune, a 50 H. P. car, for \$3,048.13, the retail price being \$4,250; to E. L. Brock, a 30 H. P. car, for \$2,166.60, the retail price being \$2,400.

[1] The plaintiff and his assignor also claimed to have sold Mrs. O. E. Gilman a 30 H. P. car, of the model 1913, for the regular retail price. Concerning this transaction, it seems that during the absence of Mr. Gilman from home the plaintiff called on Mrs. Gilman and had her sign a contract for the purchase of a car. When Mr. Gilman returned and learned what had occurred he told the defendant company that the contract had been entered into without his consent, that therefore he would have absolutely nothing to do with it, and that he would not take an American car under any conditions. No car was sold to Mrs. Gilman. About three months after the termination of the plaintiff's contract, however, the defendant persuaded Mr. O. E. Gilman to buy a car. There is no intimation in the record that the contract of purchase was entered into after the expiration of the agency with the view of affecting the question of commissions.

[2] Two cars were sold by the defendant's predecessor to Herbert Von Loan, one for \$2,016.45 and the other for \$2,036.55 the retail price of each being \$2,400. The plaintiff and his assignor had sold E. Von Loan a car prior to this sale, and it was through that transaction that he became acquainted with the San Francisco concern. Thereafter, desiring to help his son, Herbert Von Loan, to establish himself in business, Von Loan and his son called at the San Francisco establishment, with the view of purchasing two cars and of getting the agency of the American car for Modoc county, where they lived. After some negotiations the cars were sold to Herbert Von Loan under his regular

agency contract and paid for by his father. In any event, the Von Loans were not residents of Alameda county, and the evidence does not show that the sales were effected through the efforts of the plaintiff and his assignor.

It was stipulated at the trial of the case by counsel for the plaintiff that no agreement was made between the parties here concerned as to the commission which plaintiff and Romie should receive on account of sales of cars sold in San Francisco by defendant and his predecessor to residents of Alameda county at a price less than the regular retail price established by the factory.

Plaintiff claims that the evidence does not support the findings, and the main points argued in the briefs are: (1) Are sales made to residents of Alameda county, but negotiated outside of the county, within the terms of the agency? and (2) if they are, does the contract of agency fix a commission therefor?

As to the Gilman transaction, it does not appear from the record where the sale was made, but even if it were made in Alameda county, we do not conceive how it can be held that plaintiff is entitled to recover commissions for this sale, since it clearly appears that the transaction did not occur during the life of the agency.

As to the cars sold to Von Loan, from the testimony already alluded to, it must be held that there is ample evidence to sustain the view that the agents were not the moving cause of the sale.

[3] As to the remainder of the sales, it appears that they were made by the defendant or its predecessor at San Francisco to residents of Alameda county and for less than the regular retail price. As to these plaintiff claims that under the terms of the contract he is entitled to 7½ per cent. commission.

The contract between the parties reserved the right to the company to enter Alameda county for the purpose of selling its cars therein, and provided that whenever its selling force should enter that territory and make sales of cars therein at the regular retail price as established by the factory, the agents should be entitled to a commission of 7½ per cent. The contract, however, further provides that in case a sale is made at a figure less than the regular retail price the commission payable shall be agreed upon in advance of any such sale.

The evidence as to the sale of these cars, however, shows that, although sold to residents of Alameda county, the sales were made in San Francisco. It is not shown by the plaintiff that in order to effect these sales the defendant's representatives or employees entered the territory of the plaintiff. We think, therefore, that such sales do not come within the terms of the contract, so as to entitle the plaintiff to a commission or discount thereon. This was the rule followed

by the Supreme Court in *Haynes Automobile Co. v. Woodhill Automobile Co.*, 163 Cal. 102, 124 Pac. 717, 4 L. R. A. (N. S.) 971, where it is said:

"In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory is not entitled to commission on a sale made by the manufacturer outside of such territory, to a resident thereof."

Similarly, in the case at bar, there is no evidence of a trade usage, or that a person who has appointed an exclusive agent for a given territory is thereby prevented from dealing outside of the limits of that territory with a resident thereof.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(25 Cal. A. 685)

STERN, School Director, v. COUNCIL OF CITY OF BERKELEY et al.  
(Civ. 1364.)

(District Court of Appeal, First District, California. Nov. 7, 1914.)

1. MUNICIPAL CORPORATIONS (§ 58\*)—CHARTER—EFFECT AS STATE LAW.

A charter framed and adopted pursuant to Const. art. 11, is not a law passed by a municipality, but is a law of the state, having the same force and effect as a law directly enacted by the Legislature.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 145-147; Dec. Dig. § 58.\*]

2. STATUTES (§ 4\*)—CONSTITUTION AS LIMITATION ON POWER.

The state Constitution is not a grant of power, but rather a limitation on powers of the Legislature, and it is competent for the Legislature to exercise all powers not forbidden by the state and federal Constitutions or delegated to the general government.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 3; Dec. Dig. § 4.\*]

3. MUNICIPAL CORPORATIONS (§ 57\*)—CHARTER—CONFLICT WITH GENERAL LAWS.

A municipal charter framed under Const. art. 11, may, unless prohibited by some provision of the Constitution expressed or necessarily implied therefrom, contain any provision not in conflict with, or covered by, general laws of the state; hence a charter provision providing for compensation of school directors in furtherance of the general law relating to schools, and not forbidden by the Constitution, is valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.\*]

4. MUNICIPAL CORPORATIONS (§ 57\*)—CHARTERS—COMPENSATION OF SCHOOL DIRECTORS—"MUNICIPAL OFFICER."

A provision of a charter framed under Const. art. 11, providing for compensation to city school directors, is not invalid on the theory that such provision should be covered by general laws because the school system is necessarily a state affair, since a school director is purely a "municipal officer," and his compensation is exclusively controlled by charter provisions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Municipal Officer*.]

5. STATUTES (§ 90\*)—SPECIAL LAWS—MUNICIPAL CHARTERS—COMPENSATION OF OFFICER.

Where a municipal charter, as a whole, is germane to the purpose of its creation, and its various sections are subordinate to, and in harmony with, the fundamental and statutory law, and affect all persons and things alike in the particulars provided for, the objection that such charter or any provision thereof such as fixing compensation of school directors is special legislation under Const. art. 4, § 25, subd. 28, is not tenable.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 98-100; Dec. Dig. § 90.\*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Mandamus proceedings by Herman I. Stern against the Council of the City of Berkeley and J. Stitt Wilson and others, as members of the Council. From a judgment sustaining a demurrer to an alternative writ, petitioner appeals. Reversed, with instructions to overrule the demurrer and require respondents to answer.

Vincent Surr and William H. Bryan, both of San Francisco, for appellant. Redmond C. Staats, of Berkeley, for respondents.

LENNON, P. J. The appellant in this proceeding is a school director of the city of Berkeley. He sought by a petition for writ of mandate presented to the superior court of Alameda county to compel the respondents, as members of the city council, to issue to him a warrant upon the city treasury for his salary as school director. An alternative writ was issued, a demurrer to which was sustained without leave to amend; and this appeal is from the judgment thereupon entered.

Petitioner's claim to the salary in controversy is based on section 19 of article 5 of the charter of the city of Berkeley, which provides that:

"Each school director shall receive five dollars for each regular meeting of the board of education which he shall attend, provided that he shall not receive more than fifteen dollars in any month."

The question here involved is the validity of this provision, considered in conjunction with the Constitution of the state, as such Constitution existed prior to the amendment in October, 1911, of subdivision 2 of section 8½ of article 11, which amendment reads as follows:

(1) "It shall be competent in all charters framed under authority given by section 8 of article 11 of this Constitution, to provide, in addition to those provisions allowable by this Constitution and by the laws of this state, as follows: \* \* \* (2) For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, \* \* \* and for the number which shall constitute any one of such boards."

This subdivision, as amended in October, 1911 (*Stats.* 1911, p. 2166), expressly declares that it shall be competent in all charters framed under authority of section 8 of article 11 of the Constitution to provide for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

qualifications, compensation, and removal of members of boards of education. It thus appears that prior to the amendment in question the power of city charters to fix the compensation of members of boards of education was not in express terms given by the Constitution. It is not contended, however, upon behalf of the respondents that the amendment referred to is retroactive, or that it in any wise affects the constitutionality of the charter provisions in controversy here. It is the contention of respondents that, before the amendment to the Constitution in the particulars stated, a municipal corporation was not authorized to provide for the payment of salaries to school directors; and therefore it is argued that the charter provision in question had no basis for its enactment and is therefore void. The charter provision in question must be upheld, unless it is clearly shown to have been at the time of its enactment repugnant to, and inconsistent with, the then existing fundamental law.

[1] A charter framed and adopted pursuant to the constitutional provisions is not a law passed by a municipality. It is a law of the state, having the same force and effect as a law directly enacted by the Legislature. As was said in *Ex parte Sparks*, 120 Cal. 395, 399, 52 Pac. 715, 716, 717:

"It is clear that it is made a law by the Legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the Legislature or rejected, as it shall see fit."

See, also, *Sheehan v. Scott*, 145 Cal. 684, 685, 79 Pac. 350; *Fragley v. Phelan*, 128 Cal. 383, 58 Pac. 923; *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250.

[2, 3] Our Constitution is not a grant of power, but, rather a limitation upon the powers of the Legislature; and it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the state or delegated to the general government or prohibited by the Constitution of the United States. Accordingly it has been held that, unless prohibited by some provision of the Constitution expressed or necessarily implied from its terms, a municipal charter adopted as provided in article 11 of the Constitution may contain any provision not in conflict with, or covered by, general laws of the state. *Los Angeles v. Longden*, 148 Cal. 380, 83 Pac. 246. It is true that the Legislature, in keeping with the general provisions of the Constitution, has provided a general system of laws concerning the creation and conduct of the common schools of the state. These laws are controlling and conclusive over conflicting charter provisions; but the charter of a city or of a city and county may provide for matters not enumerated in the general laws and not in conflict therewith. *McKenzie v. Board of Education*, 1 Cal. App.

407, 82 Pac. 392; *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558. The power of charters to so provide extends to all cases where the purpose of the provision is in furtherance of the purpose of the general laws of the state. *Los Angeles School District v. Longden*, supra. In the present case the charter provision in question is obviously in furtherance of the school system adopted by the state, and does not conflict with the general laws relating to and regulating the same. There is no general law with respect to the compensation to be paid to school directors or trustees. The general laws relating to and regulating the state school system nowhere limit or deny the right of a municipality or of the legislative power acting through a freeholder's charter to make provision for the payment of salaries to school trustees or directors.

[4] It is further contended upon behalf of the respondents that, inasmuch as the public school system of the state has been made, by the Constitution and general laws, a matter of general concern, the regulation of that system is a state affair, as distinguished from a municipal affair, and therefore can be rightfully covered and controlled only by general state laws. Generally speaking, this may be so; but, in our opinion, appellant, as a school director of the city of Berkeley, is a municipal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair, which is exclusively controlled by charter provisions. *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655.

[5] The further contention that the charter provision in question is a special law, and is therefore unconstitutional under subdivision 28 of section 25 of article 4 of the Constitution, is untenable. Necessarily the charters of the various cities throughout the state must differ in many minor details in order to conform to the varying needs of different localities. Such differences, however, will not operate to bring each of the many existing city charters within the category of special legislation. Where a municipal charter, as a whole, is germane to the purpose of its creation, and its various sections are subordinate to, and in harmony with, the fundamental and statutory law of the state, and affect all persons and things alike in the particulars provided for, the objection that such charter or any provision thereof is special legislation cannot be successfully maintained. *Potwin v. Johnson*, 108 Ill. 70; *People ex rel. v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 81 Am. St. Rep. 457; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800.

Respondents' contention that the petition does not show that the city of Berkeley has any funds from which his claim could be paid is answered by the petition itself, which alleges that there are moneys in the general fund for this purpose.

What we have thus far said, in effect, covers and disposes of the remaining points made upon behalf of the respondents. In conclusion, it may be said that we have been cited by opposing counsel to all of the decisions of our appellate courts relating to powers conferred under various charter provisions. It would be a matter of supererogation to reassert the doctrines laid down in those cases. We are satisfied that nothing contained in the legislative enactments or in any of the expressions of opinion of the courts of last resort upon the subject in hand conflicts with the conclusions we have reached here.

For the reasons stated, it is ordered that the judgment appealed from be reversed, with instructions to the lower court to overrule the demurrer and require the respondents to answer.

We concur: RICHARDS, J.; KERRIGAN, J.

(25 Cal. A. 717)

WALTZ v. SILVEIRA et al. (Civ. 1382.)  
(District Court of Appeal, First District, California. Nov. 9, 1914.)

1. SALES (§ 477\*) — CONDITIONAL SALE — BREACH OF CONTRACT—REMEDIES OF SELLER—ELECTION.

Where the seller sued for the price of a safe sold with a condition that title should remain in the seller until payment, he thereby waived his right to a return of the safe in good condition on default by the buyer in making payments.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. § 477.\*]

2. SALES (§ 347\*)—PURCHASE-MONEY NOTE—CONSIDERATION—DESTROYED.

Where a safe in consideration of which a note was given was so damaged by fire as to render it useless for the purpose for which it was intended and used, the consideration for the note was destroyed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.\*]

3. TRIAL (§ 165\*) — MOTION FOR NONSUIT — PROBATIVE EFFECT OF EVIDENCE—CROSS-EXAMINATION.

That the evidence of the destruction of the consideration for the note sued on was developed on cross-examination of plaintiff's witnesses did not lessen its probative effect or preclude the court from considering it in passing on a motion for nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

4. SALES (§ 439\*) — IMPLIED WARRANTY — BREACH—BURDEN OF PROOF.

Where, in an action on a note for the price of a safe, defendant cross-complained, alleging that the safe was bought to protect jewelry, and that, through defects of construction unknown to defendant, jewelry stored in the safe was damaged by fire, for which damage judgment was prayed, the burden was on defendant

to establish the implied warranty given to a purchaser of personal property by Civ. Code, §§ 1767, 1769, by proof that plaintiff knew of such defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.\*]

5. APPEAL AND ERROR (§ 977\*)—ORDER GRANTING NEW TRIAL—PRESUMPTION.

Where an order granting a new trial on a motion based in part on insufficiency of the evidence is general in its terms, it must be assumed on appeal that the new trial was granted for insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3360-3865; Dec. Dig. § 977.\*]

6. APPEAL AND ERROR (§ 933\*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

A general order granting a new trial will not be disturbed on appeal, in the absence of a showing of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

7. SALES (§ 441\*)—WARRANTY—BREACH—EVIDENCE—CONCLUSIVENESS.

In an action on a note for the price of a jeweler's safe, wherein defendant counterclaimed for damages to jewelry stored in the safe, relying on breach of the warranty of reasonable fitness given by Civ. Code, § 1770, evidence that the safe was destroyed and its contents damaged by fire was not conclusive as to whether the safe was reasonably fit for its purpose, where there was evidence that no so-called fireproof safe could go through a fire such as that in question without serious damage to the safe and its contents.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Charles Waltz against Anna L. Silveira and another. From a judgment of nonsuit and the denial of a new trial, plaintiff appeals, and from the granting of a new trial after judgment for defendants on cross-complaint, defendants appeal. Affirmed.

F. M. Parcels, of San Francisco, and B. F. Griffins, of Richmond, for plaintiff. Mastick & Partridge, of San Francisco, C. C. Hamilton, of Oakland, F. I. Lemos, of Hayward, and H. F. Chadbourne, of San Francisco, for defendants.

LENNON, P. J. The plaintiff in this action sought to recover from the defendants the sum of \$315, alleged to be the balance due and unpaid of the purchase price of a fireproof safe which had been sold and delivered to the defendants pursuant to the terms of a contract of conditional sale. The plaintiff was nonsuited, and this appeal in part is from the judgment thereupon entered that the plaintiff take nothing by his action, and from an order denying a new trial.

The material averments of the plaintiff's complaint were admitted by the answer of the defendants; but, as a special defense to the action, they pleaded the destruction of the safe by fire without fault on their part.

By the terms of the contract the defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ants, as part of the purchase price, gave in exchange an old safe valued at \$375, and paid the sum of \$105 in cash. Thereupon the defendants, as required by the contract, executed to the plaintiff 12 promissory notes, each for the sum of \$35, payable monthly, with interest at the rate of 8 per cent. per annum until paid. Only three of the notes were due and had been paid at the time of the fire. After the fire the defendants refused to pay the remaining 9 notes, aggregating the sum of \$315, upon the theory that, the safe having been destroyed through no fault of theirs, the consideration for the notes had failed. By the terms of the contract title to the safe was to remain in the plaintiff until the last of the promissory notes had been paid.

[1] It is conceded to be the law that, in the absence of an agreement to the contrary, the risk accompanies the title to property, and that, "where there is a mere agreement to sell, and title therefore has not passed, the loss falls upon the vendor." *Potts, etc., Co. v. Benedict*, 156 Cal. 322, 324, 104 Pac. 432, 25 L. R. A. (N. S.) 609. But it is contended that the evidence adduced in support of the plaintiff's case did not show that the safe sold to the defendants had been actually destroyed, and that, even if it had been destroyed, the nonsuit should not have been granted because of a covenant in the contract in controversy to return the safe to the plaintiff in good order "in any event."

Upon the failure or refusal of the defendants to meet the payment of the notes provided for in the contract, the plaintiff had one of two remedies: he might recover the possession of the safe; or, waiving the conditions of the contract, consider the sale as absolute, and sue for the balance of the purchase price as evidenced by the notes. The plaintiff could not have both remedies. *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945; *Elsom v. Moore*, 11 Cal. App. 377, 105 Pac. 271. Having elected to proceed against the defendants for the purchase price of the safe plaintiff thereby exercised his option to treat the transaction as an absolute and completed sale. Consequently he must be held to a waiver of the alternative condition of the contract, to the effect that the defendants would upon default of the payments provided for or "in any event" return the safe in good condition.

[2] During the presentation of the plaintiff's case the fact was developed without conflict that the building in which the safe had been placed by the defendants was, without fault on their part, destroyed by fire, and that, as a result of the fire, the safe, without fault on the part of the defendants, was damaged to such an extent as to render it useless for the purpose for which it was intended,

purchased, and used. This being so, the safe was destroyed within the meaning of the law. *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 South. 759; *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77; *London, etc., Ins. Co. v. Heckman*, 64 Kan. 388, 67 Pac. 879; *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. 509; *O'Keefe v. London, etc., Ins. Co.*, 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; *Thuringia v. Malott*, 111 Ky. 917, 64 S. W. 991, 55 L. R. A. 277.

[3] The destruction of the safe was a fact developed in evidence upon the cross-examination of the plaintiff's witnesses; but this did not lessen its value as evidence, nor preclude the trial court from considering it when passing upon the motion for nonsuit. The motion for nonsuit was rightfully granted.

[4] The defendant Anna L. Silveira cross-complained against the plaintiff, and for a cause of action alleged substantially that the safe described in the contract referred to in the plaintiff's complaint was intended and purchased for the express purpose of protecting a stock of watches and jewelry against damage by fire; that the safe was not fireproof, and was not reasonably fit for the purpose for which it was sold and purchased, because of certain defects existing in the material and construction of the safe which were unknown to the defendant and cross-complainant; that, owing to the unfitness of the safe for the purpose for which it was agreed to be sold and was sold, a stock of jewelry stored therein was damaged by the fire referred to in the sum of \$3,000. This phase of the case was tried with a jury under a stipulation of the parties that any evidence offered and received upon the whole case should apply to every phase of the case. A verdict for \$1,500 was rendered in favor of the defendant and cross-complainant, Anna L. Silveira. Thereafter the plaintiff and cross-defendant moved for and was granted a new trial upon this phase of the case. The defendant and cross-complainant has appealed.

[5, 6] The motion for a new trial of the issues involved in the cross-complaint was grounded in part upon the insufficiency of the evidence to justify the verdict. The order granting a new trial was general in its terms, and therefore we must assume that the alleged insufficiency of the evidence to support the verdict in favor of the defendant and cross-complainant appealed to and prompted the court below to grant a new trial. A general order granting a new trial will not be disturbed, in the absence of a showing of an abuse of discretion. It would serve no useful purpose to detail the evidence upon which the defendant and cross-complainant relies to support the verdict. It was the defendant and cross-complainant's contention in the court below, and it is her con-



tention here, that the safe in controversy at the time of its purchase and sale contained undisclosed latent defects in its materials and construction, and, as a consequence, was not reasonably fit for the purpose for which it was sold. In this behalf it will suffice to say that it was not disputed at the trial that the safe in controversy was bought and sold as a fireproof safe for the express purpose of safeguarding a stock of jewelry; and it must be conceded that the evidence adduced in support of the allegations to the cross-complaint shows without conflict that the safe was destroyed and its contents damaged by fire. The fact that the safe was destroyed by fire, in the sense that it was no longer fit for the use for which it was intended and purchased, may have been some evidence of the existence of a latent defect; but the record is barren of any evidence showing, or tending to show, that the plaintiff and cross-defendant had any knowledge of the existence of a latent defect in the material and construction of the safe. The burden of proving that fact was at all times on the defendant and cross-complainant; and, in the absence of such proof, it cannot be held that the verdict of the jury was justified upon the theory that it was rightfully based upon proof of the breach of the implied warranty given to a purchaser of personal property by the provisions of sections 1767 and 1769 of the Civil Code.

[7] The case of the defendant and cross-complainant, in so far as it concerned the alleged breach of the statutory warranty, given by section 1770 of the Civil Code, that the safe was reasonably fit for the purpose for which it was sold, was rested upon proof of the fact that the safe was destroyed and its contents damaged by fire. This undoubtedly was evidence that the safe was not absolutely fireproof; but such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold. Upon this phase of the case expert witnesses for the plaintiff and cross-defendant testified, in effect, that the safe in controversy was reasonably fireproof, and that neither it nor any other so-called fireproof safe could go through the fierce flames of an extraordinary fire such as occurred in the present case without serious damage to the safe and its contents. In brief, the best that can be said for the defendant and cross-complainant is that the evidence upon the issue under discussion was in substantial conflict; and, in the absence of an apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon the insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon this court. *Domico v. Casassa*, 101 Cal. 412, 85 Pac. 1024; *Von Schroeder v. Spreckels*, 147

Cal. 186, 81 Pac. 515; *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

The judgment and orders appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(25 Cal. A. 691)

STATE SAVINGS & COMMERCIAL BANK  
v. WINCHESTER et al. (Civ. 1385.)  
(District Court of Appeal, First District, California. Nov. 7, 1914.)

1. CORPORATIONS (§ 429\*)—OFFICERS—AUTHORITY.

A corporation can act only through its board of directors, and the public generally act at their peril with one purporting to represent such corporation without evidence of his being authorized by the governing board of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1720-1723, 1725; Dec. Dig. § 429.\*]

2. BANKS AND BANKING (§ 116\*)—OFFICERS—UNAUTHORIZED LOAN—ESTOPPEL OF BANK—NOTICE TO AGENT.

Where the secretary of a bank combined with the president and general manager of a corporation to get control of the bank, and for that purpose the president, to procure funds with which to buy stock, applied to the bank for a loan on behalf of the corporation with the secretary's knowledge, the bank is estopped to claim that the loan was made in the regular course of business so as to charge the corporation.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 282-287; Dec. Dig. § 116.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the State Savings & Commercial Bank, a corporation, against Elisabeth F. Winchester and Frank Winchester. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

F. A. Cutler and F. R. Sweasey, both of San Francisco, for appellant. E. A. Bridgford, of San Francisco, for respondents.

LENNON, P. J. This is an appeal from a judgment and from an order denying a new trial. The action was one to foreclose a mortgage executed by defendant and respondent, Elisabeth F. Winchester, as security for the payment of a promissory note in the sum of \$11,500, made by the Main-Winchester-Stone Company, as maker, and the respondent as indorser and guarantor. The execution of both the note and mortgage was an admitted fact in the case; but as a defense to the foreclosure proceedings, it was alleged that the note and mortgage were executed without consideration to either the respondent Elisabeth F. Winchester or to the Main-Winchester-Stone Company, and that the same were both obtained by false and fraudulent representations.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The facts leading up to the transaction in suit, and out of which the claim of fraud arises, are, in substance as follows: On December 13, 1906, A. G. Stoll, the then president and general manager of the Main-Winchester-Stone Company, made application to the appellant bank upon behalf of said company for a credit loan of \$15,000. The application for the loan was approved; and a credit was thereupon given to the Main-Winchester-Stone Company upon the books of the bank in the sum mentioned, for which three notes were executed in different sums to the bank by Stoll in the name of the company. Thereafter, these notes were taken up with a renewal note of said company for \$15,000, which renewal note was indorsed by A. G. Stoll, R. P. Grubb, a Mr. Richardson, and Frank Winchester, all directors of the Main-Winchester-Stone Company. After the sum of \$3,500 had been paid and indorsed thereon, Richardson, having sold his stock in the Main-Winchester-Stone Company, desired to be released as an indorser of said renewal note. The bank thereafter released him, in consideration of the giving by respondent Elisabeth F. Winchester of the mortgage in question, as security for the payment of the indebtedness due upon the renewal note. A second renewal note was thereupon executed in the sum of \$11,500, upon which the name of Elisabeth F. Winchester replaced that of Richardson as indorser, and at the same time and as a part of the same transaction, the mortgage in question was executed as security therefor. The indorsement of the second renewal note and the execution of the mortgage by respondent were in lieu of the prior indorsement of Richardson. The trial court found that Stoll as the president and general manager of the Main-Winchester-Stone Company was without authority to execute the first renewal note in controversy, that said company never received any benefit from the money obtained upon the note, and that the same was procured to be signed by fraud and through false and fraudulent representations. In support of and as a basis for this finding, the trial court also found that prior to the execution of the original notes involved in the transaction, A. G. Stoll, C. P. Hagg, who was the then secretary of the appellant bank, and other persons, had entered into an agreement to secure control of the appellant bank by purchasing a certain amount of its capital stock; that the loan procured by Stoll, to and in the name of the Main-Winchester-Stone Company, from the appellant bank, was procured and used by him for the purpose of purchasing a controlling interest in the appellant bank, and not for the use and benefit of said company; that, in order to conceal and cover up this phase of the transaction, Stoll, on January 15, 1907, represented to the Main-Winchester-Stone Company that it was necessary to bor-

row \$15,000 from the appellant bank, to be used in the business of the company; that he could secure such a loan from the appellant bank if a resolution were passed authorizing the same; that such resolution was duly passed authorizing a loan from the appellant bank not to exceed \$15,000; and that such resolution made no reference to past loans made by appellant bank to the Main-Winchester-Stone Company. It was further found that all subsequent notes made by said Main-Winchester-Stone Company to appellant bank, including the note and mortgage in suit and the indorsements and guaranties thereon, were made without any knowledge on the part of the makers thereof, of the transaction of December, 1906, but that such notes, indorsements, guaranties, and mortgage were made in the belief that the money borrowed, guaranteed, and secured had been procured by Stoll under the resolution of January 15, 1907, that, in fact, no loans were made by appellant bank under said resolution, and that the only money appellant bank parted with was the sum advanced in December, 1906. Upon these facts judgment went for defendants.

[1] It is conceded by appellant that a corporation can act only through its board of directors, and that the public generally act at their peril with one purporting to represent such corporation without evidence of his being authorized by the governing board of such corporation. It is insisted, however, that the evidence shows that the Main-Winchester-Stone Company so conducted itself as to be estopped from denying that Stoll had authority to make the loan for want of the proper resolution. On the other hand, it is the contention of the defense that the money obtained from the appellant bank by Stoll and claimed to have been wrongfully diverted from the use of the Main-Winchester-Stone Company was advanced by the bank for the individual use of one of the directors of the company with the knowledge of the bank.

[2] The trial court adopted the view that, inasmuch as Hagg was secretary of the appellant bank, any knowledge gained by him in the transaction with Stoll was imputable to the bank. In this behalf, as previously stated in substance, the trial court found that arrangements were made between Hagg, the secretary of the appellant bank, and Stoll and others prior to the loan of December, 1906, to get control of the bank; but Stoll was without the necessary funds to pay for his proportion of the stock; that in the making of the application and obtaining of the loan, he dealt only with Hagg and never saw or dealt with any other officer of the bank, in connection with the transaction; that shortly after the loan was made, a majority of the stock of appellant bank was transferred to Stoll, Hagg, and others; and

that they were immediately installed as directors of the bank.

There is evidence, in our opinion, to support this finding, and this finding in turn supports the conclusion and judgment of the trial court to the effect that the appellant bank was estopped from claiming that the loan in controversy was made in the regular course of business. 5 Cyc. p. 460.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(25 Cal. A. 680)

PEOPLE v. EDDARDS. (Cr. 526.)

(District Court of Appeal, First District, California. Nov. 4, 1914.)

1. FALSE PRETENSES (§ 26\*)—INFORMATION.

An information for obtaining money under false pretenses held sufficient, both in following the language of the statute and in setting forth with particularity the details and successive steps of the fraud.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 28.\*]

2. INDICTMENT AND INFORMATION (§ 133\*)—INSUFFICIENT AMPLIFICATION—DEMURRER.

Objection that the information for obtaining money by false pretenses makes no reference to the means by which the fraud was consummated, aimed at its mere uncertainty because of insufficient amplification to set forth the entire transaction, being in the nature of special demurrer, is waived by failure to demur in limine.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. § 133.\*]

3. FALSE PRETENSES (§ 29\*)—INFORMATION—SUFFICIENCY.

That one of the representations by which defendant is charged to have obtained money, if standing alone, might not be sufficiently tangible to base a prosecution on does not require a reversal.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 34-36; Dec. Dig. § 29.\*]

4. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS.

It is enough that a refused requested instruction was covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

5. CRIMINAL LAW (§ 406\*)—EVIDENCE—CONVERSATIONS WITH THIRD PERSON.

Conversations between defendant and another regarding dealings between them, constituting part and proof of the dealings charged between defendant and the complaining witness, are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

6. CRIMINAL LAW (§ 371\*)—EVIDENCE—SIMILAR TRANSACTION—MOTIVE.

Evidence of a similar transaction of defendant with another is admissible to shed light on his motive in making the representations to complaining witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

7. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—IMMATERIAL EVIDENCE.

Admission of evidence of an entirely immaterial matter is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

8. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—CONFLICTING EVIDENCE.

There being a substantial conflict in the evidence, the verdict cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

E. J. Eddards was convicted, denied a new trial, and appeals. Affirmed.

Miss Marguerite Ogden, of San Francisco, and Holcomb & Kempley, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a verdict and judgment of conviction, whereby the defendant was found guilty of the crime of obtaining money under false pretenses, and from an order denying the defendant's motion for a new trial.

[1, 2] The first alleged error of the trial court consists in the denial of the motion of the defendant in arrest of judgment, and for a dismissal of the action upon the ground that the facts stated in the information did not constitute a public offense.

The information charges that the defendant, together with one George Gilbert—

"devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into their custody and possession the personal property of Frank M. Ferguson, with intent to cheat and defraud said Frank M. Ferguson of the same, did then and there willfully, unlawfully, knowingly, and designedly, falsely, fraudulently, and feloniously pretend and represent to the said Frank M. Ferguson that they, the said E. J. Eddards and George Gilbert, had sold to the Standard Oil Company, a corporation, a mica mine for a large sum of money, and that said large sum of money was then and there in the hands of and in the possession of one Asa V. Mendenhall, and that a portion of said large sum of money, to wit, the sum of \$15,000, in lawful money of the United States, in the hands and in the possession of said Asa V. Mendenhall, was to be paid by said Asa V. Mendenhall to one J. S. Lord; that said \$15,000 in lawful money of the United States was the share and interest of said J. S. Lord received from the sale of said mica mine to the Standard Oil Company, a corporation; that adjoining said mica mine there were other lands containing mica, and that they, the said E. J. Eddards and George Gilbert, had then and there a contract with said Asa V. Mendenhall whereby the said Asa V. Mendenhall would, for a consideration of 10 per cent. of the sale price, induce the Standard Oil Company, a corporation, to purchase from them, the said E. J. Eddards and Geo. Gilbert, 10 mica claims for the sum of \$550,000 in lawful money of the United States when they, the said E. J. Eddards and Geo. Gilbert, would locate and properly stake

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

off said ten mica claims and obtain deeds on said mica claims."

It is then set forth specifically that each and all of the foregoing representations were utterly false and fraudulent, and were known so to be by the said E. J. Eddards and Geo. Gilbert, and each of them, and were made by them and each of them for the purpose of inducing said Frank M. Ferguson to pay over and deliver to them the sum of \$200; and that the said Frank M. Ferguson, believing each and all of said false and fraudulent representations and pretenses to be true, and being deceived thereby, did deliver and pay over to said defendants the sum of \$200, which said sum was received and obtained by them and each of them with the intent then and there to cheat and defraud the said Frank M. Ferguson out of the same, and that they and each of them did thereby then and there willfully, unlawfully, fraudulently, designedly, and feloniously cheat and defraud said Frank M. Ferguson out of said money.

We think this information sufficient both in the respect that it follows the language of the statute, and also in that it sets forth with particularity the details and successive steps of the fraud. It is contended by the defendant that there is no reference in the information as to the means by which the alleged fraud was consummated. This objection, however, is one which is aimed at the mere uncertainty of the information by reason of its insufficient amplification so as to set forth the entire transaction between the defendants and the defrauded person, and is in the nature of a special demurrer. This being so, it should have been made in the form of a demurrer to the information in limine, but the record shows that no such pleading was presented. We think, therefore, that this objection, if otherwise tenable, was waived by the failure of the defendants to demur to the information.

[3] The next contention of the appellant is that one of the several representations made by the defendants to the defrauded person was inadequate to form the basis of a criminal pretense sufficient to satisfy the statute. But this was only one of the representations averred to have been made by the defendant; and, while standing alone, it might not be regarded as sufficiently tangible to base a prosecution upon, still we think that, read with the others, especially when viewed in the light of the entire testimony, the insufficiency of this single item of the charge would not be adequate to work a reversal of the case.

[4] The appellant's next contention is that

the court erred in its refusal to give to the jury the fifth instruction asked by his counsel. We think that this instruction, however correct in point of law, was sufficiently covered by the other instructions given by the court.

[5-7] As to the alleged errors of law arising out of the rulings of the court during the trial, we do not find that any of these are of sufficient importance to warrant discussion in detail. The principal one of these has reference to the action of the court in permitting the witness Mendenhall to testify in respect to conversations between himself and the appellant regarding dealings between them closely allied to the transaction with the complaining witness. These conversations were admitted for two reasons: First, as part and proof of the very dealings between the appellant and Ferguson set forth in the information; and, second, as evidence of a similar transaction with Mendenhall tending to shed light upon the motive of the appellant in the making of his representations to Ferguson. Both of these were sufficient reasons for the admission of this testimony. There is also a ruling of the court admitting in evidence a certain telegram for money sent by George Gilbert, the codefendant, with appellant, to the wife of one J. O. Brown, who was one of the associates of appellant in the mica enterprise. The purpose of producing this telegram and its admission does not seem very clear; but it is too immaterial an episode in the progress of the case to justify a reversal, even if it were conceded to be an error.

[8] The main argument of counsel for the appellant upon the hearing of this appeal and in her briefs was devoted to the plea that the evidence in the cause did not sufficiently show the defendant to be guilty of the offense charged in the information. This branch of the case was very clearly, logically, and plausibly presented; and were this the trial court, or were we sitting in the attitude of jurors, we may not say how far it would have availed to set this defendant free; but since the evidence in the cause was conflicting upon practically every important issue of fact involved in the trial, we may not, under the well-established rule of this court, give ear to an argument predicated upon such substantial conflict in the testimony as the record discloses here.

We find no sufficient error of law in the record to justify a reversal of the case. The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(83 Wash. 271)

**SILVAIN v. BENSON et al.** (No. 11940.)  
(Supreme Court of Washington. Jan. 7, 1915.)

**1. APPEAL AND ERROR (§ 633\*)—ABSTRACT—SERVICE—NECESSITY.**

Where a copy of the abstract on appeal was not served on two of the several respondents, and there was no stipulation on the subject in the record nor acknowledgment by attorneys on the abstract, acknowledging the receipt of a copy thereof, the appeal must be dismissed as to the two respondents.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2772-2774; Dec. Dig. § 633.\*]

**2. APPEAL AND ERROR (§§ 1097, 1195\*)—LAW OF THE CASE.**

A decision of the Supreme Court on a former appeal is the law of the case on a subsequent trial and appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.\*]

**3. CORPORATIONS (§ 253\*)—LIABILITY OF STOCKHOLDERS—JUDGMENT ESTABLISHING DEBT—RES JUDICATA.**

Where no appeal was taken from a judgment establishing the validity of claims against a corporation in the hands of a receiver, the question of validity could not be raised in an action by the receiver of the corporation to compel stockholders to pay assessments ordered by the court to pay the claims.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1024-1030; Dec. Dig. § 253.\*]

**4. CORPORATIONS (§ 262\*)—LIABILITY OF STOCKHOLDERS—CALLS—ENFORCEMENT.**

In an action by a receiver of a corporation as the representative of creditors to enforce the liability of stockholders assessed to pay debts of the corporation, defenses of no valid subscription to the capital stock or defects of organization are not available.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076-1083, 2273; Dec. Dig. § 262.\*]

**5. BANKS AND BANKING (§ 49\*)—RECEIVERSHIP PROCEEDINGS—STOCKHOLDERS—ENFORCEMENT OF LIABILITY—DEFENSES.**

Where no appeal was taken from a judgment establishing claims against a banking corporation in the hands of a receiver, the fact that the state bank examiner had not issued a certificate authorizing the corporation to do a banking business was not available as a defense in an action by the receiver to enforce the obligations of stockholders assessed to pay debts of the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.\*]

**6. CORPORATIONS (§ 76\*)—SUBSCRIPTION—ESTOPPEL.**

One who signed his name on a subscription list for stock subscriptions, without indicating in figures the amount of the subscription, and thereby induced others to subscribe for stock, is bound for the number of shares set opposite his name by the promoter, and is estopped from questioning the promoter's authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.\*]

**7. CORPORATIONS (§ 269\*)—ASSESSMENTS AGAINST STOCKHOLDERS—ENFORCEMENT—ISSUES.**

Where corporate stock subscription contracts were on their face unconditional, the stockholders could not escape liability for assessments to pay corporate debts, on the ground

that the subscriptions were conditional, without proving that fact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 980, 1149-1159, 2277; Dec. Dig. § 269.\*]

**8. CORPORATIONS (§ 76\*)—STOCKHOLDERS—LIABILITY.**

One who neither signed a corporate stock subscription list nor authorized any one to sign his name thereto is not liable as a subscriber.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.\*]

**9. CORPORATIONS (§ 262\*)—STOCKHOLDERS—LIABILITY.**

Where subscriptions to corporate stock were not induced by fraudulent representations, the fact that certificates issued were surrendered because the full amount of the stock was not subscribed did not relieve stockholders from liability on the ground of fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076-1083, 2273; Dec. Dig. § 262.\*]

**10. APPEAL AND ERROR (§ 671\*)—RECORD ON APPEAL—ABSTRACTS.**

The court will not search the statement of facts for testimony to which no reference is made in the abstracts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Louis T. Silvain, as receiver of the German-American Bank of Seattle, against W. D. Benson and others. From a judgment for defendants, plaintiff appeals. Reversed in part and affirmed in part.

See, also, 68 Wash. 286, 123 Pac. 457.

Shorett, McLaren & Shorett, of Seattle, for appellant. John W. Roberts, Alfred Gfeller, John E. Humphries, Byers & Byers, E. P. Edsen, Geo. B. Cole, Beeler & Sullivan, Peterson & Macbride, Ernest B. Herald, Channing M. Coleman, McClure & McClure, Nicholas Schmitt, Edward Von Tobel, Emil J. Brandt, and Edward C. Kriete, all of Seattle, for respondents.

**MAIN, J.** This action was brought by the receiver of the German-American Bank of Seattle against the defendants as subscribers to the capital stock of the bank. The cause was tried to the court sitting without a jury, and resulted in a judgment for the defendants, except as to the defendant Heinzerling, against whom a judgment was entered in favor of the plaintiff. From this judgment the plaintiff appeals.

The facts, so far as necessary here to set them forth, are substantially as follows: On or about February 19, 1909, articles of incorporation were acknowledged and copies filed in the office of the secretary of state, in the office of the county auditor of King county, and with the state bank examiner. The annual license fee was paid for the year ending June 30, 1909. On April 15th a meeting of the stockholders was held at the Butler Ho-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tel Annex in Seattle, Wash. At this meeting there were present, either in person or by proxy, 27 of the persons who had subscribed for the stock. At this meeting by-laws were adopted and trustees elected for the ensuing year. Immediately after the adjournment of the stockholders' meeting there was a meeting of the trustees. At this meeting officers were elected. The first vice president and cashier were authorized to sign the lease with the trustee company for the banking room. The cashier was authorized to proceed to collect the subscriptions to the stock of the bank. Prior to this date the fixtures, vault, safe, and some other articles necessary to a banking institution had been purchased and were in place. The banking room had been arranged for and a deposit made on the rental. After the meetings of April 15th certificates of stock were issued to many of the subscribers for stock. This was paid for either by money or note, and in some instances by both. The capital stock of the bank was to be \$100,000 divided into 1,000 shares of the par value of \$100 per share. This stock was at no time all subscribed for. Some time after the meeting of April 15th it became apparent that a full subscription to the capital stock could not be obtained, and it was concluded that the enterprise should be abandoned or turned over to one Garland, who was willing to undertake its promotion. The certificates of stock which had been issued were returned to the corporate officers, and the money or notes which had been paid therefor were returned to the respective subscribers. The debts contracted on account of the installation of the fixtures, vault, safe, etc., had been incurred prior to the meeting of the stockholders mentioned. Subsequently one of the creditors brought an action against the corporation and obtained a judgment for the amount of its claim. In this action a receiver was appointed for the bank. In due time the receiver, under direction of the court, converted the available assets into cash. This amounted to \$1,037.50 and, not being sufficient to meet the claims, the receiver made an application to the superior court for a call upon the stockholders for their unpaid subscriptions. The court fixed a date and directed that the receiver give notice to the stockholders, both by mail and by publication, of the time and place where a hearing would be held for the purpose of determining the amount of the liabilities of the corporation, and the amount necessary to assess the solvent stockholders for the purpose of liquidating the same. Notice having been given as required by the order of the court, in due time the cause came on for hearing. At the conclusion of the hearing the court entered an order, wherein it was found "that there are unpaid claims against said German-American Bank of Seattle amounting to the sum of at least \$5,000," and that it would be necessary, in order to meet the existing obliga-

tions, that a call be made upon each of the subscribers to the capital stock. The stockholders not responding to this call, the present action was instituted against them. Other facts will be noted in connection with the consideration of the points to which they may be particularly germane.

There are approximately 60 respondents in the action. In addition to the appellant's opening and reply briefs, six briefs have been filed by different groups of the respondents. A discussion of all the questions raised in these briefs would extend this opinion to forbidden lengths. Only those questions will be considered which seem to us determinative of the controversy.

[1] The respondents Hull and Klyce open their brief with a motion to dismiss the appeal as to them for the reason that no copy of the abstract was served upon them. This motion must be granted. *Ollar-Robinson Co. v. O'Neill*, 141 Pac. 194. The plaintiff in his reply brief states that there was a stipulation that the one copy of the abstract served upon the attorneys for certain of the respondents should be sufficient. This stipulation, however, does not appear in the record. Had the stipulation been made a part of the record, or had the attorneys for the various respondents acknowledged on the back of the appellant's abstract the receipt of a copy thereof, there would be no occasion for the motion. But under the record as it is, there is no alternative but to dismiss the action as to these two respondents.

[2] Upon the merits it is first claimed that in the receivership proceeding the court did not acquire jurisdiction of the defendant corporation, and that therefore the entire proceeding is ineffectual. This question was before this court upon a former appeal in this case. *Silvain v. Benson*, 68 Wash. 286, 123 Pac. 457. It was there held that upon the showing made the court had acquired jurisdiction, and the cause was "remanded for trial upon the merits." The question having been presented and determined upon the former appeal, the ruling there becomes the law of the case upon that question and will not be again reviewed.

[3] It is next claimed that the debts were not those of the German-American Bank, but were the individual debts of one Heinzerling. It is asserted in one of the briefs that this was the view of the trial court. But that question is one which is not subject to be litigated in the present proceeding. As appears from the facts, the court fixed a day upon which the amount of the liabilities of the corporation would be determined, as well as the assessment necessary to meet these against the stockholders. Of this hearing notice was given by mail and by publication. At the hearing the amount of the claims against the corporation were determined, and it was ordered:

"That the call and assessment be and is hereby made against each and all of the subscribers

of stock of the said German-American Bank of Seattle. \* \* \*

It does not appear that that order was appealed from by any of the parties. The court there found that the claims were obligations of the corporation. The rule is that where the validity of the claims against the corporation are determined in a receivership proceeding, they cannot be litigated when a subsequent action is brought against the individual stockholders. If these claims were in fact not the obligations of the corporation, that question should have been reviewed by an appeal from the order of the court adjudging them to be such. *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536; *Bennett v. Thorne*, 86 Wash. 253, 78 Pac. 936, 68 L. R. A. 118.

Speaking upon this question in the case last cited, it was said:

"Two main questions were put in issue by the proceedings, and finally determined by the court, viz.: (1) The right of the creditors represented by the receiver to have an assessment, that is, whether any assessment could be properly levied at that time; and (2) the amount of the assessment. Testimony was heard, and the stockholders availed themselves of an opportunity to cross-examine witnesses upon the subject of the amount of the assessment, and the court finally decreed the amount of the bank debts of a strictly banking character then existing. Upon that point the decree must be considered final, at least as to all parties regularly before the court and contesting that question. If the court had power to finally determine the exact amount of the assessment, certainly it ought to have had power to determine the receiver's right to any assessment at all, for it would be idle to determine the amount, if the right did not exist.

"That the decree is one from which an appeal will lie becomes more apparent when viewed from the aspect of an adverse decision. Suppose, for instance, it had appeared on the face of the petition that the last of the assets had been exhausted and applied more than six years before the petition for the assessment was filed; doubtless the court would have sustained the demurrers on the ground that the right to prosecute this remedy had accrued more than six years ago, but that is exactly what the appellants are contending now appears from the face of the petition. Suppose, further, that the demurrers had been sustained, and the proceeding dismissed, on the ground that an assessment could not be properly levied at this time by reason of lapse of time; no one would doubt the receiver's right to appeal as from a final order; and, if a decree will give one party a right to appeal, when adverse to him, it must confer the same right on the other under a like condition. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Taylor v. Spokane Falls, etc., R. Co.*, 32 Wash. 450, 73 Pac. 499. On the whole, therefore, we think that an appeal lies from the decree in the case before us, and that the cause is here for determination upon its merits."

[4] Another contention is that since the total amount of capital stock had at no time been subscribed for, and since the state bank examiner had not issued a certificate to the bank authorizing it to do a banking business, there can be no liability so far as the subscribers to the capital stock may be concerned. It must be remembered that this action is by the receiver as the representative of the creditors, and is not an action

by the corporation seeking to collect unpaid subscriptions. Where the action is brought by the receiver, the defenses of no valid subscription to the capital stock of the company, or defects of organization, are not available. In *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, two of the contentions were that valid subscriptions to the capital stock had not been made, and that there was a defect in the organization of the company. Speaking upon these contentions, together with others, in that case, it was said:

"The first five of these defenses may be considered together. It must be remembered that this is not an action by the corporation to enforce collection of subscriptions for stock or its contracts with its subscribers, but is an action brought by a receiver, under order of the court, to enforce such subscriptions for the benefit of creditors. As between the corporation itself and the stockholders all these defenses would probably be good, but as between the stockholders and the creditors of the corporation another rule prevails. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415. In such cases, 'it is no defense to a suit by a creditor to recover his debt out of an unpaid subscription that the defendant was induced to subscribe to the stock by fraudulent misrepresentations of the agent of the corporation, or by an agreement which the corporation had failed to carry out, or that the corporation was irregularly organized, or organized for an illegal purpose, or has been dissolved; nor can a stockholder set up informalities in the issue of the stock if the corporation had the power to create it, though he may show that the stock is void as having been issued in excess of the limit imposed by the charter.' 26 Am. & Eng. Ency. Law (2d Ed.) p. 1011. See, also, 10 Cyc. pp. 244, 249; *Mitchell v. Matheson*, 23 Wash. 723, 63 Pac. 564; *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858. Under this rule the trial court was clearly in error in basing the judgment of dismissal upon the facts found as stated above. Such facts, if true, did not constitute a defense in this action, because the stockholders were estopped to say that the corporation was not a legal one, or that they had a contract with the corporation to purchase its stock at 50 per cent. of its par value, or that they subscribed for its stock believing that the company was not in debt. The receiver in this action represents the creditors. *Mitchell v. Matheson*, supra."

[5] As to the defect claimed, in that the state bank examiner had at no time issued a certificate authorizing the corporation to do a banking business, it may also be said, as stated above, that the claims were found by the superior court in the receivership proceeding to be obligations of the corporation, and that no appeal was prosecuted from that judgment.

[6] As to some of the respondents it is claimed that they placed their names upon the subscription list, but did not indicate in figures thereafter the amount of the subscription or the number of shares, and that therefore there can be no liability as against them. The number of shares set opposite their respective names, it is claimed, were placed there without authority. When they signed their names to the subscription list it must have been as an incentive to others to subscribe. In other words, to permit the promoter to represent them as subscribers

when in fact they were not. In *Jewell v. Rock River Paper Co.*, 101 Ill. 57, the court considered the question as to whether a person who places his name upon a subscription contract for the purpose of inducing others to subscribe, but does not carry out the amount of the subscription in figures, can be held upon such subscription contract. Answering the contention that there was no liability upon such subscription, it was there said:

"We frankly confess our inability to perceive the force or plausibility of this theory, however prominent or influential the parties may be. The more natural theory is that if the amounts of their subscriptions were not carried out at the time, and were purposely left blank, the object in doing so was to enable Willard to represent them as subscribers when they were not, which would have been a palpable fraud on those subscribing through such an influence. It is well known that in becoming a party to an enterprise of that kind one is generally controlled, in a large degree, by the character of those who are, or who are expected to be, identified with it. Any artifice or trick, therefore, tending to mislead a subscriber in this respect would be highly reprehensible in morals, as well as a legal fraud. If, then, appellants signed the subscription book of the company in blank for such purpose, it is but fair and just to hold that as to creditors of the company they thereby impliedly authorized those empowered to take subscriptions to fill up the blanks, and that, having been done in this case, as is claimed, appellants are estopped from questioning their authority to do so."

To the same effect see, also, *Johns v. Clothier*, 78 Wash. 602, 614, 139 Pac. 755.

[7] It is argued that certain of the subscriptions were conditional, and that inasmuch as the conditions were never fulfilled, no liability arose by reason of such subscription. It may be assumed, but not decided, that the rule is that a conditional subscriber is not liable even when the rights of creditors are involved, unless the condition upon which a subscription was based has been fulfilled, or unless the condition is waived or the subscriber is estopped from asserting the condition. In this case the subscription contract was introduced in evidence. Upon its face it does not appear to be conditional. The appellant prepared an abstract of the record. The respondents prepared a supplemental abstract. In neither of these abstracts is there evidence set forth or referred to which shows a conditional subscription. It may be that the statement of facts shows such evidence, but if it does, we fail to find that it has been abstracted. We have not overlooked the fact that in the respondents' supplemental abstract it is said the promotor Heinzerling testified that the subscriptions should not become effective until the entire amount of the capital stock was subscribed. In support of

this statement certain pages of the statement of facts are referred to. But upon an examination of the statement of facts at the pages referred to, we are unable to find testimony supporting the statement as abstracted.

[8] One of the respondents, Fred H. Peterson, is not obligated by the subscription contract introduced in evidence. His testimony as abstracted is unequivocal and positive that he neither signed the subscription list, which was plaintiff's Exhibit E, nor authorized any one to sign his name thereto. By reference to the statement of facts the abstract in this regard is verified. This respondent, neither having signed nor authorized the placing of his name upon the subscription contract introduced in evidence, is not liable.

[9] Finally it is claimed that when certain of the subscriptions were taken, fraudulent representations were made by the person securing the subscriptions. But we do not find in the abstracts evidence sustaining this charge. It is true that the certificates which had been issued were surrendered. But the reason for the surrender does not appear to have been because the subscriptions were induced by fraud, but because the full amount of the capital stock had not been subscribed, and if the subscriptions could not be secured, the enterprise must fail.

[10] It may be that in the statement of facts there is testimony which would show certain of the subscriptions to be conditional, and others fraudulent, which had been rescinded for that reason before the rights of creditors intervened. The court, however, will not search the statement of facts for testimony to which no reference is made in the abstracts.

From what has been said, our conclusion is that the judgment as to Hull, Klyce, and Fred H. Peterson will be affirmed. The judgment as to all the other respondents will be reversed. The judgment rendered against Heinzerling is not involved in this proceeding, he not having appealed. Klyce, Hull, and Peterson will recover their costs in this court against the receiver. The receiver is entitled to costs as against those respondents as to whom the judgment is reversed. The cause will be remanded, with directions to the superior court to take further testimony for the purpose of determining the proportionate amount for which judgment shall be rendered against each solvent stockholder, in order that the debts of the corporation and the expenses of the receivership and litigation may be paid.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.



(83 Wash. 281)

In re PINE STREET ASSESSMENT IN  
CITY OF WALLA WALLA.

APPEAL OF CUNNINGHAM et al.

(No. 12023.)

(Supreme Court of Washington. Jan. 7, 1915.)

1. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW—CONDEMNATION PROCEEDINGS—ASSESSMENTS—PARTIES.

Where condemnation proceedings were instituted to acquire land for a street extension, the proceedings to condemn and those to assess the necessary cost on property benefited were essentially separate, and, there being no statute entitling the owners of property sought to be assessed to be made parties to the condemnation proceedings, a failure to make them parties did not deprive them of their property without due process of law; they being authorized to challenge the validity of the award and judgment thereon on jurisdictional grounds or for connivance or bad faith on the part of the city authorities amounting to fraud as against the owners of property assessed when it was sought to fasten assessment liens on their property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\*]

2. EMINENT DOMAIN (§ 223\*)—CONDEMNATION PROCEEDINGS—LAND FOR STREET EXTENSION—VERDICT—INSTRUCTION.

Rem. & Bal. Code, § 7782, provides that, when an ordinance providing for street extension declares that compensation shall be paid for land taken in whole or in part by special assessment on property benefited, the jury shall find separately the damage which will accrue to the part remaining because of its severance from the part taken, over and above any local or special benefits arising from the proposed improvement, and that no land damaged shall be assessed for any benefits arising from the taking only. *Held* that, where, in a proceeding to condemn land for a street extension, the court clearly instructed the jury in accordance with such section, a verdict allowing \$150 for damage to remaining land by reason of the severance of land taken was not objectionable, because it did not show on its face that the jury had set off the benefits against the damages in arriving at that portion of the award, but the verdict would be construed as a finding of net damage over and above special benefits.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 568-573; Dec. Dig. § 223.\*]

Department 1. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Proceedings for the acquisition of land for an extension of Pine Street, in the City of Walla Walla. From a judgment levying an assessment to pay for land acquired for that purpose, Minnie Cunningham and others appeal. Affirmed.

John C. Hurspool and El. W. Benson, both of Walla Walla, for appellants. Thos. H. Brents and John F. Watson, both of Walla Walla, for respondent.

PARKER, J. This is an appeal from a judgment of the superior court of Walla Walla county confirming a special assessment made by eminent domain commissioners upon property of appellants to pay the expense of acquiring land for the extension

of Pine street, in the city of Walla Walla, by eminent domain proceedings. The land so acquired by the city was a portion of a tract owned by Joseph Davin et al. The jury awarded them, as the value of the portion of their tract taken, the sum of \$1,500, and, as damages to the remainder of their tract by reason of the severance, the sum of \$150.

Joseph Davin et al., the owners of the land so taken and damaged, were alone made defendants in the condemnation branch of the proceedings, and thereafter appellants and other owners of property found by the eminent domain commissioners to be benefited by the extension of Pine street were made parties to the assessment branch of the proceedings, given notice, and awarded a hearing upon the confirmation of the assessment. Both branches of the proceedings were conducted, as to parties and notice, as prescribed by the statute relating to the exercise of the power of eminent domain by cities. Rem. & Bal. Code, § 7767 et seq.

Counsel for appellants contend that the assessments against their property are void for want of due process of law, in that they were not made parties to the condemnation branch of the proceedings, and were thereby deprived of a hearing upon the question of the amount of the award made by the jury for the land taken and damaged. They claim the right to such a hearing upon the ground that their property is being assessed to pay the award; that the amounts they are called upon to pay are not only affected by the amount of the award made by the jury, but also by the finding of the jury that the remaining land of Davin et al. was damaged, resulting in its exemption from assessment, which it otherwise would not have been, but would have shared, with appellants' land, the burden of the assessments. It is not claimed that there was any want of jurisdiction in the condemnation proceedings impairing in the least either the right of the city or the defendants Davin et al., the owners of the land taken and damaged. Neither is it claimed that the condemnation proceedings was conducted by the city authorities other than in good faith, with due effort to procure an award by the jury as favorable as possible to the owners of property to be assessed to pay the same.

[1] We have no such situation here presented as in *In re Third, Fourth, and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, where the award was made by the jury in compliance with an agreement between the city and the owners of the land taken and damaged rendering the award and the judgment thereon void as to the owners of property to be assessed to pay the award. It seems to us the claimed right of appellants to be heard as parties to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

condemnation branch of the proceedings must rest upon some positive statute law before it can be recognized by the courts; though this does not mean that the owners of assessed property may not challenge the validity of the award and judgment thereon, upon jurisdictional grounds, or upon grounds of connivance or bad faith on the part of the city authorities amounting to fraud as against the right of owners of property to be assessed, when it comes to fastening assessment liens upon their property. This claimed right to be heard in the condemnation branch of the proceedings is, as we view it, in substance, the same as the right of property owners to protest against the making of the improvement in the first instance, or the right to have the cost of the improvement determined by competitive bids, or the right to have the improvement initiated in some prescribed statutory manner. The securing of such rights as these, as they are sometimes secured by statute, is unnecessary to satisfy the due process of law provisions of the state and federal Constitutions. This view finds support in the case of *In re Leary Avenue*, 72 Wash. 617-623, 131 Pac. 225, 228, where it is said:

"While property owners whose property is liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against making the improvement, they have no absolute right to have their protest granted, or absolute right to maintain an action or proceeding in the courts based on the right if their protest is not granted. Rights of this character must be based upon some positive law or statute especially conferring the right, as it does not exist as part of the inherent law of the land. That there is no such law or statute is conceded; hence it must follow, we think, that no vested right is denied by the failure to give property holders whose property is liable to be assessed to pay the cost of a contemplated improvement an opportunity to protest against such improvement. Nor does a property holder whose property is liable to be assessed for a public improvement have a legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken and damaged by the making of the improvement. The duty of conducting these proceedings is devolved by statute upon the city, and, since it has the responsibility of properly conducting the proceedings, it must follow that it, and it alone, has the lawful right to appear in such proceedings, or to be represented therein by counsel. Nor do we perceive any valid reason which supports the contention. The city must, of course, initiate and carry on a public improvement in the manner prescribed by the laws governing the procedure, and it is an admittedly essential element of a valid assessment that the owners of property on which an assessment is proposed to be levied have notice of the assessment and an opportunity to be heard as to its validity and amount before it becomes a fixed charge upon their lands. But these mark the extent of their absolute rights."

The eminent domain branch and the assessment branch of the proceedings are entirely separate, so far as acquiring jurisdiction over the parties and the questions to be adjudicated are concerned. Rem. & Bal.

Code, §§ 7772, 7792; *In re Third, Fourth, and Fifth Avenues*, 49 Wash. 109, 114, 94 Pac. 1075, 95 Pac. 862; *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 693, 696, 132 Pac. 633; *Com'rs Com. W. Dist. v. Seattle Factory Sites Co.*, 76 Wash. 181, 187, 135 Pac. 1042.

No decision has come to our notice indicating that there is any want of due process of law by failure to award to a property owner whose property is to be assessed for a public improvement a hearing upon the taking of any preliminary steps by which the cost of the improvement is determined, whether such cost is incurred by eminent domain proceedings or otherwise.

[2] The language of the verdict of the jury awarding damage to the remaining land of Davin et al. is simply: "For damage to remaining land by reason of severance, \$150." Counsel for appellants insists that this finding of the jury did not result in the exemption of this land from assessment to aid in paying the cost of extending the street, and that it therefore should have been assessed so as to have borne its proportion of the burden with the lands of appellants and others which were assessed, the same as if it were not remaining land from which that taken was severed.

The rule for awarding damages to land not taken and the exemption of such land from assessment, is prescribed by section 7782, Rem. & Bal. Code, as follows:

"When the ordinance providing for any such improvement provides that compensation therefor shall be paid in whole or in part by special assessment upon property benefited, the jury or court, as the case may be, shall find separately: 1. \* \* \* 2. The damages which will accrue to the part remaining because of its severance from the part taken, over and above any local or special benefits arising from the proposed improvement. No lot, block, tract or parcel of land found by the court or jury to be so damaged shall be assessed for any benefits arising from such taking only."

The trial court clearly instructed the jury accordingly. Counsel's contention seems to be that the verdict should have, upon its face, evidenced the fact that the jury offset the benefits against damages in arriving at this portion of the award. We are of the opinion, however, that in view of the law and the court's plain instructions to the jury, the verdict must be read in the light thereof, which we think renders its meaning quite plain that the jury's finding as to this land is a finding of net damage over and above special benefits. This statutory provision exempting land found so damaged from assessment has been given full force and effect by our previous decisions. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *Seattle & P. S. Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093; *Hagood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *Inner Circle Property Co. v. Seattle*, 69 Wash. 509, 125 Pac. 970; *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089.

In the last cited case we said:

"It is apparent that this provision of the law is for the purpose of enabling the eminent domain commissioners and the court, in making assessment against benefited property, to determine what property is exempt from such assessment by reason of being damaged by the taking, and thus avoid the constitutional objection against assessing property which is damaged, for the very purpose of paying such damage."

Other contentions of counsel for appellant have to do with the questions of benefits and apportionment thereof. A careful review of the evidence to which our attention has been called convinces us that we would not be warranted in disturbing the conclusion reached by the eminent domain commissioners and the trial court. The evidence is by no means in harmony as to the amount of benefits or the proper apportionment thereof. It furnishes ample room for difference of opinion upon both of these questions. We are quite clear that it cannot be said that the decision of the eminent domain commissioners or the superior court was capricious or arbitrary, or rested upon a fundamentally wrong basis. In *re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58.

The judgment is affirmed.

CROW, C. J., and GOSE, MORRIS, and CHADWICK, JJ., concur.

(83 Wash. 300)

LOWERY et al. v. CITY OF SPOKANE.  
(No. 12349.)

(Supreme Court of Washington. Jan. 7, 1915.)

MUNICIPAL CORPORATIONS (§ 816\*) — SIDEWALK OBSTRUCTIONS—INJURIES TO PEDESTRIANS—NOTICE—NATURE OF INJURIES—DISCLOSURE.

Where a notice to a city of injuries to a pedestrian alleged injury to the back part of both legs and to her left heel and tendon Achilles, it was sufficient to justify and prove that the injury also caused her to suffer from "flat foot" or "broken arch."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.\*]

Department 1. Appeal from Superior Court, Spokane County.

Action by Melvina Lowery and her husband against the City of Spokane. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for appellant. Roche & Onstine, of Spokane, for respondents.

PARKER, J. The plaintiffs seek recovery for personal injuries which they claim resulted to the plaintiff Melvina Lowery from the negligence of the city of Spokane in permitting a boiler to be insecurely placed over a public sidewalk along which she was walking, which boiler, by reason of its insecure position, fell and injured her. Verdict and

judgment being rendered in favor of the plaintiffs in the sum of \$1,350, the city has appealed therefrom.

The principal contentions of counsel for the city are, in substance, that the trial court permitted counsel for respondents to introduce evidence upon the trial tending to show injuries the nature and extent of which were not sufficiently claimed or described in their claim of damages presented to the city preliminary to the commencement of this action. The city charter provides that such claims must state the time when and the place where such injury was received or happened, the cause, the nature and extent thereof. After describing the location and the position of the boiler over the sidewalk in front of a plumbing shop, respondents state in their claims as follows:

"Said Melvina Lowery, being in the exercise of ordinary care, passed along in front of said shop. The said boiler, by reason of the defective and negligent manner in which it was held in position, fell from its position across the said sidewalk and struck the said Melvina Lowery on the back part of both her right and left leg, and left heel and tendon Achilles, with such force and weight as to knock her to the ground and permanently injure her. That by reason of the force and weight of said boiler the back of her legs and left heel and tendon Achilles thereof have been crushed and bruised to such an extent that she has been unable to walk, and has been constantly confined to her bed, and ever since has been and still is caused to suffer great pain and anguish, and will continue to suffer great pain and anguish by reason thereof for some time in the future, and perhaps the balance of her life, and by reason of said injury her nervous system has been greatly shocked and affected, and she is caused to continuously suffer by reason thereof, and is permanently injured."

In their complaint respondents allege injuries to the bones of the foot and ankle of respondent Melvina Lowery, as well as the injuries to "the back part of her legs and left heel and tendon Achilles thereof" mentioned in their claim presented to the city. In support of these allegations evidence was introduced in behalf of respondents, over objections of counsel for the city, tending to show, in addition to the injury to the back of the legs and heel, the existence of what is known as "flat foot" sometimes called "broken arch," as the result of respondent Melvina Lowery being struck by the falling boiler while she was walking past it. This evidence, it is insisted by counsel for the city was not admissible, because it related to injuries not mentioned or described in respondents' claim presented to the city before commencing their action. We think that the injuries which this evidence tended to prove were so nearly related in location and character to those mentioned in the claim, that they should be regarded as a portion of the injuries for which respondents claimed damages at the time of presenting their claim to the city. In *Lindquist v. Seattle*, 67 Wash. 230, 232, 233, 121 Pac. 449, 450, after reviewing our

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

former decisions at some length and noticing the liberal construction theretofore given by us to such claims for damage, Justice Ellis, speaking for the court, said:

"These, and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful, rather than a reasonable protection against the fraudulent and designing."

"Applying these rules to the case before us, it is obvious that the notice that the claimant's leg was 'fractured and bruised to such an extent that he was compelled to undergo a surgical operation' should be held sufficient to allow proof of a bruised leg from the knee to the foot, and an ankle so sprained and ligaments so ruptured as to necessitate a surgical operation, which was the proof made. The injuries described in the notice and those proved were so nearly related in location and character that notice leading to inquiry and examination as to the one would necessarily afford full knowledge as to the other."

We conclude that the admission of this evidence, in addition to evidence tending to show injury to the back of the leg and heel, was not erroneous.

Contention is made that the evidence was not sufficient to support the verdict and judgment. It is enough to say that a review of the evidence convinces us that it was ample for that purpose.

The judgment is affirmed.

CROW, C. J., and GOSE, MORRIS, and CHADWICK, JJ., concur.

(83 Wash. 296)

NORTHERN BANK & TRUST CO. v. DAY et al. (No. 12152.)

(Supreme Court of Washington. Jan. 7, 1915.)

#### 1. CORPORATIONS (§ 152\*)—DIVIDENDS—DECLARATION—PAYMENT.

Dividends can be declared and paid only out of profits or surplus net earnings; the corporation not being authorized to reduce its capital stock by paying any portion of it to stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.\*]

#### 2. CORPORATIONS (§ 153\*)—DIVIDENDS—DECLARATION—STOCK DIVIDENDS.

Where stockholders act honestly and in good faith without fraud in valuing the corporation's assets to pay subscriptions to capital stock or declaring dividends, no creditor can successfully complain.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 579, 580; Dec. Dig. § 153.\*]

#### 3. CORPORATIONS (§ 66\*)—CAPITAL STOCK—INCREASE—PAYMENT.

Where a corporation's assets exceed its debts and capital stock, the excess may be applied by the stockholders in payment of subscriptions to an increase of capital stock; the rule being that so long as the corporation has property exceeding its indebtedness in an amount equal to its capital stock, including the increase, such increase is legal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173-180, 449; Dec. Dig. § 66.\*]

#### 4. CORPORATIONS (§ 66\*)—CAPITAL STOCK—INCREASE—PAYMENT—VALUATION OF ASSETS.

Evidence held to warrant a finding that, at the time a corporation increased its capital, its assets exceeded its liabilities, including its capital stock, by an amount equal to the increase, and that the increase was therefore fully paid as against the corporation's creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173-180, 449; Dec. Dig. § 66.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the Northern Bank & Trust Company, as trustee in bankruptcy of the Standard Fish Company, against W. P. Day and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Shorett, McLaren & Shorett, of Seattle, for appellant. Ballinger, Battle, Hulbert & Shorts and Granger & Clarke, all of Seattle, Lund & Lund, of Tacoma, and R. G. Denny, of Seattle, for respondents.

MORRIS, J. The appellant, as trustee in bankruptcy, seeks in this action to recover from the respondents, as stockholders of an insolvent corporation, an amount claimed to be due the corporation upon subscriptions to its capital stock. The pertinent facts are about these: In March, 1910, the stockholders of the Standard Fish Company adopted a resolution increasing its capital stock from \$25,000 to \$60,000; the par value of both the old and new issues of stock being \$10 per share. At a subsequent meeting of the trustees it was provided that 1500 shares of the increased stock should be divided between the stockholders according to their holdings January 1, 1910, and that such increase of stock should be issued in lieu of dividends. Under this arrangement certificates of capital stock were issued to the respondents dividing the 1500 shares between them in various amounts ranging from 21 to 463 shares. It is this 15,000, representing the par value of this stock, that appellant seeks to recover, contending that respondents have not paid for the stock in money or property of any value.

[1] We have held, following the uniform rule, that dividends can be declared and paid only out of profits or surplus net earnings, and that a corporation could not reduce its capital stock by paying any portion of it to its stockholders. *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637.

[2] This rule is to be read in the light of the facts there presented. If the circumstances here were of the same nature as those reviewed in the cited case and others upon which it is based, the same rule would necessarily be announced. But we have another rule that, where stockholders act honestly and in good faith in placing a value upon the assets of the corporation for the purpose of paying subscriptions to capital stock or in declaring dividends, no creditor can success-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

fully complain of such act, unless he can show fraud of some character. The court will look to the bona fides of such a transaction, and, if it is clear that it was carried out in good faith in all its particulars and in the exercise of a judgment fairly and honestly directed, it will be sustained. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Taylor v. Cummings*, 127 Fed. 108, 62 C. C. A. 108; *Taylor v. Walker* (C. O.) 117 Fed. 737.

[3] A like pronouncement has been made by us in *Lantz v. Moeller*, 76 Wash. 429, 138 Pac. 687, 50 L. R. A. (N. S.) 68, in holding that, if the assets of a corporation exceed its debts and the amount of the capital stock, the excess can be applied by the stockholders in payment of subscriptions to an increase of capital stock. It is not an infrequent thing for a corporation to make a stock dividend by increasing its capital stock and issuing the same to its stockholders, and so long as the corporation is possessed of property exceeding its liabilities in an amount equal to its capital stock, including such increase, it will be permitted to do so. *Lantz v. Moeller*, supra; 2 *Clarke & Marshall, Private Corporations*, p. 1603; 1 *Cook on Corporations*, § 287.

[4] The purpose of the stockholders in increasing the capital stock was plainly to enable the company to provide cold storage facilities. The books of the company, as represented to the stockholders by the treasurer, showed the company to be in good financial condition, with undivided profits exceeding the par value of the 1,500 shares of stock. We can find nothing to indicate that the respondents were not honest in such a belief at the time, or that it appeared other than in good faith to them and as proper in a business sense to divide this profit among themselves before taking in additional stockholders. Illustrating the good faith of the transaction is testimony to the effect that, subsequent to the issuance of the new stock, the company refused to sell stock to certain offering parties, giving as their reasons therefor that the company was a small one, and only those who were familiar with the fish business and could be of some assistance to the company were wanted in the company. Another fact that looms large in showing good faith is that the captain of the fishing boat, referred to as the Woodbury, invested \$1,000 in this stock. This fact is significant in view of the attack made upon the value of the Woodbury and the act of the company in increasing its value from \$15,000 to \$20,000. This man knew the boat and its condition. It does not look reasonable that he would have paid \$1,000 for stock based upon its excessive valuation. The Woodbury was purchased for \$22,500 when the company was first organized. It was a small concern, and the organizers figured that a capitaliza-

tion of \$25,000 would be sufficient, and that, in addition to the Woodbury, \$10,000 would be required. The value of the Woodbury was accordingly fixed at \$15,000, irrespective of the amount expended in its purchase. When it was desired to increase the capital stock, they increased the value of the Woodbury to \$20,000, and held it at this valuation in determining the net surplus to be divided among the stockholders in payment of the issuance of the increased capital stock. There was no need in March, 1910, for this corporation to act other than in good faith. It was apparently in a good financial condition, doing a good, though small, business. At that time there were no creditors seeking in any way to molest the company. It was not until September, 1911, that it was adjudicated an insolvent. This unfortunate ending in no wise reflects upon the good faith of the transaction in March, 1910. The stockholders were then dealing with themselves as they considered to be for the best interests of the company. No question of creditors loomed upon their horizon. There was no necessity for bad faith, for there was nothing to conceal and no one to deceive. The record admits of no other conclusion than that respondents acted fairly and honestly in making this stock dividend, and that they were honest in the belief that it was justified by reason of the company's possession of property equal in value to the capital stock so increased and above all liabilities.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and PARKER, JJ., concur.

(83 Wash. 287)

TOLBERT v. MODERN WOODMEN OF AMERICA. (No. 12094.)

(Supreme Court of Washington. Jan. 7, 1915.)

CORPORATIONS (§ 665\*)—FOREIGN CORPORATION—JURISDICTION.

Plaintiff, a member of a beneficiary society organized in Illinois and having its head office in that state, upon notice to appear there and show cause why his certificate should not be canceled on the ground that he was 45 years of age when his application was approved, before the day fixed for the hearing sued to enjoin the defendant society from canceling his certificate. *Held*, that a superior court was without jurisdiction, since the matter concerned the internal affairs of a foreign corporation, and the acts of its officers at its home office, and that Laws 1911, p. 288, relating to the appointment of a resident agent for service of process upon foreign beneficiary societies, did not enable the court to exercise extraterritorial jurisdiction to the extent of controlling the society's internal affairs.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2571, 2573, 2595–2600; Dec. Dig. § 665.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action for injunction by Walter M. Tolbert against the Modern Woodmen of America. Judgment for defendant, and plaintiff appeals. Affirmed.

Elías A. Wright, of Seattle, for appellant. Benj. D. Smith, of Mankato, Minn., and Ralph Simon, of Seattle, for respondent.

**PARKER, J.** The plaintiff, Walter M. Tolbert, commenced this action in the superior court for King county, seeking an injunction to prevent the defendant, Modern Woodmen of America, from canceling his benefit certificate which evidences his membership and insurance in the defendant society. The plaintiff has appealed from the judgment of the superior court denying the relief prayed for.

Respondent is an incorporated fraternal beneficiary society organized and existing under the laws of the state of Illinois, with its principal place of business at the city of Rock Island, in that state. It has local branches, called "camps," in the several states of the Union, one of which is at Seattle, in this state. In May, 1910, appellant made application for, and was admitted to, membership in the Seattle camp, when a benefit certificate was issued to him by the proper officers of the society at Rock Island, evidencing his membership in the society and the right of his beneficiary named in the certificate to participate in the benefit fund of the society to the amount of \$1,000 in case of his death while a member in good standing. On March 21, 1913, the head clerk of the society at Rock Island, evidently acting at the instance of the executive council of the society, gave notice in writing to appellant as follows:

"Modern Woodmen of America.  
"A Fraternal Beneficiary Society.

"Rock Island, Ill., Mar. 21, 1913.

"Mr. Walter M. Tolbert, Box 16, R. D. No. 2, Seattle, Washington—Esteemed Neighbor: Complaint has been filed at this office to the effect that at the time of the head physician's approval of your application for beneficial membership in this society, you were past 45 years of age. You are therefore notified that the executive council of this society will be in session in its council chamber in the head office building of the society, at Rock Island, Ill., on the 17th day of April, 1913, at 10 o'clock a. m., or as early thereafter as possible, at which time and place you may appear, in person or otherwise, to show cause why your benefit certificate should not be declared to be absolutely null and void, and to have been so at all times, on account of your having been past 45 years old at the time of the head physician's approval of your application for beneficial membership in this society.

"Fraternally yours, C. W. Hawes,  
"Head Clerk, M. W. of A."

This notice was received by appellant at Seattle in due course of mail a few days later. Evidently deeming this a threat by respondent to cancel his benefit certificate, appellant on March 31, 1913, several days before the time appointed for the hearing

before the council, as stated in the notice, commenced this action in the superior court, for King county, seeking to enjoin the cancellation of his benefit certificate. It is to be noticed that the injunctive relief sought is against alleged threatened action of officers of the society at its headquarters, in the state of Illinois, under whose laws it exists as a corporation.

We are constrained to hold that the denial of relief and judgment of dismissal rendered in the superior court must be affirmed if for no other reason than that of want of jurisdiction in the courts of this state to interfere with the internal affairs of a foreign corporation; since the alleged threatened act sought to be restrained would be but the exercise of claimed authority of the officers of the society at its home office beyond the territorial jurisdiction of the courts of this state. In *North State Copper & Gold Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039, there was involved the threatened forfeiture of the rights of a stockholder in a corporation existing under the laws of the state of North Carolina, hence foreign to the territorial jurisdiction of the courts of Maryland. Disposing of the contention there made, that the stockholder was entitled to mandamus against the corporate authorities to reinstate him in his rights as a stockholder, and refusing to assume jurisdiction, the court observed:

"It may not be in all cases easy to draw a clear line of distinction between the acts of a corporation relating to its internal management, and those which do not. But we apprehend the distinction to be this: That where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and, in case of a foreign corporation, our courts will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here.

"The controversy in the case before us arises entirely out of the internal management of the affairs of the company. It is the complaint of a stockholder that he has been deprived of his rights, as a stockholder, by the illegal action of the board of directors. His complaint is that he is still a stockholder, and a member of the corporation, and entitled to his vote at the stockholders' meeting, etc., but that these rights have been withheld from him by the action of the directors, and he seeks to be reinstated as a member of a foreign corporation by the action of a Maryland court. He seeks this through the extraordinary remedy of a mandamus, to compel the board of directors to place on their books his name as a stockholder, and thus to restore him to all the rights of a member of the corporation, which the directors say he had forfeited."

In *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185, there was involved a threatened deprivation of the rights of a member of the Union, a fraternal

insurance association, by its officers at its home office; it being a foreign corporation beyond the territorial jurisdiction of the courts of Texas. The court disposed of the claimed right of the insured to an injunction against the home officers of the union to prevent cancellation of his policy as follows:

"Putting that construction upon his petition most favorable to the appellee, his allegations amount to this: That the appellant is a foreign corporation, with its domicile in the state of Missouri, and is engaged in the business of issuing policies of insurance against sickness, accident, and death; that it is doing business in this state under and by virtue of a permit from the proper officer; that the appellee is the holder of one of the appellant's policies of insurance, without naming the benefits agreed to be paid; that he has promptly paid in full, as they accrued, all of the dues and assessments required of him by the terms of his policy, and is therefore entitled to be regarded as a policy holder in good standing; that, notwithstanding those facts, the appellant is wrongfully threatening to cancel and declare forfeited the policy issued to the appellee; that unless the appellant is restrained from so doing it will cancel and declare forfeited the aforesaid policy of insurance; that the appellee is now over 60 years of age, and, if his policy of insurance is forfeited, he will be without protection, inasmuch as he will be unable, by reason of his age, to obtain any further insurance. It thus appears from the allegations of the appellee that he is asking a court of equity in this state to enjoin the officers and agents of a foreign corporation, domiciled in another state, from doing certain acts in and about their business affairs in that state. The court below having granted the relief prayed for, let us suppose that this court should affirm that judgment. The question would then arise: How is such a decree to be enforced in the event the officers and agents of the appellant company should persist in doing the acts prohibited? Such a judgment could only operate in personam, and obedience to the court's mandate can be compelled only by an attachment of the body of the contumacious individuals and the infliction of some punishment. In the case before us all of the parties against whom the order of the court is directed are permanently domiciled beyond the territorial jurisdiction of the court, and cannot be reached by any process issued therefrom. It is therefore evident that such a decree would be utterly futile. Moreover, the appellant being a foreign corporation, domiciled in another state, it is not within the judicial province of a court of this state to undertake to supervise and direct its internal affairs and management. *Clark v. Mutual Reserve Fund Ass'n*, 14 App. D. C. 154, 43 L. R. A. 392; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; 3 *Cooley's Briefs on Ins.* p. 2841. It is true that there are instances in which a court of equity situated in one state will enjoin the performance of acts beyond its territorial jurisdiction; but this seems to be limited to cases where the parties against whom the injunction is sought reside within the jurisdiction of the court. *Bellogs, etc. v. Rutland*, 28 Vt. 470; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; 1 *High on Inj.* §§ 105, 106."

In *Taylor v. Mutual Relief Life Insurance Co.*, 97 Va. 60, 66, 33 S. E. 385, 388, 45 L. R. A. 621, 625, where the insured sought to have his claimed rights protected by injunction against officers of the company at its home office which was foreign to the terri-

torial jurisdiction of the courts of Virginia, the court observed:

"Process was served upon the agent of the association as provided by statute. The association appeared by counsel, and demurred to the bill. Its demurrer was sustained, and the bill dismissed. From that decree this appeal was allowed.

"Several grounds of demurrer are relied on, but the principal objection urged to the bill is that the case made and the relief sought would require the court to interfere with the internal management of a foreign corporation, a subject-matter over which the court has no jurisdiction. If this objection is well founded, it is decisive of the case, and will render it unnecessary for us to consider the other grounds of demurrer. It seems to be well settled that courts will not interfere with the management of the internal affairs of a foreign corporation. Such questions are to be settled by the tribunals of the state which created the corporation. The reasons for such a rule are apparent. Courts other than those of the state creating it, and in which it has its habitat, have no visitatorial powers over such corporation, have no authority to remove its officers, or to punish them for misconduct committed in the state which created it, nor to enforce a forfeiture of its charter. Neither have they the power to compel obedience to their orders nor to enforce their decrees. *Smith v. Mutual L. Ins. Co.*, 14 Allen [Mass.] 336; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151 [20 Atl. 1039]; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99 [42 Atl. 944], 44 L. R. A. 149 [73 Am. St. Rep. 169]; 6 *Thomp. Corp.* § 8011.

"There is nothing in the act of assembly approved May 18, 1887, entitled 'An act in relation to insurance companies and associations upon the assessment plan' (Acts Ex. Sess. 1887, p. 348, c. 271), which changes the general rule upon the subject, and gives to the courts of this state the right to control or interfere with the management of the internal affairs of a foreign corporation doing business here. Section 8 of that act provides, among other things, that no insurance company or association organized upon the assessment plan shall transact business in this state by an agent, unless it shall first authorize some person who is a resident of this state 'to act as its attorney, and to acknowledge service of process, or upon whom process may be served for and on behalf thereof, which service shall be taken and held to be as valid as if served upon such corporation or association according to the laws of this or any other state.'

"The object of that provision of the act was to secure the residents of this state the benefit and protection of its own laws, and to confer upon its own courts jurisdiction to determine and enforce their rights where the subject-matter of the litigation was within their jurisdiction, or the remedy sought was within their reach. It provides how the corporation can be brought into court, but it does not confer upon the courts, nor does it require such corporations to concede, any right to exercise authority over the organization, the corporate functions, nor the relations between the corporation and its members, nor to determine the rights and duties of the corporation or its members arising under the law of the state of its creation, and depending upon its local laws, nor deprive it of the right to plead a want of jurisdiction on the ground that the subject-matter of the suit, or the remedy sought, is beyond the reach of the court, or not within the sovereign power of the state from which the court derives its authority."

This is of value in showing that the fact that the statutes of a state make provisions for admitting of foreign life insurance associations to do business therein, and for appointment of an agent upon whom service of



process may be made, do not enable the courts of the state to exercise extraterritorial jurisdiction to the extent of controlling the internal affairs of such association. Dealing with this phase of the question in the light of such a statute, the following observations of the court in *Condon v. Mutual Relief Fund Ass'n*, 89 Md. 99, 118, 42 Atl. 944, 948, 44 L. R. A. 149, 154, 73 Am. St. Rep. 169, 179, are of interest here:

"The reasons for thus interpreting these provisions of the Code are conspicuously clear. There are obvious difficulties that would be encountered if the courts of one state undertook to adjust the internal affairs of a foreign corporation formed under the laws of a different state, and having its habitat within the borders of another sovereignty. The absence of a visitatorial power over such a corporation, and the absolute inability to enforce a forfeiture of its charter for a violation of the law, or to remove its officers for misconduct, or to punish them for malversations committed in the place of its domicile, are open and apparent obstacles in the court's pathway, should it assume to exert an extraterritorial jurisdiction. Besides all this, its lack of the means to do full justice, and its want of the machinery to enforce against the corporation, in the place of its existence, any decree it might render in such a proceeding, indicate, if they do not demonstrate, that the Legislature never designed to confer a power the exercise of which would or might be utterly fruitless and vain."

Our statute relating to the appointment of a resident agent for, and service of process upon, foreign fraternal beneficiary societies plainly must be viewed in this same light. *Laws of 1911*, p. 288; *Clark v. Mutual Relief Fund Life Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390; *Jackson v. Hopper*, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658; *Kinney v. Mexican Plantation Co.*, 233 Pa. 232, 82 Atl. 93. These authorities we think are conclusive of the correctness of the disposition of the cause by the superior court. Our attention is called to *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689. That case, however, involved the rights of a member in a fraternal benefit association organized under the laws of this state. The question of extraterritorial jurisdiction of the court did not stand in the way of the granting of such relief as was there held to be proper.

We conclude that the relief asked for by appellant is beyond the power of the courts of this state to grant. We refrain from discussing other questions involved, touching the merits of the controversy.

The judgment is affirmed.

CROW, C. J., and MORRIS, J., concur.

CHADWICK and GOSE, JJ. We concur in the result. This action was brought prematurely in any event. The demand made upon the defendant was a reasonable one and sustained by the authorities. He was not called upon to subject his cause to the jurisdiction of the court of a foreign state.

He was asked to show cause to the company, "in person or otherwise," why his benefit certificate should not be declared void under the rules and by-laws of the society. Instead of meeting this very proper demand at the bar of the society, he has rushed into court demanding that it be determined as a matter of law that the company is about to do him an injury, when under his contract the society has a preliminary right to inquire into the facts and pass its judgment thereon. It will be time enough for plaintiff to seek relief at the hands of the courts when the society has injured or threatened to injure him.

(83 Wash. 230)

DISHMAN v. STROM. (No. 12151.)

(Supreme Court of Washington. Jan. 6, 1915.)

APPEAL AND ERROR (§ 1002\*) — JUDGMENT — CONFLICTING EVIDENCE.

Where the evidence is wholly oral and largely opinion evidence, and so conflicting as to authorize different conclusions, the judgment will be affirmed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by A. T. Dishman against R. E. Strom. From judgment for plaintiff, defendant appeals. Affirmed.

Severin Iverson, of Spokane, for appellant. Lawrence Jack, of Spokane, for respondent.

PARKER, J. The plaintiff commenced this action in the superior court for Spokane county, seeking recovery of rent for a portion of a tract of land which he had purchased from the defendant, and which the defendant continued to hold possession of and occupy after the purchase and after the plaintiff was entitled to possession thereof. The case was tried before the court without a jury, resulting in findings and judgment in favor of the plaintiff, from which the defendant had appealed.

There is no question here presented, worthy of serious consideration, other than the reasonable rental value of the portion of the land held possession of by appellant after the purchase thereof by respondent. This question must be determined wholly from oral evidence, the larger part of which is opinion evidence. It is in serious conflict, leaving ample room for difference in conclusions to be drawn therefrom. The statement of facts comprising only 18 pages of typewriting, we have read all of the evidence therein, rather than depending on the abstract thereof prepared by counsel, and conclude that we would not be warranted in disturbing the learned trial court's conclusion upon the question of reasonable rental value

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the portion of the land which appellant retained possession of.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and MORRIS, JJ., concur.

(83 Wash. 188)

STATE v. NORTHERN PAC. RY. CO.  
(No. 11693.)

(Supreme Court of Washington. Jan. 6, 1915.)

INTOXICATING LIQUORS (§ 138\*)—LOCAL OPTION—TRANSPORTATION TO WHOLESALE—STATUTES—CONSTRUCTION.

Sess. Laws 1909, p. 165, § 18, makes it unlawful for any person to accept or receive for shipment to a consignee within a dry unit any intoxicating liquor on payment of a specified penalty, provided that the act should not apply to shipments or deliveries at residences by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, unbroken packages of liquor, nor should the act prohibit the manufacture of intoxicating liquors from raw materials in a no-license unit, nor the delivery of the same. *Held*, that such act was only intended to prohibit the retail sale of liquor in dry units, and did not prevent a wholesaler from continuing his wholesale business in a dry unit, so long as his sales were all made in wet units; and hence a carrier's transporting liquors to a wholesaler in a dry unit in unbroken packages to replenish his stock, was not a violation of the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Information by the State against the Northern Pacific Railway Company, for alleged violation of the Local Option Law. From a judgment sustaining a demurrer to the information and discharging defendant, the State appeals. Affirmed.

Frank W. Bixby and Walter A. Martin, both of Bellingham, for the State. Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, and Isaac D. Hunt, of Portland, Or., for respondent.

CROW, C. J. Two informations were filed by the prosecuting attorney of Whatcom county against the Northern Pacific Railway Company, a corporation, charging it with a violation of chapter 81, Session Laws of 1909, commonly known as the Local Option Law. By agreement of the parties an amended information was filed in each case.

One of these amended informations, omitting formal parts, reads as follows:

"Then and there being the said defendant, Northern Pacific Railway Company, a corporation, did then and there willfully and unlawfully bring into Bellingham, Whatcom county, state of Washington, on or about the 28th day of April, 1913, a car load of intoxicating liquor; the said defendant Northern Pacific Railway Company being a public carrier, and the said liquor being consigned to the Puget Sound Bottling Works, a copartnership, consisting of Rafael Geri and Benjamin Geri, engaged in part in the sale of intoxicating liquors at wholesale, and

the said Bellingham being then and there a dry unit, under chapter 81 of the Session Laws of 1909. That on or about the 20th day of April, 1913, the said Puget Sound Bottling Works, a copartnership, ordered from a manufacturing wholesale brewery in Portland, Or., the said car load of bottle beer; the same consisting of 405 cases. That the same was delivered in Portland, Or., to the Northern Pacific Railway Company, the above-named defendant corporation, who agreed to transport the said beer to Bellingham, consigned to the said Puget Sound Bottling Works, a copartnership, and issued its bill of lading therefor. That thereupon the said Northern Pacific Railway Company, a corporation, defendant herein, did transport said car load of beer to Bellingham, Wash., the freight having been prepaid by the shipper at Portland, Or. That the said Northern Pacific Railway Company, a corporation, defendant herein, did, as a public carrier, bring the said car load of beer into Bellingham, a dry unit under the Session Laws of 1909, state of Washington, the same being known as the Local Option Law, and the same was transferred to the said consignee, Puget Sound Bottling Works, a copartnership, at the side track of the said defendant corporation in Bellingham, Whatcom county, Wash., on or about the 28th day of April, 1913. That the said Puget Sound Bottling Works immediately transferred the said beer to its warehouse in Bellingham, Wash., the same not being a place of public resort, but a place of storage only, and that subsequently, to wit, on or about May 1, 1913, and on subsequent consecutive days, the said Puget Sound Bottling Works made deliveries therefrom in the original package at various residences in Bellingham, Wash., after the sale of the same by orders taken in wet units."

The other amended information was substantially the same, except that it charged that a car load of bottled beer was consigned to Benjamin Geri, a member of the partnership firm known as the Puget Sound Bottling Works; that the beer had been ordered by Benjamin Geri; that it was delivered to him by the Northern Pacific Railway Company on defendant's side track in the city of Bellingham; that Benjamin Geri immediately transferred the shipment to his private residence; that on the same day and on subsequent days he and the Puget Sound Bottling Works made deliveries in original packages at various residences in Bellingham after sales made by orders taken in wet units.

It will thus be seen that the only material difference between the two amended informations is that in one instance a car load of beer was taken to the warehouse of the firm, while in the other it was taken to the private residence of a member of the firm.

It was stipulated that the two cases might be heard together, and they have been consolidated in this court. The defendant interposed a demurrer to each of the amended informations. Prior to the hearing of these demurrers, the parties filed a stipulation in each case, setting forth certain facts which they agreed should be considered by the trial court in passing upon the demurrers. The facts in the first case thus stated in substance are: That on or about April 20, 1913, the Puget Sound Bottling Works ordered

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from a brewery in Portland, Or., one car load of bottled beer which was there delivered to the Northern Pacific Railway Company for transportation to Bellingham, consigned to the Puget Sound Bottling Works; that, having issued its bill of lading therefor, the railway company transported the beer to Bellingham, the freight thereon having been prepaid by the shipper at Portland, Or.; that the sale to the Puget Sound Bottling Works by the brewery was made at Portland, Or.; that the beer was packed by the shipper in original unbroken packages containing 24 quarts each, and was thus carried and delivered; that it arrived in Bellingham on April 26, 1913, and on April 28, 1913, was delivered by the railway company at its side track; that the Puget Sound Bottling Works, with its own conveyances, transported the beer in the original and unbroken packages to its warehouse in Bellingham; that the warehouse is not a place of public resort, but is a place of storage only; that subsequently deliveries of the beer were made at residences in Bellingham; that the Puget Sound Bottling Works is not engaged in selling intoxicating liquors at retail; that the car load of beer was ordered for its convenience in the matter of making deliveries after it had taken orders for the sale and delivery at residences in Bellingham, Whatcom county, Wash., the sales and orders for such deliveries being made in wet units outside of the dry unit; that the Puget Sound Bottling Works has complied with all license laws with reference to its business; and that the federal statute (Act March 1, 1913, c. 30, 37 Stat. 699 [U. S. Comp. St. 1913, § 8739]), commonly known as the Kenyon-Webb Act, was at all times subsequent to April 1, 1913, in full force and effect. This stipulation is somewhat peculiar, as by its terms it seems to be agreed that the Puget Sound Bottling Works made sales and accepted orders in wet units for delivery in the identical dry unit where its stock of goods was held and located. However, we will consider the facts as they are stipulated. The trial court sustained a demurrer to each of the informations, and discharged the defendants. The state has appealed.

Appellant's contention is that the respondent violated section 18 of the Local Option Act, which reads as follows:

"It shall be unlawful for any person, or public or private carrier to accept or receive for shipment, transportation or delivery to any person or place within any unit in which the sale of intoxicating liquor is forbidden under the provisions of this act, or to carry, bring into or transfer to any other person, carrier or agent, or handle, deliver or distribute in any such unit any intoxicating liquor of any sort or character whatsoever; and whoever shall, either as principal, agent or servant, knowingly violate any of the provisions of this section shall, upon conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars, and upon a subsequent violation of this section, in addition to the fine hereinbefore prescribed, he shall, if a natural person, be imprisoned in the county jail for not less than thirty days nor

more than six months: Provided, however, that nothing herein contained shall be construed to apply to any individual who may bring into such unit upon his person or as his personal baggage and for his private use intoxicating liquor in quantity not to exceed one gallon of spirituous liquor or one case of malt liquor, nor to physicians or druggists to whom any public carrier may deliver such goods in unbroken packages, nor to deliveries to churches or the proper officers thereof of wine in unbroken packages for sacramental purposes, nor to shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, any unbroken packages of liquor, nor to shipments of liquor in continuous transit to a point outside of such unit, nor to shipments of commercially pure alcohol for mechanical or chemical purposes. This section shall apply to all packages of intoxicating liquor, whether broken or unbroken, and the carrying into or delivery of each such package of intoxicating liquor, regardless of the name by which it may be called, accepted, received, carried, transferred, handled, delivered, or distributed in violation of the provisions of this section, shall constitute a separate offense, and any liquor so carried or delivered shall be forfeited and shall be destroyed by the officer seizing the same: Provided, that nothing in this act shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same. \* \* \*

If section 18 were to be considered alone, and if we were to ignore its second proviso, there might be some force in the argument which appellant makes to the effect that shipments of intoxicating liquors in original packages cannot be lawfully made to a wholesaler in a dry unit for the purpose of replenishing his stock of goods, but the language and the intent and purpose of the entire act must be considered. As stated by this court in *State v. Robinson*, 67 Wash. 425, 121 Pac. 848, the manifest purpose of the act is to prevent sales of intoxicating liquor in dry units, but the right of a wholesale dealer to continue his place of business in a dry unit, provided that he made no sales therein, and confines his sales to wet units, was recognized. We there said:

"Section 18 has reference to deliveries, and provides for the shipping and carrying of intoxicants into dry units in unbroken packages from some point without such unit, and seemingly permits the wholesaler, having his place of business within the dry unit, to deliver his goods therein. But this section does not, in the light of the other provisions of the act, permit him to sell his goods in a dry unit. \* \* \* The act is pregnant with but one meaning, and that meaning is that intoxicating liquors shall not be sold in dry units, except by druggists and pharmacists. Any other view would take the life blood out of the act. The wholesaler within a dry unit must, like his competitor without that unit, make his sales in wet territory."

Section 10 of the act provides that within ten days after the date when the result of any election under the act has become operative, every retail liquor dealer within the dry unit shall remove or cause to be removed all intoxicating liquor from his place of business, and that failure so to do shall be prima facie evidence that such liquor is kept for the purpose of being sold, given away, or

otherwise disposed of, in violation of the provisions of the act. There is no such provision as to wholesalers. Section 20 provides that the issuance of an internal revenue special tax stamp or receipt by the United States to any person as a retail liquor dealer at any place within a unit in which, at the time of the issuance thereof, the sale of intoxicating liquor was forbidden shall be prima facie evidence of the sale of intoxicating liquor by such person, but provides that the section shall not apply to wholesalers. There is no provision in the act making it unlawful for a wholesaler to have his place of business in a dry unit, and store his stock of goods therein, although his sales, if any, must be made in wet units exclusively. Neither is there any provision in the act requiring the wholesaler to dispose of his stock of goods at any time after the local option statute takes effect in the dry unit where his place of business is located. Appellant contends that the only purpose of the provision of the act requiring a retailer to dispose of his stock of goods, while permitting a wholesaler to retain his, was to afford the wholesaler a reasonable time within which he might gradually dispose of his stock by sales made in wet units in the due course of trade, but that section 18, which prohibits the shipment of intoxicating liquors into a dry unit, discloses an evident intention that the wholesaler shall not be permitted to replenish his stock within such dry unit. If the Legislature had so intended, it certainly would have so stated in an act of the length of the one now before us. Our construction is that the wholesaler is permitted to retain his place of business and store his stock of liquors in the dry unit, but that he cannot make any sales in such dry unit. If the act so contemplated, and it certainly does, the wholesaler could not continue his business of making sales in wet units without the right of replenishing his stock and receiving shipments for that purpose. The question naturally arises: How could he maintain his stock unless it may be shipped to him from outside of the dry unit, and be delivered to him in original packages by a common carrier? The second proviso of section 18 is:

"That nothing in this act shall be construed to prohibit the manufacture of intoxicating liquors from the raw material in any no-license unit, nor the delivery of the same."

The history of the adoption of this proviso by the Legislature is set forth by Judge Chadwick in his dissenting opinion in *State v. Bellingham Bay Brewing Co.*, 70 Wash. 658, 127 Pac. 298. Construing this proviso, and especially the last clause "nor the delivery of the same" in the light of the entire act, and in connection with the fact that the wholesaler may maintain a place of business and have a stock of intoxicating liquors in a dry unit for the lawful purpose of making sales in wet units, it would seem that the

respondent committed no offense when it delivered liquors in unbroken packages to the wholesaler in the dry unit. It may be that this construction of the statute will afford the wholesaler a better opportunity for evading and violating the law by making illegal sales in a dry unit after he thus obtains his stock of goods; but, if so, the responsibility lies with the Legislature, and not with the courts, and the remedy, if any, must be obtained by legislation, and not by judicial interpretation. If a wholesaler should violate the law by making illegal sales within a dry unit after he has lawfully obtained his stock of intoxicating liquor within such dry unit, criminal prosecutions should be instituted against him, and not against the common carrier which lawfully delivered his stock of liquors. Our conclusion is that the trial court committed no error in sustaining the demurrers. The conclusion we have reached makes it manifest that the Kenyon-Webb Act has no application to the facts of this case.

The judgment is affirmed.

MAIN, MORRIS, ELLIS, and GOSE, JJ., concur.

(83 Wash. 196)

NICHOLSON v. KILBURY. (No. 11785.)

(Supreme Court of Washington. Jan. 6, 1915.)

# 1. PARTNERSHIP (§ 5\*)—WHAT CONSTITUTES.

A partnership is effected by a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, First and Second Series, Partnership.]

# 2. PARTNERSHIP (§ 53\*)—EXISTENCE—PROOF.

It is not necessary that a partnership be proven by direct evidence, but its existence may be implied from circumstances, especially where the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory, showing that the parties have entered into a business relation combining their property, labor, skill, or experience, or some or all of them, on one side, and some on the other for joint profits.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.\*]

# 3. PARTNERSHIP (§ 53\*)—PROOF—EVIDENCE.

Evidence held to establish the existence of a partnership between complainant and defendant's intestate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.\*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Lucy Nicholson against T. T. Kilbury, as administrator of the estate of Emma Ju. Kilbury, deceased. Judgment for de-

defendant, and plaintiff appeals. Reversed and remanded, with directions.

Voorhees & Canfield and C. E. H. Maloy, all of Spokane, for appellant. Peacock & Ludden and H. G. Kinzel, all of Spokane, for respondent.

ELLIS, J. This is an action against an administrator for an accounting and settlement of the affairs of a partnership which it is claimed existed and continued between the plaintiff and the decedent from the fall of 1892 to the time of the decedent's death in October, 1911.

The evidence is very voluminous, and much of it of little materiality. We cannot within the reasonable limits of an opinion set out more than the salient facts developed. It is not claimed that the contract of partnership was in writing, and, since one of the alleged partners is dead, the plaintiff could not testify to any express contract between her and the decedent. The evidence was therefore directed to an effort to establish the partnership by circumstantial evidence and the admissions of the decedent to various persons at different times throughout the existence of the alleged partnership. The following facts are either admitted or so thoroughly established by the evidence as to be beyond controversy.

The plaintiff was a niece of and lived with the decedent as a member of her family from the time she was a girl of 14. In the fall of 1892, when the plaintiff was about 17 years of age, she, with the decedent's family, moved from Sprague, Wash., to Spokane. She then possessed, by inheritance from her mother, furniture worth somewhere in the neighborhood of \$1,000, and sufficient to furnish eight or ten rooms in a lodging house. This furniture was used in furnishing a lodging house on Sprague avenue, in the city of Spokane. The plaintiff was a girl of unusual energy and executive ability, and gave her whole time and attention to the development of the rooming house business conducted in the name of her aunt. The Sprague avenue house was conducted until March, 1893, when the plaintiff's furniture was moved to another house No. 225 Howard street, known as the Little Metropolitan Hotel, which was conducted from March, 1893, until some time in 1898. In the spring of 1893 the plaintiff, through final settlement with her guardian, received \$570 in money, which was also used in equipping the Little Metropolitan Hotel. The business prospered, and in 1895 or 1896 another lodging house on Howard street, known as the Star was purchased. In 1897 another lodging house known as the Lauman House, on Riverside avenue, was purchased, furnished, and conducted as the other houses. It appears that from March 1893, until some time in 1898, from one to three hotels were being successfully operated with considerable profit. In 1898 the three houses above mentioned were disposed of and a house procured

at 220 Howard street, known as the Big Metropolitan Hotel. This was conducted until 1904, when it was sold and a larger establishment, known as the Riverside Hotel, was opened. This house was operated until 1909, when it was traded for two pieces of property in Whitman county, a farm and seven lots in the town of Rosalia. During nearly all of the time that the various lodging houses and hotels were operated, the plaintiff gave to them her constant attention, and for a part of the time conducted one or more of the houses with very little assistance from her aunt. It appears that for about 14 or 15 years of this period the plaintiff devoted all of her time and energy to the business, receiving no pay save her living. During the progress of the hotel business a farm in the Big Bend Country near Edwall was purchased, also two lots in Cook & King's addition to Spokane. The Edwall property was sold in 1902 and two lots in Moore's addition to Spokane purchased. This property is known in the record as the Mansfield property. During this period, also, the decedent purchased an interest of certain of the other heirs in the estate of Amanda J. Fry, known as the Joseph Fry estate. The evidence as to this estate is not clear, but the plaintiff admitted that two notes aggregating \$3,400 in amount given for a sale of a part of the Fry land, known as the Markel notes, were the personal property of the decedent and not partnership property; the land which they represented having come to decedent as one of the Fry heirs. In 1907 three lots in Peter Sapro's addition to Spokane were purchased. This property is spoken of in the record as the Fairview of home property. In 1899 the decedent married the defendant, T. T. Kilbury, who is now the administrator of her estate. In 1906 the plaintiff also married. For a short time after her marriage plaintiff lived in the Fairview or home property, but afterwards returned to the hotel and devoted her time to its operation for a while; but it appears that during the last year and a half of its operation it was mainly conducted by the decedent. The decedent had no property whatever at the time of embarking in the lodging house business. All of the furniture and money for starting the business were furnished by the plaintiff. All of the money for the purchase of furniture of the various hotels and for the purchase of the several properties, save such sums as the defendant claims that he himself furnished, was produced from the profits of operation and the proceeds of the sale of the various hotels. It clearly appears from the evidence that during the progress of the business the plaintiff and the decedent from time to time drew from the profits of the business such moneys as were necessary for their living expenses, but had no accounting of any kind touching the partnership business.

The uncontradicted evidence shows that the decedent many times from 1893 up to her

last illness in 1911 stated to several witnesses that the plaintiff was a partner in the business and was entitled to half of everything that the decedent held in her name. These statements were made to one A. L. Ritz, a brother-in-law of the decedent, many times during the years 1908 and 1909 and shortly before her death in 1911. He testified that the decedent at these times told him that all the money and property they owned when they opened the Little Metropolitan Hotel was Lucy's; that the decedent then had no money; that she (the decedent) had made whatever she had from that hotel as the start; and that Lucy had a half interest in the business. One Margaret Frary also testified that about the year 1898 she was living and boarding at one of the hotels in question, was well acquainted with the decedent, and that the decedent several times said to her that the plaintiff was a partner in the business and just as much entitled to her share of the profits as she (the decedent) was. Two other disinterested witnesses, one Miller and his wife, testified that they had lived and boarded at the Little Metropolitan Hotel in the year 1896 for a short time, and again in the year 1897, and at times during the years 1898, 1899, and 1900 at other hotels conducted by the plaintiff and the deceased. Both testified that many times during those years the decedent had said to them that the plaintiff was a partner in the business and entitled to one-half of all that she (the decedent) had at any time. These witnesses also testified that when the decedent in 1899 married the defendant, or shortly after the marriage, the decedent said to Mr. Miller that the plaintiff was threatening to withdraw from the business and demanding a settlement; that if she persisted in that course it would ruin her (the decedent), and asked Miller to intercede with the plaintiff and persuade her to let the business continue as before; that he did this with the result that the matter was not pressed and the decedent afterwards thanked him for his good offices in the matter. The decedent's two sons both testified that, at the time of the opening of the rooming house on Sprague avenue in 1892, the plaintiff's furniture was practically all of the furniture used in furnishing the house; that on the opening of the Little Metropolitan Hotel in the spring of 1893 the plaintiff's furniture and something over \$500 of the plaintiff's money were used in furnishing that hotel; that the decedent had no property of any kind at that time; and that the decedent, throughout all of the period when the hotels were being conducted, recognized the plaintiff as a full partner in the business and often said to them and in their presence that the plaintiff was her partner and entitled to half of everything she (the decedent) had.

As opposed to all of this evidence tending to show a partnership, there is but one circumstance worthy of serious consideration

not in harmony with the partnership theory. That is the fact which is undisputed that, throughout all of the period covered by the alleged partnership operations, all of the business was conducted in the name of the decedent either as E. J. Smith or E. J. S. Kilbury; that the bank account was kept in her name; and that the title to all property purchased was taken in her name.

There were other circumstances testified to by defendant which it is asserted refute the claim of a partnership. To conserve space we shall notice these but briefly. The defendant lived at intervals at the Sprague rooming house, at the Little Metropolitan Hotel, and other hotels conducted in the decedent's name prior to his marriage to the decedent in 1899. He claims that during these times he devoted his own time and labor to the promotion of the business, and, when he was otherwise employed, turned over to the decedent whatever moneys he received above his own living expenses; that after the marriage he assisted the decedent in conducting the hotels and operating the farms, and spent some of his own money in improving the farms and the other properties. He also joined with her in the execution of certain notes and mortgages for moneys borrowed and secured on some of these properties, and the proceeds of such loans were used in the purchase and improvement of the properties. There were also introduced in evidence various bills and receipts rendered and given in connection with the hotel business running to the decedent or to the decedent and her husband, the defendant.

The trial court made no findings of fact or conclusions of law, but, after all of the evidence was in, entered a decree that the plaintiff take nothing by her action, but go hence without day, and that the defendant, as administrator of the estate of Emma J. Kilbury, deceased, receive his costs. The plaintiff has appealed.

[1] The sole question presented by this appeal is whether the evidence was sufficient to establish the alleged partnership. Chancellor Kent defines a partnership as:

"A contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions." 3 Kent's Commentaries, p. 24.

See *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249.

There is no arbitrary rule by which it may be determined whether a partnership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties.

[2] While a contract of partnership, either expressed or implied, is essential to the crea-

tion of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory. *Bridgman v. Winsness*, 34 Utah, 383, 98 Pac. 186. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established. *McDonald Bros. v. Campbell & Bergeson*, 96 Minn. 87, 104 N. W. 760; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611; *Price v. Middleton & Ravenel*, 75 S. C. 105, 55 S. E. 156.

[3] In *Haug v. Haug*, 193 Ill. 645, 61 N. E. 1053, a case closely analogous to that in hand in all points save that there the business was conducted under a partnership name, the court, holding that the partnership was established by circumstantial evidence, said:

"There is no evidence in the record of any express contract of partnership or written agreement of partnership between the parties. It is well settled, however, that written articles of agreement are not necessary to constitute a partnership, but that a partnership may exist under a verbal agreement. *Bopp v. Fox*, 63 Ill. 540. The existence of a partnership may be implied from circumstances. *Kelleher v. Tisdale*, 23 Ill. 405. A partnership may arise out of an arrangement for a joint business, wherein the word 'partnership' may not have been used. 'If there is such a joinder of interests and action as the law will consider as equivalent and regards as in effect constituting a partnership, it will give to the persons so engaged all the rights, and lay upon them all the responsibilities, and to third persons all the remedies which belong to a partnership.' *Morse v. Richmond*, 6 Ill. App. 166. It is also well settled that when, by agreement, persons have a joint interest of the same nature in a particular adventure, they are partners *inter se*, although some contribute money and others labor. Such a partnership may well exist, although the whole capital is in the first instance advanced by one party, and the other contributes only his time and skill and ability in the selection and purchase of the commodities. *Robbins v. Laswell*, 27 Ill. 365."

It is true that in that case the use of the partnership name was regarded as the most potent fact in evidence; still the other circumstances tending to establish the partnership were neither undisputed as here, nor by any means so convincing as those found here.

In *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195, the alleged partnership involved the operation of a rural telephone business. No formal agreement

was ever made. The title of the original stem from which the system was developed was taken in the name of one of the alleged partners. The other party, however, advanced the money for the purchase of this nucleus, to buy new material and to operate the business. The parties operated the business together. The court held that these circumstances were sufficient to establish the partnership, notwithstanding the lack of any express contract, either written or oral. The opinion implies that no partnership name was used in any part of the operation of the business. The court, speaking through Winslow, C. J., said:

"But it is not necessary that the partners should call themselves such. If they engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share profits as such, there will be a partnership, whatever they may call themselves. Nor need an express contract, either written or oral, be shown. Like other contracts which the law does not require to be in writing, a contract of partnership may be proven by circumstantial evidence; that is, by showing acts and conduct of the parties from which the fact may be inferred that the parties have agreed to become partners and share profits as such."

In view of all the evidence in this case, we give little weight to the fact that the business was conducted and titles taken in the decedent's name. When the business was started, the appellant was a mere girl. The other party to the venture was her aunt. Whatever their relative interest in the business, it seems only natural that it should be conducted in the name of the aunt. Since the aunt at all times admitted the partnership relation, it is not strange that the business was continued in her name. Nor do we see much probative force in the respondent's claim that he contributed of his own time and funds to the business. That contributed before the marriage was clearly a gift to the deceased, whom he then intended to marry. That contributed after the marriage would tend only to establish a community interest in his wife's half of the partnership property. Whether it would be sufficient even for that purpose we do not decide. It is true that in the summer of 1907 a set of books was opened in the name of the respondent and the deceased, but that was near the end of the hotel business, and after the appellant had already contributed some 14 or 15 years of her life and energy to its development. The circumstance is worthy of little consideration. The fact that the respondent joined in the execution of certain notes and mortgages is readily explained by the well-known fact that the paper of a married woman is seldom taken without requiring that her husband join therein. Upon the whole record, we are clear that the partnership was fairly established. We fail, however, to find any evidence of an understanding that the appellant should receive a return of the money and the value of the furniture which she originally contributed to the enterprise.

The judgment is reversed, and the cause is remanded, with direction to enter a decree in favor of the appellant establishing her undivided one-half interest in the entire estate, save the proceeds of the Markel notes, which it was admitted represent property which came to the deceased by inheritance.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

(83 Wash. 206)

LUDWIGS et al. v. CITY OF WALLA WALLA et al. (No. 11808.)

(Supreme Court of Washington. Jan. 6, 1915.)

1. LIMITATION OF ACTIONS (§ 60\*)—ACCRUAL—CHANGE OF GRADE—EQUITABLE RELIEF.

Where city ordinances fixing the established street and curb grades for certain streets had never been repealed, but were violated by the city in lowering a curb grade in 1904, when a four-foot strip of new sidewalk was laid at a level below the established grade, the city's wrong consisting of compelling the reconstruction of the old sidewalks to comply with the new grade dated from each actual physical change, and hence a property owner's suit, instituted in 1912, to restrain the city from enforcing such order, was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 333-341; Dec. Dig. § 60.\*]

2. EMINENT DOMAIN (§ 101\*)—STREET GRADES—CHANGE—DAMAGES.

Where a city by ordinance has established a street and curb grade for both roadway and sidewalk, both the city and adjoining property owners were bound to conform to such grade, and the city after such conformity could not change the grade without payment of damages resulting to the property owners thereby.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

3. MUNICIPAL CORPORATIONS (§ 656\*)—STREET GRADES—ORDINANCES—REPEAL—AMENDMENT—MOTION.

Where a city had established street and sidewalk grades by formal ordinances, they could not be repealed or amended by mere order or motion.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 656.\*]

4. MUNICIPAL CORPORATIONS (§ 394\*)—STREETS—CHANGE OF GRADE—DAMAGES.

Where a city, in violation of certain grade ordinances, improved a street on a grade below the official grade, abutting owners could not recover damages for the destruction of their old sidewalks so far as they did not conform to the official grade, but were entitled to recover such damages as resulted solely from lowering the sidewalks contiguous to their property below the established grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 933-945; Dec. Dig. § 394.\*]

Department 1. Appeal from Superior Court, Walla Walla County; Edward O. Mills, Judge.

Action by George Ludwigs and others against the City of Walla Walla and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

John F. Watson and Thos. H. Brents, both of Walla Walla, for appellants. H. S. Blandford, Sharpstein & Sharpstein, and T. P. & C. C. Gose, all of Walla Walla, for respondents.

ELLIS, J. Four separate actions were brought to enjoin the city of Walla Walla from enforcing an order that sidewalks adjacent to the properties of the respective plaintiffs be removed and new sidewalks laid at their expense. The issues being practically the same, the four cases were by stipulation consolidated. The plaintiffs are the owners of certain business properties, some of which abut on the south line of West Main street, some on the west line of South Third street, and some on both of these streets. All of these properties are in the plat of the original town, now city, of Walla Walla. Between the years 1875 and 1878 the city council caused the streets in question to be surveyed, grades established, and profiles prepared by the city surveyor, and adopted and caused to be filed in the office of the city clerk the profiles of the grades so established.

On September 6, 1878, Ordinance No. 17 was passed making it unlawful for any person to construct any sidewalk or gutter except in accordance with the ordinance; requiring a permit from the committee on streets for such work; requiring the city surveyor upon application to make the necessary surveys for such work; requiring a certificate of the surveyor as to the accuracy of any such work before acceptance by the council; and providing for sidewalk locations and curb grades as follows:

"Sec. 9. The grade of Main and parallel streets hereafter established shall run from center to center, and the curbs of those streets shall correspond to the official grade of the center of the street opposite. The grades of streets running from north to south, on the intersection of Main and parallel streets shall be level and shall run from line of block to line of block, the grade of the curb lines conforming to the official grade of cross-street, and running with grade parallel to the center of the street.

"Sec. 10. In all cases not otherwise provided for the curbs shall correspond to the official grade of the street of which said sidewalk shall form a part. Sidewalks shall rise from the curbs to the line of the block at the rate of one-fourth of an inch to every foot of width, and where the covering planks do not cover the whole width of the sidewalks the space not covered shall be filled to the top of the curb; the width of all sidewalks hereafter laid on streets eighty (80) feet wide shall be twelve (12) feet and upon streets one hundred (100) feet wide shall be sixteen (16) feet measuring from the line of the block to the outside of the curb."

On November 26, 1880, the council by Ordinance No. 81 established a certain bench mark 100 feet above the base grades of the city as the initial bench mark of all levels thereafter to be run in the city.

On January 4, 1881, Ordinance No. 88 was adopted establishing the grades of Main street at the intersections of the center line



with the cross-streets, at specified heights above the base grades of the city.

In 1881 the city, by special assessment against the abutting properties, graded and improved the roadways of Main and Third streets substantially to the grades so established.

The buildings on the Ludwigs property, or some of them, were first erected in 1881. All of the other buildings on all of the properties involved were built about the year 1887. So far as the record shows, none of the then owners of any of the properties secured any grades or surveys for the construction of these buildings. All that appears is that in the construction of the Ludwigs buildings the levels were taken from the physical surface of the crown of Main street. Wooden sidewalks were first constructed. In 1899 an ordinance was passed prohibiting wooden walks within certain limits including the properties here in question. During the year 1900 and 1901 the several plaintiffs constructed cement concrete sidewalks along the adjacent streets here involved, replacing the old wooden sidewalks. None of these parties secured grades from the surveyor as required by the ordinance. Ludwigs claims that he was told by the chairman of the street committee to put his sidewalks on the same grade as the old wooden one, but the then city surveyor testified that he warned Ludwigs that he was building his walk off grade and urged him to use the official grade. At any rate, the trial court found that all of these concrete sidewalks were above the official grade, and none of the plaintiffs excepted to the finding. We therefore accept it as a fact.

In 1904 the city by ordinance created local improvement district No. 2 for the pavement of the streets here involved with asphalt on a concrete base. The district included all of the above-mentioned properties. Main street is 100 feet, Third street 80 feet, wide. As formerly improved, the roadway on Main was 68 feet, and on Third 48 feet wide. The width of sidewalks was, on Main 16 feet, on Third 12 feet. The plan of the new improvement narrowed the roadway on Main to 60 feet, on Third to 40 feet, thus extending the curbs 4 feet further into the streets on each side. The improvement consists of the pavement of the roadway from curb to curb, the construction of concrete curbs on each side of the narrowed roadway, and the laying of a 4-foot strip of concrete sidewalk from the new curb to the old sidewalk. The two sidewalks failed to meet, the old being several inches higher than the new. The crown of the asphalt pavement conforms substantially to the elevation of the center grade line of Main street as established in 1881 by Ordinance No. 88. The curbs, however, do not conform to Ordinance No. 17 as applied to that grade. All the curbs on Main street are 5 inches lower than the established center

grade line of Main street, and on Third street 4 inches lower than the opposite center line of Third street. The same lowering of the curbs prevails throughout the whole district. This happened in this way: The city engineer adopted the property line, instead of the curb line, as the base of the sidewalk grades, thus reversing the rule plainly prescribed in Ordinance 17, above quoted. Obviously, taking the property line as the base on a level with the center line of the street and sloping thence down to the curb, 16 feet distant on Main street and 12 feet distant on Third street, at the rate of  $\frac{1}{4}$  inch to the foot, would make the curb just 4 inches lower with a 16-foot walk and 3 inches lower with a 12-foot walk, and 5 inches lower with a 20-foot walk than would have been the case had the ordinance been followed by taking the 16-foot curb line on Main street and the 12-foot curb line on Third street as the base on a level with the center line of the street, and sloping the sidewalk grade thence up  $\frac{1}{4}$  inch to the foot to the property line and down  $\frac{1}{4}$  inch to the foot to the new curb. An attempt was made to justify this departure from the ordinance on the ground that for years that plan had been followed because of the varying heights of the crown of the streets before there were any permanent pavements. The actual physical crown of a street is, however, a very different thing from the officially fixed grade of the center line of the street. The crown would, of course, vary with the state of repair of the street. The grade being a fixed line with reference to the city datum would be invariable. It is clear from the evidence that this confusion of crown with official grade has led to the blunder of placing the curbs in this district from 4 to 5 inches below the official curb grade.

The court found, in substance, all of the facts as above outlined, and further found that the plaintiffs' sidewalks are all above the official grade, while the strip of new sidewalk laid by the city is on Main street 4 inches, and on Third street 3 inches, below the official sidewalk grade of the respective streets, and that the lowering of the sidewalks adjacent to the plaintiffs' properties will damage the plaintiffs' properties in addition to what they were damaged upon the making of the permanent improvement by the city in 1904. The defendants were accordingly enjoined from compelling the lowering of the plaintiffs' sidewalks to conform to the new strip of sidewalk until these damages have been assessed and paid. The defendants appealed.

[1] The appellants contend that the actions are barred by the statute of limitations because the curb grade was lowered in 1904, and these actions were not commenced till 1912. It must be remembered, however, that neither Ordinance No. 17 nor Ordinance No. 88, which fixed the established street and curb



grades, has ever been repealed. They have merely been violated. The official grade has never been changed. The wrong therefore dates from each actual physical change. The respondents may be barred of any remedy for the construction of the four-foot strip of new sidewalk which was laid in 1904. They are not barred as to the threatened enforced lowering of the old sidewalks adjacent to their properties to a level below the established grade.

[2] The appellants also contend that under the decision in *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 699, to the effect that all that is required of a city is to construct the sidewalk with reasonable reference to the established grade of the roadway, no damages can be recovered in this case in any event. On the other hand, the respondents argue from the same case that their own old sidewalks, though higher, reasonably conform to the official grade of the roadway. That case, however, was decided upon its own facts. No grade had ever been established for the sidewalk area, either with reference to the center line of the roadway or otherwise. The sidewalk there involved was the initial improvement of the sidewalk area. So far as appeared, its level was the only official grade ever established. The sum of that decision is that, in an initial improvement, the laying of a sidewalk ten inches higher than center of the roadway in a residence district is not, per se, an abuse of the city's acknowledged power to establish original grades for its sidewalks. Here the city had actually established a grade for both roadway and sidewalk by formal ordinances. Both parties were bound to observe that grade and conform to it. A definite grade once established or long recognized by the city in improving the street cannot be changed without payment of any damages which may result to the owner of abutting property. *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304.

[3] The respondents urge that the city by an order in 1891 raised the grade of Main street from Fourth to Second streets six inches. As pointed out in *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, 137 Pac. 819, there is no evidence that this order had any reference to the sidewalk area or curb grades, but there is another reason why it could have no such effect. The grades had already been established by formal ordinances. These ordinances could not be repealed or amended by a mere order on motion. *McQuillin, Municipal Ordinances*, § 210.

The clearly established fact that in this case the city, in violation of the provisions of Ordinance No. 17, adopted the property line as the base for the sidewalk grade, instead of the curb line 16 feet from the property line on Main street, and 12 feet from the property line on Third street, thus lowering the

established curb lines 4 and 3 inches, respectively, distinguishes this case from that presented in *Jones v. Gillis*, supra. In that case there was no evidence that the sidewalk grade did not conform to the center line of the street. In fact, it is said in that case that the strip of new sidewalk was "about level with the crown of the street."

[4] The respondents are not entitled to recover damages for the destruction of their old sidewalks so far as they do not conform to the official grade. They are, however, entitled to such damages as may result solely from lowering the sidewalks contiguous to their properties below the established grade. The judgment is affirmed.

CROW, C. J., and CHADWICK, MAIN, and PARKER, JJ., concur.

(88 Wash. 225)

RASTELLI v. HENRY et al. (No. 12139.)

(Supreme Court of Washington. Jan. 6, 1915.)

1. MASTER AND SERVANT (§ 236\*)—QUESTION FOR JURY—MASTER'S NEGLIGENCE.

In an action for injuries to a contractor's employé thrown in front of the donkey engine on which he was riding by a pinch bar on its running board striking a dump of sand, *held*, on the evidence, that whether the foreman should have anticipated the result was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

2. MASTER AND SERVANT (§ 219\*)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

An employé assumed the open and obvious dangers of the work, but not those that were not open and obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

3. MASTER AND SERVANT (§ 265\*)—ACTION FOR INJURY—BURDEN OF PROOF.

In a servant's action for injury, the burden of proving that he assumed the risk or was guilty of contributory negligence was upon the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

4. MASTER AND SERVANT (§ 288\*)—ACTION FOR INJURY—QUESTION FOR JURY—ASSUMPTION OF RISK.

In action by an employé for injury from being thrown from the running board of a donkey engine when an iron bar on the running board struck a dump of sand, *held*, that his assumption of risk was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

5. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence of an employé *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Dominick Rastelli against L. O. Henry and another, doing business as Henry & McPhee. Judgment for plaintiff, and defendants appeal. Affirmed.

Peters & Powell and Geo. E. de Steiguer, all of Seattle, for appellants. Burton E. Bennett, of Seattle, for respondent.

GOSE, J. The plaintiff was injured while engaged in the service of the defendants, and seeks compensation upon the theory that the defendants were negligent. The jury adopted the plaintiff's view of the case, and the verdict was made effective by a judgment. This appeal followed. This is the second appeal. *Rastelli v. Henry*, 73 Wash. 228, 131 Pac. 643.

The facts are fully stated in the opinion on the former appeal. In brief they are as follows: The respondent is an Austrian by birth, was 26 years of age at the time he met his injury, and was experienced in railroad construction work. He had worked for the appellants about 8 days. The appellants were making a fill for a side track. The respondent worked a part of a day along the fill. He was then put to work as a pitman; that is, working about a steam shovel. The dirt for the fill was loaded onto cars by means of a steam shovel. The cars were hauled on a temporary track to the fill, where they were dumped. It was customary for the men who dumped the cars to level the dirt immediately. The respondent testified that, on the morning of the accident, the appellants' foreman directed the steam shovel crew to get onto the donkey engine and go down the track for the purpose of putting a steam or leveling plow onto the track; that the foreman directed him to take a frog weighing 25 or 30 pounds (others say 80 pounds) with him; that he did so; that he attempted to get on the back part of the engine, and found the space all taken; that the foreman then said to him to get on in front; that he got on in front with the frog, and noticed a pinch bar lying upon the running board; that he stepped upon the running board and had to hold to the frog; that the engine started at once; that after they had gone some distance, the pinch bar shifted so that it projected over the end of the running board, came in contact with an earth dump, and threw the plaintiff in front of the engine in such a way that his leg was cut off. The foreman testified that a few dumps had been left near the edge of the temporary track the day before to be leveled with the plow car as soon as it was placed on the track. A witness for the respondent testified that the foreman put the pinch bar on the running board of the engine. The pinch bar was four or five feet in length and weighed 12 to 15 pounds. Respondent said that just as soon as he got onto the footboard the engine started, and that the whole crew, including the engineer, was under the direction

of the foreman. The witness who testified that the foreman put the pinch bar on the footboard said that the foreman told the respondent to get on in front, and said, "Hurry up; jump on in front," and that the respondent obeyed the order. A witness testified that the dumps are usually leveled at once by the men who dump the cars. The testimony shows that the foreman knew that the dumps were there. There is no evidence that the respondent knew this fact. The inference is that he did not, because, as we have said, the testimony is that the custom was to level the dumps at once. The foreman testified that he did not put the pinch bar on the engine, and that he did not know the respondent was upon the front of the engine until after he had been injured.

The appellants contend: (1) That the injury could not have been reasonably foreseen or anticipated; (2) that the respondent assumed the risk and was guilty of contributory negligence.

[1] In the light of the facts stated, we think it was for the jury to say whether an ordinarily prudent foreman ought reasonably to have anticipated the results that followed. The jury were warranted in believing that the foreman placed the pinch bar upon the running board, and the foreman testified that he knew of the presence of the dumps. The jury were also warranted in believing that a reasonably prudent man would have anticipated that the motion of the engine might cause the pinch bar to project beyond the end of the footboard.

[2-5] Questions of assumed risk and contributory negligence will be considered together. The respondent was a man experienced in railroad construction work. He knew that cars were being loaded with dirt and that dirt was being dumped into the fill; but there is no testimony that he knew that the dumps had not been leveled. He assumed the open and obvious dangers, but he did not assume those that were not open and obvious. He knew of the presence of the pinch bar. As a man experienced in such work, he knew that the track was a temporary one, and that the pinch bar might joggle over the end of the footboard. The proximate cause of the injury, however, was the presence of the pinch bar and the dump of earth. He knew of the presence of one of the elements, but not of the other. The burden of proving that the respondent assumed the risk or that he was guilty of contributory negligence was upon the appellants.

It is argued in this connection that the respondent voluntarily chose the running board which was a dangerous place, when he might have stood upon the deadwood, which was a safe place. The answer to this is twofold: First, he did not know of the presence of the dump; second, he was told to "hurry up; jump on in front," and just as soon as he got onto the running board with the frog the en-

gine started. The jury were warranted in believing this testimony, and, if they did believe it, the respondent had little time or opportunity for selecting a safe place or for determining which was the safer place, the deadwood or the footboard.

It is said that respondent should have laid the frog upon the rods or handrails which were attached to the engine, and that he should have taken hold of one of these rods. He testified that he could not so place the frog, and that he had to hold it. The photographic views of the engine do not conclude him upon the question, in view of the haste with which he was required to act.

The appellants have cited a line of authorities which would be in point if the respondent had been injured because of any defects in the temporary track. The respondent testified that he knew that the track was not good. He, of course, knew that it was a temporary track. He knew the character of the work. Indeed, he knew every condition and every element present, save one—the dump of earth.

We think the case was one for the jury.

The judgment is affirmed.

CROW, C. J., and PARKER, J., concur.

CHADWICK, J. It is my opinion that the former decision of this court (73 Wash. 228, 131 Pac. 643), is wrong. The danger was obvious, and the risk was incident to the work then being done by the plaintiff and his associates, but this court held, inferentially at least, that if there had been testimony tending to show that the foreman himself had placed the pinch bar on the footboard, that it would be for the jury to say whether it was an act of negligence and the proximate cause of the injury. That decision, it seems to me, compels the present holding, and for that reason I concur in the result.

(83 Wash. 118)

WECHNER et al. v. DORCHESTER.  
(No. 12033.)

(Supreme Court of Washington. Dec. 4, 1914.)

1. ESTOPPEL (§ 101\*)—JUDGMENTS—SALE OF INTEREST—RIGHT TO SHERIFF'S DEED.

E., the holder of judgment liens, after redeeming the property from a mortgage foreclosure sale to A., caused the property to be sold to B. under executions issued on his judgments. Meantime A. procured a quitclaim deed from the original owner's transferee. Thereafter E. assigned to D. the certificate of redemption under the mortgage foreclosure. These sales and assignments were properly recorded, and all parties had notice at all times of their execution. Held, that the act of D. in thereafter selling his interest under the judgments and the certificate of sale thereunder to A. for the price paid by D. did not estop D. from demanding and receiving a sheriff's deed for the property under his certificate of redemption from the mortgage sale.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 293; Dec. Dig. § 101.\*]

2. ESTOPPEL (§ 54\*)—CONDUCT—WANT OF KNOWLEDGE—NECESSITY.

To create an estoppel it is necessary that the party claiming to have been influenced by another's conduct to his injury shall have been destitute of knowledge of the facts and of any available means of acquiring such knowledge, and that the facts shall have been equally within the knowledge of the parties, or that both shall not have had the same means of ascertaining the truth.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.\*]

For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

Department 2. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by R. L. Wechner, administrator of the estate of J. J. Attridge, deceased, and others, against H. G. Dorchester. Judgment for plaintiffs for a certain sum, but denying cancellation of deed and refusing to quiet title in them, and plaintiffs appeal. Affirmed.

Miller, Crass & Wilkinson, of Vancouver, for appellants. H. W. Arnold, of Vancouver, for respondent.

MOUNT, J. This action was brought to cancel a deed upon certain real property, and to quiet the title thereto in the plaintiffs. Upon issues joined the cause was tried to the court without a jury. Findings of fact were made and a judgment was entered awarding the plaintiffs \$665.47, with interest thereon, but denying a cancellation of the deed, and refusing to quiet the title in the plaintiffs. The plaintiffs have appealed.

[1] The principal facts in the case are stipulated, and are, in substance, as follows, stated in chronological order: In the year 1908 Oliver Walling and others were the owners of the tract of land in controversy, in Clarke county, Wash. The owners had executed and delivered two mortgages upon their real estate, one in favor of one Laverdieu, and the other in favor of one McKenna. These mortgages were duly recorded. Subsequent to the mortgages three judgments were obtained against the mortgagors in favor of one J. P. Johnson. These judgments will be hereafter referred to as the Johnson judgments. In January, 1909, an action was brought to foreclose the mortgages. The mortgagors and their judgment creditors were all made parties. While that action was pending, and on March 3, 1909, the owners by quitclaim deed conveyed all their interest in the property to one F. V. Arnold, who had notice of the foreclosure proceedings and purchased subject thereto. Thereafter, on August 14, 1909, the mortgaged property in question was sold under a decree of foreclosure, and bid in by J. J. Attridge. The mortgaged property at this sale brought enough to satisfy the mortgages, but there was nothing to apply upon the Johnson

judgments. On March 22d the Johnson judgments were assigned to one Epperson; and on March 28, 1910, Epperson gave notice of intention to redeem from the purchaser at the mortgage sale. Afterwards, on March 31, 1910, Epperson redeemed by paying the amount of the selling price, with interest, to J. J. Attridge, the purchaser at the mortgage sale. Thereafter, on April 26, 1910, Arnold conveyed by quitclaim deed his interest in the property to J. J. Attridge. On August 13, 1910, Epperson, being the owner of the Johnson judgments, and having redeemed from the mortgage sale as hereinbefore stated, caused an execution to be issued on the Johnson judgments, and the real estate in question was sold under this execution to the defendant, H. G. Dorchester. On November 15, 1910, Epperson sold and assigned to Dorchester the certificate of redemption under the mortgage foreclosure above referred to. All these sales and assignments above referred to were duly recorded in the auditor's office of Clarke county, where the property was situated. All the parties at all times had full notice of these conveyances. On December 28, 1910, at the request of Attridge and his counsel, Dorchester sold his interest in the Johnson judgments and the certificate of sale thereunder to Attridge for the sum of \$665.47, being the price Dorchester had paid. On May 1, 1911, Dorchester, under his certificate of redemption from the mortgage sale, demanded and received a sheriff's deed for the property in question. This action was brought to set aside this deed. As stated above, the trial court concluded that the sheriff's deed of May 1, 1911, conveyed in fee the title of the property in dispute to the defendant, Dorchester, but found that the sale of the interest in the Johnson judgments to Attridge for \$665.47 was without consideration, and therefore ordered this money returned. The appeal is prosecuted from that judgment. The defendant did not appeal.

It is apparent from this statement of facts, which is agreed to, that the only interest which Attridge had to the property in dispute was acquired under the sale of the property by virtue of the Johnson judgments. It is conceded by the appellants, as we understand, on the briefs that the Johnson judgments were simply liens upon the real estate, subject to the mortgage liens, and that these liens gave the right of redemption within the statutory period, which is one year from the date of sale. Section 595, Rem. & Bal. Code. And it is also apparently conceded that an execution issued upon these judgments did not, and could not, extend the time for redemption. The execution upon the Johnson judgments clearly conferred no new rights upon the holders of these judgments. The defendant, Dorchester, regularly obtained title to the land in question at the time the sheriff's deed was issued on May 1, 1911, by virtue of the mortgage foreclosure. He

was also the holder of the sheriff's certificate of sale under the subsequent Johnson judgments. At this time the right of redemption of any party or any subsequent purchaser with notice had fully expired. The plaintiff Attridge, who was the first purchaser at the mortgage sale, and from whom the property had been redeemed, had acquired a supposed interest from Mr. Arnold. The only interest which he acquired from Arnold was clearly a right to redeem within the year, which he did not do. His rights from that source were then lost.

Counsel for the appellants make some contention in their brief to the effect that Attridge was induced by fraud to purchase the certificate of sale under the Johnson judgments; and also that the defendant Dorchester is estopped to say that the title to the property was not sold to Attridge for the sum of \$665.47 when the certificates of sale under the Johnson judgments were sold. There is no merit in either of these contentions. No fraud is alleged in the complaint, and clearly no fraud was proven. All the parties who had anything to do with the transaction knew of all these transfers. At the time Dorchester sold the certificate of sale under the Johnson judgments to Attridge for \$665.47, Mr. Attridge was represented by counsel who knew all the facts, who had examined the records, was informed of all these conveyances, and presumably knew the effect of the conveyances. They sought the purchase, which was not offered to them. It was not intimated or intended at the time of this sale that Dorchester was releasing his rights to a deed under the foreclosure sale. He sold whatever rights the Johnson judgments or the sale under the Johnson judgments carried, and nothing more. We are satisfied that when Attridge purchased the certificates under the Johnson judgments he knew just what he was purchasing.

[2] In order to create an estoppel it is necessary that:

"The party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties or both have the same means of ascertaining the truth there can be no estoppel." 11 Am. & Eng. Ency. Law, p. 434; *Globe Nav. Co. v. Maryland Cas. Co.*, 39 Wash. 299, 307, 81 Pac. 826.

The evidence upon this question is clear and certain to the effect that all the parties had equal knowledge. Dorchester knew what he was selling; Attridge knew what he was buying; both were dealing at arm's length; and neither made any representations, or attempted to deceive the other, unless Attridge supposed that in buying the certificate of sale under the Johnson judgments he might acquire some advantage over the holder of the certificate under the mortgage sale. We are satisfied from a review of the whole record that the trial court properly refused to set

aside the sheriff's deed of May 1, 1911, to Mr. Dorchester.

The judgment is therefore affirmed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

(83 Wash. 242)

DAVID v. FIDELITY-PHENIX FIRE INS. CO. OF NEW YORK.  
(No. 12375:)

(Supreme Court of Washington. Jan. 6, 1915.)

1. INSURANCE (§ 645\*)—ACTION ON POLICY—PLEADING AND PROOF.

An allegation of the answer, in an action on a fire insurance policy, denying "each and every allegation" in a certain paragraph of the complaint, being the form of general denial contemplated by Rem. & Bal. Code, § 264, put in issue the allegation of such paragraph as to the value of the property destroyed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.\*]

2. STIPULATIONS (§ 14\*)—EFFECT.

Where, in an action on a fire insurance policy, the value of the property destroyed was in issue, and defendant claimed that the policy was void for fraudulent swearing by plaintiff as to such value and as to what property was destroyed, statements of counsel amounting to a stipulation, eliminating the question of fraudulent swearing as to value, did not eliminate the question of fraudulent swearing as to the value of the property.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

3. INSURANCE (§ 645\*)—ACTION ON POLICY—SPECIAL DENIAL.

In an action on a fire insurance policy, an allegation of the answer that plaintiff, under the terms of the policy, had avoided it by fraudulent swearing as to the property destroyed and its value presented an affirmative defense, and was not a "special denial" within the rule that where both a general denial and special denials are employed in an answer, the scope of the general denial is limited to the issues raised by the special denials.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.\*]

4. TRIAL (§ 260\*)—REFUSAL OF INSTRUCTIONS COVERED.

In an action on a fire insurance policy, a requested instruction that the value set opposite the various items in the proofs of loss could not be considered on the issue whether plaintiff had avoided the policy by fraudulent swearing as to the articles destroyed was sufficiently covered by an instruction that to avoid the policy plaintiff must have knowingly and willfully sworn falsely in his proof of loss that certain articles were destroyed, with intent to defraud defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

5. INSURANCE (§ 670\*)—ACTION ON POLICY—VERDICT—JUDGMENT.

A verdict for plaintiff, in an action on a fire insurance policy, wherein defendant contested the alleged value of the property destroyed and contended that plaintiff had avoided the policy by fraudulent swearing, in the proof of loss, as to the property destroyed, did not demand a judgment for the full amount of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1785-1787; Dec. Dig. § 670.\*]

6. APPEAL AND ERROR (§ 1003\*)—VERDICT—WEIGHT OF EVIDENCE.

The weight of evidence is for the jury, and not for the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

Department 1. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Peter David against the Fidelity-Phenix Fire Insurance Company of New York. From judgment for plaintiff for less than claimed, he appeals. Affirmed.

Sachse & David, of Tacoma, for appellant. Granger & Clarke, of Seattle, for respondent.

GOSE, J. This is an action to recover \$6,000, the amount of a fire insurance policy. There was a verdict and judgment in favor of the plaintiff for \$3,000, from which he has appealed.

On the 27th day of June, 1912, the respondent issued to the appellant a policy of insurance against loss by fire upon household furniture, useful and ornamental, beds, bedding, linen, family wearing apparel, furs, plate, plated ware, printed books and music, piano, other musical instruments, portraits, pictures, paintings, tapestries, watches, and jewelry, etc., then in the home of the appellant at Stellacoom in this state. On the 22d day of July following, the property was destroyed by fire. Proofs of loss were submitted and payment refused.

[1] It is alleged in paragraph 4 of the complaint that the personal property in the dwelling house "was totally destroyed by fire, and the plaintiff's loss on account of the destruction by fire at said time, of said personal property was and is the sum of \$6,000." The respondent in its answer denied "each and every allegation contained in paragraph 4 of said complaint." This is the form of general denial contemplated by the Code, and put in issue the value of the property destroyed by the fire. Rem. & Bal. Code, § 264; Peters v. McPherson, 62 Wash. 496, 114 Pac. 188.

[2] In its affirmative answer the respondent alleges that the policy in litigation provides:

"This entire policy shall be void \* \* \* in case of any fraud or fraudulent swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It is then alleged that the sworn proof of loss submitted by the appellant to the respondent was false and fraudulent, and was made for the purpose of deceiving the respondent and fraudulently obtaining from it the amount of insurance named in the policy. Upon the filing of the answer, the appellant moved the court to require the respondent to state in what respect the proof of loss was false and fraudulent. In response to the motion the court required the respondent to

furnish the appellant a bill of particulars showing the items which it claimed were fraudulently included in the proof of loss. Thereupon the respondent filed a bill of particulars, which states:

"That with the exception of a few articles of furniture and a few books and a few kitchen utensils, the plaintiff swore falsely as to all of the items as set out in his proof of loss, in that said articles were not in the house at the time of the fire and were not destroyed by the fire."

After the jury had been impaneled and sworn to try the cause, a colloquy occurred between court and counsel in respect to the issues, particularly with reference to the new matter pleaded in the affirmative defense. The discussion terminated in the following statements by respective counsel:

Mr. Bates, for the appellant: "I think under the general issue we have to prove we sustained a loss to the amount of the policy, which you dispute, but I want it distinctly understood that there is no charge against us that we made any false or fraudulent swearing when we fixed the charges of the particular items."

To which Mr. Clarke, counsel for the respondent, answered: "That is correct. If that property was in there, I am not going to say that it was not worth that amount. I don't know. It is up to them to prove it was there."

Upon the record as we have disclosed it, the appellant insists that the question of the value of the property was eliminated, and that the issue was narrowed to one question, viz., that of fraudulent swearing in respect to the presence of the property in the house at the time of the fire. We do not so understand the record. It seems clear that it was the intention of counsel that the appellant should be required to prove the value of the property upon the general issue, and that the respondent would make no claim that the false and fraudulent swearing extended to the question of value, but it would limit the inquiry under that issue to the single question whether or not the appellant, willfully and with the intention of defrauding the respondent falsely swore that the property was in the house at the time of the fire.

[3] The appellant invokes the rule that:

"When both a general denial and specific denials are employed in an answer, the scope of the general denial is limited to the issues raised by the specific denials." 81 Cyc. 694.

This is a sound rule of pleading and practice, but as we read the record, it has no application here. The affirmative defense is not a specific denial. It sets forth a clause of the policy which, if willfully violated, avoids the policy in toto, and then alleges that the proof of loss was in fact false and fraudulent, and that it was made for the purpose of fraudulently obtaining the amount of insurance named in the policy.

It is claimed that the court erred both in giving and refusing to give instructions. The court instructed the jury, after correctly instructing as to the burden of proof, that if they should believe from the evidence that the property covered by the policy was owned by the appellant at the time of the fire,

that it was destroyed by the fire, and that the appellant did not willfully make false statements in his proof of loss, "then the plaintiff is entitled to a verdict against the defendant for such sum as you find was the fair cash market value of said property destroyed." The criticism of this instruction is, as we understand it, that the question of value had been eliminated by stipulation. This question has already been disposed of.

The court instructed the jury that, if they found from the evidence that the appellant in his proof of loss which he submitted to the respondent willfully made false and fraudulent statements for the purpose of deceiving it, there could be no recovery. The court was equally explicit in instructing the jury that, if they should find that some of the property mentioned in the proof of loss was not in the house at the time of the fire, such fact would not avoid the policy, unless they found, further, that the misrepresentation was made willfully and with the intention of deceiving and defrauding the respondent. In short, the court instructed the jury that an innocent misrepresentation in the proofs of loss would not avoid the policy, but that a fraudulent misrepresentation therein would avoid it.

[4] The appellant assigns error in the court's refusal to instruct the jury to the effect that the value set opposite the various items in the proof of loss was immaterial "and cannot be considered by you on this affirmative defense." The court did instruct the jury that "you must find by a fair preponderance of the evidence that the plaintiff knowingly and willfully in his proof of loss swore that certain articles were in the house and destroyed by fire, when as a matter of fact he knew they were not, with the intention thereby of defrauding the insurance company," in order to avoid the policy. We think the instruction given embraced all the material matter contained in the requested instruction. It was more comprehensive in that it eliminated every element except that of fraudulent swearing in respect to the property that was in the house at the time of the fire.

[5, 6] It is earnestly contended that the court erred in denying the appellant's motion for a judgment for the full amount of the policy after the coming in of the verdict. The appellant and his wife swore that the property destroyed by fire was worth considerably more than \$6,000. The respondent's testimony was directed to circumstances which it conceived tended to show that a large part of the property had been removed from the house before the fire, and that the appellant had been guilty of false swearing. It is argued, and we think correctly, that the jury exonerated the appellant upon the charge of willful false swearing. It does not follow, however, that the jury were compelled to accept the appellant's estimates of

value. The appellant's testimony upon the question of value was nonexpert, opinion evidence. The value of opinion evidence necessarily depends upon the facts which form the basis of the opinion. These facts were before the jury. The itemized statement of the articles which the appellant claims to have lost in the fire, and which were made a part of his proofs of loss, covers 27 typewritten pages. In the main these items show the character of the article and the date of the purchase, and, in parallel columns, the cost price of the article and its estimated present value. Some of the articles were purchased in 1909, others in 1910, others in 1911, others in 1912. For illustration, one Morris chair was listed as having been purchased in 1909 for \$35, and the present value was estimated at \$35. The jury, having before them the character of the articles, the date of purchase, the purchase price, and the estimated present value, were not compelled to adopt the opinion of any witness as to the present value of the articles. They had before them all the facts, upon which the appellant's witnesses estimated the values, and they were at liberty to determine the value upon all the evidence. The weight of the evidence was for the jury and not for this court.

From the entire record, we think the judgment should be affirmed.

CROW, C. J., and MORRIS and PARKER, JJ., concur.

(83 Wash. 180)

KOONTZ et al. v. KOONTZ. (No. 12178.)  
[Supreme Court of Washington. Jan. 5, 1915.]

1. WILLS (§ 191\*)—PROBATE—REVOCATION.

Under the express provisions of Rem. & Bal. Code, § 1323, a will is revoked by the marriage of testator unless provision be made for the wife by marriage settlement or in the will, or she be mentioned therein in some way showing an intention not to make such a provision, though testator, who dies before his wife, has relinquished prospective claims to her property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.\*]

2. FRAUDS, STATUTE OF (§ 5\*)—ANTENUPTIAL AGREEMENT — "CONSIDERATION OF MARRIAGE."

An antenuptial agreement, induced solely by the contemplated marriage, and showing a single purpose on each side to preserve after the marriage the existing status of each toward the property of the other, is an agreement made upon "consideration of marriage" within Rem. & Bal. Code, § 5289, providing that such agreements shall be void unless in writing and duly signed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 5; Dec. Dig. § 5.\*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceedings by H. M. Koontz and another against Sophia C. Koontz. From a decree denying admission of a will to probate, plaintiffs appeal. Affirmed.

G. W. Sommer and A. J. Langhon, both of Spokane, for appellants. Chas. A. O'Connor and Hubert P. Suing, both of Spokane, for respondent.

ELLIS, J. This is an appeal from a decree of the superior court of Spokane county, in probate, denying admission of a will to probate on the ground that it had been revoked by the marriage of the maker subsequent to its execution.

The following facts are not disputed: On January 3, 1911, the deceased, Joseph N. Koontz, made a will bequeathing and devising all of his property to the appellants, his two sons. He was then a widower. On December 15, 1912, he married the respondent, who was a widow. It was admitted in argument that both were then well advanced in years. He then owned real estate worth about \$3,000, and had between \$3,000 and \$4,000, in money. She owned a home worth between \$3,000 and \$4,000. They lived together as husband and wife until his death on January 29, 1914. In the will of January 3, 1911, the deceased made no provision for, nor any mention of, the respondent, nor did he ever make any other will or codicil. The appellants sought to show by the parol testimony of several relatives and friends that the deceased had, at different times stated, but not in the presence or hearing of the respondent, that he and the respondent prior to their marriage had an express understanding that when either should die the survivor should have no interest in the decedent's estate. This evidence was admitted subject to the objections of respondent that such an agreement was, under the statute of frauds, void, unless in writing, and that no written evidence of such an agreement had been offered. No proof of any such agreement in writing was ever offered. The respondent testified that neither before nor after the marriage did she and the deceased enter into any contract or agreement in writing settling their property rights as between themselves. She was not asked, nor did she say, whether any such verbal agreement was made or not. There was evidence that the deceased held a mortgage on the home of the respondent securing a note for the sum of \$750. This mortgage and note, with an assignment from the deceased to the respondent written upon the back of the note, was found in a tin box in which the deceased had kept his private papers. Neither of these instruments is in evidence, and it does not clearly appear when they were executed. There is an inference, however, that both were executed subsequent to the marriage, since it appears that the mortgage was made to take up a prior debt secured by a mortgage upon the respondent's home which the deceased paid. At the close of the hearing the court ruled out all of the oral

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testimony touching the alleged antenuptial agreement and found, in substance, the foregoing admitted facts, and further:

"That said deceased did not at any time make provision for the said Sophia C. Koontz, his widow, by marriage settlement or in any other manner."

The appellant excepted to the latter finding. The court concluded as a matter of law that the will of the deceased was revoked by the marriage to Sophia C. Koontz, who survived him, and hence was not entitled to admission to probate. The decree went accordingly.

The making of the above quoted finding and the conclusions of law and the decree based thereon are assigned as error.

We think the decree should be sustained for two reasons: (1) Because, even conceding the validity of the alleged antenuptial agreement, it made no provision for the widow; (2) because the alleged agreement rested in parol and was void under the statute of frauds. Both questions are new ones in this state. We shall therefore consider them with some care.

[1] (1) The statute relative to revocation (Rem. & Bal. Code, § 1323) is as follows:

"If, after making any will, the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage settlement, or unless she be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received."

Touching the question here involved there is no ambiguity in this statute. Its terms are clear and explicit. We must assume that it means what it says. In *Re Adler's Estate*, 52 Wash. 539, 547, 100 Pac. 1022, a case mistakenly relied upon by the appellants, we said touching this statute:

"When the Legislature has assumed to speak upon a given subject, courts must take its expression as it is, and if it be certain in its terms, there is no reason for speculation as to its reasons, nor warrant for adding anything to meet a given case."

In that case we also held that the several contingencies tolling the revocation are stated in the statute disjunctively, as they clearly are, and must be, so applied. The statute says such will shall be deemed revoked, unless *provision* shall have been made for her by marriage settlement, or unless she be provided for in the will, or in some way mentioned *therein* as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. Clearly evidence aliunde the will itself, of an intention not to make any provision for her, would be inadmissible whether oral or in writing. The disjunctive statement of the contingencies followed by the statement that no other evidence shall be received clearly limits the evidence in each contingency to the appropriate proof of that contingency. The first contingency is a *pro-*

*vision* made for her by marriage settlement. The tolling of the revocation on that ground can only be proved by that means. Proof of a settlement such as that here advanced, denying her any provision from his own property even as his heir, would not be sufficient, since such a settlement would make no provision for her, but quite the contrary. It would take away that provision which, but for the agreement, the law would give her. Nor can it be said that decedent's relinquishment of any prospective claim to her property as her heir would be sufficient, since the testator's death prior to that of the other spouse offers the sole field for the operation of the statute of revocation or any part of it. Clearly permission to retain her own property after his death, which she would retain on his death in any event, would be no provision for her. It seems plain that if, as we have held, the statute means what it says, the settlement here claimed, even if established by competent evidence, made no provision for the surviving wife; hence did not toll the revocation. Had the settlement been mentioned in the will itself, a different question would be presented. *Clark v. Baker*, 78 Wash. 110, 135 Pac. 1025. In that case the will itself would have furnished the requisite statutory evidence to invoke the third contingency tolling the revocation. It will not do to say that the view here expressed rests in a technical construction of the statute, in that any provision, however small, would meet it. It is not technical. It is not even construction. It is the statute. The argument suggested should be addressed to the Legislature. In *re Adler's Estate*, supra.

[2] (2) In any event the agreement here in question rested in parol and was subject to the ban of the statute of frauds (Rem. & Bal. Code, § 5289) which, so far as material, reads:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: \* \* \* every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry. \* \* \*

The sum of the appellant's argument to the contrary is this: That the agreement was made in contemplation of marriage, but was not made "upon consideration of marriage"; that while of course the agreement would not have been made had the parties not then intended to marry, and to that extent the prospective marriage entered into it and was considered by them, still the gist of the transaction was the mutual promise that each made to the other as to the future status of the property which each then owned. This argument is engaging, but, is as it seems to us, unsound. Where as here, the antenuptial agreement is induced on both sides solely by the contemplated marriage and by its terms shows the single purpose on each side to *pro-*



serve, after the marriage, the status which each would occupy toward the property of the other had there been no marriage, it is obvious that the marriage is the sole inducement to and the moving consideration for every promise made by each of the contracting parties. It is idle to say that the promise of each is made in consideration of the promise of the other. But for the marriage neither had any right or interest, present or prospective, in the property of the other to relinquish when the promise was made, and neither relinquished nor agreed to relinquish to the other any right in his or her own property in any event. The mutual promises related to a property status to be created by the marriage and which would have no existence but for the marriage. But for the marriage there would be neither subject-matter, actual or potential, nor consideration, present or future, for either promise. This clearly distinguishes the case here from that instanced in *Browne on the Statute of Frauds* (5th Ed.) § 215b (cited by appellants) as an example of a promise made in *expectation or contemplation* of marriage as distinguished from a promise made *upon consideration* of marriage. The text cited reads as follows:

"The distinction should be carefully noted between agreements in *consideration* of marriage, and agreements which are merely in *expectation or contemplation* of marriage. In order that the contract shall be within the statute, marriage or the promise of marriage must have been its consideration or inducement. In a case where an intestate, about seven years before his marriage, borrowed money from the person who afterwards became his wife, and in an interview with her shortly before their marriage promised her that if she would not enforce payment of the notes, they should remain good and collectible against his estate, and she retained the notes during the coverture and after his death, it was held that, although the promise of the husband was made in contemplation of marriage, it was made in consideration of forbearance to collect the notes, and that after his death a claim for their amount by his wife was properly allowed against his estate, and that his agreement was not within the statute of frauds, and could be proved without writing."

The case referred to is *Riley v. Riley*, 25 Conn. 154. Obviously in the case mentioned there was a present subject-matter, the debt evidenced by the note, and a present consideration for his promise, her forbearance to collect. Both existed independently of the promise of marriage. Such is not the case here.

The appellants cite one case which, so far as the oral antenuptial agreement related to personalty, sustains their view. But even in that case the agreement was held void, since it also included prospective interests in real estate and impinged the law that such contracts can only be proved by written evidence. It was also held that the contract, being indivisible, was void in toto, which would also be true as applied to the facts here.

*Rainbolt v. East, Administrator*, 56 Ind.

538, 26 Am. Rep. 40. The Indiana court professedly based its decision as to the validity of the agreement touching personally upon the Connecticut case of *Riley v. Riley*, supra. With deference, however, we suggest that the court overlooked the distinction between the two cases recognized in *Browne* on the statute of frauds, and which we have attempted to point out.

The other cases cited by the appellants require scant notice. In *Southerland v. Southerland*, 68 Ky. (5 Bush.) 591, the statute of frauds is not discussed. The main question was that of a gift causa mortis.

In *Child v. Pearl*, 43 Vt. 224, the statute did not, like ours, avoid the contract, but merely required proof in writing. It was held not to apply to the agreement there in question because the wife's action was based, not upon the oral antenuptial contract, but upon her title to property that was always hers.

In *Edwards, Adm'r v. Martin*, 39 Ill. App. 145, the contract was in writing. The sole question related to the consideration.

In *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404, the agreement was one for support, and the consideration and subject-matter both existed independently of the marriage, so that the contract could operate regardless of any marriage.

On the other hand the respondent cites one case sustaining the view here expressed. In *Frazer v. Andrews*, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593, 13 Ann. Cas. 556, a man and woman prior to their marriage made a parol agreement that the property of each should pass to their respective children on the death of either free from any claim by the other, the exact agreement claimed here. After marriage they entered into a written agreement of the same nature, but in no manner referring to the oral antenuptial agreement. The written contract was held void under a statute declaring that when property is owned by a husband or wife, the other has no interest therein which can be the subject of contract between them. The parol antenuptial agreement was held incapable of proof because made in consideration of marriage, and such contracts under the Iowa statute are only susceptible of proof by written evidence.

We have found two other decisions clearly sustaining this view. In *Mallory's Adm'r v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737, it was held that an antenuptial agreement that neither party shall have any interest in the property of the other by reason of the marriage, the exact agreement here, is a contract in consideration of marriage within the meaning of the statute of frauds, and is not valid unless in writing. The court said:

"An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relation and make a law in that regard to suit themselves, and considera-

tion for the contract is the agreement to marry each other, which must be consummated, else the consideration fails. So the contract clearly comes within the provision, supra, requiring contracts in consideration of marriage to be in writing."

See, also, *White v. Bigelow*, 154 Mass. 593, 28 N. E. 904.

The clear object of the statute touching revocation is to prevent a capricious or inadvertent disinheritance of the surviving consort. The clear purpose of the statute of frauds is to remove the temptation to perjury. Neither object would be promoted by a construction of either statute which would sustain the agreement here asserted.

Affirmed.

CROW, C. J., and MOUNT, MAIN, and FULLERTON, JJ., concur.

(83 Wash. 158)

**In re SLOCUM'S ESTATE.**

**KNOWLES v. SLOCUM.**

(No. 11984.)

(Supreme Court of Washington. Jan. 5, 1915.)

**1. HUSBAND AND WIFE (§ 249\*)—"COMMUNITY PROPERTY"—PROPERTY ACQUIRED DURING MARRIAGE.**

Under the express provisions of Rem. & Bal. Code, §§ 5915-5917, all property acquired by either husband or wife after marriage, whether the title is taken in the name of the husband or in that of the wife, or in their joint names, with certain specified exceptions, is "community property."

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 887, 889-892; Dec. Dig. § 249.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Community Property*.]

**2. HUSBAND AND WIFE (§ 262\*)—COMMUNITY PROPERTY—DENIAL—BURDEN OF PROOF.**

Where it is claimed that property acquired after marriage is not community property, the burden rests on the party so claiming to establish the fact by clear, certain, and convincing evidence.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.\*]

**3. GIFTS (§ 4\*)—PERSONAL PROPERTY—REQUISITES.**

It is essential to a valid gift of personal property that there be an intention on the donor's part to presently give, a subject-matter capable of passing by delivery, and an actual delivery such as will divest the donor of present control and dominion, absolutely and irrevocably, and confer such dominion and control on the donee.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 3, 17; Dec. Dig. § 4.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Gift*.]

**4. GIFTS (§ 47\*)—PRESUMPTIONS.**

A gift of personal property will not be presumed, but he who asserts title by gift must prove it by clear, convincing, strong, and satisfactory evidence.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 81-86; Dec. Dig. § 47.\*]

**5. GIFTS (§ 31\*)—SECURITIES—DELIVERY—PRESUMPTION.**

Though from possession of a note, bond, or deed by an indorsee, assignee, payee, or grantee, a delivery will be presumed, mere passage of the naked possession to one other than the payee or grantee, and to whom it has not been assigned or indorsed, does not show a sufficient delivery to establish a valid gift.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. §§ 58-62; Dec. Dig. § 31.\*]

**6. HUSBAND AND WIFE (§ 49½\*)—GIFTS—TRANSFER OF SECURITIES.**

Evidence held to show a valid gift of securities by husband to wife in his lifetime.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

**7. HUSBAND AND WIFE (§ 266\*)—COMMUNITY PROPERTY.**

Evidence held insufficient to show a valid transfer of securities which were community property by a husband to his wife in his lifetime so as to exempt her, as his executrix, from liability to account therefor as community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 925-928; Dec. Dig. § 266.\*]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Judicial settlement of the estate of C. W. Slocum, deceased. O. W. Knowles applied for an order compelling Laura Slocum, as executrix of decedent's will, to include certain omitted property in her inventory as community property, and, from a judgment granting only part of the relief prayed for, petitioner appeals. Affirmed in part, and reversed in part, and remanded, with directions.

Miller, Crass & Wilkinson, of Vancouver, for appellant. Henry St. Raynor and McMaster, Hall & Drowley, all of Vancouver, for respondent.

MAIN, J. The controversy in this case is over the question whether certain personal property should be inventoried as the community property of C. W. Slocum, deceased, and Laura Slocum, his surviving wife, or whether it was the separate property of Mrs. Slocum. The property in question had been accumulated while the Slocums were residents of Clarke county, Wash. On December 29, 1904, C. W. Slocum executed a will, giving the use of the property belonging to him, and his community interest therein, to Laura Slocum, his wife, during her natural life, and at her death to descend to the heirs of C. W. Slocum. The latter died on September 20, 1912, and at this time was about 78 years of age. His wife was a few years his junior. The will was admitted to probate on the 7th day of October, 1912. It was what is known as a nonintervention will, and Laura Slocum, the wife, was named as executrix. After the admission of the will to probate, the executrix filed an inventory of the estate. On December 30, 1912, C. W. Knowles, one of the heirs of C. W. Slocum, deceased, filed a petition in the probate proceeding, alleging that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the executrix had omitted from the inventory filed by her certain property, a part of which is the property in dispute in this case, and asked that she be required to include the same in the inventory as part of the community property of the estate of C. W. Slocum, deceased. To the petition an answer was filed setting forth the claim that the property had been given to Mrs. Slocum by her husband about 20 days previous to his death, and that by reason of such gift became her separate property. Upon the issues framed, the case proceeded to trial. The trial court found a portion of the property in dispute to be community property, and a portion to be the separate property of Mrs. Slocum. From the judgment entered, C. W. Knowles, the petitioner, appealed. Mrs. Slocum did not appeal.

The property here in controversy, then, is the property which was by the trial court adjudged to be the separate property of Mrs. Slocum. It is as follows: Certificates for 50 shares of stock of the par value of \$100 per share, in the Donegan Shoe Company, a corporation; certificate in the Equitable Savings & Loan Association, of Portland, Or., for \$2,000, dated September 17, 1912; certificate in the same company for \$3,000, issued December 20, 1910; certificate in the same company for \$3,000, dated May 16, 1911; certificate in the same company for \$3,000, dated August 17, 1912; certificate in the same company for \$4,000, dated October 21, 1911; certificate in the same company for \$5,000, dated February 14, 1912; also, a certificate in the Realty Associates of Portland, Or., for \$10,000, dated April 22, 1909. In addition to this, there were two notes, one for \$200, and the other for \$2,500. Further reference to the facts and the evidence will be made when the items of property specified are hereinafter considered more in detail.

There appears to be no conflict in the evidence. Hence it will not be necessary to review the findings of the trial court. The sole question in this case is whether the title to the property in dispute vested in Mrs. Slocum as her sole and separate property at the time of the death of her husband, C. W. Slocum. If the property in question had become her separate property at that time, then the judgment of the superior court must be affirmed. If some or all of it had not taken on the character of her separate property, then the judgment must be either reversed or modified. Owing to the numerous items of property involved, a statement of the rules of law which are pertinent to the inquiry will first be made.

[1] In this state all property acquired after marriage by either the husband or the wife, or both, is "community property," other than certain well-known exceptions which are specified in the statute. Rem. & Bal. Code, §§ 5915-5917, inclusive. Property acquired during the existence of the marriage relation,

whether the title thereto be taken in the name of the husband or that of the wife, or in their joint names, is presumed to be community property. Cyc. vol. 21, p. 1651. This is a rule so well known and so generally established that it is not necessary to assemble the cases in support of the text cited.

[2] Where the claim is made that property acquired after marriage is not community property, the burden rests with the parties claiming the separate character of the property. The presumption as to the community character of the property may be overthrown only by evidence of a clear, certain, and convincing character. In re Estate of Boody, Deceased, 113 Cal. 682, 45 Pac. 858; Fennell v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361.

[3,4] In order to constitute a gift of personal property, three things are necessary: (a) An intention on the part of the donor to presently give; (b) a subject-matter capable of passing by delivery; and (c) an actual delivery at the time. Hecht v. Shaffer, 15 Wyo. 34, 85 Pac. 1056; Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857; Meyers v. Albert, 76 Wash. 218, 135 Pac. 1003. The delivery must be such as will divest the donor of the present control and dominion over the property absolutely and irrevocably and confer upon the donee the dominion and control. Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500. The distinction that exists between gifts inter vivos and gifts causa mortis need not here be defined. The pivotal facts which give caste to the various transactions in the present case are the same, whether the gifts or attempted gifts be considered inter vivos or causa mortis. A gift will not be presumed; but he who asserts title by this means must prove it by evidence which is clear, convincing, strong, and satisfactory. In Jackson v. Lamar, supra, it was said:

"While it is true the courts have relaxed the rigor of the old rules, they have never departed from holding that something more is required to constitute a gift, either inter vivos or causa mortis, than the expression of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery, either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and, as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. Although it may not be true that the law now presumes against a gift, it certainly does not presume in its favor, but requires proof."

[5] From the possession of a note, bond, or deed by an indorsee, assignee, payee, or grantee, a delivery will be presumed. Sharmer v. Johnson, 43 Neb. 509, 61 N. W. 727; Castor v. Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854; Richmond v. Morford, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; Kauffman v. Baillie, 46 Wash. 248, 89 Pac. 548, 13 Ann. Cas. 975. A mere passage of the naked possession, however, to one other

than the payee or grantee, and to whom it has not been assigned or indorsed, does not meet the requirements of a good delivery. *Sharmer v. Johnson*, supra.

From the testimony of Mrs. Slocum it appears that, at the time of Mr. Slocum's death, the items of property above mentioned were in her possession, and had been in her possession for about 20 days. They were in a private drawer with her own private papers. This private place had been used by her for about three years. No one else had the papers after they came into her possession. The possession was with the knowledge of Mr. Slocum. The latter died at home, and prior to that time he and his wife lived together as husband and wife. The drawer in which the papers were kept after they came into the possession of Mrs. Slocum was in a cupboard in the bedroom downstairs in the house occupied by them.

From the testimony of the maker of one of the notes it appears that the understanding was that while the notes were made payable to C. W. Slocum, or Laura Slocum, during the lifetime of Mr. Slocum payments were to be made to him; but, after his death, to his wife. From the testimony of the assistant secretary of the Equitable Savings & Loan Association, with whom the transactions were had with reference to the purchase of the stock in that company, it appears that while certain of the shares of stock were placed in the name of C. W. Slocum, or Laura Slocum, the understanding was that during the lifetime of both of them the payments that might accrue would be made to either presenting the certificate. The evidence as it has just been stated is taken substantially from the appellant's abstract. There being no supplemental abstract filed, the abstract of the appellant is recognized as correct.

[6] The items of property in controversy may be divided into three classes. The first class includes stock certificates in various corporations which were issued to C. W. Slocum, or to C. W. Slocum or Laura Slocum, and assigned by C. W. Slocum to Laura Slocum. The stock included in this class is as follows: 50 shares Donegan Shoe Company, par value \$5,000; 30 shares Equitable Savings & Loan Association, \$3,000; 40 shares Equitable Savings & Loan Association, \$4,000; 50 shares Equitable Savings & Loan Association, \$5,000; and a profit-sharing bond in the Realty Associates of Portland, a corporation, \$10,000. The Donegan Shoe Company stock, on April 4, 1910, was assigned by C. W. Slocum to Laura Slocum, his wife, and "became her sole and separate property." The 30 shares of Equitable Savings & Loan Association stock was issued to C. W. Slocum on December 20, 1910, and was by him assigned to Laura Slocum on December 26, 1910. The 40 shares of Equitable Savings & Loan Association stock on October 21, 1911, was issued

to C. W. Slocum or Laura Slocum, and was assigned to Laura Slocum. The 50 shares of Equitable Savings & Loan Association stock was issued to C. W. Slocum or Laura Slocum on February 14, 1912, and was assigned to Laura Slocum on February 20, 1912. The Realty Associates profit-sharing bond for \$10,000 was issued to C. W. Slocum on April 22, 1909, and was assigned to Laura Slocum on June 22, 1909. All of these items of property, it will be seen, were assigned by C. W. Slocum during his lifetime to his wife, Laura Slocum. They were in Mrs. Slocum's possession for 20 days prior to the death of her husband. They were in a place, as she testified, which no one knew about but herself, and to which no one but herself had access. Under the rules of law above stated, we think the title to this property had passed to Mrs. Slocum as her sole and separate property prior to the death of her husband.

[7] The second class of the property in controversy includes certificates of stock and promissory notes made payable to C. W. Slocum or Laura Slocum, and which were not assigned. These include 20 shares of stock in the Equitable Savings & Loan Association of the par value of \$2,000; 30 shares of the Equitable Savings & Loan Association of the par value of \$3,000; a note for \$200; and a note for \$2,500. The possession of these items was the same as in class one. The evidence, as already indicated, showed that the reason for having the notes and stock made payable to C. W. Slocum or Laura Slocum was so that during their lifetime payments might be made to either. In the absence of an assignment there is no evidence that as to this class of property C. W. Slocum intended to make a present gift to his wife. On the contrary, the evidence is that the dominion and control had not passed from him to her. Possession alone was not sufficient to establish title. It is true that, at the time the certificate for 30 shares in the Equitable Savings & Loan Association was issued, Mr. Slocum said to his wife, "Laura, here is another certificate for you." But giving effect to the evidence of the assistant secretary with whom the transaction occurred, it is evident that the husband did not intend by that act to presently give and surrender the dominion and control of that certificate absolutely to his wife.

In the third class is a certificate issued to Laura Slocum for 80 shares in the Equitable Savings & Loan Association, of the par value of \$8,000. This certificate was dated May 16, 1911, and bears no assignment. That it was community property when issued cannot be well denied. It being community property, in order to change its character to that of separate property would require evidence, according to the rule above stated, which is clear and convincing. If it became separate property, it must have

been by reason of the donation by the husband of his community interest therein. To establish a gift it is necessary that the evidence be clear and convincing, strong and satisfactory. The only evidence which supports a gift of this certificate is the fact of possession. This is not sufficient. Had the husband survived and asserted title to this certificate as community property, could his claim with any show of reason be denied? This class of property does not fall within the rule that delivery will be presumed from possession by the indorsee, assignee, payee, or grantee. Mr. Slocum relative to this certificate had performed no act as indorser, assignor, or grantor.

The cause will be remanded to the superior court, with direction to enter a judgment directing that the property specified in what we have denominated classes 2 and 3 be included in the inventory as community property.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

(83 Wash. 151)

**BANK OF LIND v. COSS et al.** (No. 11895.)  
(Supreme Court of Washington. Jan. 5, 1915.)

**1. SHERIFFS AND CONSTABLES (§ 118\*)—ATTACHMENT—DISCHARGE—SURRENDER OF PROPERTY—STIPULATION.**

Where a sheriff was not a party to a stipulation made on the submission of a motion to quash an attachment writ that plaintiff should be advised immediately in case the court's decision was adverse, and that a sufficient time should be granted plaintiff to take an appeal and file the supersedeas bond therein, such stipulation imposed no duty on the sheriff to retain control of the property on dissolution of the attachment after demand for surrender to enable plaintiff to appeal and file supersedeas.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 196-198; Dec. Dig. § 118.\*]

**2. SHERIFFS AND CONSTABLES (§ 98\*)—RELEASE OF PROPERTY—ATTACHMENT—VACATION.**

Where an attachment was vacated, the sheriff lost his right to further hold possession of the attached property after demand by the owner, though plaintiff in attachment had given bond to indemnify the sheriff; and hence a redelivery of the property to the defendant in attachment after it had been set aside on the defendant's demand did not render the sheriff liable on the subsequent reversal of the order of dissolution and a return of execution on a judgment recovered by plaintiff in attachment unsatisfied.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 143-157; Dec. Dig. § 98.\*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Bank of Lind against A. J. Coss and the United States Fidelity & Guaranty Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Wakefield & Witherspoon and A. C. Shaw, all of Spokane, for appellant. G. E. Lovell, of Ritzville, for respondents.

**PARKER, J.** The plaintiff, Bank of Lind, seeks recovery of damages from the defendants, A. J. Coss, sheriff of Adams county, and the United States Fidelity & Guaranty Company, the surety upon his official bond, which damages it claims resulted from the unlawful release of personal property which had been seized and was being held by the defendant Coss under a writ of attachment issued out of the superior court for Adams county at the instance and for the benefit of the plaintiff. Judgment of dismissal having been rendered in favor of the defendants upon sustaining their demurrer to the complaint and the plaintiff's election to stand upon its complaint and not plead further, it has appealed to this court.

The controlling facts may be summarized from the complaint as follows: In October, 1911, appellant commenced an action in the superior court for Adams county to recover money owing to it by G. H. and L. O. Thomas, and caused a writ of attachment to be issued therein for the seizure and holding of property of the Thomases pending the action. Seizure of property under the writ was accordingly made by respondent Coss as sheriff of Adams county. Thereafter, on November 10, 1911, the Thomases appeared in the action and moved for dissolution of the attachment, which motion came on for hearing on November 22, 1911, when, the matter being submitted to the court for decision, it was by the court taken under advisement, and, as alleged in the complaint, "with the understanding that the plaintiff or its counsel, whose office and place of practicing was in Spokane, Wash., a distance of about 100 miles from the place of the sitting of said court, were to be advised immediately upon the court's decision in the matter, and that a sufficient time was to be given the plaintiff or its counsel, in event the court granted said motion, to take its appeal and file a supersedeas bond therein." Thereafter, on November 27, 1911, the court granted the motion dissolving the attachment and entered the order accordingly, and immediately thereafter respondent Coss, who was holding the property as sheriff under the attachment, released and surrendered possession of the property. Appellant had no actual notice of the rendering of the court's decision dissolving the attachment or of the release of the property by respondent Coss until about a week later.

[1] Whatever the understanding may have been as to appellant being notified upon the rendition of the court's decision on the question of dissolution of the attachment, looking to giving it an opportunity for protecting its interest by appeal and supersedeas,

\*For other cases see same topic and section NUMBER in Dec. Dig. & An. Dig. Key-No. Series & Rep'r Indexes

we are unable to gather from the complaint any facts showing that respondent Coss was a party to such understanding, or that there was any duty imposed upon him by virtue of such an understanding, whatever his duty may have been under the law aside from such understanding. Soon thereafter appellant gave notice of and perfected its appeal to this court from the decision of the superior court dissolving the attachment, and also filed a supersedeas bond such as was sufficient to supersede that decision, in so far as the same could be superseded in view of the prior surrender of the property by respondent Coss. There is no allegation of the complaint pointing to any effort or request on the part of appellant looking to a retaking of the property by respondent Coss after its release by him in pursuance of the dissolution of the attachment by the superior court and the appeal therefrom. Thereafter judgment was rendered in the superior court upon the merits of the action in favor of appellant and against the Thomases for the amount of the debt sued upon. Thereafter on August 16, 1912, this court reversed the decision of the superior court dissolving the attachment. 69 Wash. 700, 125 Pac. 776. Thereafter execution was duly issued looking to the collection of the judgment rendered against the Thomases, which execution was returned unsatisfied because no property of the Thomases could be found applicable to the satisfaction of the judgment. This, it is alleged, resulted from the unlawful failure of respondent Coss to hold the attached property after the dissolution of the attachment until appeal and supersedeas was perfected by appellant so as to preserve the attachment.

[2] Was respondent Coss, as sheriff, justified by the order dissolving the attachment in immediately surrendering possession of the attached property? In view of the fact that there was no process or order of the court of any nature then in existence authorizing the holding of the property, we are constrained to hold that he was not only authorized by that order to surrender the property, but that he was bound so to do upon demand from its owner. In *Anderson v. Land*, 5 Wash. 493, 495, 32 Pac. 107, 108 (34 Am. St. Rep. 875), Judge Dunbar, speaking for the court touching the termination of the lien of an attachment by its dissolution, a purchaser of the attached property from its owner pending the attachment claiming his title was perfected upon the dissolution of the attachment, as against a subsequent attachment, though the property remained in the hands of the sheriff during the interim between the dissolution of the first and the levy under the second attachment, said:

"The dissolution of the attachment on the 16th day of December ended the lien, and the owner of the property had a right to make any disposition of it he saw fit, no matter whether the

property had actually been turned over to him by the officer or not. He could sell the property during the time the writ was in effect in such case, and the purchaser's title would only be subject to the right of the attaching creditor under the writ, and when the attachment was dissolved there would be an end to any such right, and the purchaser's title would be complete."

It seems to us difficult to escape the controlling force of that decision in respondents' favor here. *Ryan Drug Co. v. Peacock*, 40 Minn. 470, 42 N. W. 293, dealing with a situation almost exactly like that here involved. Chief Justice Gillfillan, speaking for the court, there said:

"As to what is the duty of the sheriff in respect to the attached property upon the dissolution of the attachment, *Drake, Attachm. § 426*, states the general rule that: 'The special property of the officer in the attached effects is at an end, and he is bound to restore them to the defendant, if he is still the owner of them, or, if not, to the owner.' This is certainly the logical rule; for, the writ being his only authority for keeping the property from the owner, such authority is gone when the writ is dissolved. It is true that under our practice the plaintiff may, by appealing from the order dissolving the writ and giving the bond for a stay, suspend the operation of the order, and that such suspension will relate back to the date of the order, so that, if the officer still has the property, his right to hold it is restored; and it may also be, as between the parties to the writ, that, if between the date of the order and the appeal with a stay the sheriff has returned the property to the defendant, the appeal and stay reinstates the lien so that the plaintiff may require the sheriff to retake the property. Neither of these, however, is this case. Here the question is: Is it the duty of the sheriff to retain the property after the dissolution of the writ, which is his only warrant for holding it, to enable the plaintiff to determine whether he will appeal, and to perfect the appeal and stay, if he decides to take that course? The statute is silent on the point. If it be his duty to still hold the property, for how long must he hold it? Some authorities suggest that he should hold it for a reasonable time. But who is to determine what is a reasonable time? If that be the rule, the officer will be liable to the plaintiff in case he return the property to the defendant before the end of a reasonable time, and to the defendant in case he refuse to return it on demand after such reasonable time. The position of the officer would be a hard one if he must take the risk of the court or jury trying the action against him agreeing with him as to what is a reasonable time. We think it is for the plaintiff, and not the sheriff, to do what may be necessary to preserve the interests of the former in case of a dissolution of the writ. This he may do by procuring and serving on the officer an order directing him, in case the writ shall be dissolved, to retain the property, or staying the operation of the order dissolving in case it shall be made."

Counsel for appellant cite and rely principally upon the decision of the Iowa Supreme Court in *Danforth, Davis & Co. v. Carter*, 4 Iowa, 230, which involved the question of the preservation of the lien of an attachment by appeal from an order of the trial court dissolving the attachment accompanied by a supersedeas, where the controversy was only between the parties to the action in which the attachment was issued; the liability of the sheriff for surrendering the property not being in any way involved

Holding that the lien of the attachment held as between the parties to the action, the court, on page 237 of 4 Iowa, said:

"It appears that on the decision of the court setting aside the attachment, and before the appeal was taken, the sheriff delivered up the attached property remaining in his hands, and the clerk paid over the money which was in his hands to the defendant's attorney, 'taking an accountable receipt therefor.' The plaintiffs excepted to the decision of the court in refusing to render a judgment against the property, and to order a special execution, and appealed from the same. The question now is whether the attachment still holds the property; the judgment of the court dissolving it being reversed. We believe that the only consistent decision is that it still holds. This court has held in this and other cases that an appeal lies from a judgment of the court dismissing an attachment. The common effect of an appeal is to suspend the effect or operation of the judgment appealed from, if a supersedeas bond is filed, as required by law. What other object can there be in an appeal in such a case as the present? And what exempts a judgment on an attachment from the ordinary effect of the appeal? It would seem, upon reason, that an appeal should save this, as well as any other part of a cause."

And on page 239 of 4 Iowa added:

"When the question bears upon the relations of third persons, it is manifest that the attachment may be gone, when it would not be if viewed with reference to the two parties alone."

In the later case of Danforth, Davis & Co. v. Rupert, 11 Iowa, 547, the court absolved the clerk of the court from liability upon his paying out money, the proceeds of a sale of perishable attached property, upon dissolution of the attachment, before appeal therefrom; the order of the trial court being thereafter appealed from and reversed. Disposing of the contention that the former decision was decisive against the clerk touching his liability, the court said:

"We do not understand that decision as determining the rights of any others than the parties to that suit. In fact, the court says that no question touching the rights of third parties arises in that case, and that the question is decided without reference to such. The court, without doubt, in referring thus to third parties, must have had in view this very cause or the one against the sheriff, because the plaintiffs would, from the nature of the transaction, be compelled to resort to this remedy. We conclude that the defendant is a third party, as thus referred to by the court, and that the right of plaintiffs to recover, as against defendant, has not been adjudicated. When an attachment is dissolved by the district court, it is a final adjudication upon all questions involved therein, unless, in the proper time, appealed from. That appeal must be taken forthwith to continue the lien; but, as between the parties, four days is a reasonable time within which to perfect such appeal. In determining what rule the clerk should be governed by when an attachment has been dissolved, and money deposited with him is demanded, we cannot be guided by precedents, because we are unable to find a case presenting the peculiar condition that this one does. It is true that the safest and most correct course would be for the clerk to obtain an order of court directing him to pay over the money before so doing. Yet we cannot say that he is liable if he does pay over the money in good faith, after the attachment has been dissolved, the suit ended, and without any notice of an appeal given."

Is it not the duty of the plaintiff, whose attachment has been dissolved, to be vigilant, if he desires his cause to stand in statu quo? The ruling is against him, and he is the only one who can determine whether it is final or not. Had the plaintiffs, who were the only parties interested in having the money remain in the clerk's hands, notified him that they had appealed, and after such notice the defendant had parted with the money, he would have been liable."

Some contention is made resting upon the fact that appellant furnished respondent Coss an indemnity bond securing him "against any damages that he might sustain by reason of the execution of said writ of attachment." We are quite unable to see that this put upon respondent Coss any obligation to hold the property after the dissolution of the attachment. There was then no longer any attachment to execute, so far as the duty of respondent Coss, as sheriff, was concerned. We have already noticed that there was no move made by appellant to have the attachment revived and respondent Coss retake the property.

Counsel for appellant dwell somewhat upon wrongs which they conceive as possible to flow from the conclusion we here reach. It must be remembered that the right of seizure of property by writ of attachment under modern systems of procedure is purely statutory. 4 Cyc. 396. The doctrine which calls for our present conclusion works no greater hardship to a creditor than as if there were no attachment statutes, in which event no seizure of a defendant's property could be made until after judgment against him.

The judgment is affirmed.

CROW, C. J., and CHADWICK, GOSE, and MORRIS, JJ., concur.

(83 Wash. 166)

PORT OF SEATTLE v. YESLER ESTATE, Inc., et al. (No. 12008.)

(Supreme Court of Washington. Jan. 5, 1915.)

1. EMINENT DOMAIN (§ 320\*) — TITLE OR RIGHT ACQUIRED—TIME OF PASSING TITLE.

Under Rem. & Bal. Code, § 7784, declaring that the court, on proof that just compensation and costs have been paid to the person entitled or into court, shall enter an order that the municipality condemning may take possession and be invested with title, title to land condemned by award of January 17th, and judgment of January 21st, passed to it on February 20th, the day on which the award was paid into court, and stipulations of the parties, dated January 17th and January 21st, providing that taxes for the preceding year, if a lien on property in the hands of the port, should be paid out of the award, and a judgment recital as to the right of the parties as of January 17th did not make the passing of title relate back to that date.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 851, 852; Dec. Dig. § 320.\*]

2. TAXATION (§ 511\*)—LIEN—GRANTOR AND GRANTEE—STATUTE.

Under Rem. & Bal. Code, § 9235, making taxes a lien upon real property from and including the 1st day of March in the year in which they are levied until paid, but, as between grantor and grantee, a lien from the first Mon-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—14



day of February of the succeeding year, taxes against land for 1912, title to which, under condemnation proceedings, passed to a municipal corporation on February 20, 1913, were a lien against the owner and not against the municipality.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 947-949; Dec. Dig. § 511.\*]

**3. TAXATION (§ 511\*)—PUBLIC PROPERTY—EFFECT OF CONDEMNATION—LIEN AGAINST AWARD.**

Although taxes assessed and actually delinquent cannot be collected by sale of land upon which they are a lien, after title thereto has been acquired by a municipality in an eminent domain proceeding, the award of damages paid into the registry of the court, as to taxes which were a lien against the former owner, was impressed with a lien for their collection.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 947-949; Dec. Dig. § 511.\*]

**4. STIPULATIONS (§ 17\*)—PARTIES BOUND.**

In a condemnation proceeding, a county not a party to stipulations between the municipality and the defendant owners as to damages, taxes, etc., was not bound thereby.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 38-40; Dec. Dig. § 17.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Condemnation proceeding by the Port of Seattle against the Yesler Estate, Incorporated, Joshua Green and wife, in which defendants filed petitions against King County to obtain the award remaining in court. Judgment for King County, and petitioners appeal. Affirmed.

Bronson & Robinson and Hughes, McMicken, Dovell & Ramsey, all of Seattle, for appellants. John F. Murphy and Samuel Morrison, both of Seattle, for respondent.

**CROW, C. J.** In May, 1912, the Port of Seattle, a municipal corporation, hereinafter called the port, filed, as plaintiff, in the superior court of King county, its petition in eminent domain against Yesler Estate, Incorporated, Joshua Green, Laura T. Green, his wife, the county of King, and other defendants, to condemn lots 1 and 2 in block 272, Seattle tidelands belonging to the Yesler Estate, and lots 3, 4, 5, 6, and 7 in the same block, belonging to Joshua Green and wife. The port intended to pay for these lots from the proceeds of certain bonds which it was authorized to issue, but considerable delay occurred in the sale of the bonds which caused a like delay in the condemnation proceeding. On or about January 3, 1913, the port negotiated a sale of its bonds; payment of \$500,000 to be made as soon as they were ready for delivery and approved by attorneys in New York City. An order was entered adjudging a public use, and the question of damages was, by the consent of all the parties, submitted to the court for trial sitting without a jury. On January 17, 1913, the date of the trial, a stipulation, to which King county was not a party, was entered into

between the port, the Yesler Estate, and Joshua Green and wife, reading as follows:

"It is hereby stipulated by and between the port of Seattle, Yesler Estate, Incorporated, and Joshua Green and Laura T. Green, his wife, parties to the above-entitled action, by their respective attorneys, that the condemnation judgment to be entered in the above-entitled cause shall provide that the amount fixed in the verdict of the jury, or the findings of the court, shall not bear interest during the period of sixty (60) days following the rendition of said verdict or findings, and that the plaintiff shall not be required to pay interest during the said period, provided that plaintiff pay such judgment forthwith upon the receipt of the proceeds of the sale of its first million dollar issue of bonds. It is further stipulated that out of said judgment award all liens of every kind and nature upon said property, including general or special taxes, which may be adjudged valid liens as of this date, shall be paid, it being understood that the amount of any such lien, or liens, asserted by any person, corporation or municipality may be determined by the court, and pending such determination of such lien or liens shall be retained in the registry of the court to be paid out in accordance with the final judgment of the court, or of the Supreme Court in case of appeal."

After hearing the evidence, the court made findings of fact and awarded damages as the value of the lots in the sum of \$120,000 for the lots owned by the Yesler Estate, and in the sum of \$280,000 for the lots owned by Joshua Green and wife. On January 21, 1913, a subsequent stipulation, to which King county was not a party, was entered into between the port, the Yesler Estate, and Joshua Green and wife, reading as follows:

"It is hereby stipulated and agreed by and between the parties hereto that in the stipulation made and filed at the time of the trial thereof on January 17, 1913, it was the purpose and intention of the parties hereto to provide that if the tax for the year 1912 were held to be a lien upon the property appropriated in the hands of plaintiff, which plaintiff would be required to pay, the amount of such tax should then be paid out of the said judgment award, but not otherwise."

In pursuance of the award and these stipulations, a judgment was signed and entered on January 21, 1913, awarding the damages, which judgment in part provided:

"It is further considered, ordered, adjudged, and decreed by the court that said awards shall not bear interest during the period of 60 days from the 17th day of January, 1913, and that the plaintiff shall not be required to pay interest during said period: Provided, that the plaintiff shall pay said awards into court as soon as it receives the proceeds of the sale of the first million dollar issue of bonds of said port of Seattle. It is further considered, ordered, adjudged, and decreed that out of the said awards there shall be paid all liens of every kind and nature upon said property, including special assessments and general taxes which may be adjudged valid liens against said property in the hands of plaintiff as of date of January 17, 1913. It is further considered, ordered, adjudged, and decreed that, upon the payment into the registry of this court of said awards and the costs of these proceedings taxed in favor of said respondents, the title to the property herein described shall be vested in fee simple in the port of Seattle, and said port of Seattle shall be entitled to the immediate possession thereof."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The port experienced further delay in the sale of its bonds, with the result that the awards were not paid into court until February 20, 1913. It is conceded that general taxes and certain special assessments, payable to King county, had been levied and assessed on the condemned lots for the year 1912. After the awards had been paid into court, the Yesler Estate and Green and wife withdrew the respective amounts due them, less \$1,504.52 taxes and assessments on the Yesler Estate, and less \$3,195.48 taxes and \$217 assessments on the Green lots, which sums were permitted to remain in the registry of the court subject to further litigation. Thereafter the Yesler Estate and Green and wife filed in the condemnation case, and served upon King county, their respective petitions claiming the residue of the awards then remaining in the registry of the court. King county by answer demanded payment of the funds to the county treasurer in satisfaction of the 1912 taxes and special assessments which had been levied on the lots. The trial court made findings of fact and conclusion of law, upon which a final judgment was entered, directing payment of the taxes and assessments to King county. The Yesler Estate and Green and wife have appealed.

It will be noticed that the award of damages for the value of the lots condemned was made on January 17, 1913; that judgment for the same was entered on January 21, 1913, but that the damages were not paid until February 20, 1913. Under section 9235, Rem. & Bal. Code, taxes become a lien upon real estate from and including the 1st day of March in the year in which they are levied until paid, but, as between grantor and grantee, such lien shall not attach until the first Monday of February of the succeeding year, which in this instance would be February 3, 1913. The controlling question in this case seems to be whether the title which the port obtained to the lots passed to it on February 20, 1913, the day upon which the awards were finally paid, or whether, upon the payment of the awards, the passing of the title, in pursuance of the judgment and stipulations, related back to January 17, 1913. The further questions are presented whether, at the time title passed, the taxes were a lien upon the real estate, and, if so, whether the damages awarded were in lieu of the lots impressed with a lien in favor of King county for the satisfaction of such taxes.

Appellants insist that by the judgment and decree of January 21, 1913, which they say was invited by the stipulations, the port was required to take the property and pay the awards immediately upon receiving the proceeds of the sale of its bonds; that the payment of the awards on February 20, 1913, related back to January 17, 1913, the date of the findings and awards made in the con-

demnation proceedings; that by relation the title vested in the port as of the later date; and that no taxes were to be paid out of the awards, except such as were adjudged valid liens on the lots in the hands of the port as of the date of January 17, 1913.

[1] The vital question presented for our consideration is whether the title passed to the port on February 20, 1913, the day on which it paid the awards. It would seem that this question is answered in the affirmative by section 7784, Rem. & Bal. Code—a section of the eminent domain act pertaining to municipal corporations. In *re Twelfth Avenue South*, 74 Wash. 134, 132 Pac. 868. The section cited provides that:

"The court, upon proof that just compensation so found by the jury, or by the court in case the jury is waived, together with costs, has been paid to the person entitled thereto, or has been paid into court as directed by the court, shall enter an order that the city or town shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court as aforesaid, and thereupon, the title to any property so taken shall be vested in fee simple in such city or town."

Appellants, however, insist that, by reason of the stipulations of the parties and the terms of the judgment, the payments, when made, related back to January 17, 1913, which caused the transfer of the title to relate back to that date. In support of this contention they cite *North Coast R. R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856, quoting certain expressions therefrom which, standing alone, would appear to lend some force to their argument. In the *Gentry* Case there had been two trials awarding damages in condemnation proceedings. From the judgment entered on the award made at the first trial, the property owners appealed to this court and secured a reversal which necessitated a second trial. Immediately after the first trial, the railroad company paid into court the damages awarded, thereby electing to take the property. Had the judgment entered therein been affirmed, the title would undoubtedly have passed as of the date of the payment, and a like result would follow upon the payment of any additional damages that might have been thereafter awarded. Pending the appeal the railroad company withdrew the award from the registry of the court. On the second trial a larger award was made. Payment of this award into court was made by the railroad company, which payment continued its election to take the property. Later the railroad company commenced an action to require the former owners to pay certain taxes which had become a lien on the real estate after payment of the first award, but prior to the payment of the second award; its theory being that under the statute the title finally passed on the date of its payment of the second award. After reviewing several sections of the eminent domain act, under which the condemnation had been made, we held that, when the

railroad company paid the first award, it elected to take the property; that without authority it had wrongfully withdrawn its payment pending the first appeal; and that, when it made a payment of the second award and continued its election to take the property, the title which it then obtained related back to the date of its payment of the first award. In so holding, we used the following language, on which appellants now rely:

"If, in the case before us, on the original appeal there had been an affirmation of the original judgment for damages, the right of abandonment so suspended by payment of the award into court would have been forever lost, and the respondent's title would have related to the date of the original judgment and decree of appropriation, not to the date of affirmation."

It is apparent that the decision cited has no application to the facts now before us. No payment of an award was made by the port at any time prior to February 20, 1913, and under section 7784, supra, the title passed at that time. There is no sufficient reason for holding that it related back to January 17, 1913. The judgment, as above quoted, contemplates that the title would not pass until the award was paid. It in effect so provided.

[2, 3] It is apparent that, as against appellants, the taxes in question became a lien upon the property on February 3, 1913, prior to the date on which the title passed.

In *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, it was held that taxes definitely assessed and actually delinquent could not be collected by a sale of land upon which they were a lien after title thereto had been acquired by a municipality, in the exercise of its sovereign right of eminent domain. That case, however, is consistent with the idea that although after such condemnation the land itself, while owned by the municipality, could not be reached in the collection of the outstanding and delinquent taxes, the award of damages, when paid into the registry of the court, by the condemning municipal corporation, could be subjected to tax liens which were payable at the date of the transfer of title to the municipality in the condemnation proceeding, and this course of procedure seems to have been contemplated by the terms of the stipulations and the provisions of the judgment in this action. Title to the lots having passed on February 20, 1913, after the taxes had become a lien as between grantor and grantee, it would seem to follow that the money paid into court by the condemning corporation should be impressed with a lien for the collection of such taxes, as was done in this case.

There seems to be some contention on the part of appellants that the county by stipulation waived its right to a lien upon the fund in question. A reading of its stipulation, in the light of the circumstances and history of the case, shows that its only pur-

pose was to permit the appellants to draw down the award due them, less the taxes involved, the right to which could be thereafter litigated.

[4] The county, not being a party to the stipulations entered into between appellants and the port, was not bound thereby.

Our conclusion from the entire record is that the title passed on February 20, 1913; that the taxes were then a lien upon the real estate; that they could not be enforced against land owned by the municipal corporation; and that the trial court properly held them to be a lien upon the awards when paid into court, and properly directed their payment therefrom.

The judgment is affirmed.

MOUNT, FULLERTON, MORRIS, and PARKER, JJ., concur.

(83 Wash. 174)

LEBOVITZ et al. v. COGSWELL et al.  
(No. 12062.)

(Supreme Court of Washington. Jan. 5, 1915.)

1. ACTION (§ 50\*)—MISJOINDER OF PARTIES—STATUTES—COMMON INTEREST IN A CAUSE OF ACTION.

Under Rem. & Bal. Code, § 189, providing that those having a common interest in a cause of action shall be joined as plaintiffs, and section 408 providing that judgment may be given for or against one or more of several plaintiffs or defendants, plaintiffs, to whom timber land had been conveyed as tenants in common with one of the defendants, although they did not each contribute the same amount of money to the purchase of the property, suing to recover damages for defendants' fraudulent representations as to the amount of timber on the land, the facilities for logging, and the interests of the defendants, had a common interest in a cause of action, and might jointly prosecute the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 265-267; Dec. Dig. § 50.\*]

2. APPEAL AND ERROR (§ 694\*)—REVIEW—SUFFICIENCY OF EVIDENCE—STATEMENT OF FACTS.

On appeal on a transcript and a bill of exceptions, wherein the trial judge certified that the proceedings in the bill of exceptions were those occurring in the cause and made a part of the record, the question whether the evidence supported a verdict could not be considered, for want of a properly certified statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.\*]

3. TRIAL (§ 232\*)—VERDICT—STATUTE.

Under Rem. & Bal. Code, § 364, providing that the court may direct a special verdict upon all or any of the issues, and may instruct that, rendering a general verdict, the jury find upon particular questions of fact, to be stated in writing, an instruction to return a several verdict in favor of each of the plaintiffs was warranted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. § 232.\*]

4. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—FORM OF VERDICT.

Such direction, if error, was harmless, where it could make no difference to the defendants whether the verdicts were several or wheth-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er there was a joint verdict for plaintiffs for the aggregate amount of the several verdicts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

##### 5. APPEAL AND ERROR (§ 714\*)—MOTION FOR NEW TRIAL—AFFIDAVIT.

An affidavit upon a motion for a new trial, appearing only in the transcript, and not included in the statement of facts nor referred to in the certificate of the trial judge, and not shown by the record to have been called to the attention of the court, could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.\*]

Department 1. Appeal from Superior Court, King County; H. A. P. Meyers, Judge.

Action by Morris Lebovitz and another against Theodore Cogswell and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

John T. Casey, of Seattle, for appellants. Geo. B. Cole and John Wesley Dolby, both of Seattle, for respondents.

GOSE, J. This is an action to recover damages because of fraud which it is alleged was practiced upon the plaintiffs by the defendants in the sale of three sections of timberland. There was a verdict and judgment in favor of the plaintiffs against the defendants Theodore Cogswell and P. H. Casey. The action was dismissed as to all other defendants. Cogswell and Casey have appealed and will hereafter be referred to as the appellants.

As constituting the fraud, it is alleged that the appellants agreed between themselves to and did represent to the respondents that each of the three sections of timberland contained at least 15,000,000 feet of good, merchantable timber; that in furtherance of the fraud the appellant Casey took the respondent Lebovitz into a timbered section and pointed out to him certain heavily timbered land which he (Casey) represented to be one of the sections; that he told Lebovitz he was well acquainted with the other two sections, and that each thereof contained as much or more timber than the section shown; that he represented to Lebovitz that none of said timber was situated to exceed two miles from a railroad; that it could be easily logged and marketed; that the land purchased and the whole thereof was without value and devoid of merchantable timber, which the respondents well knew; that the land shown to the respondent Lebovitz by the appellant Casey was not a part of the land purchased; that the respondents were not familiar with timberlands or their value; that they relied upon and believed the representations made to them by the appellants; that Lebovitz paid to appellant Cogswell upon the purchase price \$4,200; that Kronfeld paid him the sum of \$4,543; that the appellant Casey represented to the respondents, and induced them to be-

lieve, that he was paying to Cogswell the sum of \$4,368, but that in truth and in fact he did not pay that sum or any sum whatever; that, upon the making of such payments by the respondents, the land was conveyed to the respondents and Casey; that they agreed in writing that Lebovitz should own an undivided interest in the land to the extent of 600 acres, that Kronfeld should own an undivided interest to the extent of 640 acres, and that Casey should own an undivided interest to the extent of 624 acres; and that the property, if it had been as represented by the appellants, would have been of the reasonable value of \$60,000. The case comes to us upon a transcript and a bill of exceptions. The judge who tried the cause certified "that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein," and that certain identified exhibits attached to the bill of exceptions were all the exhibits "admitted upon the trial of said cause." The land was conveyed to "Morris Lebovitz, Herman Kronfeld, and Patrick Casey" by three warranty deeds. One of these deeds conveyed section 5, another conveyed section 7, and the other conveyed section 15 to the parties as above named.

At the close of respondents' evidence the appellants moved for a nonsuit (1) on the ground that there was a misjoinder of plaintiffs, that the action was joint, and that the evidence showed if there was any cause of action for damages it was a several cause of action in favor of each of the plaintiffs; (2) insufficiency of the evidence to support the verdict.

[1] The first error assigned is that the respondents cannot jointly prosecute the action. Our statute (Rem. & Bal. Code, § 189) provides that those having a common interest in a cause of action shall be joined as plaintiffs. Section 406, Rem. & Bal. Code, provides that judgment may be given for or against one or more of several plaintiffs and for or against one or more of the several defendants. We think the respondents have a common interest in the cause of action, within the meaning of the statute. *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812. In that case a husband and wife and a third party brought an action to recover the possession of real estate and to quiet title. They alleged that the defendant wrongfully entered into the possession of the land; that he wrongfully held it and claimed some interest therein which was unfounded and without right. It was urged that the plaintiffs did not own the premises in dispute "by unity of title, and that they had no common right to maintain the action." The court held that the several rights of action arose from a common cause, were governed by the same

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

legal rule, and that the whole matter could be settled in a single suit. It does not appear in that case whether the plaintiffs had acquired title by one instrument or more, nor does it appear whether the third party acquired his interest in the property at the same time that the husband and wife acquired their title, or by the same instrument. In the instant case the land was conveyed to the three parties as tenants in common. It is true that the respondents did not each contribute the same amount of money in the purchase of the property. The statute, however, does not require that the interests of the plaintiffs shall be equal, but that there shall be a common interest in the cause of action. The appellants cite in support of this contention, *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428, and *Johnson v. Seattle*, 39 Wash. 211, 81 Pac. 705.

In the *Utterback Case* there were 13 plaintiffs, each claiming to be lawfully in possession of distinct and different pieces of land, consisting of town lots in different additions to the town of Puyallup. Some of the plaintiffs had merely individual contracts of purchase. Other plaintiffs claimed in virtue of deeds of general warranty by which each held in severalty several distinct parcels of land. The action was brought to remove a cloud upon the titles of the several plaintiffs. The defendants demurred to the complaint upon the ground, among others, that several causes of action had been improperly united. In addressing itself to these facts, the court said:

"Briefly stated, what is attempted here is to unite in one action several distinct and separate causes of action existing in favor of distinct parties, whose interests are several, and neither of whom has any interest in the cause of the others."

In the *Johnson Case* a surviving husband and minor son of the deceased jointly brought an action to recover damages on account of the death of the wife and mother. It was held that the husband had no cause of action for the loss of his wife; that he was entitled to recover the amount he had paid for funeral expenses, but that he could not join his cause of action with the action on behalf of the minor child for the loss of the mother. The two causes of action were distinct, one in favor of the husband against the party who had negligently caused the death of his wife, for funeral expenses which he had paid; the other the statutory action of the minor child for the loss of the mother. It is obvious that there was nothing in common between the two causes of action.

[2] It is argued that the evidence does not support the verdict. That question we cannot

consider, in the absence of a properly certified statement of facts. *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Beall & Co. v. O'Connor*, 78 Wash. 651, 139 Pac. 605; *Powers v. Washington Portland Cement Co.*, 79 Wash. 1, 139 Pac. 615; *Agens v. Powell*, 79 Wash. 131, 139 Pac. 873; *Mattson v. Eureka Cedar Lumber, etc., Co.*, 79 Wash. 286, 140 Pac. 377; *Thurman v. Kildall*, 141 Pac. 691.

[3, 4] The jury was instructed to and did return a several verdict in favor of each of the respondents. This is assigned as error. We think the practice followed by the court was warranted by the provisions of Rem. & Bal. Code, § 364. In any event, if it was error, it was technical error and without prejudice to the appellants. It could make no difference to the appellants whether the verdicts were several, or whether there was a joint verdict in favor of the respondents for the aggregate amount of the two verdicts.

[5] It is argued that the court erred in denying the appellants' motion for a new trial. It is said that this was error because of matter contained in the affidavit of two jurors. The affidavit appears only in the clerk's transcript. Under the authorities cited, the affidavit cannot be considered. In *Powers v. Washington Portland Cement Co.*, we said:

"The affidavits which were filed in support of this motion are brought to this court in the clerk's transcript, and are not included in the statement of facts certified by the trial judge. Under the doctrine frequently announced in the decisions of this court, they cannot be here considered. It has repeatedly been held that affidavits which were used during the progress of the trial in the superior court to establish or dispute a fact cannot be considered, unless they are included in the statement of facts or bill of exceptions, and by certificate of the trial judge made a part of the record"—citing numerous cases from this court.

In the case at bar the affidavit is not included in the statement of facts, nor is it referred to in the certificate of the trial judge. It is not even referred to in the motion for a new trial. The record is silent as to whether the affidavit was called to the attention of the court. It is not referred to in the judgment overruling the motions for a new trial.

Other errors assigned, which go to the merits upon the evidence, cannot be considered, in the absence of all the evidence which was submitted to the jury and which influenced the court in entering a judgment upon the verdicts.

The judgment is affirmed.

CROW, C. J., and CHADWICK, PARKER, and MORRIS, JJ., concur.

(83 Wash. 130)

**STATE ex rel. RAYMOND LIGHT & WATER CO. v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al.**  
(No. 12381.)

(Supreme Court of Washington. Jan. 4, 1915.)

**1. WATERS AND WATER COURSES (§ 203\*)—  
WATERWORKS COMPANY — REGULATION —  
POWERS OF COMMISSION.**

Public service commission act (Laws of 1911, p. 538), which prohibits the granting of unreasonable preference or making discriminations between persons or corporations by water companies, section 34 of which provides that nothing in the act shall prevent any water company from furnishing its product under any contract in force at the date of the act at the rate fixed in such contract, but that the commission may, in its discretion, order such contract to be terminated, does not, in the exercise of the police power of the state, declare void or voidable a contract by which a water company agreed to furnish water free to certain mills for the period of 49 years, and the commission's only power with reference to such contract is to direct the water company to terminate it by proper proceedings, if it finds that the contract prevents the company from rendering proper service.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**2. WATERS AND WATER COURSES (§ 203\*)—  
WATERWORKS COMPANY — REGULATION —  
POWERS OF COMMISSION.**

Even if the commission had jurisdiction to declare such a contract void, it could not do so before giving the parties thereto an opportunity to be heard.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**3. WATERS AND WATER COURSES (§ 203\*)—  
WATERWORKS COMPANY — DISCRETION OF  
COMMISSION—TERMINATION OF CONTRACT.**

Where the public service commission ordered a waterworks company to terminate a contract by which it had agreed to furnish water to certain mills free for 49 years, after a hearing of which the mill companies had no notice, and later the mill companies intervened and showed that the contract was executed in consideration of the transfer by the mills to the water company of the water plant, though there was no reservation of the right to use the water in the deed of transfer, it was not abuse of the commission's discretion to set aside the former order directing the termination of the contract.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**Department 2. Appeal from Superior Court, Thurston County; C. E. Claypool, Judge.**

Writ of review by the State of Washington, upon the relation of the Raymond Light & Water Company, against the Public Service Commission of Washington and others, to annul an order of the Commission. From an order of the superior court reversing the order of the Commission, the Commission and others appeal. Reversed, and writ dismissed.

Corwin S. Shank, and H. O. Belt, both of Seattle, for appellants. Grosscup & Lee, of Seattle, George Dysart, of Centralia, and B. O. Graham, of Spokane, for respondent.

**MOUNT, J.** This appeal is from an order of the superior court for Thurston county reversing an order of the public service commission. The Willapa Lumber Company, the Siler Mill Company, and the public service commission have each appealed from the order of the superior court.

The facts are as follows:

In August, 1912, the city of Raymond, by its proper authorities, filed a complaint against the Raymond Light & Water Company with the public service commission, challenging the rates of the water company as unreasonable and excessive, and alleging that the supply of water furnished by the water company to the citizens of Raymond was inadequate and insufficient. The Raymond Light & Water Company answered the complaint and alleged that, under the existing rates, its returns upon its investment were insufficient, and alleged that it had spent large sums of money in furnishing the city of Raymond with a water supply, and intended to still further extend and expand its plant.

Thereafter, in February, 1913, a hearing was had before the public service commission upon the issues raised by the complaint and answer. Testimony was introduced, and in the course thereof it developed that there were two outstanding water contracts, made and entered into between the Willapa Lumber Company, the Siler Mill Company, and the Raymond Light & Water Company in the year 1904, by which the water company was deriving and would derive no revenue therefrom for a period of 49 years. Upon the conclusion of the testimony the public service commission entered its findings of fact and conclusions of law to the effect:

(1) That the respondent water company had for a period of years furnished water free or at reduced rates to the Siler Mill Company and the Willapa Lumber Company, and that, if such water so furnished free had been charged for on the basis of the published tariff rates, the estimated increased income of the water company would be approximately \$3,600 per year.

(2) That the rapid and unusual growth of the city of Raymond had necessitated a rapid extension of water mains and increased water supply and continual and unusual expenditures by the water company.

(3) That the water company had failed and neglected to meet its obligations to the city of Raymond and the inhabitants thereof, and had failed to provide an adequate and sufficient supply of water for domestic and manufacturing purposes, and had failed and neglected to furnish water under sufficient pressure to insure fire protection, and had failed and neglected to provide suitable mains for distributing the water supply.

(4) That the rates and charges of the water company had been varied and discriminatory

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on account of the contracts with the Willapa and Siler Companies, and that such contracts should be terminated and such discriminatory practices discontinued.

(5) The commission then ordered the water company to submit detailed plans to the commission, showing clearly the manner in which the water company proposed to improve its water system and meet its obligations to the public, by providing wholesome water in sufficient quantity to reasonably serve the city of Raymond and to give the estimated cost of such improvements and full information as to the financial ability of the company to successfully carry out such plans.

(6) The water company was then ordered to install meters upon the plants of the Willapa and Siler Companies and to desist from extending further discriminatory privileges to such plants and to collect from all consumers alike the amount due for water on the basis of the company's published tariffs, and further that the contracts with the said companies should be terminated and the water company ordered for a period of one year to keep an accurate account of all moneys received from and all charges made to these mill companies and others that had been receiving free water, to the end that the commission might be intelligently advised as to what revision, if any, could be made in the rates of the respondent water company.

Thereafter the water company complied with this order of the commission, and filed plans with the public service commission showing to what extent and in what manner it proposed to improve its water system. It further notified the Siler and Willapa Companies of the termination of their water contracts, and proceeded to collect from these industries water bills under the published tariff of rates. The water company installed meters upon these plants, and in all other respects complied with the commission's order. The water company prosecuted no writ of review from the commission's order. The Siler and Willapa Companies paid their water bills for a period of several months under protest.

Thereafter in June, 1913, the Willapa and Siler Companies filed with the commission a petition in intervention in which it was alleged in substance: (1) That the mill companies in question had not been made parties to the original proceeding and were not served and did not appear therein. (2) That the commission had no jurisdiction over the subject-matter of the water contracts between these mill companies and the water company. (3) That the order entered by the commission, with reference to the subject-matter of these contracts, deprived the mill companies of valuable property rights without due process of law, and impaired the obligations of such contracts. The petition in intervention also alleged that, prior to the organization of the Raymond Light & Water Company, the interveners were the owners of the water plant

which was then in existence, and which was used by them in conducting water from the source of supply to their respective mills; that, when the water company was organized, they transferred the water plant to the water company and reserved to themselves such water as they might need for their respective manufacturing plants.

Upon this showing the Willapa and Siler Companies were allowed to intervene, and the public service commission reopened the case upon the issues presented in the petition of the mill companies. After a somewhat extensive hearing going into the history of these contracts with the mill companies, the commission made and entered findings of fact finding in substance: That the Willapa and Siler Companies, at the time of the transfer of the water plant to the water company, reserved to themselves sufficient water for the use of their respective plants, and then concluded in substance: (1) That the water mentioned in the contracts between the Siler and Willapa Companies and the respondent water company was reserved to the mill companies; (2) that the commission had not at the time of making the order of February, 1913, which order terminated the said contracts, acquired jurisdiction over either of said mill companies or over the subject-matter of said contracts. (3) That the original order of the commission be modified in so far as it authorized the termination of the said contracts and permitted the Siler and Willapa Companies to take and use water as before. The rest of the original order was not changed.

From this decision of the commission the respondent water company sued out a writ of review to the superior court for Thurston county. After a hearing that court entered a judgment on May 23, 1914, by which the last order of the public service commission was annulled, reversed, and set aside, and the first order of the public service commission was reinstated. From that judgment this appeal is prosecuted, first, by the public service commission, and, second, by the mill companies.

The lower court apparently based its judgment upon the conclusion that the contracts entered into between the water company and the mill companies in the year 1904 were avoided by the act of 1911 (Laws of 1911, p. 538, relating to the public service commission), because these contracts were contracts for free water to these companies for a period of 49 years, and for the further reason that the deed by which the waterworks of the mill companies was transferred to the water company did not contain a reservation of water, but transferred the whole rights of the mill companies to the water company, and that the public service commission, in making the first order, had jurisdiction of the parties and authority to cancel these contracts for free water.

The respondent in a voluminous brief, in

answer to voluminous briefs filed by the appellants, states that there are but three questions in the case, as follows: First, had the public service commission jurisdiction over the persons of the mill companies in making the original order terminating the contracts between the mill companies and the water company; second, had the commission jurisdiction over the subject-matter of the contracts between the interveners mill companies and the respondent water company; and, third, had the commission the legal right to terminate these contracts in the exercise of its police power?

[1] It is argued by the respondent that the public service commission had jurisdiction to terminate these contracts in the exercise of the police power of the state. If the contracts were contracts which the state in the exercise of its police power, had a right to terminate, and which the state had declared void, as were the contracts in the case of *Cowley v. Northern Pac. Ry. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, or in the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, or in *Louisville & Nash. Rd. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, we would have no doubt of the right of the water company or of the public service commission to terminate these contracts. But it seems to us that the contracts involved in this case do not partake of the nature of the contracts in those cases. Conceding that there was no reservation of any part of the water on the part of the mill companies when the transfer of the water system was made to the water company, and that simple contracts were entered into by which the water company agreed to furnish water to these mill companies for a period of 49 years, we are still satisfied that the commission act in question does not make these contracts, or contracts of this character, either void or voidable, because at section 34 of the commission act (Laws of 1911, p. 561) the act provides:

"Nothing in this act shall be construed to prevent any gas company, electrical company or water company from continuing to furnish its product or the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto and thereupon such contract or contracts shall be terminated by such company as and when directed by such order. \* \* \*

The act in prior sections provides that water companies shall not make or grant any undue or unreasonable preference or advantage to any person or corporation, that there shall be no discrimination between patrons, and then provides, as quoted above, that nothing in this act shall prevent any water company from continuing to furnish its product or

service under any contract in force at the date this act takes effect. It seems plain, therefore, that it was the intention of the act that contracts of the character of these were not declared illegal, or even voidable, because they are expressly excepted. It is true the section then provides that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the company party thereto, and that thereupon such contract or contracts shall be terminated as and when directed by such order. This simply means that, if a contract has been entered into, it is within the power of the public service commission, in its discretion, to order that such contract shall be terminated by the company in the manner directed by the public service commission. It was intended, no doubt, that, when a contract of the character of these in question is detrimental to the service of the company furnishing water, the public service commission, if it finds this to be a fact, may direct the termination of such contract. It would be for the parties to the contract to terminate it. If it was a void contract, it might be terminated without damages. If it was a valid and binding contract, before it could be terminated, damages would necessarily be assessed. It could not be reasonably contended that if a public service corporation, furnishing water to a city, had acquired by purchase the right to take a certain portion of a stream for the purpose of furnishing water to its patrons, and it should eventuate that the whole stream was necessary, the public service commission would have the power to require the owner of the stream to deliver it to the public service corporation without compensation. The public service commission could only direct that the public service corporation should acquire the stream by proper and legal methods. And so, in this case, these were valid contracts when entered into, upon valid and good considerations. The commission act, as above stated, exempts these contracts from the operation of the statute, except that the public service commission, in the exercise of its discretion, may require the companies, or the parties to the contracts, to terminate them. By reason of this exception in the statute, we are satisfied that these contracts are neither void nor voidable. They were valid and binding obligations which the statute does not attempt to avoid, but expressly exempts.

[2] Upon the question of jurisdiction, we are satisfied that the public service commission had jurisdiction to determine the questions presented upon the original application between the citizens of Raymond and the water company. It had a right, no doubt, to inquire into the quantity and quality of the water furnished to the citizens and the facilities for furnishing water. It was authorized to inquire into the reasonableness of the rates, and for that purpose to inquire wheth-

er water was being furnished free or otherwise. And, under its powers in this respect, it might require the water company to desist from furnishing free water. But we are satisfied that the public service commission was not authorized to set aside the contracts in question, first, because the statute does not give the public service commission that authority; and, second, even if the statute did give this authority, the beneficiaries under the contracts were clearly entitled to a hearing upon that question. We think the order of the public service commission first made must be construed as directing the water company to terminate the contracts, and did not in itself terminate the contracts.

[3] After this order was made, and after the water company had notified the mill companies that the contracts were terminated, the mill companies then intervened in the case, and alleged, in substance, that the contracts ordered to be terminated were valid and binding contracts; that they were the consideration for the transfer of the water plant to the water company; and that the right to take water from the plant was reserved by the mill companies. The public service commission was then asked to vacate the order requiring the termination of the contracts. As we have seen above, section 34 expressly provides that the public service commission shall have power, in its discretion, to terminate such contracts. In short, the authority of the commission was discretionary. It might exercise that power or not, as the facts or circumstances warranted. After a full and complete hearing upon the question whether these contracts were in effect contracts for free water or otherwise, the commission determined that they were not contracts for free water, but that there was a reservation of the water used by the mill companies at the time the water plant was transferred to the water company. It is obvious that the public service commission should have taken these facts into consideration before making its first order. It did not do so. It was not apprised of the facts or circumstances which led up to the making of the contracts. Upon a full hearing of all the evidence upon this question, the commission was of the opinion that, while the deed from the mill companies to the water company made no specific reservation of water, the contracts and deed, when taken together, showed that it was intended by the parties that there was a reservation of water sufficient and necessary for the mills. And therefore the commission exercised its discretion and vacated its first order. It is true there is no reservation in the deed conveying the water plant to the water company. The deed recites that it conveys a certain quantity of land, making no mention of water. It does not even mention appurtenances to the land. The contracts in

question were executed a few months later. These contracts recite that the mill companies may connect with the pipes of the water company and use a sufficient amount of water to run their mills for a period of 49 years. The evidence clearly shows, we think, that these contracts and deed were a part of one and the same transaction, and that one was the consideration for the other. The evidence also shows that it was the intention of all the parties, at the time this deed and these contracts were made, that the mill companies should reserve sufficient water for the use of their mills at all times during the period named. The mills to which the water was conveyed and the land upon which the water was used by the mill companies were not transferred to the water company. The deed conveyed simply a tract of land at the headgates of the creek where the water was taken, and a right of way to the town of Raymond. We are satisfied, upon the whole case, that the public service commission, in making its last order vacating the first order, was acting within its discretion, and that there is nothing in the case to justify the conclusion that this discretion was abused; and we are satisfied, therefore, that the trial court was in error in setting aside the last order and reinstating the first order. What we have said above disposes of the case upon its merits, and there is no necessity to discuss other questions presented in the briefs.

The judgment is therefore reversed, and the writ ordered dismissed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

(83 Wash. 123)

MUELLER et al. v. DENNIS. (No. 12067.) (Supreme Court of Washington. Jan. 4, 1915.)

1. MASTER AND SERVANT (§ 150\*)—INJURY TO MINOR—NECESSITY OF INSTRUCTION.

Where a boy was hired to assist a janitor, and his duties required him to operate a freight elevator unfamiliar to him, if the elevator at times started up after being apparently stopped, and the employer or the janitor knew of the peculiarity, it was the employer's duty to instruct him as to that fact.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.\*]

2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTION FOR JURY—INSTRUCTIONS TO SERVANT.

In an action for injuries to a minor employé injured by the starting up of a freight elevator, whether it was a peculiarity of the elevator to start up after having been apparently stopped, and whether defendant knew of the peculiarity, so as to require instruction, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by Eugene A. Mueller, by Laura T. Hagman, his guardian ad litem, and Laura T. Hagman against Graham B. Dennis. From a judgment for plaintiffs, defendant appeals. Affirmed.

Cullen, Lee & Matthews, of Spokane, for appellant. Zent, Powell & Redfield, of Spokane, for respondents.

**MOUNT, J.** This is an action for personal injuries. The plaintiff recovered a judgment for \$1,425 upon a verdict of a jury. The defendant has appealed.

The four assignments of error made in the brief are all based upon the question of the sufficiency of the evidence to take the case to the jury. According to the evidence on behalf of the plaintiff, he was a boy a little over 18 years of age at the time of the injury. He was employed by the appellant to work at certain hours in an apartment house owned and conducted by the appellant. A part of his duties consisted in assisting the janitor. At the time he was employed he was instructed to obey the janitor and do what the janitor told him to do. There was a freight elevator in the building. This elevator was used only for freight. It was started and stopped by means of a cable. The janitor instructed the boy that to start the elevator it was necessary to give a certain pull on the cable, and that to stop the elevator it was necessary to pull upon the cable in the opposite direction. These were all the instructions given. The plaintiff had made two or three trips on the elevator prior to the time he was hurt. He had never operated an elevator other than this one. The testimony of the boy who had preceded the plaintiff in his employment was to the effect that the operation of the elevator was peculiar, because it would start with a jerk and frequently require several pulls in order to stop it. The plaintiff was not told of this fact.

On October 11, 1912, the janitor left the keys of the elevator with the plaintiff and told him to deliver certain packages to tenants at about 3 o'clock of that day. In obedience to this direction, the plaintiff took some packages to the elevator in the basement, unlocked the door, laid the packages on a ledge between the door and the elevator shaft, and then brought the elevator cage, which at that time was in the well below the basement floor to the level of the floor, and stopped it by giving a pull upon the cable. While he was stooping over to reach the packages and place them in the elevator cage, the cage started, caught him, and carried him partly in the cage to the top of the door, and there caught him and injured him.

[4] If it is true that this elevator sometimes required two or three pulls on the cable in order to stop it, or that it would sometimes start of its own accord after being apparently stopped, as the evidence of the plain-

tiff seems to indicate, it was, we think, clearly the duty of the defendant or the janitor who had charge of the building to instruct the boy of that fact.

[2] It is contended by the appellant that there were no defects in the elevator; that it had been inspected and was in perfect order; and that the defendant had no knowledge of the peculiarity above mentioned. The appellant's evidence tended to show these facts. If this peculiarity existed, which was a question for the jury, it was also a question for the jury to say whether the defendant knew, or, in the exercise of ordinary care, should have known the fact. If he knew, or should have known, as the jury evidently concluded he did, it was negligence not to instruct the boy thereof. The boy was shown to be an intelligent boy for his age; but we think he was not required to take notice of a peculiarity such as this when he was inexperienced in the use of elevators, had not been told, and did not know, of the peculiarity, and had used the elevator but two or three times prior to the time he was hurt, and then did not observe the peculiarity.

We are satisfied, therefore, that the court properly submitted the case to the jury.

The judgment is affirmed.

**CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.**

(83 Wash. 126)

**NORDEEN IRON WORKS v. RUCKER et al.**  
(No. 12085.)

(Supreme Court of Washington. Jan. 4, 1915.)

**1. WORK AND LABOR (§ 11\*)—EFFECT OF CONTRACT—FAILURE TO FIX AMOUNT OF CONSIDERATION—REASONABLE VALUE—EXCESSIVE CHARGE.**

Where machinery had been manufactured upon defendant's order and accepted by the defendant, the manufacturer, in the absence of an agreement as to the price, can recover the reasonable value of the machinery, though he charged the defendant with a price in excess of the reasonable value.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 26; Dec. Dig. § 11.\*]

**2. WORK AND LABOR (§ 30\*)—ACTION FOR PURCHASE PRICE—INSTRUCTIONS.**

Where defendants purchased certain machinery without any agreement as to the price, an instruction that, if the jury found that defendants could have purchased the machinery in the open market at a price considerably less than plaintiff asked, that fact might be considered in determining whether there was a contract between the plaintiff and defendants was erroneous, misleading, and confusing.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 59-65; Dec. Dig. § 30.\*]

**3. NEW TRIAL (§ 39\*)—ERRONEOUS INSTRUCTION—PREJUDICE.**

The trial judge can grant a new trial for error in instruction, though he is of the opinion that the verdict was just.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.\*]

#### 4. NEW TRIAL (§ 41\*)—ERRONEOUS INSTRUCTION—PREJUDICIAL ERROR.

On a motion for new trial, prejudice will be presumed from erroneous instruction upon material questions, unless the contrary clearly appears.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.\*]

#### 5. APPEAL AND ERROR (§ 977\*)—REVIEW—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

An order of the trial court granting a new trial will not be disturbed, in the absence of a clear abuse of discretion, unless the record shows a misconception of the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by the Nordeen Iron Works against B. J. Rucker and others. From an order of the trial court granting plaintiff's motion for a new trial, defendants appeal. Affirmed.

Coleman, Fogarty & Anderson and W. P. Bell, all of Everett, for appellants. Jesse H. Davis, of Everett, for respondent.

MOUNT, J. This appeal is from an order granting a motion for a new trial. The plaintiff brought the action to recover the reasonable value of certain articles of mill machinery alleged to have been ordered by the defendants from the plaintiff and thereafter manufactured by the plaintiff and delivered to, and accepted by, the defendants. The answer was a general denial. The case was tried to the court with a jury. A verdict was returned in favor of the defendants. The plaintiff then filed a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict, errors in law occurring at the trial, and erroneous instructions given by the court. The trial court granted this motion upon the latter ground. The defendants have appealed from that order.

Upon the trial of the case there were three well-defined issues as follows: (1) Were the goods ordered from the plaintiff by the defendants? (2) Were the goods accepted by the defendants? (3) The reasonable value of the goods. These questions were all disputed in the evidence.

The court gave the following instruction to the jury:

"You are instructed that, if you find by a preponderance of the evidence that S. J. Pritchard was, on or about the 22d day of May, 1913, authorized to purchase, for and on behalf of defendants, the machinery mentioned in plaintiff's complaint herein, and that he did, on or about said date, order from plaintiff, for and on behalf of defendants, said machinery, and that, pursuant to said order, the plaintiff manufactured said machinery and delivered the same to said defendants, you must find for the plaintiff, unless you further find that the plaintiff charged for the same a price in excess of the reasonable value of said machinery, as hereinafter instructed."

The court also instructed the jury as follows:

"The court instructs the jury that, if you find by a preponderance of the evidence in this case that the machinery and supplies mentioned in the plaintiff's complaint in this action could have been purchased by said defendants in the open market for a sum considerably less than the amount claimed to be due by the plaintiff for such machinery at the time it is alleged the order was given therefor, then you are further instructed that you may take this fact into consideration in determining whether or not there was a contract entered into between the plaintiff and defendants, as alleged in plaintiff's complaint herein."

[1] The trial court was of the opinion that these instructions were wrong, and of this conclusion we have no doubt; for he said to the jury that, if the machinery was ordered by the defendants and delivered to the defendants, the plaintiff was entitled to recover, unless the jury found "that the plaintiff charged for the same a price in excess of the reasonable value of said machinery, as hereinafter instructed." There was no instruction thereafter which modified that instruction. It is too plain for argument that this instruction was erroneous; because, if the machinery was ordered by the defendants and delivered to and accepted by the defendants, the plaintiff was entitled to recover the reasonable value thereof, no matter what the plaintiff charged. It was not claimed at any stage of the cause that there was any contract as to the price of the machinery. The plaintiff therefore, if entitled to recover at all, was entitled to recover the reasonable price; while this instruction tells the jury that, if they should find that the price charged was in excess of the reasonable value, the plaintiff was not entitled to recover. This instruction was therefore clearly erroneous.

[2] The other instruction was erroneous because it told the jury that, if they should find that the machinery and supplies could have been purchased by the defendants in the open market for a sum considerably less than the amount claimed, then the jury might take this fact into consideration in determining whether or not there was a contract entered into between the plaintiff and the defendants, as alleged in the complaint. This instruction is erroneous, because there was no issue in the case as to any contract price. It was conceded that no price was agreed upon or mentioned at the time the machinery was ordered, if it was ordered at all. This instruction was misleading and confusing to the jury, and should not have been given.

[3] It is argued by the appellant that, conceding these instructions to be erroneous, the trial court should have denied the motion, because the judge was of the opinion that no other verdict could have been rendered in the case. A number of cases from this court are cited to the effect that, where the verdict is in accordance with the evidence and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in consonance with justice, the verdict will be sustained, even though erroneous instructions are given by the court. This rule would apply to a case where the court refused to grant a new trial for that reason. But in this case, while the trial court may have been of the opinion that the verdict was just, yet he refused to place his judgment upon that ground. He granted the motion because of these erroneous instructions. The trial court was of the opinion that the instructions were erroneous. He was also of the opinion that the instructions were misleading to the jury, and, in view of the fact that the principal questions in the case were disputed questions of fact, concluded that the jury must have been guided by these instructions, and returned a verdict because thereof.

[4] Where erroneous instructions are given upon material questions, prejudice will be presumed, unless it clearly appears from the whole case that there was no prejudice. It does not so appear in this case.

[5] There was some discretion in the trial court in granting or refusing to grant a new trial. And we have frequently said that:

"It is a general rule applicable to all cases that an order granting a new trial will not be disturbed, in the absence of a clear abuse of discretion, unless the record discloses that the order was made because of a misconception of the law applicable to the case." *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88, and cases there cited.

We are satisfied that the trial court properly granted the motion for a new trial, and the order is therefore affirmed.

CROW, C. J., and MAIN, FULLERTON, and ELLIS, JJ., concur.

(83 Wash. 231)

**GERMAN-AMERICAN STATE BANK OF RITZVILLE et al. v. GODMAN.**  
(No. 12338.)

(Supreme Court of Washington. Jan. 6, 1915.)

**1. WILLS (§ 6\*)—TESTAMENTARY DISPOSITION—PROPERTY SUBJECT—COMMUNITY PROPERTY—INSURANCE.**

Under Rem. & Bal. Code, § 1319, providing that any person of lawful age and sound mind may devise his estate, and section 1342 providing that one-half of the community property is subject to testamentary disposition, insured's community interest in the proceeds of insurance policies, three payable to insured's "executors, administrators, or assigns," one to his estate, and two to his legal representatives, was subject to testamentary disposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. § 6.\*]

**2. WORDS AND PHRASES—"LEGAL REPRESENTATIVE."**

The words "legal representatives" mean ordinarily "executors or administrators."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legal Representative.]

**3. EXEMPTIONS (§ 50\*)—PROPERTY SUBJECT—INSURANCE.**

Under the express provisions of Rem. & Bal. Code, § 569, the proceeds of a life insurance policy are exempt from liability for debts of either the insured or the beneficiary.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 75; Dec. Dig. § 50.\*]

**4. EXEMPTIONS (§ 62\*)—PROPERTY SUBJECT—INSURANCE—EXPENSES.**

Rem. & Bal. Code, §§ 1464-1467, excepting funeral expenses and expenses of administration from certain specific exemptions, do not apply to the proceeds or avails of insurance policies, which by section 569 are made "exempt from all liability for any debt," including expenses of administration, funeral expenses, and expenses of last sickness.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 88; Dec. Dig. § 62.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 181\*)—EXEMPT PROPERTY—SETTING ASIDE—PROPERTY BEQUEATHED—INSURANCE.**

Rem. & Bal. Code, § 1468 et seq., requiring that exempt property be set apart to the widow and minor children, does not apply to the proceeds of insurance policies bequeathed to a designated legatee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.\*]

**6. WILLS (§ 827\*)—CONSTRUCTION—DIRECTION TO PAY DEBTS—INSURANCE.**

A direction in a will that the executrix should pay "all my lawful debts and the expenses of my funeral" was not an appropriation of the proceeds and avails of insurance policies which were bequeathed to a designated legatee, where it did not appear from the entire will that such was the testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139, 2140; Dec. Dig. § 827.\*]

**7. WILLS (§ 827\*)—CONSTRUCTION—EXEMPT PROPERTY—APPROPRIATION.**

A testator will not be deemed to have appropriated exempt property to the payment of his debts, unless such intention appears by clear and apt language other than a mere general direction to pay debts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139, 2140; Dec. Dig. § 827.\*]

**8. WILLS (§ 488\*)—PAROL EVIDENCE.**

Parol evidence is inadmissible to limit or extend the unambiguous provisions of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.\*]

Department 1. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

In the matter of the estate of Henry E. Christensen, deceased. Action by the German-American State Bank of Ritzville and others against M. M. Godman. From the judgment, the bank and Charles W. Johnson, guardian ad litem, appeal. Affirmed.

Wm. O'Connor, of Seattle, for appellants. Benton Embree, of Seattle, for respondent.

GOSE, J. This litigation arose out of a controversy over the application of the proceeds and avails of certain policies of insurance upon the life of Henry E. Christensen, deceased. The policies in controversy amount in the aggregate to \$17,000. The administra-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tor with the will annexed collected upon the policies \$15,739.28. The court held that \$14,537.83 of this amount was exempt from the debts of the insured, expenses of administration, and funeral expenses and expenses of the last sickness. The administrator and the German-American Bank of Ritzville, a corporation, intervener, and the guardian ad litem have appealed. The death of Judge Godman was suggested in this court, and Mary B. Godman, as the executrix of his last will and testament, was substituted as the respondent.

The admitted facts are as follows: Henry E. Christensen died testate June 1, 1912. He was then a resident of Franklin county in this state. He was married to Anna M. Christensen in 1901. The will was admitted to probate on the 24th day of June, 1912, and on that date James W. McBurney was appointed administrator with the will annexed upon the petition of the widow Anna M. Christensen, who was also named as executrix in the will. On the 7th day of July, 1909, Henry E. Christensen made his last will and testament which, after the formal recital that he was then of sound and disposing mind, provides:

First. Nominates Anna May Christensen as executrix of the will.

Second. "I hereby direct my executrix to pay all my lawful debts and the expenses of my funeral as soon as may be conveniently possible for her so to do after my decease."

Third and fourth. Bequeathes the sum of \$10 to each of his two children.

Fifth. "The rest, residue and remainder of my estate, both real and personal and wherever located, I give, devise and bequeath unto my said beloved wife Anna May Christensen."

Sixth. Directs that his will be executed and his estate settled without the intervention of any court except such as the law requires.

Seventh. Revokes all former wills and testaments.

After the admission of the will to probate and the appointment of the administrator with the will annexed, the surviving wife, Anna M. Christensen filed a petition in the estate, setting forth her marriage, the death of the deceased, the issuance of the policies upon the life of the deceased after the marriage, and averring that she claims one half of the proceeds and avails of the policy as her community property and the other half thereof in virtue of the terms of the will. The administrator answered, setting forth the proceeds and avails of the policies which had come into his hands in the amount heretofore stated, and prayed for an order to pay all just debts. The German-American State Bank intervened, and alleged that the estate was indebted to it "in a large sum," and that the estate, aside from the insurance policies, was insufficient "to pay any appreciable part of the indebtedness of the estate." It further alleged that it was the intention of the testator to appropriate the proceeds and avails of the policies to the payment of his debts. These matters were put in issue by the answer of the surviving wife.

Three of the policies, aggregating \$12,000, were made payable to the insured's "executors, administrators or assigns," one policy for \$2,000 was made payable to "the estate of the insured," and two policies, aggregating \$3,000, were made payable to "the legal representatives of the insured." After finding the facts stated in this paragraph, the court allowed the administrator the following credits: (a) The reasonable expenses in making proof of death, \$112.40; (b) premiums paid upon the policies when the insured was insolvent, \$158.34; c) statutory fees and compensation for collecting the policies, \$629.57; and (d) \$880, the amount theretofore paid by the administrator for the support of the widow and the two minor children. The court further directed the administrator to pay to each of the two minor children the sum of \$10, the amount of their respective bequests, and directed him to pay to M. M. Godman, as assignee of the widow, the sum of \$14,537.83.

The court found that the reasonable value of the funeral expenses was \$432.60, and that the reasonable expenses of the last sickness of the deceased amounted to \$35. These two items the court refused to deduct from the proceeds and avails of the insurance policies. Findings 16 and 17 are as follows:

"16. That in his lifetime the said Henry E. Christensen realized that he was insolvent, and he believed and said that his life insurance would be sufficient to pay his debts after his death."

The assignee excepted to this finding.

"17. The estate of the said deceased is now insolvent and will probably be insufficient to pay the funeral expenses and the expenses of the last sickness of said deceased."

We find no exception to this finding. The appellants excepted to certain conclusions of law.

[1] 1. Whether the policies in controversy were community property we need not decide. They were subject to testamentary disposition to the extent of the testator's interest in them.

"Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate. \* \* \*" 1 Rem. & Bal. Code, § 1319.

Rem. & Bal. Code, § 1342, provides that one-half of the community property is subject to testamentary disposition. This principle was recognized in Grigsby v. Russell, 222 U. S. 149, where it was held that the rule of public policy that forbade the taking out of insurance by one on the life of another in which he has no insurable interest does not forbid the assignment by the insured of a valid policy to one not having an insurable interest in his life.

"Where the insurance is payable to the insured or to his estate or to his executors, the proceeds may be bequeathed and will pass under a general or residuary bequest of his property." 1 Underhill on Wills, § 56.

"Policies payable to the assured or his legal representatives may be disposed of by him by his

will as part of his estate, but policies otherwise payable cannot be so disposed of." 25 Cyc. 895.

The law does not differentiate between policies payable to the "executors, administrators, or assigns" and policies payable to "the estate" of the insured. *Mitchell v. Allis*, 157 Ala. 307, 47 South. 715.

[2] The words "legal representatives" mean ordinarily "executors or administrators." *Sulz v. Mut. Reserve Ins. Co.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; 25 Cyc. 887.

A policy made payable to the "legal representatives" of the assured may be bequeathed to his fiancée by the terms of a residuary clause in his will. *Walker v. Peters*, 139 Mo. App. 681, 124 S. W. 35. In *re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, impliedly recognizes this principle.

[3] 2. The Code (Rem. & Bal. § 569) provides that:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

Counsel for the appellants say that our statute is *sui generis*, and in criticism of it say:

"We think if the Legislature had given a little thought to the matter and had used a little judgment in passing the law, it would have read as follows: 'The proceeds of all life insurance shall be exempt to the beneficiary from all debts of the decedent.'"

The Legislature, however, did not so provide. As was said by Judge Hadley in *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851: "It would be difficult to employ language more sweeping and comprehensive than that used in the statute." In that case it was held that endowment policies in the hands of judgment debtors were exempt from seizure and sale in a proceeding supplementary to execution. It was contended that life insurance which has a present surrender value to the holder was not exempt from liability for his debts, and that the statute only protects insurance payable to a beneficiary other than the assured, and which was intended for the protection of the family or other beneficiary without any present or prospective interest in the insured. This view was rejected. In *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, in considering this statute, it was said that the amendment of 1897 (page 70, 1 Rem. & Bal. Code, § 569), extending the exemption of 1895 (page 396) to accident insurance, together with the fact that the statute is broader in its terms than the statutes of most other states, "conclusively show the intention of the Washington Legislature to adopt a broader and more comprehensive exemption." The statute received a liberal construction in *Northwestern, etc., Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326. In *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994, in speaking of another statute, we said:

"When the language of the act is plain, free from ambiguity, and devoid of uncertainty, it is unanimously [universally] held that there is no room for construction, and that inconvenience following the enforcement of the law as expressed can have no weight in the construction of the statute."

In *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, we said that it was the intent of the law to exempt the proceeds and avails of an insurance policy from the debts of the insured and from the debts of the beneficiary existing at the time the policy became available to him. A like rule of interpretation has been announced in other jurisdictions. *Bailey v. Wood*, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083; *Kimball v. Gilman*, 60 N. H. 54; *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720; *Bishop v. Grand Lodge*, 112 N. Y. 627, 20 N. E. 562. The statute is too plain to require construction. Any other interpretation than to follow the simple and direct mandate of the statute would be legislation.

[4] 3. The appellants contend that the court erred in holding that the proceeds and avails of the policies were exempt from the expenses of administration, the funeral expenses, and the expenses of last sickness. Rem. & Bal. Code, §§ 1464 to 1467, inclusive, is relied upon as supporting this view. These are old statutes, which in terms except funeral expenses and expenses of administration from certain specific exemptions. The statute under consideration is a later one, and contains no exceptions. These sections of the Code have no application to the proceeds or avails of insurance policies.

When the proceeds and avails of the policies become available to the widow, they were exempt, not only from the debts of the insured, but from her debts existing at that time. *Reiff v. Armour & Co.*, supra. The argument implies that the fund was exempt from some debts, whilst the statute exempts it from all debts. The obligation of the estate to inter the remains of the deceased arose immediately upon his death. The policies came to the widow at the same moment as an exempt fund.

The question of the exemption of the proceeds of insurance policies was not involved or considered in *Butterworth v. Bredemeyer*, 74 Wash. 524, 133 Pac. 1061, or *Butterworth v. Teale*, 54 Wash. 14, 102 Pac. 768, 18 Ann. Cas. 854.

[5] 4. It is further argued that, if the proceeds of these policies are exempt, they should have been set aside to the widow and minor children under the provisions of Rem. & Bal. Code, § 1466 et seq. These sections have no application to the proceeds or avails of insurance policies which have been bequeathed to a designated legatee. Although not relied upon by the appellants, it is equally plain that section 36, Laws 1906, p. 556, has no application to the facts in the case

at bar. *Frost v. Frost*, 202 Mass. 100, 88 N. E. 447, 27 L. R. A. (N. S.) 184, 132 Am. St. Rep. 476.

[8, 7] 5. The appellants' main contention is that the direction to the executrix in the will to pay "all my lawful debts and the expenses of my funeral" is an appropriation of the proceeds and avails of these policies to those purposes. These are words commonly employed in a will. In construing a will it is the business of the court to discover the intention of the testator. It is almost universally held that a general direction in a will to the executor to pay the debts of the testator does not impress a trust upon exempt property bequeathed or devised to a designated person. The intention of the testator to appropriate exempt property to the payment of debts must appear by clear and apt language. The trial court said that the words in the will are only the common formula of wills, and that they merely direct the executrix to pay the debts and funeral expenses of the testator if there be sufficient estate "legally applicable thereto." We have no doubt of the correctness of the court's interpretation. *Larson v. Curran*, 121 Minn. 104, 140 N. W. 337, 44 L. R. A. (N. S.) 1177; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560.

In *Larson v. Curran* the will, after the usual formal recitals, directed the executors—

"to pay out of my estate, as soon after my decease as shall be practicable, all the expenses of my last illness, all funeral expenses and charges of all kinds relating thereto."

Then followed this language:

"It is my will and I hereby direct that all my just debts shall be paid out of my estate as soon as the same can be determined after my decease."

This was followed by a devise and bequest of "all the rest, residue and remainder of my estate real, personal or mixed," to the testator's sister, who was named executrix and given full power of sale both as devisee and as executrix. In holding that these words did not impress a trust upon exempt property, the court said:

"The general rule is that only property of the decedent that was unexempt in his lifetime is, after his death, subject to his debts, and we think that it is and ought to be the law that a general direction in the testator's will to pay his debts out of his estate, whether it precedes or follows in the will a devise of the exempt property, does not have the effect of charging the homestead with the payment of debts. The direction to 'pay all my just debts' 'out of my estate' is a purely formal phrase, commonly employed and really superfluous. To give it the meaning that it amounts to a direction by the testator that the homestead devised to his sister shall be charged with the payment of his debts would be to attach altogether too much significance to a well-worn stereotyped expression that really means nothing, any more than do the very common assertions by a testator that he is of sound mind, and aware of the uncertainties of this frail and transitory life."

Under statutes making real estate liable for the payment of debts of the testator if

the personal estate is insufficient, it has been held that neither a general direction to the executor to pay debts, nor a power of sale to pay the debts, indicates an intention to charge the debts upon real estate. *Harmon v. Smith* (C. C.) 38 Fed. 482; *Clift v. Moses*, 116 N. Y. 145, 22 N. E. 393; *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545; *Hamilton v. Smith*, 110 N. Y. 159, 17 N. E. 740; *Gates v. Shugrue*, 35 Minn. 392, 29 N. W. 57.

It has been held that real estate is not charged with the payment of legacies unless the intention of the testator to that effect is expressly declared or fairly or satisfactorily inferred from the language and disposition of the will. *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614. It has been held that a general direction to an executor to pay a legacy "out of my estate" does not make the legacy a charge on the real estate which was devised in the residuary clause of the will. *White v. Kauffman*, 66 Md. 89, 5 Atl. 865. These cases hold that the same rules which would charge debts against real estate would also charge legacies against real estate.

If the words employed in the will should be held to impress a trust upon exempt property, the widow and minor children, when the estate was small, might, in many cases, be left homeless and penniless.

The appellants have cited, among other cases in support of their view, *Kiesewetter v. Kress* (Ky.) 70 S. W. 1065, and *Union Trust Co. v. Cox*, 108 Tenn. 316, 67 S. W. 815. The *Kiesewetter* Case seems to support their contention. In a later case in the same court (*McLean v. Trabue*, 142 Ky. 806, 135 S. W. 309) the court said that, under the statutes of the state, the homestead was subject to the debts of the testator the same as other property. It was the homestead that was involved in the *Kiesewetter* Case. In *Union Trust Co. v. Cox*, the testator named an executor to "administer upon my estate" by the following methods: First, to pay all just debts; second, to invest the balance of such funds as may remain as directed in the will. The will concluded with these words:

"My estate (as a whole regardless of prior transfers) to be divided as above directed each one-third of my entire effects including all insurance."

The policies were payable to the "executors, administrators and assigns." The court, after considering the peculiar phrasing of the will, reached the conclusion that it was the intention of the testator to appropriate the avails of his insurance policies to the payment of his debts. We think that the sounder rule is, and it is practically the universal rule of interpretation, that the testator will not be deemed to have appropriated exempt property to the payment of his debts by a general direction in his will to pay debts, and that before an intention to so appropriate exempt property will be ascribed to him, such

intention must appear by clear and apt language.

[8] The court permitted witnesses to testify that the deceased in his lifetime had said that he had sufficient insurance to pay his debts. Finding No. 16, supra, was based upon this testimony. The will is clear, definite, and free from ambiguity, and its provisions cannot be either limited or extended by resort to parol testimony.

The judgment is affirmed.

CROW, C. J., and PARKER, CHADWICK, and MORRIS, JJ., concur.

(83 Wash. 260)

STUDEBAKER et al. v. BEEK et al.  
(No. 11871.)

(Supreme Court of Washington. Jan. 7, 1915.)

1. DEEDS (§ 138\*)—CONSTRUCTION—"EXCEPTION" AND "RESERVATION"—DISTINGUISHMENT.

An "exception" is a clause in a deed which withdraws from its operation some part of the thing granted, which would otherwise have passed to the grantee under the general description, which part is in existence at the time of the grant and remains in the grantor unaffected by the conveyance; a "reservation" is the creation in behalf of the grantor of a new right issuing out of the thing granted, something that did not exist as an independent right before the grant; but frequently the words "exception" and "reservation" are used as synonymous, and the term "exception" will be held "reservation" whenever it be necessary to effectuate the intention of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 466; Dec. Dig. § 138.\*]

For other definitions, see Words and Phrases, First and Second Series, Exception; Reservation.]

2. DEEDS (§ 138\*)—CONSTRUCTION—EXCEPTING AND RESERVING.

The owner of a lot having granted an easement of way to a railroad, reserving the fee simple in the lands, thereafter gave a bond for the deed containing no reservation, and executed a deed in compliance with the bond, "reserving and excepting" therefrom the strip of land previously conveyed for a right of way. Held that, if the use of the words "reserving and excepting" in the last deed created an ambiguity, it would be resolved, not by any technical definition of the words, but by the nature of the right of the thing reserved and excepted, and that the deed reserved the fee of the right of way to the grantor and excepted the easement in the right of way to the railroad.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 466; Dec. Dig. § 138.\*]

3. ESTOPPEL (§ 29\*)—BY DEED—RESERVATION.

One who, under a bond for a deed containing no reference to any reservation, accepted in satisfaction a deed reserving and excepting a strip of land previously conveyed by the grantor for a railroad right of way with reservation of the fee was in no position to insist that the reservation was improperly inserted in the deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69-73; Dec. Dig. § 29.\*]

4. RAILROADS (§ 81\*)—PROPERTY—DEEDS—CONSTRUCTION—RESERVATION.

The owner of donation land granted a railroad right of way reserving the fee in the strip, and later conveyed part of the land to the

railroad on the express condition that the railroad would construct a station on the premises, which condition was never performed, and thereafter the railroad reconveyed by quitclaim deed, reserving and excepting therefrom the strip of land conveyed by the owner's first deed. Held that, as the railroad had not performed the condition, there was no basis for any reservation in its reconveyance, which reinvested the owner with all he had conveyed by his second conditional deed, and reserved to the railroad only what it received in its original deed of the right of way, so that its quitclaim deed of the abandoned right of way did not convey the fee therein, since it did not own the fee and had nothing but an easement by abandonment of which it lost all rights to the strip.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 209-212; Dec. Dig. § 81.\*]

5. EQUITY (§ 71\*)—LACHES—EQUITABLE TITLE.

Where an owner conveyed land for a railroad right of way reserving the fee, and thereafter conveyed part of the land to the railroad upon a condition which was never performed, there was no equity to sustain a reservation of the right of way in the railroad's reconveyance of the part granted, and, as the original owner had the equitable and the legal title in the fee, his grantee by deed reserving it to the grantor could not, over 30 years thereafter, assert an equitable claim to the strip.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.\*]

Department 1. Appeal from Superior Court, Cowlitz County; W. T. Darch, Judge.

Action to quiet title by J. W. Studebaker and others against John Beek, Joseph Beek, and others. Decree for defendant Joseph Beek, and plaintiffs appeal. Affirmed.

O'Neill & Spaulding, of Castle Rock, for appellants. Miller, Crass & Wilkinson, of Vancouver, for respondents.

ELLIS, J. This is an action to quiet title in the plaintiffs to a strip of land formerly occupied as a railroad right of way. The evidence was chiefly documentary, consisting of instruments, the parts of which hereinafter chronologically set out constitute the essential facts.

(a) On December 12, 1870, John Beek and Jane Beek, the then owners of a donation land claim, where the town of Castle Rock, in Cowlitz county, is now located, conveyed to the Northern Pacific Railroad Company an easement for a right of way described as follows:

"The right of way for the construction of a railroad and telegraph line to the extent of 200 feet wide of land on each side of said railroad, along the entire of said railroad as located, or to be located, across on hereinafter described lands and premises, and the right, power, authority, to take from our said lands adjacent to the line of said railroad material of earth, stone, and timber for the construction thereof, to wit, reserving always the fee simple to said lands and premises, it being understood that the use of the land for said railroad purposes is all that is conveyed by this instrument, to wit, Our donation claim certificate No. 12, notification No. 1243, as designated on the plats and records of the United States land office at Vancouver, W. T., containing 315<sup>00</sup>/<sub>100</sub> acres, be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—15

ing: [Here follows a particular description of the donation claim.]”

(b) On December 19, 1871, the same grantors conveyed by bargain and sale deed to the Northern Pacific Railroad Company by specific description a part of the donation claim containing 45.25 acres, upon condition as follows:

“This deed is given upon the express condition that the said Northern Pacific Railroad Company, party of the second part, construct a station and depot upon the line of its railroad upon the above-described premises, with proper and usual facilities and accommodations for passengers and freight, and maintain the same permanently.”

(c) On February 20, 1878, the railroad company reconveyed to John Beek by quitclaim deed the same 45.25 acres of land last above mentioned, with the following reservation:

“Reserving and excepting therefrom, however, a strip of land extending through the same or so much of said strip of land as may be within said described premises of the width of four hundred feet, that is, two hundred feet on each side of the center line of the Northern Pacific Railroad as conveyed by said party of the second part to said party of the first part, for right of way, by deed dated the twelfth day of December, A. D. 1871.”

(d) Prior to the execution of the deed last mentioned, John Beek executed to one George R. Pyle a bond for a deed providing that, upon the payment of the purchase price, John Beek would convey to Pyle or his legal representatives or order the entire donation claim by particular description, followed by no reservation or exception, and reciting, “containing three hundred and fifteen acres and eighty-hundredths of an acre, more or less.” Across the face of the record of this instrument was written, “Canceled by deed dated June 12, 1879.”

(e) On June 12, 1879, John Beek and Jane Beek, his wife, executed to James Studebaker a deed conveying by particular description the entire donation claim, reciting, “Containing 315<sup>00</sup>/<sub>100</sub> acres, more or less,” and followed by a reservation and exception which reads:

“Reserving and excepting therefrom, however, a strip of land extending through the same or so much of said strip of land as may be within said described premises of the width of four hundred feet, that is, two hundred feet on each side of the center line of the Northern Pacific Railroad as conveyed by said John Beek and Jane Beek, his wife, to the Northern Pacific Railroad Company, for right of way, by deed dated the twelfth day of December, A. D. 1870.”

(f) On April 18, 1913, the Northern Pacific Railroad Company executed to one Joseph O’Neil a quitclaim deed of the abandoned right of way across the Beek donation claim. This deed, it is admitted, was given for the benefit of all of the plaintiffs. It was also admitted that the railroad company has recently abandoned this part of its former right of way and removed its tracks therefrom.

The evidence showed that the plaintiff

James Studebaker was a son-in-law of Pyle and a partner in the purchase of the Beek donation claim. Studebaker testified that the deed from Beek and wife to him, dated June 12, 1879, was given in compliance with the bond for deed from John Beek to Pyle. It was admitted that the other plaintiffs are the heirs at law of George R. Pyle, who is now dead, and that whatever interest they have in the premises comes through the deed to Studebaker. It was admitted that John Beek and Jane Beek both died intestate some years ago, and that the defendants John Beek, Joseph Beek, and Mrs. Price were their heirs at law. It is admitted that Mrs. Price has not been heard from for over seven years, and that she probably lost her life in the San Francisco fire. She left no issue. John and Joseph Beek are her only heirs. Joseph Beek alone answered. The court found that he is the owner of an undivided one-third interest in the property as heir of John and Jane Beek, and of an undivided one-half of the undivided one-third inherited by Mrs. Price. Decree was entered accordingly, quieting his title to those interests, and denying the plaintiffs any relief as against him. The plaintiffs appealed.

The appellants’ claims of error are all, so far as material, directed to three points: (1) That the deed from John Beek and wife to the appellant Studebaker, instrument (e), should have been construed in connection with the bond for deed from the Beeks to Pyle, instrument (d), as conveying the fee of the right of way then occupied by the railroad company and reserved to the Beeks in their original deed to the railroad company, instrument (a); (2) that the second deed from the Beeks to the railroad company, conveying the 45.25-acre tract, instrument (b), conveyed to the railroad company the fee of the right of way which had been reserved to the Beeks in their original deed of the easement to the railroad company, instrument (a), and the deed from the railroad company of this 45.25 acres back to the Beeks, instrument (c), reserved to the railroad company the fee of the right of way so that the deed from the railroad company to O’Neil, instrument (f), of the abandoned right of way conveyed the fee title of that strip; (3) that because the reservation in the deed from the Beeks to Studebaker, instrument (e), was couched in the same terms as the reservation in the deed from the railroad company to the Beeks of the 45.25 acres, instrument (c), this reservation inured to the benefit of Studebaker carrying whatever rights the Northern Pacific Railroad Company had reserved to the Beeks.

1. The claim that the deed from the Beeks to Studebaker should be construed in connection with the bond for a deed from Beek to Pyle is based upon the contention that the reservation in the deed from the Beeks to Studebaker is ambiguous in that it contained



the words "reserving and excepting," as applied to the strip of land here in question. It is urged that the deed should be construed together with the bond for a deed in fulfillment of which the deed was given. The bond for a deed contained no reservation or exception whatever. It is claimed, therefore, that the reservation and exception in the deed was a mere reservation to the railroad company of the easement for a right of way which, when abandoned, passed by the deed and the bond for a deed to Studebaker.

[1] This court said in *Biles v. Tacoma, Olympia & Grays Harbor R. Co.*, 5 Wash. 509, 32 Pac. 211:

"While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that, whether a particular clause in a deed will be considered, an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved. *Martindale on Conveyancing*, p. 106, § 118. An exception is a clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description. The part excepted is in existence at the time of the grant, and remains in the grantor unaffected by the conveyance. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. 5 Am. & Eng. Enc. of Law, 1, 455, title 'Deeds'; *Tiedeman on Real Property*, § 843. But frequently the words 'exception' and 'reservation' are used as synonymous, and the term 'exception' will be held to mean 'reservation' whenever it may be necessary to effectuate the intention of the parties to the instrument."

[2, 3] Assuming, therefore, that the use of the words "reserving and excepting" in the Studebaker deed created an ambiguity, that ambiguity must be resolved, not by any technical definition of the words "reserving and excepting," but by the nature of the right or thing reserved or excepted. See, also, *Delano v. Luedinghaus*, 70 Wash. 573, 127 Pac. 197.

The evidence shows that, when the bond for a deed was given by the Beeks to Pyle, the records showed that the Beeks, in their original deed of the easement for a right of way to the railroad company, had reserved the fee of the right of way to themselves; the language in that deed being:

"Reserving always the fee simple to said lands and premises; it being understood that the use of the land for said railroad purposes is all that is conveyed by this instrument."

Studebaker for himself and the Pyle heirs accepted the deed containing a reservation and exception of this right of way in satisfaction of the bond for a deed to Pyle. This is not a suit to reform the deed to correspond with the bond. Having accepted the deed in satisfaction of the bond and permitted the bond to be canceled of record, Studebaker and the Pyle heirs are now in no position to insist that the reservation was improperly inserted in the deed. Construed with reference to the definitions of reservation and exception above quoted from the *Biles Case*, it

would seem that the words "reserving" and "excepting" were both properly used. At the time the deed to Studebaker was made, the railroad company was occupying the right of way with its track and enjoying the easement therein. The deed of the right of way having reserved to the Beeks the fee therein, the reservation and exception in the deed to Studebaker from the Beeks should be construed as a reservation of the fee of the right of way to the Beeks and an exception of the easement in the right of way to the railroad company. While there cannot be, with technical correctness, both a reservation and an exception of the same thing, as pointed out in the *Biles Case*, the nature of the things reserved and excepted in this instance shows that there was a separate subject-matter upon which each of these terms could operate, the reservation upon the fee of the right of way reserved to the Beeks, the exception upon the easement of the railroad company in the right of way which had been conveyed to the railroad company. It seems plain, therefore, that when applied to the subject-matter, this deed read in connection with the original deed of the easement for a right of way to the railroad company and the reservation therein of the fee of this right of way to the Beeks, the deed to Studebaker reserved also the fee of the right of way to the Beeks.

The case of *Hall v. Wabash R. Co.*, 133 Iowa, 714, 110 N. W. 1039, presents a situation closely parallel to that before us. In that case a right of way had been previously deeded to the railroad company, and later a deed had been made to another person of the entire tract, just as in this case the deed was made from the Beeks to Studebaker. In the deed of the entire tract the following language was used: "Excepting the part occupied by the right of way of the Iowa Central Railroad Company." In the case here there was a reservation and exception of the strip of land, and for a description reference was made to the original deed of the right of way to the railroad company. The cases are thus clearly analogous. The court said:

"This exception is clear and unequivocal, and no title to the land embraced in the right of way passed. She deeded all of the 40-acre tract, except the land occupied by such right of way. We do not see how an exception could be more definite, or how the intent of the grantor could be made plainer. The railroad company, then, had a recorded deed of the right of way. An exception in the grant of the right of way alone would amount to nothing, and, unless the exception in question withheld from the grant the strip of land so occupied, it is meaningless. It was the soil itself that was in terms excepted from the grant, and not merely the right of way. The exception before us is not repugnant to the grant, and must be held valid; and, if it be valid, the title to the land occupied as right of way remained in the grantor, with the like force and effect as if no grant had been made."

This language is directly applicable to the situation here. Since the railroad company was in possession of the right of way at the time the deed was given to Studebaker under

a prior recorded deed, the reservation and exception in the Studebaker deed would be meaningless, unless it was intended to reserve to the Beeks the title to the soil itself, and not merely to except the easement which had been granted to the railroad company. The language in the deed to Studebaker is even less capable of a contrary construction than was that in the deed in the Hall Case. The reservation could only refer to the title to the soil of the strip in question, even if the exception were held to refer to the easement alone.

The case of *Reynolds v. Gaertner*, 117 Mich. 532, 76 N. W. 3, is also a close parallel to that in hand. In that case a deed excepted from the premises conveyed 2.46 acres which formerly had been conveyed to a railroad company for use as a right of way. The railroad company, as it seems subsequently, abandoned the right of way. The contest was between the grantor and grantee in the first-mentioned deed; both claiming title to the strip formerly occupied by the railroad as a right of way. The court held that the exception in the deed was an exception of the fee of the right of way, not merely an exception of the railroad company's easement, and that the title to the land so excepted never passed to the grantee. Here again the language in the Studebaker deed, in that it both reserved and excepted the right of way, is less capable of the contrary meaning than that in the deed involved in the *Reynolds* Case.

[4] 2. The claim that the second deed from the Beeks to the railroad company conveying the 45.25 acres conveyed to the railroad company the fee of the right of way reserved in their original deed of the easement to the railroad company might be conceded were it not for the fact that it was given upon an express condition which was never performed. The evidence fails to show that the railroad company ever constructed or maintained a depot on this 45 acres. Construing the deed from the railroad company of this 45.25-acre tract back to the Beeks, instrument (c), in the light of that circumstance it seems clear that there was no basis for a reservation by the railroad company of the fee of this right of way. The railroad company never having performed the condition upon which alone its right to any part of the fee of this 45-acre tract could rest, the deed from the railroad company to the Beeks, instrument (c), must be construed as intended to reinvest the Beeks with all they had conveyed to the railroad company in their second deed, and as reserving only what the railroad company had received in its original deed of the right of way, instrument (a), which was nothing more than an easement for the use of the right of way for railroad purposes; the fee being retained by the Beeks. It follows, therefore, that the deed from the rail-

road company to O'Neill of the abandoned right of way, instrument (f), did not convey the fee of that strip, since the railroad company did not own the fee, and by the abandonment of the right of way for railroad purposes lost all right to the strip in which it had nothing but an easement.

[5] 3. The claim that the identity of the reserving clause in the deed from the railroad company to the Beeks with that in the deed from the Beeks to Studebaker would compel the same construction on both deeds, thus carrying the fee of the right of way to Studebaker, would have much force, were it not for the fact that the relation of the parties to the subject-matter in the two instances was different. As we have pointed out, the railroad company never had any claim to the fee of the strip of land here in question, except upon a condition which it never performed. Its deed to the Beeks was obviously for the purpose of reinvesting them with the title to the 45-acre tract because of its failure to perform the condition. On the other hand, the Beeks at all times had the equitable right to the fee of this strip because of the nonperformance of the condition. As said in *Delano v. Luedinghaus*, supra:

"In each case the equities of all the parties must be considered in arriving at the intent of the deed."

There was no equity to sustain a reservation in the railroad company of the fee of this strip. Studebaker and the Pyle heirs, however, having accepted in 1879 from the Beeks, who had the equitable and, as we construe it, the legal title in the fee of this strip, a deed reserving it to the Beeks, in full satisfaction of the bond for a deed of the donation claim, can at this late day hardly assert an equitable claim to this strip.

Viewed in the light of all of the circumstances and of the relation of the parties to the subject-matter, we believe that the trial court reached the correct result.

The judgment is affirmed.

CROW, C. J., and GOSE and MAIN, JJ., concur.

(33 Wash. 141)

PIERCE v. SEATTLE ELECTRIC CO. et al.  
(No. 11215.)

(Supreme Court of Washington. Jan. 5, 1915.)

1. APPEAL AND ERROR (§ 835\*)—REHEARING—QUESTIONS REVIEWABLE.

Where, pending appeal from an order granting a new trial on a specific ground, the Supreme Court in another case reversed its previous holding that in such an appeal it would not consider other grounds than the one on which the order was based, and held that respondent might sustain the order by urging all the grounds covered by his motion, the fact that appellee, following the old practice, and not having the change called to the attention of his counsel, argued only the ground for a new trial, which the trial court sustained, did not preclude it on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reversal from urging the other grounds specified for a new trial on rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. § 835.\*]

## 2. DAMAGES (§ 173\*)—PERSONAL INJURY—EVIDENCE.

In an action for injuries, evidence that, before plaintiff's injury, she was doing a profitable business selling hair goods, and that she contemplated and was about to take advantage of what she considered was a good opportunity to establish a hairdressing business in the city, was competent to show loss of earning capacity and was not objectionable as an attempt to recover anticipated profits.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.\*]

## 3. WITNESSES (§ 396\*)—IMPEACHMENT—FOUNDATION—REDIRECT EXAMINATION.

Where plaintiff, to lay a foundation for impeachment, asked a witness for defendant concerning a specific conversation with plaintiff, and the witness denied ever having had such a conversation, the court properly refused to permit defendant on redirect examination to show by the witness the whole conversation which she claimed she had; such evidence being proper only after impeaching evidence had been introduced, in the absence of any claim that the witness would not then be available.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.\*]

## 4. TRIAL (§ 296\*)—INSTRUCTIONS CURED BY OTHERS.

Where the only question for the jury with reference to the validity of an alleged release was whether its execution and delivery had been induced by fraud, and on that issue the jury were specifically instructed that the burden of proof was on plaintiff, defendant was not prejudiced by a general instruction defining the issues and charging that the burden of proving affirmative defenses was on defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

## 5. RELEASE (§ 58\*)—FRAUD—MISREPRESENTATIONS—QUESTION FOR JURY.

Whether a release of damages for injuries executed by plaintiff to defendant was obtained from her by fraudulent representations held for the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

En Banc. On rehearing. Reversed and remanded, with instructions.

For former opinion, see 78 Wash. 167, 138 Pac. 666.

CROW, C. J. A rehearing has been granted in this case, but a restatement of the issues and facts is unnecessary. The questions considered on the former hearing were: (1) Whether the facts were sufficient to sustain the verdict; and (2) whether the verdict, if allowed to stand, should be reduced. Our decision was against defendant's contention on both of these propositions. *Pierce v. Seattle Electric Co.*, 78 Wash. 167, 138 Pac. 666. To these rulings we now adhere.

The plaintiff has appealed from an order granting a new trial, and the defendant has appealed from an order denying its motion for judgment notwithstanding the

verdict. Both parties having appealed, we will avoid confusion by alluding to them as plaintiff and defendant. The questions to be decided at this time are: (1) Whether we will consider additional assignments of error now presented for the first time by the defendant in support of its motion for a new trial; and (2) if so, whether such additional assignments disclose error of law sufficient to necessitate a new trial.

[1] While the appeal in this case was pending, this court in *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, announced a new rule of practice, holding that where a new trial had been granted upon some specific ground, and the adverse party had appealed, the respondent might sustain the order by urging all the grounds covered by his motion, so that he would not thereafter be put to the necessity of further proceedings in the court below, or another appeal upon the same record. We there said:

"The correct rule of practice is now announced to be that where, upon the consideration of a motion for a new trial, the trial court enters an order granting a motion upon a specific ground or for a specific reason stated, and the adverse party appeals, the party seeking to sustain the order may urge in this court all the grounds which were covered by his motion, and is not limited to the specific ground or reason upon which the trial court based the order. A second appeal will not be entertained. However, to apply this rule to the present case would be unjust, since the practice here followed is in accordance with the previous holdings of this court. We will therefore consider this case upon its merits."

Our decision in that case was handed down on October 2, 1913. This case was first heard in this court on November 6, 1913, and was decided on February 16, 1914. Plaintiff insists that defendant should not be permitted to present additional assignments, as it had notice of the change in our rule of practice in ample time to act under it before or at the time of the original argument, or while the case was being considered by this court; that having failed to do so, and having allowed an opinion to be filed, it cannot raise new questions by petition for rehearing or upon rehearing. Defendant proceeded in strict accord with the settled practice as it existed prior to the decision in the *Rochester Case*. Counsel for the defendant frankly say that the decision had not been called to their attention at the time this case was first argued.

We are not disposed to make technical application of any rule which does not touch the substantive law of a case, especially where it has been so recently announced and there is no showing of bad faith. To bind a litigant in a given case where the court in the same case overlooked the fact that its changed practice might apply might operate as a denial of justice. We would arbitrarily cut off a right which an appellant had at the time his appeal was taken. It is no answer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to say that defendant did not urge its right in its former brief or by a supplemental brief. It was not bound to do so, and is entitled to be heard now, unless we are prepared to hold that it is fatal to a litigant to assume that the court will decide in its favor upon the question that is before the court. This would be to say that appeals are not prosecuted with an earnest belief that the court will decide in favor of the appellant. There may be some such appeals. If so, they are the exception and not the rule. The object of all lawsuits is to arrive at the ultimate truth and do justice. Rules are made to promote justice, not to defeat it. Nor do we think that the right to be heard should be denied under the many decisions cited, holding that the court will not consider matters urged for the first time on petition for rehearing. To so hold would be to say that the other grounds of the motion for a new trial should have been argued in the defendant's brief, when, under the rule as it existed at the time the brief was prepared, we would not have considered them. Plaintiff's objection to hearing the additional assignments of error now predicated upon the grounds of the motion for a new trial, not considered or impliedly overruled by the court below, is overruled.

[2] Plaintiff, as a witness in her own behalf, was interrogated and testified in part as follows:

"Q. What business were you in in Colorado? A. I had a hairdressing establishment. Q. For how long a time did you conduct a hairdressing establishment? A. About four years. Mr. Falknor: I object to that as immaterial. By the Court: She has not been in that business for a great many years, has she? Mr. Griffin: No, but we will prove she was intending to go into that business here, and would have done so if she hadn't been injured. By the Court: I think it is so remote, as to what her business would have been at the time, she could hardly testify what she might do here. She was not familiar with conditions here. A. I was selling goods here. Q. Is that a profitable business? A. Very. Q. Before you were injured, were you intending to go into that business? Mr. Falknor: I object to that as too remote and speculative. By the Court: She may go that far—state what she intended to do. A. I was going to open up a place on Third avenue. I had Messrs. West & Wheeler looking for a location for me, and I was out selling goods. Q. You were out selling the goods—hairdressing goods? A. Yes, hair goods. Q. And you investigated what opportunities there were here in Seattle for a hairdressing business? A. Yes. Q. What were they? A. Very good; never better."

Defendant contends that this evidence was incompetent and prejudicial; the substance of its argument being that it amounted to a claim of damages for loss of profits in a contemplated business, and that loss of such profits cannot be shown as an element of damage. In support of this position defendant cites *Kirk v. Seattle Electric Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991, *North Star Trading Co. v. Alaska Yukon Pacific Exposition*, 68 Wash. 457, 123 Pac. 605, and *Webster v. Beau*, 77 Wash. 444, 137

Pac. 1013, 51 L. R. A. (N. S.) 81, decided by this court, with additional authorities from other states. To the principle announced in these cases, plaintiff takes no exception; her position being that no evidence showing the value or extent of anticipated profits was offered or admitted. She insists that the evidence of which defendant complains was competent and admissible, not as a measure of damages for loss of profits, but as one of the elements entering into her principal case, which, taken in connection with other evidence, had a tendency to show a loss of ability to work or transact business, and therefore a resulting loss of earning capacity. The evidence was competent as tending to show a loss of earning capacity, and, as no specific statement was made of any specific amount of anticipated profits which plaintiff claimed she had lost, we fail to understand how the defendant was injured or prejudiced.

[3] Mrs. Brier, a witness for defendant mentioned in our first opinion, during her examination in chief testified to her recollection of what occurred at the time of the alleged settlement between plaintiff and defendant; the effect of her testimony being to show that the settlement was made in good faith and that no fraud was practiced by the defendant's agents. On her cross-examination counsel for plaintiff sought to lay the foundation for her impeachment. With this purpose in view he asked her if she did not have a conversation with plaintiff in the presence of plaintiff's daughter, in which she (the witness) told Mrs. Pierce "that she (Mrs. Pierce) had all the best of them because they agreed to get her well in two weeks." Mrs. Brier answered:

"A. I beg your pardon. Nothing was ever said—let me tell what was said at that conversation— A. I don't like to tell the conversation that passed. Mr. Griffin: I am laying the foundation for an impeaching question. Q. Didn't you say, the last time that you were at Mrs. Pierce's house; in effect this, in the presence of Mrs. Pierce and her daughter Margaret: 'You have all the best of them because they promised to get you well in two weeks, and you signed that paper, and you didn't know what you were signing'? A. I beg your pardon; I never said such a word; and the conversation—if you want me to say, I will tell you the conversation that passed between us, which I don't like to do."

On redirect examination, defendant's counsel asked Mrs. Brier to detail the conversation as she remembered it. To this counsel for plaintiff objected, saying:

"I simply laid the foundation for an impeaching question when I got Mrs. Pierce on the stand and her daughter; that is the reason. In fairness I asked the witness if such a conversation didn't occur, and she said no such conversation took place. She denied any such conversation took place, and that settles it. If she admitted a portion of it took place, or some such conversation took place, then Mr. Falknor could inquire, but not when she denies it."

This objection was sustained, and upon this ruling of the trial court the defendant now predicates one of its additional assign-

ments of error, contending that Mrs. Brier on her redirect examination should have been permitted to state the full conversation, to which her attention had been directed by the impeaching question. The record shows that the cross-examination above set forth was the first instance in which the alleged conversation was mentioned during the progress of the trial. No testimony had theretofore been given by plaintiff or any other witness relative to the supposed conversation. Mrs. Brier denied having made any statement such as was suggested to her by the impeaching question. At that time no conversation calling for an explanation had been given in evidence. After the defendant rested, the plaintiff and her daughter were recalled in rebuttal, and testified on this subject. Their testimony was in substance the same; plaintiff's evidence being as follows:

"Q. You know Mrs. Brier, do you? A. I do. Q. How close to where you live does Mrs. Brier live? A. She lives in the same block. Q. I want to ask you whether or not Mrs. Brier said to you, in the presence of Margaret, at the last time or about the last time that she was at your house, 'You have all the best of them because they promised to get you well in two weeks'? A. She did. Q. And you signed that paper and did not know what you were signing? A. That is what she said; she told me, she said, 'You didn't know what you were signing,' and she said: 'You have the best of them. They have got themselves in trouble, and they know it.'"

This testimony, given by the respective witnesses, had a bearing, not only on the issue whether the settlement had been made in good faith, but also went to the credibility of Mrs. Brier. Had the plaintiff and her daughter not been recalled as impeaching witnesses to testify to this alleged conversation, there would have been nothing in the record tending to contradict or impeach Mrs. Brier. While, in the exercise of his discretion, it might have been proper for the trial judge to have permitted Mrs. Brier on her redirect examination to give her version of the conversation mentioned in the impeaching question, there was no real necessity for pursuing such a course at that time, as Mrs. Brier could have been recalled to give her version of the conversation after plaintiff and her daughter had testified as impeaching witnesses. There is no suggestion that defendant was unable to recall her. Having failed to do so, defendant is in no position to predicate error upon the ruling whereby the trial judge excluded the redirect examination. In *Southern Ry. Co. v. Stewart*, 141 Ky. 270, 132 S. W. 435, a case cited by defendant, the court in the course of its opinion said:

"As the impeached witness may, as it is pointed out in the *Queen's Case*, supra, leave the scene of the trial, and cannot then be introduced, we conclude that it is always proper to permit him, on re-examination, while on the stand, to explain the supposed contradictory statement. On the other hand, as the impeaching witness may not be introduced at all, and there may be, therefore, no necessity for explanation, we conclude that the impeached witness may

be recalled and then given an opportunity to explain. In other words, the impeached witness at one stage of the proceedings or another should always be given an opportunity to explain the supposed contradictory statement."

After the plaintiff and her daughter had been recalled, and had given their testimony relative to this conversation, had the defendant then recalled Mrs. Brier to give her version of the conversation, and had the trial court at that time rejected her evidence, we would hold that prejudicial error was committed; but to hold on the record before us that the case should be reversed, the defendant having made no effort to recall Mrs. Brier, would be the declaration of a more technical rule than we should announce, in the absence of any showing that for some sufficient reason Mrs. Brier could not have been recalled.

[4] The trial judge, when defining the issues, instructed the jury in a general way that the burden of proving the affirmative defenses was upon the defendant. One of these defenses was the execution of a release which plaintiff contends was obtained by certain fraudulent representations as to the extent of her injuries, and the probable duration of her disability. Thereafter the court fully instructed as to this defense, announcing the rule that the burden of overcoming defendant's prima facie case by evidence "clear, strong, satisfactory, and convincing" was imposed upon the plaintiff. We have held in a line of cases too numerous to require citation that we will not reverse a case because of some technical error in the giving of instructions, when it is apparent from the entire record that the jury could not have been misled. The only question for the jury on the issue involved was whether the execution and delivery of the release had been induced by fraud, and on this issue they were so specifically instructed that the burden was on the plaintiff that we are unable to conclude the jury were misled by the general instruction above mentioned.

[5] The defendant contends that the trial court erred in submitting the question of fraudulent misrepresentations to the jury for the two reasons: First, that the whole record shows that the alleged representations of the claim agent and the company's doctor, to the effect that plaintiff would probably recover in about two weeks, was no more than an expression of opinion; and, second, that plaintiff's own physician, Dr. Snow, had told her that her recovery might be delayed for a considerable period of time. If the representations as to time of recovery stood alone, defendant's contention would have some merit; but when such representations are considered in connection with the fact that plaintiff and her daughter testified that the release was signed under the mistaken notion that it was only a receipt for the money then paid, and that the sum so paid would be treated as a payment on account in the

event that her injuries proved permanent, and the further fact that there was some doubt as to whether the one alleged to be plaintiff's family physician really sustained that relation, it becomes apparent that this case is not controlled by the rule announced in *Nath v. O. R. & N. Co.*, 72 Wash. 684, 131 Pac. 251. Dr. Snow was called in March and attended plaintiff about three times, or until he learned that she was being treated by Dr. Willis, the defendant's physician. Dr. Snow then withdrew and did not see plaintiff until July. To hold, under such circumstances, that she was bound by the opinion of Dr. Snow to the exclusion of that of Dr. Willis, and to so hold as a matter of law, would be unjust. The mere fact that plaintiff's testimony might seem improbable would not warrant us in withdrawing a disputed question of fact from the jury.

The order of the lower court granting a new trial is reversed, and the cause is remanded, with instructions to enter judgment upon the verdict of the jury.

ELLIS, GOSE, PARKER, MAIN, and MORRIS, JJ., concur.

(33 Wash. 212)

NORTH IDAHO GRAIN CO., Limited, v. CALLISON. (No. 12028.)

(Supreme Court of Washington. Jan. 6, 1915.)

1. SALES (§ 61\*)—CONSTRUCTION OF CONTRACT—EXECUTORY OR EXECUTED CONTRACT.

Whether a contract of sale is executed or executory depends upon the intention of the parties, and must be determined by its terms, the condition and situation of the property, and the circumstances surrounding the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.\*]

2. SALES (§ 199\*)—PERFORMANCE—PASSING TITLE—"SALE."

In a completed "sale," the title to the thing sold passes to the purchaser; there is a transmutation of property from one to another in consideration of some price or recompense in value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516-523; Dec. Dig. § 199.\*]

For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. SALES (§ 214\*)—EXECUTED SALE—EXISTENCE OF ARTICLE SOLD.

There can be no valid executed sale unless the thing sold has either an actual or potential existence at the time of the sale; unless it actually exists and is in the possession or under the control of the seller, or comes out of something in his possession or control as growing crops, goods in process of manufacture, etc.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 571-573; Dec. Dig. § 214.\*]

4. SALES (§ 61\*)—CONSTRUCTION OF CONTRACT—EXECUTORY SALE.

A contract for the sale of hay not then in possession of the seller, but to be acquired by him, was prima facie an executory contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.\*]

5. SALES (§ 214\*)—PERFORMANCE—PASSING TITLE—SETTING APART.

The title to hay sold by one not in possession, but who was to buy it to fill his contract, would not pass until the seller, after acquiring it, did some act appropriating it to the contract, such as piling it away or setting it apart pending the shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 571-573; Dec. Dig. § 214.\*]

6. SALES (§ 218½\*)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE—SETTING APART.

Evidence in an action for the price of hay sold, held not sufficient to show that the seller, on acquiring it to fill his contract, received and separately piled any specific lot of hay to be held for delivery under the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 588, 587; Dec. Dig. § 218½.\*]

7. SALES (§ 345\*)—ACTION FOR PRICE—CONDITIONS PRECEDENT.

A seller cannot sue for the purchase price of goods sold unless, at the time the contract calls for delivery or at the time when he should deliver, he has the goods and is ready and able to deliver them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 956-961; Dec. Dig. § 345.\*]

8. SALES (§ 61\*)—CONSTRUCTION OF CONTRACT—BUYER'S DIRECTION TO INSURE.

A buyer's direction to the seller to insure, given when he believed that the seller had purchased hay and specifically set it apart for delivery, when in fact it was part of a common mass out of which the seller was to deliver upon call, was merely a circumstance bearing on whether the contract was an executed or an executory contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.\*]

9. APPEAL AND ERROR (§ 171\*)—REVIEW—THEORY OF CASE.

A buyer, suing for the purchase price on the theory of a sale and a holding of a specific lot for delivery, could not, on appeal, adopt the theory of an executory sale.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the North Idaho Grain Company, Limited, against I. P. Callison, doing business as the Chehalis Produce Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to dismiss.

John C. Hogan and A. E. Graham, both of Aberdeen, for appellant. Bridges & Bruener, of Aberdeen, for respondent.

CHADWICK, J. Plaintiff brought this action to recover the balance of the purchase price due under a contract for the sale of 200 tons of No. 1 timothy hay. Plaintiff was a wholesale dealer in hay at various points in the state of Idaho, and defendant is a dealer in the same commodity at Aberdeen in this state.

The contract of the parties is evidenced by correspondence, the offer and acceptance being as follows:

"Sept. 2, 1910.

"North Idaho Grain Co., Deary, Idaho—Gentlemen: Replying to your letter of the 27th, we

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

will take 200 tons of number one timothy at \$20.75 f. o. b. points between Palouse and St. Maries on the W. I. & M. Road. Please wire acceptance of this order.

"Yours very truly,

"[Signed] Chehalis Produce Co.,  
"By I. P. Callison."

"Deary, Idaho, Sept. 5.

"Chehalis Produce Co., Aberdeen. Accept offer two hundred tons timothy, yours second.  
"[Signed] North Idaho Grain Co."

The telegram accepting defendant's offer was followed by a letter of even date as follows:

"Messrs: We wired you as follows: 'Accept offer two hundred tons timothy. Yours second.' This telegram was in reply to your letter of the 2d inst., and covers 200 tons of No. 1 timothy at a uniform price of \$20.75 f. o. b. points on the Washington, Idaho & Montana Ry. taking the Palouse rate, viz., \$3.85 per ton to coast terminals. These shipments will come to you from Palouse, Wellesley, Potlatch, Harvard and Deary, possibly Princeton.

"We were genuinely pleased to receive this order and as soon as you give us shipping instructions, we will begin loading. All of these shipments must come via the Washington, Idaho & Montana and the Chicago, Milwaukee & Puget Sound and will be so routed and loaded into Milwaukee cars.

"Awaiting your instructions, and assuring you that we will give your orders prompt attention, we are,

"Yours very truly,

"[Signed] North Idaho Grain Co., Ltd.,  
"By F. C. McGowan."

To which defendant made reply as follows:

"Gentlemen: We are in receipt of your letter of the 5th confirming sale to us of 200 tons of number one timothy at \$20.75 f. o. b. points on the W. I. & M. Road taking the same rate as Palouse. Just at the moment we are flooded with hay but will be able to hand you shipping instructions on a part of the order in a few days.

"Yours very truly,

"[Signed] Chehalis Produce Co.,  
"By I. P. Callison."

After the contract was entered into defendant wrote to respondent that he had found that he could not ship the hay to Grays Harbor without transferring it at Tacoma from the Milwaukee Railroad to the Northern Pacific Railroad, which would involve a cost of 50 cents extra, and that there would be more delay in shipping the hay than he expected. Plaintiff responded:

"We will send you warehouse receipts attached to a draft for 90% of the f. o. b. value if this will be satisfactory to you and will ship out as per your instructions."

Pending an answer, plaintiff wrote to defendant, saying:

"We will be willing to keep the hay in our warehouse without storage charges until ninety days after the date of contract. If it cannot be moved at that time we will consider extending free storage until January 1st. The matter of interest, however, is a considerable item to small shippers like ourselves and inasmuch as you have not accepted our suggestion that we draw on you through your bankers for ninety per cent of the selling price, we offer the following method of handling it, viz., we will charge you on ninety per cent of the total hay sold, interest at the rate of eight per cent and will include this interest in the invoice when hay is ordered out. This of course to be in addition to the

insurance which we are continuing on the hay. Although you have not advised us to do this we have deemed that you would want this protection. We trust you will find these suggestions in order and remain,

"Yours very truly,

"North Idaho Grain Co.,  
"By F. C. McGowan, El."

On November 7th defendant wrote to plaintiff as follows:

"Referring again to your letter of the 14th, in regard to our contract with you, we beg to submit the following arrangements:

"We will pay you 8% interest on 90% of the amount of the purchase price of the hay, interest to be computed from the 1st day of November, up to the date of the date of the shipment of each car.

"Insurance up to \$3,500.00 is to be carried by you for us, at the rate of 80 cents per \$100.00, dating from November 1st and expiring as the hay is shipped, this insurance to be charged to us.

"We are to have free storage on the hay up to March 1st, and to pay storage at the rate of 10 cents per ton per month on all hay carried beyond that date.

"The interest, insurance and accrued storage on each car of hay is to be included in your invoice as the hay is shipped out.

"We are asking free storage on account of the fact that the hay was bought by us through a misunderstanding of the freight arrangements over the Milwaukee Road. Since this purchase we have withdrawn from your territory and have made no effort to purchase hay up that line. As a result you have no doubt been able to secure hay to fill the order at a very favorable figure.

"Yours truly, Chehalis Produce Co.,  
"By I. P. C."

On the 10th of November plaintiff replied:

"We have your letter of the 7th and note what you say about our having been able to purchase the hay at a very favorable figure. We wish that this might have been the case, but unfortunately we expected you to give shipping orders at once on this purchase, and we therefore proceeded at once to buy sufficient to cover our contract. This high priced hay, we still have, as it was necessary to pay a price above the market at that time in order to get it. And our interest on the money used to buy it is still being paid to the banks where our loans are obtained.

"The paragraph of your letter regarding insurance we will accept as an agreement. This means, however, that we carry it during the month of October for nothing.

"We will agree to grant free storage until Feb. 1st, as hay ought to be moving by that date if it is going to move at all.

"Although we began paying interest on the money put into this hay on September 10th, we will waive the 20 remaining days of that month, but we think we are entitled to 8% interest on 90 per cent on the entire purchase price from sixty days thereafter, or from Dec. 1st.

"We appreciate the hay conditions at the present time, and have tried to modify your offers as little as possible. The margin you would have left us would have been insufficient to let us out whole, and we trust our counterproposition will be acceptable to you. We are,

"Yours very truly,

"North Idaho Grain Co.,  
"By F. C. McGowan."

There seems to have been no further correspondence until in January, 1911, when negotiations for a settlement were instituted. On March 24th plaintiff wrote:

"The writer has just returned from a trip to Wisconsin and Eastern points. Having been

away about five weeks, we feel that we are a little out of touch with market conditions and consequently write you to know that the possibilities of shipping your hay to you are going to be within the next thirty days. We have been looking over your contract letter of Nov. 14th and note that the free storage period ceased on March 1st and as it may now be possible for you to receive this hay, putting it into your own warehouses, we deem it advisable to write you in order to call this matter to your attention. \* \* \*

"Yours very truly,  
"North Idaho Grain Co.,  
"By F. C. McGowan."

Receiving no reply to this letter, plaintiff wired defendant:

"Deary, Idaho, May 17, 1911.  
"Chehalis Produce Co., Aberdeen, Wash. Have had no reply to our letter of the 13th. We desire to move this hay at once and are therefore anxious to hear from you. We await your reply.  
North Idaho Grain Co."

Defendant replied:

"Aberdeen, Wash., May 18, 1911.  
North Idaho Grain Co., Deary, Idaho—Gentlemen: We consider our hay contract canceled. Our previous offer was withdrawn when you refused to accept and the contract time for delivery is now past.

"Yours truly,  
"Chehalis Produce Company,  
"By I. P. C."

No hay was ever shipped under the contract. In August, 1911, plaintiff began an action in the courts of Idaho, and attached 150 tons of hay, more or less, in the Wellesley warehouse, and either 73 or 71 tons in the Potlatch warehouse. This was sold and bought in by McGowan, the manager of the plaintiff, for the sum of \$1,000. After deducting costs, the balance remaining was applied on the purchase price. This suit was begun in the superior court in and for Chehalis county to recover the balance alleged to be due. The lower court found that there had been a present sale; that title had passed to the defendant, and that no part of the purchase price had been paid other than the credit realized from the net proceeds of the sale. Judgment was rendered for the balance due, with interest, costs, etc.

It is the contention of the defendant that the transaction was no more than an executory contract to purchase the hay, or an option revocable at any time before it was executed by delivery, which, under the custom of the trade, was at Aberdeen, Wash., and plaintiff's remedy, if any, was an action for damages for the loss of its bargain.

[1] Both parties accept the case of *Lauber v. Johnston*, 54 Wash. 59, 102 Pac. 873, as a correct statement of the law, that is:

"The question as to when the title to personal property passes to a vendee under and in pursuance of a contract of sale depends upon the intention of the parties. Whether the contract is executed or executory must be determined by its terms and purposes, the nature, conditions, and situation of the property sold, and the circumstances surrounding the parties."

See, also, *Meeker v. Johnson*, 3 Wash. 247, 128 Pac. 542; *Pacific Lounge Co. v. Rudebeck*,

15 Wash. 336, 46 Pac. 392; *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. 315, 44 Pac. 544. It will be necessary to make particular reference to the facts when discussing the law of the case, and we shall not therefore undertake a further or connected statement.

To sustain the judgment of the trial judge plaintiff depends upon the following propositions: First. The contract by its terms is a present sale. Second. The concomitant circumstances: (a) The purchase of the hay by it to fill the contract; (b) the piling of the hay in separate piles to be shipped on order; (c) the insurance of the hay at defendant's request.

Whether a sale is executed or executory will be resolved by reference to the real intent and purpose of the parties. Authorities might be multiplied, but it will be unnecessary to go beyond the decisions of this court.

In *Meeker v. Johnson*, the contract was in writing, the words of transfer being, "sell, transfer, and set over." In commenting on the case of *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, Judge Dunbar, who wrote the opinion of the court, said:

"It is true that the formal word 'sold' is used in this contract, as in that; but so it is in a great majority of contracts of this kind where it is not claimed by either party that they are anything more than executory contracts. This may be, and doubtless is, one expression, among others, to indicate the intention of the parties; but it is only one, and is not conclusive when the other conditions in the contract indicate a different intention. It is a legal conclusion, rather than a statement of fact."

In the *Pacific Coast Elevator Case* there was a written contract, the apt words being, "The Pacific Coast Elevator Company agrees and hereby sells to Bravinder & Keats, 1,500 bu. wheat," etc. The court considered all the facts of the case and held:

"That the evident intention of the parties under this contract was not that it constituted a present sale, for the plaintiff was to segregate and weigh or measure the amount agreed to be sold, and was bound to deliver merchantable wheat."

In *North Pacific, etc., Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595, the apt words were, "do by these presents, grant, bargain, sell and convey." It was held in the light of all the facts, that these words were not conclusive.

The apt words in the cases cited are even more strict than the words employed by the parties in the case at bar. It will be remembered that when plaintiff offered hay at a certain price, defendant said, "We will take 200 tons of number one timothy," etc., to which plaintiff replied, "Accept offer two hundred tons timothy."

Both parties have filed exhaustive briefs and cited authority ad libitum, but it seems to us that, being bound to consider the case in the light of its own facts, no real service would be performed by reviewing and com-



menting upon the authorities. The case may be resolved by reference to well-settled and certain fundamental principles. For this reason, then, we will not undertake to follow counsel in their excursions into the vast realm of the law of sales.

[2] It is a fundamental principle that in every completed sale the title to the thing sold passes to the purchaser. There is "a transmutation of property from one man to another in consideration of some price or recompense in value." 2 Blackstone's Com. 446.

[3] This being so, all authorities concur in laying down the rule that there can be no valid executed sale unless the thing sold has either an actual or potential existence at the time of the sale. That is to say, it must actually exist and be in the possession or under the control of the vendor, or it must come out of something that is in his possession or under his control, as, for instance, growing crops, goods in the process of manufacture, the increase of cattle and the like. As said by Chancellor Kent, the property must be "specific, or defined and capable of delivery, otherwise it is not strictly a sale but a special or executory agreement." 2 Kent's Com. (14th Ed.) 468; 1 Chitty on Contracts (9th Ed.) 517; Parsons on Contracts (9th Ed.) star page 521.

"Neither the rule itself, nor the reason on which it is founded, has any application to an executory agreement for a future sale." Whitehead, etc., v. Root, etc., 2 Metc. (Ky.) 584.

The question then, notwithstanding the words of the contract, is, What did the parties intend?

"\* \* \* This intention must be found evidenced in some way other than by the words used in the instrument or by the surroundings of the parties stated in the petition." House v. Faulkner, 61 Tex. 308.

[4] The contract to be construed was for the sale of goods not then in the possession of, but to be acquired by, the plaintiff, and is prima facie an executory contract for the sale of personal property.

[5] The title in the hay would not pass to the vendee until the vendor, after it had acquired the hay, did some act appropriating it to the contract. As, for instance, piling it away or setting it apart pending the shipment, or by marking or branding it. 2 Kent's Com. 496; 1 Chitty on Contracts (11th Am. Ed.) 524; Langton v. Higgins, 4 H. & N. 402.

We have examined the record in this case with some care, and are convinced that while there are some circumstances that might, if standing alone, be sufficient to sustain a judgment in favor of plaintiff, when considered in the light of all the evidence they cannot be held to be controlling.

[6] In the first place, we find, contrary to the holding of the trial judge, that plaintiff has not sustained its contention by a preponderance of the evidence, in that it did

receive and pile separately a specific lot of hay and hold it subject to the contract, or that it had, at any time when it might be called upon to make delivery under the contract, No. 1 hay in sufficient quantity to fill its contract. The most that can be claimed for plaintiff is that it was engaged in the business of buying and selling hay; that it entered into a contract to deliver a specific quantity of a given quality, and it believed itself to be prepared to deliver when called upon to do so. Plaintiff's manager says:

"Q. I presume when you purchased hay from a rancher at the time this hay was piled you would try to segregate the number one and two hay. A. If there was a bale or two we wouldn't, but if it amounted to five or six bales we would, because it would make a mixture. \* \* \*

Q. You say when that hay was taken in there was an endeavor made to separate the No. 1 hay from the No. 2 hay? A. We always do that. Q. You say if it is only a matter of two or three bales you didn't mind it? A. They might go into No. 1. Q. If it is a matter of seven or eight bales they would separate it? A. That is correct. Q. In doing that they were just aiming generally to put the No. 1 in one place in the warehouse and the No. 2 in another place? They wasn't grading it for shipping purposes? A. No; because you wouldn't get [all] that was put in; say you seen three sides of it, and on the other side some stubble sticking out; you might see that when you would load it and spot it out. Q. When you come to grade for purpose of shipment? A. On a weak market you have to; on a strong market it isn't usually the custom. Q. You say at first you began to pile hay in the west end of the Wellesley warehouse? A. Yes, sir. Q. And later, as the warehouse got more hay in it, you piled it over the warehouse generally? A. Yes, sir. Q. And it was all one mass? A. It was together. Q. All together? A. Yes. \* \* \* Q. You considered you had a right to give him hay out of any of those warehouses? A. I considered I had just as much right to give him 200 tons of No. 1 hay anywhere along that line. Q. In or out of any of these warehouses? A. Yes, sir; that is according to the contract."

On the other hand, it seems to us that the defendant has proved by a preponderance of the evidence that there was not 200 tons or 150, or even 129 tons (the amount finally found weighed out), of No. 1 hay in the Wellesley warehouse, where plaintiff undertook to attach the residue of its holding and estimated the lot at 150 tons more or less.

It is unnecessary to go into the testimony of the witnesses. It is enough to say that it preponderates in favor of the defendant.

It is shown, also, that some of the hay which plaintiff now claims to have passed under the contract to defendant at the time of the sale in virtue of the subsequent buying and alleged segregation was not purchased until the spring of 1911. This, coupled with plaintiff's letter of May 18th, written in response to the suggestion that it did not have hay in quantity and quality to fill its contract; that it could supply 150 tons of No. 1 hay and 50 tons that would not be docked more than \$1 per ton—is in itself enough to overcome plaintiff's theory of an executed sale of a specific lot of 200 tons of hay, pur-

chased, set aside, and held, for the defendant. Moreover, it appears that in July, 1911, one Miller, plaintiff's successor, wanted the hay then stored in the Potlatch warehouse, and which it is now insisted was held as the property of the defendant, to make up a shipment of his own. Plaintiff's manager allowed him to take it upon the promise of substitution. Miller replaced the hay out of the 1911 crop. It was the new hay or the Miller hay in the Potlatch warehouse that was attached and sold. By no stretch of the imagination can it be held that specific property sold, segregated, and held for shipment to another can be otherwise disposed of and hay of another crop substituted therefor, except it be on the theory of an executory sale and the holding of the vendor in readiness to deliver hay of the kind and quality upon demand. Furthermore, hay that is alleged to have been sold was made the subject of a pledge by the plaintiff to its bank. It remained subject to plaintiff's debt from September 4, 1910, to April 4, 1911. Plaintiff bought and sold, pledged and loaned its stock of hay without reference to its contract with defendant, apparently assuming that it would have enough of the old crop, or, if that were gone, enough of the new crop, or the hay Miller was to return, to deliver 200 tons.

The conduct of plaintiff is entirely inconsistent with its present theory. That the plaintiff regarded the contract as executory is more clearly indicated. When the sheriff went to attach the hay in the action instituted by plaintiff in the courts of Idaho, plaintiff had no particular hay or any particular warehouse in mind, but at the suggestion of the sheriff permitted him to attach the hay in the Wellesley and Potlatch houses; they being more convenient and closer to the sheriff's center of activity than the other houses.

[7] It is elementary that a vendor cannot maintain an action for the purchase price of goods sold unless at the time the contract calls for delivery, or at the time when he ought to make delivery, he has the goods and is ready and able to deliver them. 35 Cyc. 531.

"Under the contract of sale, the delivery of the iron and the payment of the money were things to be done at one and the same time. The plaintiffs were not bound to deliver the iron, unless the defendants at the same time paid the money; and the defendants were not bound to pay the price unless the plaintiffs at the same time delivered the thing sold, or were ready to deliver it. The obligations to deliver on the one part and to pay on the other were mutual and dependent. If the buyer in a case of this sort fails to pay, or offer to pay within the time specified, for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold. But it does not follow that the seller, in such case, is entitled from the mere default of the buyer, to recover the purchase money. To entitle the seller to recover the price, he must show, not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods." *Dunham v. Pettee*, 8 N. Y. 508.

The record is entirely bare of sufficient facts to sustain plaintiff's theory to sustain the judgment upon this feature of the case. As we have shown, plaintiff, if it had ever set apart 71 or 73 tons of hay which it claims to have had in the Potlatch house, reappropriated and converted the hay to its own use when it allowed Miller to take it and ship it. We have therefore, so far as this case is concerned, the hay remaining in the Wellesley warehouse and which was attached as 150 tons more or less, but which it is admitted weighed out only 129 tons, for the contract to operate upon. It follows that, plaintiff being in no position to make delivery at the time it assumed to make constructive delivery by levying an attachment on the amount of hay it claims to have sold to the defendant, it cannot recover; for while defendant might, on his side, be willing to take less than the whole, plaintiff cannot, either actually or constructively, compel him to do so.

[8] But it is said that the direction to insure the hay was an acceptance and an agreement that the contract was a present sale. This at best is but one circumstance, and as said by Judge Dunbar in the *Meeker Case*, will not be considered to the exclusion of others. In arriving at the intent of the parties, we must place ourselves in the position occupied by them. This direction was made at a time when defendant believed that the hay had been purchased and specifically assigned to its account, whereas, in fact the hay had not been purchased and held for defendant's account, but was a part of a common mass out of which plaintiff assumed to make delivery upon call. Neither was the hay insured for defendant or in defendant's name. It was, at that very time, insured under a blanket contract covering all of the warehouses. One thing is certain, defendant could not have collected on the contract of insurance if there had been a loss. The insurance had been taken out, and was carried for plaintiff's benefit.

Warehouse cases holding that a vendor has a right to supply grain, hay, and like commodities out of a common mass are cited and relied on.

[9] Admitting, but not deciding, that the rule applies to baled hay bought under a specific contract, plaintiff itself adopted the theory of a purchase and holding of a specific lot. Plaintiff might have adopted the theory of an executory sale and brought an action for damages. Having adopted the one theory, it cannot now claim the benefit of the other, or take from defendant the legal benefit flowing from its conduct.

Other questions are raised by counsel on both sides. Believing, however, that the sale was not an executed sale, or, if executed, that the plaintiff reappropriated and converted the property to the extent that it was not

in position to deliver at the time it assumed to deliver, it will not be necessary to pass upon them.

Reversed and remanded, with instructions to dismiss.

CROW, C. J., and PARKER, MORRIS, and GOSE, JJ., concur.

(83 Wash. 415)

OLSON v. CARLSON et al. (No. 12167.)  
(Supreme Court of Washington. Jan. 8, 1915.)

1. APPEAL AND ERROR (§ 882\*)—INVITED ERROR.

Defendant requesting an instruction may not assign error thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

2. APPEAL AND ERROR (§ 1099\*)—SUBSEQUENT APPEAL—CONCLUSIVENESS OF EVIDENCE.

Where the evidence is substantially the same as on a former appeal, and it was then determined sufficient, its sufficiency cannot be attacked on the second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

3. DAMAGES (§ 132\*)—PERMANENT INJURY—EXCESSIVE RECOVERY.

\$11,500 held to be excessive and to be reduced to \$8,000 on condition of reversal, where plaintiff's earning capacity was never more than \$45 a month, and was reduced very little by his injuries, which resulted in a stiffness of the back, but no injury to the spine, and a permanent injury to his ankle, whereby the leg was shortened, making him flat-footed, but his health was good.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by John E. Olson against G. A. Carlson and others. From a judgment for plaintiff, defendants appeal. Affirmed on condition of remittitur.

Cannon, Ferris & Swan, of Spokane, for appellants. Robertson & Miller and Thomas J. Corkery, Jr., all of Spokane, for respondents.

MOUNT, J. This is the second appeal in this case. At the first trial the court granted a nonsuit upon the motion of the defendants, and dismissed the case. The plaintiff appealed from the judgment then entered. Upon a review of the case we concluded that the evidence was sufficient to take the case to the jury upon the principal act of negligence alleged, which was that the respondents had adopted an unsafe method for doing the work. For that reason the case was reversed and remanded for a new trial. Olson v. Carlson et al., 74 Wash. 39, 132 Pac. 721. Upon a retrial a verdict was rendered in favor of the plaintiff for \$11,500 and costs. The defendants have now appealed from that judgment.

[1] Upon the retrial in the court below the plaintiffs practically abandoned the allegation of negligence to the effect that an insufficient number of men were furnished by the defendants for loading the timber which caused the injury to the plaintiff. When the court came to instruct the jury, an instruction was given submitting to the jury the question of the insufficiency of the men furnished to perform the work. This instruction was given as a requested instruction by the defendants. Upon a motion for a new trial it was argued by counsel for the defendants that the giving of this instruction was error, because that issue was not then in the case. The court thereupon called counsel's attention to the fact that the instruction had been given at the request of the defendants, and counsel then stated:

"I will stipulate in the record that my exception to the court's charge may be withdrawn, because if it were put in inadvertently, or otherwise, we are going to stand by it, and I shall make no objection to it here now, or in the Supreme Court; for I don't think I should. I put it in inadvertently."

It is now argued by the appellants that this instruction was error. If error, it was concededly invited, for which the case will not be reversed.

[2] It is next argued that the evidence was insufficient to justify the verdict. The law of the case was settled upon the other appeal. The evidence upon the question whether the defendants adopted an insufficient and unsafe method for loading the timber was held upon the other appeal to be sufficient to go to the jury. The evidence upon this question is substantially the same upon the last trial as it was upon the first. The decision in the other case, therefore, is decisive of the same question at this time.

[3] It is finally argued that the verdict and judgment are excessive. We are satisfied that there is merit in this contention. The defendant himself testified that at the time of his injury he was earning \$2 per day, out of which he was paying his board, which amounted to 75 cents per day. He further testified that immediately after the first trial, in January, 1912, he went to work again for the defendants at \$45 per month at light work, and that he had been earning that salary up to the time of the second trial. He further testified that his health was pretty good, except his back and his leg; that he limped, and his back was lame; otherwise he enjoyed good health. One of the doctors who testified on behalf of the plaintiff stated that, while the injury was permanent, the plaintiff would never get worse; that when the case was first tried he was in excellent condition; that he was a strong healthy boy, and, considering the serious injury, he had gotten a good result. Another physician testified that, other than a limited motion in the back, the ankle was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

the principal injury; that, considering his injury, he is in good shape to-day; that he ought to be able to get along if he had no heavy weights to carry. Another physician testified on behalf of the plaintiff that the injury did not involve the spinal cord; that the plaintiff was able to lift probably as well as he could before the accident; that, while the injury to the plaintiff was serious, dislocating three vertebræ in his back, which vertebræ, in the process of healing, had united and created a stiffness of the back, his principal injury was a broken ankle, which shortened his leg about three-fourths of an inch, and caused him to walk partially upon the side of his foot, resulting in what is called "flat-foot."

In the case of *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476, where the injury consisted of a shortening of one of the plaintiff's limbs, a verdict of \$6,750 was held excessive and was reduced to \$5,250.

In *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651, the plaintiff sustained a crushed ankle and foot, resulting in permanent injury fully as much as in this case. The verdict in that case was reduced from \$6,375 to \$4,000.

In *Ranger v. Seattle Elec. Co.*, 52 Wash. 401, 100 Pac. 842, where the plaintiff received an injury which resulted in the amputation of one of his legs three or four inches above the ankle, where he had an earning capacity of \$200 per month, a verdict for \$9,500 was held excessive, and was reduced to \$6,000.

In *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208, where the plaintiff was 26 years old, a common laborer, and received an injury to the spine which was probably permanent, we held that \$3,800 was not excessive.

In *Johansen v. Pioneer Mining Co.*, 77 Wash. 421, 137 Pac. 1019, this court upheld a verdict for \$18,000. But in that case the plaintiff before his injury was capable of earning \$4 per day and his board and lodging. He was severely crushed and injured. He was rendered entirely helpless and incapable of ever earning anything for himself.

In *Gennaux v. Northwestern Imp. Co.*, 72 Wash. 268, 130 Pac. 495, we upheld a verdict for \$18,000. But in that case the plaintiff was capable of earning on an average of \$4 per day. His left leg was atrophied and almost completely paralyzed, and he was left in a "helpless and hopeless condition."

The injuries and results in the last two cases were far greater than the injuries and results to the respondent in this case. While it is difficult for this court to determine the exact amount of damages which ought to be awarded in a case of this kind, it is at once apparent that the verdict is excessive.

The earning capacity of the respondent in this case has never been greater than \$45 per month. His earning capacity may be reduced to some extent. But the evidence shows that for at least a year prior to the last trial of the case he had earned more than he was earning previous to his injury or at the time of his injury. While his injury may be permanent, and he may endure some suffering because thereof, he is not helpless. We are satisfied that the verdict and judgment are excessive.

For this reason, the case will be remanded for a new trial, unless the plaintiff within 30 days from the filing of the remittitur in the lower court shall remit from the judgment and verdict the sum of \$3,500. If such remission is filed, the judgment will stand affirmed for \$8,000.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 406)

**BLACKWOOD v. BALLARD et ux.**  
(No. 12159.)

(Supreme Court of Washington. Jan. 8, 1915.)

**BROKERS (§ 86\*)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.**

In a broker's action to recover a commission for procuring lessees for defendants' property, evidence held not sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

Department 1. Appeal from Superior Court, King County.

Action by William A. Blackwood against W. R. Ballard and wife. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions to dismiss.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. Alexander & Bundy and Adair Rembert, all of Seattle, for respondent.

MORRIS, J. Action to recover a commission as broker in procuring lessees for a term of 15 years upon property belonging to appellants. Verdict for respondent for \$2,400, upon which judgment was entered, from which this appeal was taken.

The main error relied upon for reversal is that the evidence is wholly insufficient to support the verdict. The facts are about these: In January, 1913, appellants were the owners of a two-story building on Second avenue, Seattle, which was held by one Friedenberg and his sublessees under a lease expiring January 1, 1916. Respondent and one Bock were real estate brokers, occupying a suite of offices with appellant W. R. Ballard. Respondent learned that two men named Vigelius and Marston desired to obtain a suitable location on Second avenue for a moving picture theater, and informed Bock of this fact. Bock suggested the building owned by appel-

plants, and negotiations were immediately entered into with a view to obtaining a lease of these premises; Bock acting for appellants and respondent for the prospective lessees. During all these negotiations all interested parties knew of the Friedenbergs lease, and that no lease could be obtained by Vigellius and Marston until satisfactory arrangements had been agreed upon between Friedenbergs and appellants; the ability of Friedenbergs to enter into any new arrangement depending also upon his ability to make satisfactory arrangements with his subtenants. During these preliminary negotiations, nothing was said as to the payment of any commission, nor did appellants know for whose benefit the new lease was to be obtained, except that at one time W. R. Ballard told respondent that he would pay something "if we get together on this proposition." About this time Ballard was informed who the prospective lessees were. Negotiations continued, and, when it looked as though they might be successful, Ballard inquired of Bock what commission he expected, and was informed that a commission of 2½ per cent. on the aggregate rentals for the term would be asked. This would amount to about \$12,000, and Ballard refused to consider the proposition further with such a demand, and tendered Bock a check for \$500 that had previously been handed him as evidence of good faith. Respondent was then called in, and some conversation was had relative to the payment of a commission, ending in Ballard taking back the check, and it was then agreed that the matter of the commission would be taken up later. The only evidence of any subsequent negotiations for a commission is found in the evidence to the effect that Ballard insisted on fixing the amount, and after some parleying he offered \$2,400 as his outside figure, which respondent agreed to accept. Negotiations culminated in a written contract on February 24, 1913, between W. R. Ballard and Vigellius as trustee, whereby \$19,500 was deposited with Ballard to be used in the purchase of the Friedenbergs lease, which being obtained appellants were to lease the premises to Vigellius for a term of 15 years, at a monthly rental of \$1,800 up to January 1, 1914, \$2,600 a month for the next nine years, and \$2,800 a month for the remainder of the term. Ballard then endeavored to buy the Friedenbergs lease, and continued such endeavor until March 19th, when Friedenbergs wrote him declining to further consider any proposition looking to the surrender of his lease. Ballard exhibited this letter to respondent and Vigellius, informing them that, on account of his inability to successfully treat with Friedenbergs, the deal was off; returning to Vigellius and Marston the \$19,500 which they had deposited with him for the purpose of purchasing the Friedenbergs lease.

It is apparent that all parties looked upon the refusal of Friedenbergs to surrender his

lease as ending the matter, and nothing more was done; the complaint in fact reciting that the services of respondent and Bock terminated on or about April 1, 1913. Some days after this, Vigellius and Marston were introduced into the office of Henry Broderick, another real estate broker in Seattle, who sought to obtain for them a location on Second avenue, and busied himself with this endeavor for two or three months. In the meantime Friedenbergs had gone to San Francisco leaving his business affairs in the hands of Broderick. The evidence discloses no further negotiations between any of the interested parties to this action. Respondent, in support of his contention that negotiations continued, says that at different times he saw Vigellius and Marston in Ballard's office, and upon his approach they would cease their conversation; and that on one occasion about April 1st, while Ballard was ill at his home, respondent made an appointment for him to see Vigellius, and Vigellius kept the appointment. Vigellius and Marston say that, whenever they met Ballard, they conversed about the matter relative to the possibility of getting Friedenbergs to change his mind and surrender his lease, but that they considered the negotiations ended, and any subsequent reference was merely in the forlorn hope that something favorable might yet come out of it. Vigellius also says that some time in March Ballard told him that Broderick was Friedenbergs agent, and that he thought he "was in a position to swing the deal." About the last of June, Friedenbergs returned from California, and, shortly thereafter, he called on Broderick, who told him that he knew parties he could interest in the moving picture business providing Friedenbergs could get a long time extension of the Ballard lease. Friedenbergs then went to Ballard and suggested he could form a corporation to take over the lease if it would be extended, to which Ballard acceded, and negotiations were then entered into between Friedenbergs and Ballard as to the terms, etc. Broderick had no knowledge, in so far as the record shows, that Vigellius and Marston had been negotiating with Friedenbergs, or that they were the parties Broderick had in mind when he first suggested the procuring of an extension of his lease. Neither is it shown that Ballard had any knowledge that Vigellius and Marston were seeking a lease through Friedenbergs. Finally on July 10th, Ballard gave to E. H. Guile, acting for Friedenbergs, a lease for 15 years at a rental of \$2,000 a month, except that the rental for each March during the term was fixed at \$1,500. Friedenbergs then bought out his subtenants, expending in such purchase the sum of \$22,500. Some misunderstanding then arose between Vigellius, Marston and Broderick, and the negotiations terminated. They were taken up again in a few days, resulting in an assignment to Vigellius and Marston of the Guile lease. There is

no showing that Ballard had any knowledge of the relations between Broderick and Vigellus and Marston, or that he knew that the Gule lease had been assigned to Vigellus and Marston until long after. Bock and respondent, upon learning of this assignment, demanded a commission, which was refused. Bock then assigned his interest in the commission to respondent, and this suit was commenced; the complaint reciting, among other things, that it was agreed that Ballard would pay respondent and Bock a reasonable commission for their services in procuring the lease held by Vigellus and Marston under assignment from Gule, and that \$12,000 was such a reasonable commission.

These facts do not support the verdict, which must rest upon some proof, as alleged in the complaint, that respondent and Bock were instrumental in procuring lessees of the Second avenue property who were ready and able to lease the premises upon terms satisfactory to appellants and who became such lessees. To support this allegation, it is further alleged that the lease of July 10th was made to Gule as trustee for Vigellus and Marston, and it is evident that there must be proof of facts supporting such an inference before the verdict can find adequate evidentiary support. There is none. The lease of July 10th was procured by Friedenbergh and taken in the name of Gule, as trustee for himself or a corporation he should subsequently organize. Gule was attorney for Friedenbergh, and was at all times acting for Friedenbergh, and not for Vigellus and Marston. There is absolutely no proof, nor is there a fact from which the inference can be drawn, that Friedenbergh or Gule at any time represented Vigellus and Marston or was acting in their interest. The fact that Gule, as a result of the negotiations between Broderick and Vigellus and Marston, subsequently assigned this lease to Vigellus and Marston, is no proof that it was procured for the benefit of Vigellus and Marston in the first instance. The efforts of respondent and Bock to procure a lease for Vigellus and Marston ceased after March 19th. No better evidence of this fact is needed than the repayment of the \$19,500. It cannot be doubted but that all parties then considered the matter ended. There was an interim of three months in which no one was seeking to obtain a lease of this property for Vigellus and Marston or any other person, and when Broderick interested himself in seeking a location for Vigellus and Marston he was acting independently of respondent and Bock, and confined his efforts to other property until a few days before the Gule lease was obtained. He then approached Friedenbergh with the suggestion that he had clients who were desirous of interesting themselves in a moving picture theater, and, if Friedenbergh could obtain an extension of his lease from appellants, a mutually satisfactory arrangement could be en-

tered into. Friedenbergh then interested himself in the matter, in consideration of the benefits that might flow to him from such a lease, and not as the representative of Marston and Vigellus, whom, as it has been before said, he did not know. The lease of July 10th is not the lease respondent and Broderick were negotiating for. It is true that there are stipulations as to the character of the building, etc., similar to those contained in the agreement of February 24th. It needs but a glance at the terms of the rental proposed in the agreement of February 24th and those fixed in the lease of July 10th to see that, under the agreement of February 24th, appellants would have received many thousand dollars more in rent than under the lease finally made, and could well have afforded to pay respondent and Bock several times the amount demanded by them had they been successful in carrying out the lease as proposed in the contract of February 24th. This, of course, is no reason why respondent cannot recover, for, if he had been instrumental in procuring lessees of appellants' property, no change in the terms of the lease finally made could deprive him of his right to compensation. All that he was required to do was to procure lessees who would lease the property upon terms satisfactory to appellants. But this respondent did not do. No efforts of his nor of his assignor culminated in any lease under any terms. They contributed nothing. They were in no sense the efficient cause of the lease of July 10th. They induced neither appellants nor Friedenbergh to enter into such a lease, and when they failed to negotiate a lease, and realizing their failure ceased their efforts, they could not be said to be an efficient cause, because, through the instrumentality of other and independent causes, appellants made a lease of their property, even though such lease through assignment finally became the property of those whom respondent and Bock sought to interest. The controlling principles demanding reversal of this judgment are well set forth in *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088, and the cases there relied upon.

The only evidence referring to the sum of \$2,400, the amount of the verdict, was that this amount was finally promised by Ballard if the negotiations initiated by respondent and Bock and covered by the agreement of February 24th should terminate successfully. Respondent does not here contend that he has any cause of action based upon that promise, and is not now seeking to enforce it. Its only purpose in this case was evidentiary of the relations between Ballard and respondent and Broderick. It was not offered nor contended, either in the complaint or in fact, that it was any evidence to guide the jury in arriving at the amount of recovery, if any.

The judgment is reversed, and, since there is no evidence upon which it can rest, the

motion for nonsuit should have been granted. Reversed and remanded, with instructions to dismiss.

CROW, C. J., and GOSE, PARKER, and CHADWICK, JJ., concur.

(16 Ariz. 297)

VINCENT v. STATE. (No. 862.)

(Supreme Court of Arizona. Dec. 29, 1914.)

1. CRIMINAL LAW (§ 225\*)—PRELIMINARY EXAMINATION—WAIVER.

Where one arrested for burglary, after being informed of his rights, waived examination before the justice who had issued the warrant, and the justice then entered an order reciting such waiver, finding that a burglary had been committed, and that there was sufficient cause to believe that the defendant was guilty thereof, and ordering him to be held to answer the charge, there was a sufficient compliance with Pen. Code 1913, § 893, requiring a preliminary examination for one accused of an offense, unless he shall waive the same, whereupon the justice shall enter such waiver on his docket, and immediately order the defendant held to answer, as if he had been held after examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 468-471; Dec. Dig. § 225.\*]

2. INDICTMENT AND INFORMATION (§ 4\*) — FORM—FELONY.

Under the express provisions of Const. art. 2, § 30, one charged with a felony may be prosecuted either by indictment or information; the only limitation upon prosecution by information being by Pen. Code 1913, § 885, requiring the information to be filed within 30 days after the order of the magistrate holding the defendant to answer is made.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 3, 24-27; Dec. Dig. § 4.\*]

3. INDICTMENT AND INFORMATION (§ 189\*)—BURGLARY—DEGREE.

Under an information charging burglary in general terms, defendant may be convicted of burglary in either the first or second degree, if the evidence warrants it.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

4. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTION—COMMENT ON EVIDENCE.

Where the information was sufficient to charge burglary in either degree, an instruction that the testimony showed that, if any burglary was committed, it was committed in the daytime, so that the defendant could be convicted only of burglary in the second degree, was erroneous, as a comment on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]

5. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—ERROR FAVORABLE TO ACCUSED.

The error was favorable, and not prejudicial, to accused, and he cannot therefore complain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

6. BURGLARY (§ 46\*)—CRIMINAL LAW (§ 759\*) — INSTRUCTIONS — POSSESSION OF STOLEN PROPERTY—COMMENT ON FACTS.

In a prosecution for burglary, an instruction that possession of stolen goods by the accused

recently after a burglary in which larceny was committed, if unexplained, is a circumstance from which the complicity of the accused in the larceny might be inferred, when followed by a statement that the value of such evidence was to be determined by the jury after considering all the facts and circumstances connected with the possession and their relation to the other proofs in the case, is correct, and not a charge or comment on the facts, which is forbidden by Const. art. 6, § 12.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 111-120; Dec. Dig. § 46;\* Criminal Law, Cent. Dig. §§ 1737, 1738, 1790-1793; Dec. Dig. § 759.\*]

7. CRIMINAL LAW (§ 822\*) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

Instructions given in a criminal trial must be considered as a whole and so construed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

8. CRIMINAL LAW (§ 1038\*)—REQUESTS—NECESSITY.

Under Pen. Code 1913, § 1033, subd. 6, requiring the judge to charge the jury on any points pertinent to the issues, if requested by either party, the failure of the court to give a specific instruction good in law and pertinent to the issues, but which was not requested, is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

9. CRIMINAL LAW (§ 1137\*)—APPEAL—HARMLESS ERROR—INVITED ERROR.

Where a judgment of conviction was set aside upon motion of the defendant, so that he might move in arrest of judgment, the defendant cannot, on appeal from a judgment of conviction entered after the overruling of his motion in arrest, contend that the court lost jurisdiction to enter the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

Appeal from Superior Court, Yuma County; Frank A. Baxter, Judge.

J. A. Vincent was convicted of burglary in the second degree, and he appeals. Affirmed.

The appellant was convicted of the crime of burglary of the second degree, and appeals from the judgment of conviction, from the order refusing a new trial, and from an order denying his motion in arrest of judgment. The facts sufficiently appear in the opinion.

Timmons & Harris, of Yuma, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

CUNNINGHAM, J. The appellant was arrested February 16, 1914, upon a complaint charging him with the commission of the crime of burglary on or about the 15th day of February, 1914. The defendant was taken before the justice of the peace who issued the warrant, immediately upon his arrest, for the purpose of a preliminary examination of the charge. The justice's entries recite that the defendant was "arraigned and informed of his rights to time, attorney," etc. The defendant waived the examination of

the case before this court; whereupon the court made the following order:

"It appearing to me that the crime of felony—to wit, burglary—has been committed on or about the 15th day of February, 1914, in the county of Yuma, state of Arizona, and that there is sufficient cause to believe that J. A. Vincent is guilty thereof, I order that he, the said J. A. Vincent, be held to answer the same, and that he be admitted to bail. \* \* \*

A transcript of the proceedings with the complaint and warrant were filed in the superior court on February 19, 1914. On the same day the county attorney filed an information charging as follows:

"The said J. A. Vincent, on or about the 15th day of February, 1914, and before the filing of this information, at the county of Yuma, state of Arizona, did then and there willfully, unlawfully, feloniously, and burglariously enter the dwelling house of one Carmelita Mayhew, in the town of Yuma, in the county and state aforesaid, with the felonious intent then and there to commit the crime of grand and petit larceny, contrary," etc. (We have omitted the formal parts of the information.)

On the same day the defendant appeared before the court without counsel, and the court appointed counsel for him. Thereupon the information was read to him and he was furnished a copy. One day was allowed in which to plead to the information. On February 20, 1914, the defendant entered his plea of "Not guilty." The trial followed on February 24, 1914, both parties announcing ready for trial.

[1] The first assignment of error is that the defendant was not held to answer in accordance with the provisions of law governing the same. Paragraph 893, Penal Code 1913, is a sufficient answer to such contention. Said statute is as follows:

"When the defendant is brought before the magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, which the justice court has no jurisdiction to try and determine, such defendant may, if he so elect, waive the examination provided in this chapter, and the magistrate shall thereupon enter such waiver in his docket, and shall immediately make an order holding the defendant to answer as if he had been held to answer after examination. No defendant who has been held to answer after such waiver of examination shall be discharged upon writ of habeas corpus or other proceeding upon the ground that he has been committed on a criminal charge without reasonable or probable cause."

This statute has been substantially followed by the magistrate holding the defendant to answer. The assignment is without merit.

[2] The second assignment is to the effect that the information was filed without authority of law, and, by reason thereof, the court acquired no jurisdiction to try the cause. Paragraph 885, Penal Code 1913, requires the county attorney to file an information within 30 days after the order of the magistrate holding the defendant to answer is made. The appellant contends that the filing of the information gave the court no right to try the defendant thereon, because, under the law, the charge must be presented

by indictment found by a grand jury, and not by information. This contention is untenable. Section 30 of article 2, Constitution of the state, provides for the prosecution of all felonies either by indictment or by information; a prosecution by information being limited only to such cases where the person charged has had a preliminary examination of the charge and has been held to answer thereto, or when he has been given an opportunity to have such preliminary examination held, but has waived it. Either mode of procedure may be legally adopted by the prosecution. The citation of authorities is not necessary, they are so numerous. The constitutional and statutory provisions are too clear to require comment.

The questions presented by the sixth assignment require serious consideration. They relate to alleged erroneous instructions of the court. The first instruction objected to, which we will notice, was given and later repeated. The said instruction is as follows:

"Under the testimony in this case, if any burglary has been committed, it was committed in the daytime, so that you are only concerned with burglary of the second degree."

By giving this instruction the court definitely and unequivocally instructed the jury to acquit the defendant of the charge of burglary of the first degree. The jury obeyed this instruction by returning a verdict of burglary of the second degree. The most startling position is taken by counsel for appellant contending that that part of the charge reading—

"under the testimony in this case, if any burglary has been committed, it was committed in the daytime," was damaging in the extreme, for the reason that the information charged only burglary in the second degree, while the evidence, if tending to prove burglary at all, tended to prove burglary in the nighttime, instead of the daytime, as instructed by the court."

[3] Assuming that the information charged burglary in the second degree only, it would have then become the duty of the court to so instruct the jury. Under such charge of second degree burglary the defendant could not have been convicted of burglary of the first degree, and to have permitted a conviction in the first degree would have been reversible error. The information, however, charges burglary in general terms. Under that charge the defendant may be convicted of burglary of the first degree, if the evidence warrants it; or he may be convicted of burglary of the second degree, if the evidence warrants it. The information as filed will support a conviction of burglary of either the first or of the second degree.

[4, 5] The instruction was clearly a comment by the court on the weight of the evidence, but was made in favor of the accused, not against his rights. He was not entitled to such an instruction withdrawing from the consideration by the jury the evidence, if any, bearing upon the degree of the offense.



The error, if error was committed, was against the prosecution, and not against the rights of the accused, and therefore must be deemed error without injury on this appeal.

[6] The other instruction included in the said assignment is as follows:

"You are charged that possession of stolen goods by the accused recently after a burglary in which larceny has been committed, if unexplained, is a circumstance from which you may infer the complicity of the accused in the larceny."

The objections are made that the instruction assumes that the property was stolen, that it was found in the possession of the accused, and such possession is unexplained, and that it would lead the jury to infer that such evidence of possession alone is sufficient to warrant a conviction of burglary.

[7] The instructions given must be considered as a whole and so construed. The language quoted above that is made the subject of these objections is only a part of the instruction given by the court on this subject. The remaining portion, not the subject of objection, is as follows:

"The value of such evidence, however, is to be determined by you alone. In determining the weight to be attached to such a circumstance as evidence tending to prove guilt, you should take into consideration all the facts and circumstances connected with such possession, and their relation to the other proofs in the case."

The instruction, as given by the court, is stated in nearly the language used by Mr. Justice Davis in stating the rule applicable to this question in *Taylor v. Territory*, 7 Ariz. 234, 64 Pac. 423. After considering the rule announced in the case of *Territory v. Caslo*, 1 Ariz. 485, 2 Pac. 755, and expressly overruling that case, he says:

"Recognizing that the jury are the sole and exclusive judges of the facts proved, and the inferences to be drawn therefrom, an expression of the law more in harmony with the current authority would be substantially as follows: The possession of stolen goods by the accused recently after the larceny, if unexplained, is a circumstance from which the jury may infer his complicity in the larceny. Its value as evidence, however, is to be determined by them alone. In determining the weight to be attached to this circumstance as evidence tending to prove guilt, the jury should take into consideration all the facts and circumstances connected with such possession, and their relation to the other proofs in the case."

A number of cases are cited in support of this rule. The instruction under consideration in the *Taylor Case* was approved as within this general rule and as applicable to the evidence in that case. The Supreme Court of Iowa, in *State v. Brady*, 91 N. W. 801, upon some of the authorities cited in the *Taylor Case*, states the rule a little more clearly, as follows:

"There is no presumption of guilt of burglary attaching to the mere possession of the stolen goods by the accused, but such fact, if the alleged crime be of recent occurrence, has a tendency to prove his guilt, and, if there be other proved circumstances tending to connect him with the commission of the offense, the fact of possession thus aided will sustain a conviction."

See *State v. Powell*, 61 Kan. 81, 58 Pac. 968, to the same effect.

Section 12 of article 6. state Constitution, provides that:

"Judges shall not charge juries with respect to matters of facts nor comment thereon, but shall declare the law."

On authority of the *Taylor Case*, supra, the court in the entire instruction declared the established rule of law applicable to the question then under consideration. The instruction, when considered as a whole, is not open to the objections advanced. The rights of the accused were sufficiently guarded in other parts of the instructions given, and, while the instruction now under consideration might have been expressed in different language more appropriate to the evidence in this case than in the form in which it was given, we are of the opinion that no error was committed in giving the instruction in the form it was given, and that as given the court fairly declared the law, without charging the jury with respect to matters of fact, or without commenting thereon, as required by the Constitution, supra.

[8] If counsel is not satisfied with the instructions of the court as given, additional instructions may be requested, and, upon proper request made, must be given. Subdivision 6, par. 1033, Penal Code of Arizona 1913. A failure of the court to give specific instructions, good in point of law and pertinent to the issue, in the absence of a request therefor, is no ground for reversal. *Sisson v. State*, 141 Pac. 713.

[9] One other assignment only merits notice. The verdict of guilty was returned and filed on February 24, 1914. On February 26, 1914, the court pronounced judgment of conviction. On March 6, 1914, the defendant moved in arrest of judgment. The defendant by his counsel on the same day, March 6, 1914, made an oral motion that the judgment and commitment theretofore entered be vacated. The prosecution assented, and the order was made by the court vacating the judgment for the purpose of considering defendant's motion in arrest of judgment. The motion in arrest was submitted, and on March 23, 1914, was by the court denied; whereupon the court, over the objections of defendant, pronounced final judgment of conviction. Appellant assigns as error the order of the court overruling his objections to the imposing of the final judgment and sentence. The assignment is without merit. The first judgment pronounced was vacated at the instance of the defendant for the specific purpose of having the court rule upon his motion in arrest of judgment. He cannot now assume the inconsistent position that he was injured by an order of the court which he brought about for his supposed benefit at that time. The court retained control over its judgments, and retained the power, under the facts appearing in this respect, to modify

its judgment in accordance with law, and render its final judgment on the verdict.

The appellant has assigned as error other matters, all of which have been carefully examined and found to be without merit. They are not of sufficient importance to require separate notice.

We find no reversible error in the record. The judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(16 Ariz. 291)

LEE v. STATE. (Cr. No. 351).†

(Supreme Court of Arizona. Dec. 29, 1914.)

1. THREATS (§ 5\*) — INFORMATION — SUFFICIENCY.

Under Pen. Code 1913, § 943, providing that an information is sufficient if it states the act charged as the offense clearly and distinctly in ordinary and concise language, so as to enable a person of common understanding to know what is intended, and with sufficient certainty to enable the court to pronounce judgment, and which contains the formal allegations of the necessary jurisdictional facts, an information for extortion by threat to accuse another of a crime as defined by Pen. Code 1913, §§ 512, 513, which charges that the defendant threatened to accuse another of grand larceny, is sufficient without alleging the particulars of the larceny.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 9, 10; Dec. Dig. § 5.\*]

2. CRIMINAL LAW (§ 369\*)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

In a prosecution for extortion by threatening to accuse another of the larceny of a cow, where the theory of the prosecution was that defendant compelled the prosecuting witness to kill a cow belonging to another so that defendant and his confederates could accuse him of the crime, and then extorted money from him to forego making the accusation, evidence that the defendant pointed a gun at the witness, and thereby forced him to kill the cow, is admissible as part of the transaction, although it tends to show the commission of another crime by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

3. THREATS (§ 7\*) — EVIDENCE — ADMISSIBILITY—CIRCUMSTANCES.

Evidence that tracks were found leading to the place where the cow was killed was also admissible as tending to corroborate the testimony of the prosecuting witness.

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 7; Dec. Dig. § 7.\*]

4. CRIMINAL LAW (§ 808½\*)—INSTRUCTIONS—READING STATUTE.

In a prosecution for extortion by a threat to accuse another of a crime as defined by Pen. Code 1913, § 513, subd. 2, it was error for the court to read to the jury subdivisions 1, 3, and 4 of that section defining extortion by other threats.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1811; Dec. Dig. § 808½.\*]

5. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

The error in such instruction was harmless where the only evidence of threats was a threat to accuse the other of grand larceny, especially where the court, after reading subdivi-

sion 2 of the section, stated that that was the one under which the prosecution was brought.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

6. CRIMINAL LAW (§ 808½\*)—INSTRUCTIONS—READING STATUTE.

In a prosecution for extortion by threatening to accuse another of grand larceny, it was error to read to the jury all of Pen. Code 1913, §§ 481, 483, 484, defining grand larceny, and not to confine the instruction to the particular kind of larceny to which the threat referred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1811; Dec. Dig. § 808½.\*]

7. THREATS (§ 1\*)—ACCUSATION OF CRIME — GUILT OF PERSON THREATENED.

One who extorts money from another by a threat to accuse the other of a crime is guilty of extortion, whether the other is in fact guilty or innocent of the crime referred to in the threat.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.\*]

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Robert E. Lee was convicted of extortion, and he appeals. Affirmed.

John McGowan, of Safford, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, J. This appeal is prosecuted from a judgment of conviction of the crime of extortion. Complaint is made of errors (1) in overruling a demurrer to the information for insufficient facts to constitute the offense of extortion; (2) the admission of evidence over objection; and (3) the giving of erroneous instructions to the jury. We will consider these assignments in their order.

[1] The charging part of the information is as follows:

"The said Robert E. Lee, on or about the 7th day of November, 1912, and before the filing of the information in the county of Graham, state of Arizona, did willfully, knowingly, unlawfully, and feloniously obtain certain personal property, to wit, \$1,600.00, lawful money of the United States, from one H. E. Smith, then and there being with his said H. E. Smith's consent, which said consent was then and there induced by wrongful use of force and fear by and upon the part of said Robert E. Lee, defendant, to wit, by a threat then and there made and communicated to said H. E. Smith by said defendant, to accuse him, the said H. E. Smith, of having committed a crime, to wit, the crime of grand larceny in said county of Graham, and said personal property then and there being the property of said H. E. Smith."

Extortion is defined by the Penal Code of 1913, § 512, as follows:

"Extortion is the obtaining of property from another with his consent induced by wrongful use of force or fear or under color of official right." The "fear" mentioned "may be induced by a threat" \* \* \* (2) to accuse him \* \* \* of any crime." Id. 513.

The appellant contends that the information is defective in that it fails to describe sufficiently the crime of which accusation was threatened, and he insists that the information, to be good, should set forth the par-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 12, 1915.

ticulars of the crime threatened. In other words, he says that the allegation that defendant threatened to accuse Smith with the crime of "grand larceny" is a mere conclusion of law, and that it cannot be made to take the place of the facts constituting the accusation. The offense with which appellant is charged is extortion, and the gist of it is the obtaining the property of another with his consent induced by fear of a threatened prosecution for a crime. For some cases the description of an offense by its generic name will indicate all the essentials of such offense. That is true of such well-known offenses as arson, burglary, larceny, and murder. *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99.

If the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the rights of the case, and contains the formal allegations of jurisdictional facts, the information is sufficient. Section 943, Pen. Code 1913. Tested by this statutory rule, it seems to us that the information is sufficient. That it is not necessary in an indictment or information for extortion to give a technical description of the accusation threatened against the prosecutor is supported by *Commonwealth v. Philpot*, 130 Mass. 59; *State v. Lewis*, 96 Iowa, 286, 65 N. W. 295; *Commonwealth v. Murphy*, 12 Allen (Mass.) 449; *State v. Stewart*, 90 Mo. 507, 2 S. W. 790; *Williams v. State*, 13 Tex. App. 235, 46 Am. Rep. 237; *Cohen v. State*, 37 Tex. Cr. R. 118, 38 S. W. 1005; *State v. Robinson*, 85 Me. 195, 27 Atl. 99. It is sufficient to charge that defendant threatened to accuse the prosecutor of a specified crime. *Commonwealth v. Goodwin*, 122 Mass. 19; *Commonwealth v. Moulton*, 108 Mass. 307; *Commonwealth v. Dorus*, 108 Mass. 488; *Commonwealth v. Murphy*, 12 Allen (Mass.) 449; *Commonwealth v. O'Brien*, 12 Cush. (Mass.) 90; *Moore v. People*, 69 Ill. App. 398; *People v. Gardner*, 73 Hun, 66, 25 N. Y. Supp. 1072. See note 9 Ann. Cas. 196.

To properly understand the other two assignments of error, it is necessary to epitomize the facts as developed at the trial. The prosecuting witness Smith testified that defendant and three confederates enticed him, by representing to him that one of his cattle was down, to go to an out-of-the-way place near his ranch, and that upon his arrival there he was commanded by the defendant, who pointed a gun at him to enforce his orders, to take an axe that was given him and kill a cow that defendant and confederates had tied to a tree; that he did as directed; that after the animal was killed he asked defendant, "What he meant by pull-

ing a gun on me and making me kill that cow." The defendant answered, "He wanted a hundred head of cattle or \$3,000." "I told him I couldn't give him \$3,000, nor a hundred head of cattle." "He said he would take the hide to Foster and Marshall (who were the owners), and he and what others he had on the hill there would swear against me and stick me." "I told him I couldn't get him \$3,000, and he says: 'If you will give me what Foster and Marshall are giving me, \$2,000, I will let you off.'" That the defendant compelled him to help skin the animal, and said, taking the hide, "If I would pay him \$200 the next morning he would keep the hide and not present it to Foster and Marshall." The prosecutor paid the \$200 the following morning by check at defendant's home, and four days later gave defendant \$1,600, and received the hide from defendant. The defendant's testimony differs from that of the prosecuting witness, in that he says he knew the prosecutor was going to kill the animal at the time and place named, and that he knew that Foster and Marshall were offering a reward for the apprehension of persons stealing their cattle, and, knowing these facts, he laid for Smith and caught him; that Smith begged him not to divulge to Foster and Marshall his crime, and voluntarily gave him \$1,800 to keep the crime a secret.

[2] The evidence objected to by defendant, and the admission of which he assigns as error, was evidence given by the prosecuting witness of the defendant's pointing a gun at him, and of tracks leading to where the animal was killed. He says he was charged with extortion induced by use of threats; that the information does not charge the wrongful use of force; and that the state was permitted by such evidence to prove another and different offense than the one alleged in the information. The rule invoked by the appellant is not applicable to the facts of this case. The state was entitled to prove all the facts of the transaction, even though they did disclose another and different crime than that laid in the information. In this case, on the theory of the prosecution, it was evidently the plan or scheme of appellant to compel the prosecuting witness, by the assault with a gun upon him, to kill the animal, and then charge him with larceny and by superior numbers prove the charge, unless silence was purchased by the payment of \$2,000. Indeed, the plan or scheme, if true, embraced three crimes, larceny of the animal, assault with a deadly weapon, and extortion, all involved in the one transaction. *Jones Commentaries on Evidence*, § 145. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

[3] Proof of the tracks leading to the place where the animal was killed was also competent and relevant as corroborating the testimony of the prosecuting witness.

[4] The court in instructing the jury as to what constituted "fear," instead of confining itself to the specific charge in the information, read all of section 513 of the Penal Code of 1913. It is contended by appellant that this was prejudicial error. Subdivisions 1, 3, and 4 of that section, defining fear induced by threats, should not have been read to the jury for the reason that the state did not rely upon the kinds of fear therein mentioned, but relied upon a fear induced by a threat to accuse the prosecuting witness of a crime. The definition given to the jury should have been restricted to the charge. The injection of the other circumstances constituting fear, under the facts of the case, were mere abstract propositions of law, and without place in the instruction.

[5] But as the evidence was all of the fear of being accused of grand larceny, it does not seem possible that the jury could have been misled or influenced in its verdict by this instruction in the form in which it was given, especially in view of the fact that the court in reading section 513, after subdivision 2, said: "This is the subdivision under which this action is brought." *Simons v. State* (Tex. Cr. App.) 34 S. W. 619; *Hargrove v. State* (Tex. Cr. App.) 30 S. W. 444.

[6] The court submitted to the jury the question as to whether what was said and done by defendant in his threat constituted a threat to accuse the prosecuting witness of the crime of grand larceny, and in that connection defined larceny by reading sections 481, 483, and 484, Penal Code, 1913. What we have said concerning the instruction before this is applicable to this instruction. The court should have restricted its instruction to defining the kind threatened to be charged and proved on the trial.

[7] The appellant complains of the court's instructions wherein the jury were told "that even though Smith was actually guilty of stealing the cow, and was caught in the act of butchering her, if the defendant, because of the fear that Smith had of being prosecuted, did use that as a means of frightening Smith into the payment of the money, and actually did frighten him into paying the money, and afterwards did receive the money of Smith, the defendant would yet be guilty of extortion, and it would be your duty to so find him guilty." This is a correct statement of the law. *People v. Choyinski*, 95 Cal. 640, 30 Pac. 791; *Kessler v. State*, 50 Ind. 229; *State v. Debolt*, 104 Iowa, 105, 73 N. W. 499; *State v. Waite*, 101 Iowa, 377, 70 N. W. 596; *People v. Eichler*, 75 Hun, 26, 28 N. Y. Supp. 998; *People v. Wickes*, 112 App. Div. 39, 98 N. Y. Supp. 163.

In *People v. Eichler*, supra, the court said:

"The fact that the person who, in writing or orally, makes such a threat for such a purpose believes or even knows that the person threatened has committed the crime of which he is

threatened to be accused, does not make the act less criminal. The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases, to acquire money without legal right, by threatening a criminal prosecution. But threatening a guilty person for such a purpose is a greater injury to the public than to threaten an innocent one, for the reason that the object is likely to be attained, and the result is the concealment and compounding of felonies to the injury of the state."

The judgment of the trial court is affirmed, and it is accordingly so ordered.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(16 Ariz. 327)

NOLTE et al. v. WINSTANLEY. (No. 1410.)  
(Supreme Court of Arizona. Dec. 29, 1914.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 22\*)—VALIDITY—CONFORMITY TO STATUTE.

A general assignment for the benefit of creditors, which does not show that the assignor was insolvent, does not give a list of the creditors, and is otherwise defective as a statutory assignment, may nevertheless be valid as a common-law assignment and is not forbidden by statute.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 36-38; Dec. Dig. § 22.\*]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 193\*)—VALIDITY—CHANGE OF POSSESSION—"PRIMA FACIE EVIDENCE."

Under Civ. Code 1913, par. 3276, providing that every assignment of chattels not accompanied by immediate delivery and change of possession is prima facie evidence of fraud for the benefit of creditors or bona fide purchasers, a creditor who attached property after an assignment for the benefit of creditors, unaccompanied by change of possession, is entitled thereto, unless the statutory presumption of fraud is rebutted, since prima facie evidence is such evidence as in law is sufficient to establish a fact and, if not rebutted, remains sufficient for that purpose.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 195, 594-601; Dec. Dig. § 193.\*]

For other definitions, see Words and Phrases, First and Second Series, Prima Facie Evidence.]

3. FRAUDULENT CONVEYANCES (§ 132\*)—ASSIGNMENT FOR BENEFIT OF CREDITORS—CHANGE OF POSSESSION.

The fact that the assignment shows on its face that it is for the benefit of creditors does not rebut the prima facie presumption of fraud, where the property assigned consisted of a stock in trade and fixtures, and the assignor remained in possession thereof conducting the business and keeping the proceeds of sales of the stock.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 407-424; Dec. Dig. § 132.\*]

4. FRAUDULENT CONVEYANCES (§ 174\*)—ASSIGNMENTS FOR CREDITORS—CHANGE OF POSSESSION—RIGHTS OF PARTIES.

An assignment for the benefit of creditors, which is prima facie void against creditors be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause there was no change of possession, is sufficient to pass the title between the parties.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 530, 531, 533-536, 542; Dec. Dig. § 174.\*]

**5. FRAUDULENT CONVEYANCES (§ 146\*) — CHANGE OF POSSESSION—SALE TO WIFE.**

Where a baker assigned his stock and fixtures to an assignee for the benefit of creditors, and the latter, without having taken possession, sold it to the assignor's wife, who had assisted her husband in the business, and the sign on the place of business was not changed, nor was there any apparent change in the relation of the husband and wife to the business, although the husband claimed to be in the employ of his wife, the transaction should be treated as one between the husband and wife directly, and is *prima facie* void against the husband's creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. § 146.\*]

**6. FRAUDULENT CONVEYANCES (§ 146\*) — CHANGE OF POSSESSION—SALE TO WIFE.**

While a husband may sell his property to his wife, the statute rendering a sale *prima facie* void unless accompanied by delivery and change of possession applies to such sale, and the law requires stricter proof that the transaction was in good faith.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. § 146.\*]

**7. FRAUDULENT CONVEYANCES (§ 146\*) — RETENTION OF POSSESSION — QUESTIONS OF FACT—FRAUD.**

Under the statutes making a sale of a stock of goods and fixtures, where there was no change of possession, *prima facie* void, the question of good faith in the transaction is one of fact for the trial court or the jury.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 454-456, 471, 472, 482-484; Dec. Dig. § 146.\*]

**8. EVIDENCE (§ 353\*) — DECLARATIONS — RECITAL.**

Where a baker assigned his stock and fixtures to an assignee for the benefit of his creditors, and the assignee thereafter sold the property to the baker's wife, a recital in the bill of sale to the wife that the money paid by her was her separate property is not evidence of that fact.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.\*]

**9. CONSTITUTIONAL LAW (§ 208\*)—FRAUDULENT CONVEYANCES (§ 3\*)—BULK SALES ACT—POLICE POWER—CLASS LEGISLATION.**

The Bulk Sales Act (Civ. Code 1913, tit. 51, c. 7) is a proper exercise of the police power and not class legislation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\* *Fraudulent Conveyances*, Cent. Dig. § 5; Dec. Dig. § 3.\*]

**10. FRAUDULENT CONVEYANCES (§ 19\*)—EFFECT OF PARTIAL INVALIDITY—BULK SALES ACT—FIXTURES.**

Where a baker sold his stock in trade and fixtures, the sale of the stock being void under the Bulk Sales Act, the sale of the fixtures may nevertheless be valid.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 24, 25; Dec. Dig. § 19.\*]

Appeal from Superior Court, Pima County; W. F. Cooper, Judge.

Attachment by E. B. Winstanley against J. J. Nolte, in which Marie Nolte claimed the property. Judgment for the attachment plaintiff, and the claimant and her bondsmen appeal. Affirmed.

Charles Blenman, of Tucson, for appellants.  
Frank E. Curley, of Tucson, for appellee.

ROSS, J. This is an action to try the title to personal property under the provisions of paragraphs 1648 et seq., R. S. Arizona 1913 (Civ. Code).

On the 24th day of May, 1912, and for some time theretofore, J. J. Nolte was the owner of and carrying on a bakery and confectionery business in the city of Tucson. On that day he transferred and assigned by an instrument in writing all of said business, including furniture, delivery wagons, and horses, and all stock in trade to Alexander Rossi in trust, with instructions that the trustee sell and dispose of the same on such terms and conditions as he should see fit and divide the proceeds of sale *pro rata* between Nolte's creditors. Rossi thereafter on June 3, 1912, sold all said property to Marie Nolte for \$750, and Marie Nolte on the same day caused her bill of sale to be recorded in the recorder's office of Pima county. On June 5, 1912, appellee, as the assignee of the accounts of three of J. J. Nolte's creditors, instituted suit against Nolte and caused all of said property to be levied upon by attachment. Marie Nolte took necessary steps under paragraph 1648, *supra*, to claim the property as hers. The other appellants, Donau and Hofmeister, were her bondsmen. Issues were formed as provided by paragraphs 1659 and 1660, R. S. Arizona 1913 (Civ. Code), the appellee asserting in his complaint that J. J. Nolte was the owner of and in the use and possession of said property, and the appellant Marie Nolte claimed title to the property in her answer by virtue of bill of sale from Rossi. The case was tried to the court upon an agreed statement of facts and is here upon the same statement of facts. From a judgment in favor of appellee, this appeal is prosecuted.

In addition to the foregoing facts, it is stipulated that the bill of sale or deed of trust from J. J. Nolte to Rossi was not filed or recorded with the county recorder of Pima county, but that the trustee caused to be published in the *Arizona Daily Star*, a paper of general circulation, published in the city of Tucson, on May 30th, 31st, and June 1st and 2d, a notice of the assignment to him by J. J. Nolte, and that he would receive bids at his place of business up to noon June 3, 1912, "for the purchase of all of the assets of the business of said J. J. Nolte."

None of the creditors had accepted the terms of the trust deed at the time of the at-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tachment. The facts stipulated with reference to change of possession are as follows:

"That during all the times herein mentioned, including the 24th day of May, 1912, and up to and including the 3d day of June, 1912, the said personal property remained in said building at Nos. 19-21 South Stone avenue, in the possession of said J. J. Nolte. Marie Nolte, who is and was at all times herein mentioned the wife of said J. J. Nolte, claims that upon receipt of said bill of sale from Alex Rossi on June 3, 1912, she immediately took possession of the said personal property herein referred to and continued from said date to conduct said bakery and confectionery business. Prior to June 3, 1912, said J. J. Nolte, who was a baker by trade, did the baking for said business, conducted as 'Nolte Bakery and Confectionery,' but was assisted by his said wife, Marie Nolte, who spent the greater portion of each day in and about said bakery. After the execution of said bill of sale by Alex Rossi, the said bakery business was continued at 19-21 South Stone avenue, to all outward appearances, as formerly. J. J. Nolte continued to do the baking for said business, and said Marie Nolte continued to do the same work around said bakery as formerly. She claims, however, that from the time of the execution of said bill of sale by Alex Rossi she was in possession and control of said business and personal property herein referred to, and that her husband, J. J. Nolte, was working for her. Neither plaintiff, E. B. Winstanley, nor J. Ivancovich Company, Brena Commercial Company, nor J. F. Barker Company (appellee's assignors) had any notice of this claim on the part of Mrs. Nolte, other than may be implied from the fact that the bill of sale from Rossi to Mrs. Nolte was recorded in the office of the county recorder of Pima county on June 3, 1912. That for many months prior to the 24th day of May, 1912, J. J. Nolte had a large sign in front of his place of business 19-21 South Stone avenue, containing the words 'Nolte.' That after the 24th day of May, 1912, and up to and including the 5th day of June, 1912, at the time the attachment was levied upon the property herein described, the said sign was permitted to remain in front of the said building, and so remained at all time."

The Bulk Sales Law, being chapter 47, Laws 1909 (paragraphs 5249 and 5250, R. S. 1913 [Civ. Code]), was not observed in the sale of J. J. Nolte to Rossi.

[1] The assignment to Rossi by Nolte did not conform with the requirements of the statutes as to assignments for the benefit of creditors. The deed of assignment does not show that the assignor was insolvent, nor that the property assigned was all of his property, and fails to give a list of the names of his creditors, and is otherwise defective as a statutory assignment for benefit of creditors. Such an assignment, however, is valid under the common law and is not forbidden by statute.

Pomeroy, Equity Jurisprudence, § 994, says:

"The doctrine is generally settled in this country that voluntary general assignments for the benefit of creditors, if otherwise valid, are not mere agencies of the debtor; they create true trust relations, and the creditors are true beneficiaries. When once duly executed, they are irrevocable, and the creditors, on being informed of their existence, may take advantage of the provisions in their own favor, and may enforce the trusts declared without making themselves parties or doing any act indicating their own acceptance or assent. \* \* \* The doc-

trine generally prevails in the American states that, unless prohibited by statutes, voluntary general assignments by failing debtors for the benefit of their creditors, even when preferring individuals or classes among the beneficiaries, are valid."

[2] It is contended by appellee that the assignment was not effective to pass title, as against creditors, for several reasons: First, he says that there was no change of possession from the debtor to the trustee, as required by paragraph 3276, Civil Code 1913. That paragraph reads as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be prima facie evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith."

According to the stipulated facts, "the person (Nolte) making such assignment" remained in the possession of all of the goods and chattels from the date of the assignment, May 24th, until June 3, 1912. There was no delivery whatever and no change of possession from Nolte to the assignee. Such a state of facts is made prima facie evidence of fraud as against the creditors of the person making such assignment. The entire absence of a delivery to the assignee, and he never having taken possession, either actual or constructive, the appellee, as a creditor of the assignor, upon such a showing has made out a prima facie case entitling him to recover, unless the presumption of fraud is rebutted.

In *Gilpin v. Missouri, K. & T. Ry. Co.*, 197 Mo. 319, at page 325, 94 S. W. 869, at page 871, the court defines a prima facie case and prima facie evidence as follows:

"A prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side." *Abbott's Law Dic.* vol. 2, 812. 'A prima facie case is that which is received or continues until the contrary is shown.' 22 Am. & Eng. Ency. L. (2d Ed.) p. 1294. Prima facie evidence: 'It is such as, in judgment of law, is sufficient to establish the fact and, if not rebutted, remains sufficient for the purpose.' *Kelly v. Jackson*, 6 Pet. 632, 8 L. Ed. 523. 'Prima facie evidence of a fact is such evidence as in judgment of the law is sufficient to establish the fact, and if not rebutted remains sufficient for that purpose.' *Smith v. Burrus*, 106 Mo. 100, 16 S. W. 881, 13 L. R. A. 69, 27 Am. St. Rep. 329."

[3] If it should be suggested that the deed of assignment on its face—it being for the benefit of creditors without any preference shown—is a refutation of any inference of fraud, still the fact exists that the assignor was left in possession of the property with the opportunity and apparent right of disposition. What was realized in this interim, if anything, out of the business does not appear as an asset of the assignee. From the conduct of both the assignor and assignee, it would seem that the latter was recognized and treated more as a medium of passing

title to the property than as a trustee having certain and definite duties to his beneficiaries, the creditors. It was the duty of the trustee, upon accepting the trust, to take all of the property into his possession and to preserve and hold the same and all of it for the creditors of the assignor. This he did not do, but, on the contrary, left the property in the possession of the debtor, who, as it appears, did not dispose of it all, but who could have done so, if he had so chosen. We conclude that the *prima facie* case of fraud arising because of no delivery followed by actual and continued change of possession of the things assigned has not been overcome or rebutted, and that, as to the nonconsenting creditors of the assignor, the assignment was ineffectual.

[4] As between the assignor Nolte and the assignee Rossi, the instrument of May 24, 1912, passed title from the one to the other. It was ineffectual to pass title only as against creditors of the assignor. Had the attachment been levied on the property before the assignee sold it to the appellant Marie Nolte, and while it was in the actual possession of the debtor J. J. Nolte, the attachment lien, it would seem, could not have been successfully questioned.

[5] But the attachment was not levied upon the property until June 5, 1912, and two days after the assignee had sold the business to Marie Nolte, who paid therefor the sum of \$750. We think the transaction should be treated as one directly taking place between the Noltes, and that the bill of sale from the assignee to Marie Nolte was in effect the act of the debtor J. J. Nolte, for the reason that there was no delivery or change of possession. In that view of the case, the title to the property passed to appellant Marie Nolte exempted from the claims of creditors of the seller, providing there was an immediate delivery, followed by an actual and continued change of possession, as required by paragraph 3276, *supra*. This, it may be said, is especially true of all of the property, except such as is daily exposed for sale as merchandise in small quantities for profit. That J. J. Nolte continued in possession of the property during all the time consumed in this transaction there seems no question. The stipulation is that:

"After the execution of said bill of sale by Alex Rossi, the said bakery business was continued at 19-21 South Stone avenue, to all outward appearance, as formerly."

There was no change of the personnel of the parties in charge of the business. The sign in front of the place of business remained the same. As against the actual evidences of possession remaining unchanged is the bare claim of the purchaser that she took possession and control of the business after the execution of the bill of sale to her. The change of possession should be open and unequivocal, carrying with it the usual marks

and indications of ownership by the party purchasing the goods. It must be such as to give evidence to the world of the claims of the new owner, so that a stranger to the sale would be able at once to see that a change in the possession and ownership of the property had taken place.

"The statute demands that, in order that such sale may be *bona fide*, it shall be accompanied by immediate delivery and such actual and continued change of possession as shall indicate by outward, open, and visible signs that can be seen and known to the public or persons dealing with the property that a change of ownership and possession has taken place." *Ellet-Kendall Shoe Co. v. Ross*, 23 Okl. 697, 115 Pac. 892.

[6] In *Wheeler v. Selden*, 63 Vt. 429, 21 Atl. 615, 12 L. R. A. 600, 25 Am. St. Rep. 771, it is said:

"Where there is a joint possession by the vendor and the vendee, the property is liable to attachment upon the vendor's debts, if a candid observer would be at loss to determine which of the two has the chief control and possession of it, and, in case of doubt, the law resolves the doubt against the party who should make the change of possession open and visible. *Flanagan v. Wood*, 33 Vt. 332. The reason of the rule, which is to prevent fraudulent transfers of property, applies more strongly to transactions between husbands and wives than to those between other persons because of the greater facility for the commission of frauds of this character between the former."

This does not mean that the law forbids the husband selling his property to the wife, or the wife from purchasing property from her husband. Under the law, they have the same rights of purchase and sale of property between each other as they have to deal with total strangers, but in doing so they are required to observe the rules of law and evidence that are exacted of others, to effectually pass title from the one to the other, where the rights of creditors are involved.

[7] Under our statute, the failure to deliver goods and chattels sold or assigned and the failure of the purchaser to take actual and continued possession of the property is only "*prima facie* evidence of fraud as against the creditors of vendor" or assignor, and it is made the duty of the trial court or jury to decide that question in the first place.

Construing a statute of similar import to ours, the Supreme Court of Nebraska, in *Densmore v. Tomer*, 11 Neb. 118, 7 N. W. 635, said:

"The mere retention of possession by the vendor is regarded as *prima facie* evidence of fraud against his creditors, and is void as to them, unless the vendee shall prove the transaction to have been *bona fide*—that is, it puts upon the vendee the burden of satisfying the jury that the sale was fair and entered into in good faith. The question of fraudulent intent is one of fact to be determined from the evidence in the case. In but few instances can fraud be established by direct testimony, and ordinarily it must be proved by circumstantial evidence."

In *Stadtler v. Wood*, 24 Tex. 622, the court said:

Where the vendor of the property and the vendee live together, there should be the most

indisputable evidence of good faith in the contract of sale, for from the very nature of things it is almost impossible to tell with whom the possession of the property does in fact remain.

[8] There is nothing in the stipulation of facts to show that the \$750 paid to Rossi was the separate property of the appellant Marie Nolte. True, the bill of sale to her from Rossi recites that it is her separate property, but that is only the declaration of Rossi, doubtless inserted at her suggestion, and therefore is no evidence of her ownership of the money paid as against creditors of her husband.

In *Seitz v. Mitchell*, 94 U. S. 580, 582, 24 L. Ed. 179, the court said:

"Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action."

If a transaction of this kind may be sustained as against the creditors of the seller of goods and chattels, it amounts to an approval by the courts of an arrangement by which a debtor, whether solvent or insolvent, may place a value upon his property and for that value paid him by his wife transfer the property to her, and with the money thus paid him compel his creditors to prorrate it upon their claims. Having done this, he may resume business, if, indeed, he has ever suspended it, at the "old stand" without visible changes, and, by a claim of change of ownership to his wife, acquit himself of his just debts.

It was peculiarly the province of the trial court to determine if the transaction was bona fide and for a valuable consideration paid by the purchaser out of her separate property, and, that court having resolved the question against the appellant, we are satisfied to let it stand.

[9] Part of the goods sold consisted of stock in trade. The requirements of chapter 7, tit. 51, Civil Code 1913, being chapter 47, § 1, Laws of 1909, were not complied with. That chapter prohibits a person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, from disposing of his stock in trade, or a large part thereof, in a single transaction, and not in the regular course of business, unless notice of intention

to sell is filed with the county recorder not less than ten days before the sale. A sale made without complying with the formalities required is declared to be void as to all creditors of the vendor at the time of such transaction. This is what is known as the "Bulk Sales Law," and it, or ones very similar to it, have been adopted in many of the states. While their validity as police regulations and as being class legislation have been often questioned in the courts, we think it is now well settled that such acts are a proper exercise of the police power of the states, and that they are not class legislation.

The most recent decision on the Bulk Sales Law is by the Idaho court in *Boise Ass'n, etc., v. Ellis* (Idaho) 144 Pac. 6, decided October 29, 1914. In that case the court sustains the law and cites many of the decisions of courts of other states and the United States Supreme Court upholding the law. We are satisfied with the reasoning and conclusion of those courts.

[10] The terms of the statute, however, do not include much of the personal property described, such as fixtures, wagons, teams, and implements of manufacture used in the trade and not daily exposed for sale and as to these articles, if the sale had been in other respects legal, the title would have passed to appellant.

Finding no error, the judgment of the trial court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(19 N. M. 575)

STATE v. CHAVEZ, Sheriff. (No. 1726.)

(Supreme Court of New Mexico, Dec. 7, 1914.)

(Syllabus by the Court.)

COUNTIES (§ 67\*)—SHERIFFS AND CONSTABLES (§ 6\*)—REMOVAL FROM OFFICE—MISCONDUCT—EVIDENCE—APPEAL.

Where a county officer is found guilty of misconduct in office under the provisions of chapter 38, S. L. 1909, the verdict of the jury must be supported by substantial evidence, and, where the verdict is not warranted by the evidence, the appellate court will set it aside. *Held*, that there was no substantial evidence to sustain the verdict in this case.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 100-103; Dec. § 67;\* Sheriffs and Constables, Cent. Dig. §§ 14, 15; Dec. Dig. § 6.\*]

Appeal from District Court, Lincoln County; E. L. Madler, Judge.

Porfirio Chavez, sheriff of Lincoln County, was removed from office, and he appeals. Reversed and remanded with directions to award new trial.

Geo. W. Prichard, of Santa Fé, and Geo. B. Barber, of Carrizozo, for appellant. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

ROBERTS, C. J. At the March term, 1914, of the district court of Lincoln county, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



grand jury of said county presented an accusation in writing against the appellant, who was then sheriff of said county, charging him with knowingly demanding and receiving illegal fees as such sheriff; with failing to keep the dockets and other books prescribed by the traveling auditor, and that the books he did keep were not properly kept; with allowing the county jail to remain in a filthy and unsanitary condition; and that appellant had failed, neglected, and refused to discharge the duties of his office. The presentment set forth the specific acts, upon which the general charges above stated were predicated. Upon a trial before a jury the defendant was found guilty, and judgment of removal from office followed. From this judgment appellant appeals, and assigns 28 different grounds for a reversal. We will not undertake, nor will it be necessary, to review all the grounds assigned.

The prosecution was instituted under section 2, c. 36, S. L. 1909, which reads as follows:

"The following shall be causes for removal of any officer belonging to the class mentioned in section 1 of this act:

"1. Conviction of any felony or of any misdemeanor involving moral turpitude;

"2. Failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

"3. Knowingly demanding or receiving illegal fees as such officer;

"4. Failure to account for money coming into his hands as such officer;

"5. Gross incompetency or gross negligence in discharging the duties of the office;

"6. Any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office."

Considering, first, the evidence as to charging illegal fees, and the legal principle involved, we quote the following from the brief of the able Assistant Attorney General:

"The evidence shows that defendant presented a bill to the county commissioners for conveying Sotero Archuleta to the insane asylum, and that the mileage traveled was charged to the county at the rate of 12½ cents per mile. The commissioners approved the bill and paid it to the extent of \$170. The evidence also shows that the defendant presented a bill to the district court in April, 1913, wherein he charged mileage for services at the rate of 12½ cents per mile, which bill was paid by the clerk from the court fund, but the money was subsequently accounted for by deductions made in the readjusted bill of January, 1914, presented to the county commissioners. In effect, then, the situation is that defendant presented a bill to the clerk of the court for payment from the court funds, charging 12½ cents per mile, and that the bill was paid, but subsequently the payment was annulled, and the defendant charged simply with \$1,500 received. In the readjusted bill, the services for which defendant charged at the rate of 12½ cents per mile in the bill to the district court were practically revised, and charges made for those services on the basis of actual expenses.

"Since the Constitution became effective county officers are prohibited from receiving fees unto themselves. The Constitution provides for the fixing of salaries for county officers by the Legislature, and eliminates fees as a part

of their salary or compensation. However, there is no inconsistency or repugnancy between the statutes prescribing the fees to be charged in certain instances and the constitutional provision. The practical effect of the Constitution is that the officer makes the charges according to the requirements of the statutes, and is then obliged to deliver the money so received into the county treasury, for if he retained it, he would violate the constitutional provision. All fees collected by him must belong to the county, whose officer he is. We understand that the traveling auditor of the state informed county officers that fees collected by them must be paid into the county treasury and a receipt taken therefor. The constitutional provision cited, *supra*, compels this money to be paid into the county treasury. It has been held to be self-executing in the case of Delgado v. Romero, 17 N. M. 81, 86, 124 Pac. 649, Ann. Cas. 1914C, 1114.

"In order to fully understand what principles ought to apply in this case it is well to determine what the Legislature attempted to correct by the passage of chapter 36 of the Laws of 1909. At the time the 1909 law was passed county officials, as well as other classes of officers, received the major part of their compensation from fees collected by them. Subsection 3 of section 2 of the act, making one ground for removal the knowingly demanding or receiving illegal fees, was intended to punish officials who knowingly demanded or received fees in excess of that allowed by law. For instance, if the sheriff charged or demanded or received \$2 for levying an execution and making return thereon, he would be within the provision cited, because the law permitted him to make a charge for such service of only \$1.50. It is clear that the provisions applied when the officer prostituted his office by compelling the payment of sums, as fees, to him of a higher amount or rate than allowed by the law. The fees belonged to the official, and the excess, likewise, would become the property of the official under such illegal action.

"In the case at bar the bills presented to the district court for payment of services in serving process during the three terms of court were paid by the district court from its fund. We are told that \$1,500 was so paid. The bills were all based upon the theory that for such service the defendant was entitled to charge 12½ cents per mile. Subsection 10 of section 867 of the Compiled Laws of 1897, with its amendments, permits such a charge to be legally made. Therefore we conclude that the sheriff committed no act sufficient to authorize his removal from office by charging 12½ cents per mile for service of process for the district court. Fifteen hundred dollars of that money was apparently retained by the sheriff until a complete readjustment of his accounts was had in January, 1914, when the commissioners deducted the \$1,500 so received by him from the total of the bill presented to them at that time, so that in effect, while the sheriff had the possession of that money for some time, it cannot be said that he received the money to his own use. It is very clear to us that the sheriff believed that the moneys received from the court fund belonged to him, and continued to so believe until the traveling auditor informed him differently. The court should know that the items which made up the \$1,500, which had been received from the court fund, were all readjusted and the charges made on the basis of actual expenses, as we understood the record. So the effect of the transaction is that the commissioners deducted \$1,500 of the bill based on actual expenses, which was presented in January, 1914, and paid the defendant the balance, less certain other sums which he had formerly received. He charged no *illegal* fee, for the law permitted him to charge 12½ cents per mile. If he can be said to have been derelict in

duty at all, it consisted in retaining the \$1,500 paid from the court fund. But there is no allegation in the presentment that the defendant knowingly retained any money belonging to the county, and we cannot assume that the jury were justified in finding him guilty of retaining the money, in the absence of such charges in the presentment. So far as we are concerned, we admit that the verdict of the jury cannot stand as to the charge of illegal fees in respect to the bills presented to the district court, and subsequently paid by the commissioners on the basis of actual expenses."

His statement of the facts we have verified by a careful examination of the transcript, and find it to be correct, and we agree fully with the foregoing statement of the law. This being true, we can but conclude that there was no evidence to justify a verdict of guilty on this count of the charge.

On May 3, 1913, the appellant presented a bill to the county commissioners for conveying Sotero Archuleta to the insane asylum at Las Vegas; this bill was approved and paid July, 1913, in the sum of \$170. The appellant attempted to show upon the trial that this charge also included expenses incurred by him in taking a boy to the reform school, at Springer, taken apparently at the same time, but the court refused to permit him to offer any evidence whatever to establish this fact. We cannot refrain from saying that we cannot understand upon what theory the court excluded this evidence. Certainly the defendant should have been allowed to establish any fact which tended to show his good faith in the amount of the charge made. County sheriffs, as is well known, are, not, as a general rule, expert accountants or bookkeepers, and if they were to be turned out of office for every mistake made, regardless of the fact that such a mistake was innocently made, without corrupt motives, we would soon be without peace officers. But regardless of the facts sought to be established by the excluded evidence, from the evidence in the record it is apparent that the sheriff was honestly mistaken as to the law. He thought he was entitled to charge 12½ cents per mile for transporting patients to the insane asylum. And even had the amount been allowed, the fees would not have belonged to the sheriff, as, under the Constitution he would be required to return the same to the county treasurer. The Attorney General says:

"It seems plain to us that the defendant honestly believed that he was entitled to charge that sum (12½ cents) for each mile traveled. But eliminating all theories of mistake, and viewing the transaction in the light of a 'demand' for illegal fees, what is the result? In the first place, the charge cannot be considered in the light of a fee. The charge, when properly made, is for reimbursement of moneys expended in the service of conveying an insane person to place of confinement. Does such a circumstance come within the statute? The primary object of the statute was to prevent overcharging for services rendered. The defendant must have knowingly rendered such a bill and demanded its payment. We assume, without argument, that the evidence must show that there was no honest mistake in the transaction; that there must

be a negation of honest mistake. The evidence of the bill presented, considered alone and without any extrinsic evidence, plainly shows that the defendant was either ignorant of what law governed the charges, or that he honestly believed that he was entitled to receive 12½ cents per mile for such service. He claimed 12½ cents per mile in the first bill presented."

In view of the evidence and the concession of the law officer of the state, we can but conclude that the evidence on this phase of the case did not justify a verdict of guilty.

The next charge upon which defendant was tried reads as follows:

"That said defendant, up until the time the traveling auditor called on him to examine his book of accounts and records, which he is required to keep as sheriff of Lincoln county, and which said time was about the 18th day of December, A. D. 1913, had never kept or attempted to keep any docket, cash book, fee book, or other account book or record showing a record of fees and other matters in connection with his said office as sheriff of Lincoln county, N. M., and that when said traveling auditor called on said above-named defendant, for the purpose of examining his accounts and records, which was during the fore part of January, A. D. 1914, he found that what records said sheriff had were improperly kept, and that all of said dockets, cash book, fee book, and other account books or records had been written up or prepared by said defendant sheriff within a few days just preceding the day that the same was turned over to the said traveling auditor."

If the facts stated are sufficient to constitute a cause of removal, the evidence wholly fails to establish the same. The sheriff testified that he kept books of his accounts from the time he was inducted into office, which were produced upon the trial. It is true these books were not models of expert bookkeeping, but it is plain that the sheriff honestly attempted to comply with the law, and the books were in such shape that the condition of his accounts could be ascertained by an accountant. This charge therefore falls.

As to the charge that the sheriff failed to maintain the jail in a sanitary condition, the Assistant Attorney General says:

"In our judgment and opinion the evidence is not sufficient to support the verdict of the jury on this allegation and charge. Only ordinary conditions are shown in reference to the condition of the jail, and when considered in toto fails to make out any case of neglect of duty. The fact that the toilet was constructed without a cover, together with the fact that the flushing system depended primarily for its efficiency upon the supply of the water from the tank connected with the windmill, together with the known fact that the tank becomes dry because of lack of wind, when considered also by the evidence of the state that tubes of water were furnished to flush the toilets when the windmill supply gave out, together with other evidence as to dirt and filth, all indicate that there was no neglect of duty upon the part of the sheriff."

We agree with this conclusion.

We do not believe the defendant was awarded a fair and impartial trial. While we do not propose to review all rulings of the court in admitting and excluding evidence, because not necessary to a determina-

tion of the case, a few examples will disclose the basis for the above expression.

The state introduced Charles Gist as a witness, who testified that he was a prisoner in the county jail; he detailed the condition of the jail as to cleanliness; said he was called as a witness before the grand jury against the sheriff; that other prisoners were before the grand jury; that after they had so testified before the grand jury, he heard the sheriff say that "he would feed us on bread and water," thereby implying that the threat was made because such prisoners had testified before the grand jury. When the defendant was upon the stand, he was asked by his counsel if he had made this statement attributed to him by the state's witness, to which he replied, "I did." Thereupon his counsel propounded the following question:

"State to the court and jury what was the occasion of your making that statement to that prisoner; what caused you to make that?"

This question the witness was not permitted to answer. The question was changed by counsel in various ways, in order to obviate possible objection to the form of the question, and elicit his version of the conversation testified to by the state's witness, all without avail. From the questions propounded it is apparent that the defendant sought to show that the statement attributed to him was made because the prisoner refused to work, and not because of his testimony before the grand jury. It was only fair to the defendant that he should be allowed to give his version of the conversation, as to which Gist testified.

Another illustration is afforded by the following: Ramon Lujan had been janitor at the county jail for some months preceding the return of the accusation against the sheriff. He was called as a witness by the appellant, and after testifying as to his services in that capacity, and means of observation, this question was propounded to him: "Do you know what condition the jail was kept in, as to cleanliness or otherwise, during the time?" This question was held objectionable by the court, and the witness was not permitted to answer.

On cross-examination the defendant stated that some items had not been transferred from his original books to the books furnished him by the traveling auditor; on redirect examination the following question was asked defendant:

"Mr. Chavez, you have stated in your cross-examination that there was some things in some of these books of yours that have not been transferred to the books furnished by the auditor; will you state why those things have not been transferred?"

This question the court held to be objectionable, and defendant was denied all opportunity to explain the failure if he could have done so.

On cross-examination the state's attorney

was permitted to ask defendant as to an arrest made by him of a man named Brady, although no such specification was contained in the charge. The defendant testified that the arrest was made in Lincoln; that he saw the defendant in Carrizozo the day before he arrested him, and told him that he had a warrant for his arrest, but that before he had made the arrest Brady left and went to Lincoln. Defendant's attorney objected to the questions, on the ground that no such charge was specified in the accusation. Thereupon the district attorney said: "He is charged with having charged 12½ cents a mile for every process he ever served." The court remarked: "The man was arrested at Carrizozo, and he wanted 12½ cents a mile for going to Lincoln." This remark by the court, assuming that the questions were proper, necessarily was highly prejudicial to the defendant, for he had just stated that the defendant was not arrested in Carrizozo but in Lincoln, and the court, by the remark squarely challenged the truth of the sheriff's previous statement, and, as is well known, the jury is always very prone to give absolute credence to every statement made by the court. Courts should be very careful, in the trial of a cause before the jury, to refrain from remarks or statements which may have a tendency to create an impression in the minds of the jury that the court disbelieves, or believes any evidence that has been given, or that he leans more strongly toward one side than the other.

This question propounded to defendant was excluded:

"Is it not true that when you presented these bills [referring to the bills presented for taking the insane woman to the asylum] you requested the county commissioners to allow your expenses for these trips, and stated to them that you offered it only to show that the services were rendered?"

The ground upon which it was excluded was that no foundation had been laid for such evidence. The statute (section 1, c. 5, L. 1899) authorizes the sheriff to charge 12½ cents per mile for certain process, etc., served by him, and for transporting prisoners. Under the Constitution the sheriff is precluded from receiving any fees to his own use, but is required to collect and turn said fees over to the county treasurer. It is a disputed question as whether such fees are to be collected from the county, for services performed, and then returned to the county treasurer by the officer. But be this as it may, the sheriff certainly should have been permitted to offer such explanation as he could for his acts and conduct, and it was for the jury to say after hearing such explanation, whether he "knowingly" did the acts charged against him.

Nor would the court permit the defendant to show by the record that the commissioners had entered an order allowing him the sum of \$2,000 per annum as an advance on his

salary; this, on the theory that the commissioners had no right to make any such allowance. Assuming that the court was right as a matter of law, without so deciding, however, this evidence should have gone to the jury. No law fixing the compensation for county officers has been enacted. The Attorney General of the state advised boards of county commissioners that they had the power to do what was done in the case. See Report of Attorney General, 1912, 1913, pp. 183-184. Can it be said that a court can justly refuse to permit a county officer to show an act, which was done under the advice of the law officer of the state, where the good faith of the officer is vital to his defense? We think not.

Presumably the appellant was elected to the office of sheriff of Lincoln county by a majority vote of the electors of that county. The verdict in this case stigmatizes the appellant as a wrongdoer, and deprives him of the enjoyment of the office to which he was elected. Such verdict cannot be sustained unless it is supported by substantial evidence, nor should a conviction be affirmed where the record so plainly shows that the defendant was consistently and persistently deprived of an opportunity to present his defense, under the well-established rules of judicial procedure.

For the reasons stated, the judgment of the trial court will be reversed and the cause remanded, with instructions to award the defendant a new trial; and it is so ordered.

HANNA and PARKER, JJ., concur.

(19 N. M. 612)

ROMERO v. MCINTOSH. (No. 1656.)

(Supreme Court of New Mexico. Dec. 17, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 345\*)—TIME FOR APPEAL—COMPUTATION—NEW TRIAL—"FINAL JUDGMENT."

Under section 1, c. 57, Laws of 1907, providing that any person aggrieved by any final judgment or decision of any district court in any civil cause may, at his election, take an appeal or sue out a writ of error within one year from the date of the entry of the same, and where a motion for a new trial or rehearing is seasonably made, the time within which the appeal may be taken or the writ of error sued out is to be computed from the date of the denial of the motion, and not from the date of the rendition or entry of the judgment or decree, where the motion was authorized by statutory provision and operated as a stay of execution, because until such motion was disposed of the judgment was not "final judgment" within the meaning of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.\*]

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. TRESPASS (§ 46\*)—TIMBER—PROOF.

In an action for trespass by cutting and removing timber from lands of the plaintiff, the proof that some of it was cut by defendant was insufficient to charge him with responsibility for all the timber missing from plaintiff's land during an indefinite period of two or three years.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 123-127; Dec. Dig. § 46.\*]

Error to District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by William McIntosh against Eugenio Romero. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

In this cause defendant in error, William McIntosh, commenced an action against the plaintiff in error, Eugenio Romero, on account of alleged trespass committed by Eugenio Romero in unlawfully having cut timber from the lands of defendant in error, McIntosh. It appears from the record herein that, prior to the commencement of this action, the same defendant in error, William McIntosh, commenced and prosecuted to final determination an action against this same plaintiff in error, Eugenio Romero, and others, whereby he alleged that Eugenio Romero and the others were unlawfully cutting timber from his lands and prayed that the said Eugenio Romero and the other defendants in that action be permanently enjoined from the further cutting of timber upon his lands and for other relief. The plaintiff in error, Eugenio Romero, by his answer to the complaint in this action pleaded the judgment rendered in the first action between him and McIntosh as being res adjudicata of the cause of action in this suit. The defendant in error, McIntosh, demurred to this defense, and, the court having sustained the demurrer, plaintiff in error herein duly filed his exceptions to the ruling of the court sustaining the demurrer and filed an amended answer herein, and upon the issue thus joined this cause was tried by the court without a jury; the jury having been by both parties waived. The court rendered judgment against the plaintiff in error herein for the sum of \$6,492, with interest at the rate of 6 per cent. per annum from July 18, 1906, to the date of judgment.

S. B. Davis, Jr., and C. A. Spiess, both of East Las Vegas, for plaintiff in error. E. W. Dobson and E. A. Mann, both of Albuquerque, for defendant in error.

HANNA, J. (after stating the facts as above). Several assignments of error are presented for consideration, but we must first consider a motion for the dismissal of the writ of error upon the ground that the writ was not sued out within one year from the date when the judgment in the lower court became final.

The court rendered its judgment on January 10, 1912, and at the same time made an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order granting plaintiff in error 20 days within which to file a motion for new trial, which was filed 15 days later, but not disposed of until January 16, 1913, almost a year later, when it was overruled. This writ of error was sued out of this court January 10, 1914.

[1] The question therefore presented is whether the judgment became final upon the date of its entry, or not until the order denying and overruling the motion for a new trial was made and entered.

Our statute of limitation upon the right to an appeal is section 1, c. 57, Laws 1907, viz.:

"Any person aggrieved by any final judgment or decision of any district court in any civil cause may at his election take an appeal or sue out a writ of error to the supreme court of the territory at any time within one (1) year from the date of the entry of the same. Appeals or writs of error may also be taken from final judgments or decrees in actions for partition that determine the rights and interests of the respective parties and direct partition to be made."

In many jurisdictions where appellate courts have been called upon to pass upon general statutes, such as ours, providing that the appeal or proceedings in error shall be instituted within a certain time from the rendition or entry of the judgment or decree, it has been held that, where the motion for a new trial or rehearing is seasonably made, the time is to be computed from the date of the denial of the motion, and not from the date of the rendition or entry of the judgment or decree, where the motion was necessary to the consideration in the appellate court of the question involved. *Thompson on Trials*, § 2730; 2 R. C. L. 107; *Pearce v. Strickler*, 9 N. M. 46, 49 Pac. 727; *Conradt v. Lepper*, 13 Wyo. 99, 78 Pac. 1, 3 Ann. Cas. 627 (see cases collected in note following last citation).

This rule may be said to have the sanction of the larger number of American appellate courts, though the rule is severely criticized as one growing out of judicial legislation and is not followed by all American jurisdictions. Those departing from this rule, and holding that the time is to be computed from the actual rendition or entry of judgment or decree without regard to the fact that a motion for new trial or rehearing is pending, as evidenced by, at least, a partial list of the cases so holding, are *California*, *Colorado*, *Michigan*, *Oregon*, *Ohio*, *Oklahoma*, and *Texas*. See *Bornheimer v. Baldwin*, 42 Cal. 27; *Brooks v. San Francisco*, etc., 110 Cal. 173, 42 Pac. 570; *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387; *Houser*, etc., v. *Hargrove*, 129 Cal. 90, 61 Pac. 660; *Puckhaber v. Henry*, 147 Cal. 424, 81 Pac. 1105; *Freas v. Townsend*, 1 Colo. 86; *Slatterly v. Robinson*, 7 Colo. App. 22, 42 Pac. 179; *Burchinell v. Bennett*, 10 Colo. App. 150, 50 Pac. 206; *Hill v. Hill*, 114 Mich. 599, 72 N. W. 597; *Sellig v. Akron*, etc., 10 O. C. D. 535, 19 Ohio Cir. Ct. R. 633; *Brown v. Coal Co.*, 48 Ohio St.

542, 28 N. E. 669; *Dowty v. Pepple*, 58 Ohio St. 395, 50 N. E. 923; *Cooper v. Yoakun*, 91 Tex. 391, 43 S. W. 871; *Doorley v. Buford*, etc., 5 Okl. 594, 49 Pac. 936; *Manes v. Hoss*, 28 Okl. 489, 114 Pac. 698; *Lee et al. v. Summers*, 36 Okl. 784, 130 Pac. 268; *McCartney v. Shipherd*, 60 Or. 133, 117 Pac. 814, Ann. Cas. 1913D, 1257; *Gearin et al. v. Portland*, etc., 62 Or. 162, 124 Pac. 258; *Hahn v. Astoria Nat. Bank et al.*, 63 Or. 1, 114 Pac. 1134, 125 Pac. 284; *Miller v. Miller*, 65 Or. 551, 131 Pac. 308, 133 Pac. 86.

We understand the reason generally urged in support of the first rule, herein referred to, to be that the character of finality does not attach to the judgment or decree until the motion for a new trial has been disposed of. The chief objection to the rule is, and this has given rise to the second rule, that the statute of limitation usually provides that the proceedings looking to a review of the cause must be instituted within a fixed time after the rendition or entry of the judgment or decree, and to modify the terms of the statute by judicial opinion, without statutory authority for such ruling, to the effect that the time limited is extended until a motion for a new trial or rehearing is disposed of, cannot be other than judicial legislation.

We have observed that many of the decisions favoring the rule that the statute is tolled by the motion for a new trial, are of jurisdictions where the period of limitation is short, as where it is 90 days or 6 months; although some cases are to be found where the period is longer. Other reasons for the rule exist dependent upon statutory or other peculiar conditions, some of which are pointed out in the opinion of an Oregon case (*Gearin et al. v. Portland Ry., L. & P. Co.*, 62 Or. 162, 124 Pac. 256), as, for example, where a statute provided that, if the motion assigns as a reason for the new trial an exception to the decision of the case, the decision shall be carried forward to the time of ruling upon such motion; where a motion for a new trial is made, by statute, a prerequisite step in the proceedings for review; or where, by statute, the motion operates as a stay of execution.

It would be idle to give further consideration to the reasons supporting, or opposed to, either of the two rules referred to in this opinion; it being sufficient to say that the rule should be, and generally has been, considered dependent upon statutory provisions of the different jurisdictions.

We therefore turn to a consideration of our statutes affecting the question.

This being a case tried to the court without a jury, a motion for a new trial might be said to be unnecessary (section 24, c. 57, Laws 1907), and it is contended by defendant in error that, while it was the privilege of plaintiff in error to file a motion for a new trial, it only had the effect of staying execution until it was disposed of, and the judg-

ment was, notwithstanding, a final one and the only one entered in the cause.

As we have seen, a motion for a new trial is, in fact, unnecessary in causes tried by the court without a jury, but it is also provided by section 2891, C. L. 1897, that "motions for new trials \* \* \* shall be entertained" without qualification as to the class of cases, or otherwise. It therefore cannot be contended that the motion in this case was improper, and, aside from the fact that it was received and considered without objection, it was, in our opinion, a permissible course of procedure. It therefore remains to consider the effect of the motion. By section 135 of the Code of Civil Procedure (Comp. Laws 1897, § 2685), it is provided that "judgment shall be entered and execution may be issued thereon unless a motion for a new trial is made," etc. In our opinion, the filing of such motion within the time stipulated deprives the judgment of its character of finality and brings it within the first rule referred to in this opinion. This rule has been followed by our territorial Supreme Court in the case of *Pearce v. Strickler*, 9 N. M. 48, 49 Pac. 727, and we see no reason for departing from this holding at this time. For which reason the motion to dismiss is denied.

Several other assignments of error are presented for consideration, but one is chiefly relied upon by plaintiff in error, and, being decisive of the case, it is necessary only to dispose of this, the third assignment, which, quoting from brief of plaintiff in error, is as follows:

"The court erred in rendering judgment against the said plaintiff in error in the sum of \$6,492, the evidence in said cause not warranting or sustaining a judgment in said cause in any sum in excess of \$283; it appearing from the record and transcript of the evidence herein that the defendant in error produced no evidence proving or tending to prove that plaintiff in error cut or procured to be cut any trees or timber whatsoever upon the lands of defendant in error, and the only evidence in said cause which proves or tends to prove that plaintiff in error cut and procured to be cut timber on said lands is the evidence of the witness Raymundo Romero, a witness who testified on behalf of plaintiff in error, and the evidence of said Raymundo Romero proves that the value of the timber so cut by said plaintiff in error was of the value of only \$283."

[2] We do not deem it necessary to discuss much of the testimony introduced in the case. The essential point in controversy is whether it was proven that plaintiff in error cut the timber in question, and to the extent of the amount awarded as damages by the judgment.

By defendant in error it is urged that the answer of plaintiff in error, in a former proceeding, wherein the title to the same lands was involved and an injunction sought

against the present plaintiff in error and others to restrain trespass thereupon, supplies the alleged lack of evidence in this respect, and, being an admission against interest, is conclusive upon plaintiff in error. The essential allegations of his answer, in the respect referred to, are:

"And further answering, these defendants deny that the said firm of Dye & Romero have been engaged in cutting and is engaged in cutting any timber upon the lands described in said complaint, or any part of the same, but defendants allege Eugenio Romero is engaged, with authority of the said commissioners of the said grant of Chilili, in cutting ties upon parts of the tract of land described in said complaint, but which said parts of said tracts these defendants deny that the said plaintiff has any right or title thereto, or ever had any such right or title."

Defendant in error contends that by this answer plaintiff in error "admitted that he and he only cut timber from appellee's land." We do not consider that this is a correct interpretation of the pleading. He denied that Dye & Romero had been so engaged, and affirmed that he, himself, had been cutting timber; but the language is not susceptible of the construction that none others had been cutting. The evidence of one of the witnesses is that a large force of men under employment by a firm known as Laub & Romero had been cutting over the tract of land in question during the winter of 1904, and within the period of time fixed by Ross as the time within which the timber had been cut, which was included within his estimates made in June, 1906. This testimony would certainly cloud the issue of whether Romero cut all the timber in question, and, there being no proof that he did so, we consider the assignment well taken.

This case has much in common with the case of *Stoneman-Zearling Lumber Co. v. McComb*, 92 Ark. 297, 122 S. W. 648, and, as in that case, it seems to us to be largely a matter of conjecture, without evidence on which to base it, that plaintiff in error had cut all of the timber on the lands of Mr. McIntosh, which had been cut within two or three years. The burden of proof was on the defendant in error, before he could recover, to show that plaintiff in error had cut the timber. Before he can recover anything, he must prove the quantity of the timber cut, by plaintiff in error, and bare proof that some of the timber was cut by plaintiff in error is not sufficient evidence to charge him with responsibility for all the timber missing from the land during an indefinite period of two or three years.

Therefore the judgment is reversed, and a new trial granted, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(19 N. M. 638)

Ex parte BUNCH. (No. 1757.)  
(Supreme Court of New Mexico. Dec. 29, 1914.)

(Syllabus by the Court.)

**INTOXICATING LIQUORS (§ 29\*)—LOCAL OPTION ELECTION—VALIDITY.**

Under the provisions of section 8, c. 78, S. L. 1913, an election for the purpose of determining whether the sale of intoxicating liquor shall be prohibited within a given district cannot be held within two months preceding any other election, and such an election held within two months preceding the regular biennial election for justices of the peace and constables is absolutely null and void.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 37; Dec. Dig. § 29.\*]

Original application for writ of habeas corpus by Joe Bunch. Petitioner discharged.

O. P. Easterwood, of Clayton, for relator. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

**PER CURIAM.** The petitioner was arrested and is being held in custody by the sheriff of Union county for an alleged violation of chapter 78, Laws 1913. The act provides for the holding of elections in districts in the state upon the question of the prohibition of the sale of intoxicating liquors therein. Section 3 of the act prohibits the holding of any such election within two months preceding any other election. The election in this case was held on the 21st day of November, 1914, which was within 60 days next preceding the biennial election for justices of the peace and constables in all of the precincts of the state, as provided for in section 3224, C. L. 1897. By reason of the prohibition of the act of 1913, this election was absolutely null and void.

It follows that the petitioner is not, and cannot be, charged with a violation of chapter 78, Laws 1913, supra.

For the reasons stated, the petitioner will be discharged.

(19 N. M. 672)

Ex parte TOWNDROW. (No. 1760.)  
(Supreme Court of New Mexico. Dec. 31, 1914.)

(Syllabus by the Court.)

**HABEAS CORPUS (§ 30\*)—INSUFFICIENT COMPLAINT—DISCHARGE OF PETITIONER—RIGHT.**

Upon an application for a writ of habeas corpus, to secure petitioner's release from the custody of the sheriff, where such officer holds the petitioner under a warrant, issued upon a complaint based on information and belief, and the Attorney General admits that the process is not a lawful process and is insufficient to justify petitioner's detention, the application will be granted and the petitioner discharged.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

Original petition for writ of habeas corpus by John H. Towndrow. Petition granted, and petitioner discharged, without prejudice to other proceedings.

Jesse G. Northcutt, of Trinidad, Colo., and John Morrow, of Raton, for petitioner. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

**PER CURIAM.** On the 20th day of August, 1914, the petitioner was arrested, charged with the murder of Lillian Towndrow, his wife, Judge Thomas D. Lieb, presiding judge of the Eighth judicial district, sat as the examining magistrate and heard the testimony introduced upon the application for bail. Upon the conclusion of the testimony, the court found, among other things, that a crime had been committed, and that there was probably cause to believe the defendant committed the crime, and, on the application for bail, reserved his ruling and took under advisement the question as to whether or not the said defendant was entitled, under the Constitution and laws of this state, to bail, and, thereafter, on the 16th day of September, 1914, the said judge ordered that defendant be admitted to bail in the sum of \$15,000. This bail was given by the defendant in the form of a recognizance, denominated an appearance bond, with sureties as required by law, which was approved by the sheriff, and the defendant was released thereon. Thereafter, on the 7th day of December, which was the first day of the regular December, 1914, term of the district court of Colfax county, the petitioner and other defendants interested in other cases interposed a challenge to the array of the grand jury, which had been summoned to appear on that date to serve for that term of court. This challenge was sustained by the court, whereupon the court directed the sheriff to take the petitioner into custody, and also directed the district attorney to file in the district court an information against the petitioner, charging him with having killed and murdered the said Lillian Towndrow. The district attorney filed the information, which was supported by the oath of W. R. Hixenbaugh, upon information and belief only, however. Upon this information a warrant was issued, and it is upon this information and the warrant issued thereon that petitioner is being detained in the custody of the sheriff and deprived of his liberty.

The attorneys for the petitioner and the Attorney General have filed in this court a written stipulation, which among other recitals and agreements, contains the following:

"The Attorney General admits that the warrant, copy of which is attached to the petition herein, and under which the petitioner is held in restraint, is not a lawful process, and is insufficient to justify petitioner's detention, because the warrant was issued upon a complaint based on information and belief."

In view of this admission by the state, the application will be granted and petitioner will be discharged from the restraint under the warrant issued upon the information filed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—17

December 9, 1914, without prejudice to any proceeding heretofore instituted, now, or hereafter to be instituted by the state touching the charge against the petitioner for the murder of Lillian Towndrow.

(19 N. M. 609)

**BROBST v. EL PASO & S. W. CO.**  
(No. 1701.)

(Supreme Court of New Mexico. Dec. 16, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 1078\*) — ASSIGNMENTS OF ERROR—WAIVER.**

Assignments of error not argued in appellant's brief are deemed to have been waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.**

In a suit for damages on account of alleged assault by an officer or special agent employed by a railway company, at its station, by a person rightfully at such station but in an intoxicated condition, a requested instruction that "the fact that Mark Johnson was an officer and special agent of the defendant would not require him to submit to an assault by the plaintiff, but he had the right to repel any assault which the plaintiff may have made or attempted to make with all the force which under the circumstances and conditions seemed necessary to him," is properly refused, as it does not correctly state the law, in that it fails to impose upon the assaulted party the duty of acting in good faith and as a reasonably prudent man under such circumstances would act, using no more force than is necessary to repel the force which is being used against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

Appeal from District Court, Quay County; T. D. Lieb, Judge.

Action by John L. Brobst against the El Paso & Southwestern Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee, John L. Brobst, brought his suit against the Southwestern Company to recover damages on account of injuries received by appellee by reason of an alleged assault made upon him by one Mark Johnson, the agent of said appellant. Evidence was introduced to the effect that the appellant company was a railroad corporation and maintained a depot at Tucumcari for the transaction of its business with the public, and that said Mark Johnson was the agent of the company, and that he was, at the time of making the alleged assault, engaged in the performance of his duty as a special officer of the company; that appellee arrived at said depot on the early morning train en route to a point in Oklahoma; he stopped at Tucumcari, where it was necessary to change cars; he was found asleep in the depot by said Mark Johnson and told to get out, and was ejected from the depot and the right of way of appellant company. The appellee was intoxicated, and after he was ejected

by the special officer he returned to the depot, when the alleged assault occurred. After trial the jury returned a verdict for the plaintiff for \$1,190.16. The appellant then moved for a new trial, which was overruled and an appeal was prayed to this court. Error was assigned upon four grounds, all of which were based upon the failure of the court to give certain requested instructions. Only one of these grounds is argued in the brief.

Edwin Mechem, of Alamogordo, and Hawkins & Franklin, of El Paso, Tex., for appellant. H. H. McElroy, and H. L. Boon, both of Tucumcari, for appellee.

RAYNOLDS, District Judge (after stating the facts as above). [1] Under former decisions of this court only assignments of error which are argued by counsel in their brief will be considered and passed upon by this court. When not so argued, such assignments are deemed to have been waived. *Riverside Sand & Cement Co. v. Hardwick*, 16 N. M. 479, 482, 120 Pac. 323.

[2] The only error assigned and argued in the brief is as follows:

"3. The court erred in refusing to give the jury the eighth instruction requested by appellee, to wit, 'The fact that Mark Johnson was an officer and special agent of the defendant would not require him to submit to an assault by the plaintiff, but he had a right to repel any assault which the plaintiff may have made or attempted to make with all the force which under the circumstances and conditions seemed necessary to him.'"

The appellant cites no authority for the correctness of this instruction, and we are of the opinion that it does not embody the law, placing as it does the right, without any limitation, upon the assaulted party to use such force as he may deem necessary and in making him the sole judge of the amount of force that is necessary, without regard to the nature of the assault, his good faith, or of the reasonableness of his action under the circumstances at the time of the assault. In self-defense the assaulted party can use only such force as is necessary to protect himself from impending danger, but he must have reasonable cause to believe that danger of great bodily injury is imminent, and must act in good faith, as a reasonably prudent man under such circumstances would act, and use no more force than is necessary to repel the force which is being used against him. In the case of *Territory v. Trapp*, 16 N. M. 700, at page 709, 120 Pac. 702, this court sustained a refusal of the trial court to give an instruction similar to the one asked for by appellee, in that it omitted the element of reasonableness of defendant's belief in the existence of danger. Furthermore, this instruction does not take into consideration the nature of the assault made. There is a great difference between a simple assault and an assault with a deadly weapon; and the force necessary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to repel the latter would, if used in the case of a simple assault, make the assaulted party the assailant. We have carefully read the record in this case, and it fails to show a dangerous or vicious assault by the appellee. In fact, it was denied by the appellee on cross-examination that there was any assault whatever made upon appellant's agent, Johnson, and the sole witness for the appellant stated, in answer to a question as to the disposition of the appellee, that "his disposition was very genial; he did not seem to be out of humor in any way." The law is correctly stated in a note to the case of *Drydale v. State of Georgia*, 6 L. R. A. 424, as follows:

"The party assaulted is justified in using such force as is necessary to repel an assailant, but no more; and if unnecessary force is used he becomes the assailant." *Gallagher v. State*, 3 Minn. 270 (Gil. 185); *People v. Williams*, 32 Cal. 280; *People v. Campbell*, 30 Cal. 312; *Rasberry v. State*, 1 Tex. App. 664; *Stewart v. State*, 1 Ohio St. 66.

From a careful consideration of the whole record, having found no error therein, the judgment of the lower court is affirmed.

ROBERTS, C. J., and HANNA, J., concur.

(19 N. M. 549)

**SANDELL v. NORMENT.** (No. 1699.)

(Supreme Court of New Mexico. Dec. 2, 1914.  
Rehearing Denied Jan. 4, 1915.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 843\*)—PRINCIPAL AND SURETY (§ 45\*)—EVIDENCE—INSTRUCTED VERDICT.**

The court will not pass upon the effect of a motion by both parties for an instructed verdict, where there is no evidence in the record which would have warranted a verdict for appellant, if the cause had been submitted to the jury. Evidence reviewed. *Held*, that the court properly directed a verdict for appellee.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843; \* *Principal and Surety*, Cent. Dig. § 22; Dec. Dig. § 45.\*]

**2. BILLS AND NOTES (§ 369\*)—DEFENSES—TRANSACTIONS BETWEEN MAKERS.**

No representations, true or false, made by one maker of a note to another, no secret understanding between such makers, no inducements offered by one to the other, affect the validity of the instrument in the hands of the payee, unless he knew or was chargeable with notice of such facts.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 951; Dec. Dig. § 869.\*]

**3. PRINCIPAL AND SURETY (§ 125\*)—DISCHARGE OF SURETY—GROUNDS—PASSIVENESS OF CREDITOR.**

The mere passiveness of the creditor in the collection of his debt, either of the principal debtor or from collateral securities held by him, is not sufficient grounds for discharging the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 312-328; Dec. Dig. § 125.\*]

**4. WITNESSES (§ 388\*)—IMPEACHMENT—FOUNDATION—CONTRADICTORY STATEMENTS—DEPOSITIONS.**

Where a party, taking the deposition of a witness, seeks to impeach such witness by showing that he has made a contrary statement, at another time and place, as to the facts about which he testified, it is incumbent upon such party to have the statement, so submitted to the witness, incorporated into the deposition, in order to lay the proper foundation for its introduction.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

**5. TRIAL (§ 333\*)—VERDICT—VALIDITY—JUDGMENT.**

Where the question as to the amount of the money judgment which plaintiff is entitled to recover, if a recovery is to be had, is not disputed, and can be ascertained from the pleadings, and is simply a matter of calculation, a verdict returned by the jury, finding the issues in the case for the plaintiff, without stating the amount of the recovery, is sufficient to support a judgment.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 784, 786; Dec. Dig. § 333.\*]

**6. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE.**

Where a party to a suit is cognizant of the fact that a witness residing beyond the jurisdiction of the court can testify as to certain facts, material to the issues in the case, it is his duty to take the deposition of the absent witness, and where he does not do so, or attempt to do so in good faith, he cannot procure a new trial on the ground of newly discovered evidence, based on facts as to which such witness will testify.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

**7. NEW TRIAL (§ 150\*)—GROUNDS—ABSENCE OF WITNESS—FAILURE TO TAKE DEPOSITION—EXCUSE.**

Where a party seeks to justify a failure to take the deposition of a witness, residing within another state, it is incumbent upon him to establish the fact that, under the statutes of the state where the witness resides, no power exists in the courts of that state to compel the attendance and testimony of the witness.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

**8. JUDGMENT (§ 276\*)—ENTRY—NOTICE—STATUS.**

Subsection 136, § 2685, Comp. Laws 1897 (Code Civ. Proc. subsec. 136), refers only to the rendition of the judgment, and not to the entry thereof.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 542-545; Dec. Dig. § 276.\*]

Appeal from District Court, Santa Fe County; M. C. Mechem, Judge.

Action by J. H. Sandell against James W. Norment. From judgment for plaintiff, defendant appeals. Affirmed.

On June 24, 1909, N. A. Perry requested the appellant to sign with him a note to the Bessemer Bank of Pueblo, Colo., for \$2,000. Said Perry represented to appellant that he would permit the money procured on said note to remain on deposit in said bank, as security for the payment of the note, and that he would also further secure the payment of the note by depositing with the bank, as collateral security, 20 shares of stock of the American Bank & Trust Company of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Clovis, N. M. Upon the faith of such representations, appellant signed the note with Perry, writing after his signature the word "surety." Perry sent the note to the Bessemer Bank, together with the 20 shares of stock which he had agreed to deposit as collateral security, and instructed the bank to place the proceeds to the credit of the Savings Bank of Melrose, which was done. The business with the Bessemer Bank was transacted through C. H. Bowlds, acting vice president of that bank. At that time Bowlds was also vice president of the Savings Bank of Melrose. Perry was also an officer of the Melrose Bank, and Sandell, appellee herein, was the cashier of the Bessemer Bank. The Melrose Bank credited Perry's account with the \$2,000, so placed to its credit by the Bessemer Bank, which sum was subsequently paid out by the Melrose Bank on Perry's checks and drafts. The Melrose Bank drew, at different times, on the Bessemer Bank four drafts, each for the sum of \$500, which were all paid by the Bessemer Bank, without objection, except the last. This draft it refused to pay, because it alleged that the Melrose Bank had agreed to keep \$2,000 on deposit with it. Legal proceedings were instituted by the Melrose Bank to compel the payment of the draft, whereupon it appears that it was paid. After maturity of the note, the Bessemer Bank transferred the same to J. H. Sandell, appellee herein, who instituted this action against appellant to enforce the payment of the same. In his answer to the complaint appellant admitted the execution and delivery of the note sued upon, that it was past due and unpaid, and set up several different grounds of defense, only two of which, however, in view of the propositions discussed by counsel for appellant in their brief, need be considered. These may be briefly stated as follows: (1) That the act of the Bessemer Bank in permitting the withdrawal of the \$2,000 on deposit was an affirmative act on the part of the creditor, detrimental to the surety, and released him; and (2) that the Bessemer Bank failed to dispose of the 20 shares of stock, pledged as collateral security, as was its duty to have done.

The case was tried to a jury, and, after all the evidence was heard, the plaintiff moved for an instructed verdict. The defendant, appellant here, likewise moved for an instructed verdict in his favor. The court sustained appellee's motion, pursuant to which the jury was instructed to return a verdict for appellee. The appellant thereupon gave notice of a motion for a new trial, whereupon the court announced that the motion for a new trial would be deemed overruled, and exception would be granted to the appellant, although the appellant would be given ten days' time within which to prepare and file a formal motion for new trial, and that judgment would be entered for appellee in

accordance with the prayer of his complaint. Thereafter motion for new trial was prepared and filed, and formal order overruling the motion and granting judgment upon the verdict returned by the jury, under the instructions of the court, was entered upon the 10th day of October, 1913. On the next day there was filed a motion in arrest of judgment, and later, while said motion was pending, and on the 12th day of October, 1913, there was filed in said cause an application to amend the motion for a new trial on the ground of newly discovered evidence. The motion in arrest and motion to amend were denied by an order entered on the 8th day of December, 1913, and on the next day this appeal was allowed.

Renehan & Wright, of Santa Fé, for appellant. Francis C. Wilson, of Santa Fé, for appellee.

ROBERTS, C. J. (after stating the facts as above). [1] The first three propositions discussed by counsel for appellant in their brief are: (1) Where both parties verbally move for an instructed verdict, such fact does not constitute a waiver of the right to a jury trial; (2) the motion of appellee was equivalent only to a demurrer to the evidence; and (3) the suretyship agreement between Norment and Perry could be established by parol proof. Neither of these propositions need be discussed, because the evidence, viewed in the aspect most favorable to appellant, would not have warranted a verdict in his favor. It was his contention that he signed the note with Perry, as surety only, upon an agreement that Perry would leave the proceeds of the note on deposit with the Bessemer Bank, as security for the payment of the note, and that he would also deposit with the bank the 20 shares of stock of the American Bank & Trust Company, of Clovis, as collateral security for the payment of the note. He did deposit the stock as security, but failed to deposit the money, per his agreement with Norment. This money he deposited to the credit of the Savings Bank of Melrose, which subsequently withdrew the same before the maturity of the note. Appellant insists that it is competent for him to prove the relation and agreements of the parties by parol, and that the proof shows that the Bessemer Bank was cognizant of the above facts and assented thereto; that by permitting the withdrawal of the \$2,000, the proceeds of the note, it released him from his liability upon the note by violating the terms of the suretyship agreement between Norment and Perry. Appellee, on the other hand, contends that parol proof of the alleged suretyship agreement between Norment and Perry was inadmissible. The legal question, however, is not involved in this case, because the evidence fails to show that the Bessemer Bank had knowledge of or assented to the parol agreement, which of course must be shown in order to bind it.

The following excerpt from the evidence is copied from appellant's brief:

"Testimony of J. W. Norment: 'Some time in June, 1909—I don't recall the exact date—N. A. Perry, with whom I had had former dealings, requested that I indorse his note in the sum of \$2,000. Mr. Perry was at that time considerably indebted to me, and I hesitated to do so. His proposition was, in answer to my hesitation, that he only wanted this for a short time, and didn't expect to use the money, but only wanted a credit for the ostensible purpose of boosting his credit, and offered to put up 20 shares of the capital stock of the American Bank & Trust Company of Clovis, N. M., of the par value of \$2,000, which bank was only a few months old at that time, and in addition there-to agreed to have the proceeds of this note placed to his credit and left in the bank during the life of the loan. In view of the circumstances, and seeing where there could be no possible risk by my so doing, I signed the note in question as I did. Signed as surety.'"

"Testimony of Charles H. Bowlds: After stating that he was acting vice president at the time the loan was negotiated, that he was an officer of the Bessemer Bank, through whom all negotiations were carried on, and that he communicated all matters and things in connection therewith to the appellee, J. H. Sandell, then cashier of said Bessemer Bank, he testified as follows: 'I told Mr. Sandell that Mr. Perry had promised me that the Savings Bank of Melrose, of which I was vice president, would keep on deposit \$2,000 with the Bessemer Bank of Pueblo. I was vice president of both banks.' I told Sandell, when they made application for this loan, that Perry had represented to me that he would see that the Savings Bank of Melrose kept an account with the Bessemer Bank, and that he would see it was sufficient to cover the amount of the loan.' 'Q. But it was no part of the consideration for this loan that this deposit was to be made, it was simply an inducement?' 'A. That was an inducement to me to offer the Bessemer Bank.'"

"Testimony of A. B. Ellis: 'A. N. A. Perry stated to me about that time that he had arranged to borrow \$2,000 from the Bessemer Bank, and he wanted us to pay his drafts for \$2,000, and let that amount remain in the Bessemer Bank to the credit of the Savings Bank of Melrose, which we did.' 'A. N. A. Perry stated to me that he had told the Bessemer Bank that a good part of this deposit would remain on deposit in that bank. He further stated if we needed the money to draw for it. I understood from some one, probably from Perry, that Norment was on the note and that the 20 shares of the stock of the American Bank & Trust Company of Clovis, N. M., were put up as collateral for the loan.' 'A. We drew on them three drafts of \$500 each which were paid. After they had paid the second one, they wrote us that Perry had stated to them that a large part of this deposit would remain there, and my recollections are that they objected to pay any more of this deposit, but they afterwards paid the third draft. We made a fourth draft on them for the balance of the account, \$500, on which payment was refused. We drew again for the same amount, and the draft was returned unpaid and protested.'"

The foregoing is all the evidence upon which appellant relies to establish knowledge on the part of the bank, of the agreement in question. Waiving the question as to the proper weight to be given the testimony of A. B. Ellis, the material portion of which was clearly inadmissible under the hearsay rule, it would not have warranted a verdict for appellant. All that it shows

is that Perry agreed with the Bessemer Bank, as an inducement to it to make the loan, that the Savings Bank of Melrose would keep an account with it, which would be sufficient to cover the amount of the loan. He did not agree that the deposit of the Melrose Bank should stand as security for the repayment of the money, nor did he state to Ellis that he had so told the Bessemer Bank. Suppose the Melrose Bank had on deposit with the Bessemer Bank the sum of \$2,000 at the time this suit was instituted, how could appellant benefit thereby, unless the money, so on deposit, had been pledged for the payment of the note? Ellis said in his testimony:

"Perry stated to me that he had told the Bessemer Bank that a good part of this deposit would remain on deposit in that bank."

But he does not say that Perry stated that he had said to the Bessemer Bank that it should stand as security, or a pledge, for the payment of the note in question. There is no inconsistency between the testimony of Bowlds and Ellis. Bowlds said that Perry agreed that the Melrose Bank would carry a deposit with the Bessemer Bank, as an inducement to the latter bank to make the loan.

The testimony falls in several particulars:

(1) Because it does not appear that Perry told Bowlds or any one else connected with the bank that Norment had signed the note conditioned upon the amount realized therefrom remaining in the bank during its life. (2) Because it does not appear that Perry told the bank officials that the money was to remain in his name during the life of the note, but that the bank of Melrose was to keep a deposit in the Bessemer Bank of \$2,000 during the life of the note.

[2] The failure shown under (1) is fatal to the contention of the appellant, for the reason that his entire case must rest upon the proposition that the bank was advised that he signed as surety, subject to the alleged agreement between him and Perry. If the bank was not informed that such was the condition attached to his contract, then the bank could look to him for payment at maturity, regardless of any statement by Perry that the fund should remain in the bank during the life of the note. It is evident that any agreement between Perry and Norment would not be binding upon the bank when it sought to pursue the surety, unless it should be conclusively proven that the bank had had knowledge of the agreement. *Nelson et al. v. Flint*, 166 U. S. 277, 17 Sup. Ct. 578, 41 L. Ed. 1002.

In the foregoing case, Mr. Justice Brewer for the court laid down the law as follows:

"It is alleged that the trial court erred in ruling out evidence of a conversation between Frank J. Cannon and A. H. Cannon in the absence of the plaintiff—a conversation which it was claimed induced A. H. Cannon to sign the note. The mere statement of the proposition carries its own answer. Conversations be-

tween two makers of a note, in the absence of the payee, are clearly not binding upon the latter. No representations, true or false, made by one maker of a note to another, no secret understanding between such makers, no inducements offered by one to the other, affect the validity of the instrument in the hands of the payee, unless he knew or was chargeable with notice of such facts. The vital question is, not what passed between the makers by themselves, but what passed between the payee and any one of the makers."

Under (2) it is apparent that, whatever the rule is concerning the duty of the bank to apply a deposit of the maker of the note in the bank to the payment of the obligation, it was not its duty to apply the account of the Savings Bank of Melrose to pay the note at maturity, and, in fact, the Bessemer Bank could not do so under the law. In other words, the contention of appellant applies only to cases where the deposit was in the name of the maker of the note, and does not apply where the deposit is not in the name of the party primarily responsible on the note. *First Nat. Bank v. Peltz*, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686.

The above being true, nothing would be gained by a discussion of the legal proposition presented by appellant, on this phase of the case.

[3] Appellant next discusses the effect of the failure of the Bessemer Bank, or Sandell, its assignee, to dispose of the 20 shares of stock of the American Bank & Trust Company, which had become insolvent prior to the trial, thereby rendering the stock worthless. It is contended by the appellant that the bank and its assignee were bound to exercise active vigilance in protecting and disposing of this collateral; that, having held the same after maturity of the note until the stock became worthless, the appellant was thereby released. There are two answers to this proposition: First, the evidence shows that appellee did attempt to sell the stock, and the only offer he received was from appellant, who offered to pay \$1,600 for it, conditional upon appellee drawing upon Perry for the balance of the indebtedness. A sufficient answer to this is that appellant should have paid the entire indebtedness, which, had he done so, would have entitled him to the stock and all equities therein held by the appellee. The second answer is that the mere passiveness of the creditor in the collection of his debt, either of the principal debtor or from collateral securities held by him, is not sufficient ground for discharging the surety. *Vance v. English*, 78 Ind. 80. And see note to *First National Bank v. Kittle*, 37 L. R. A. (N. S.) 699. While it is true the case of *Bank v. Kittle* announces a contrary doctrine, the weight of authority and reason accords with the rule above stated. In the note above referred to all the authorities are reviewed, and very little support is found for the minority rule.

What we have said above disposes also of the alleged error in excluding appellant's Exhibits 3, 5, 6, 7, and 8, which were letters exchanged by appellant and the bank and appellee relating to the disposal of the bank stock and the collection of the note. In no one of these letters did appellant ever offer to pay the note or to pay the difference between what he offered for the stock and the amount due on the note. The primary duty of the surety was to pay the note, principal and interest, upon maturity, upon the failure of his principal to meet the obligation and thereby obtain possession of the collateral. By this means he could have saved any loss which he now alleges he has sustained by virtue of depreciation.

[4] The following questions were propounded to the appellee on cross-examination:

"Did you get anything at the time you got this note?"

"At the time you acquired this note, state whether or not you acquired any shares of stock in the American Bank & Trust Company of Clovis, N. M."

In both instances the court refused to permit the witness to answer. This, appellant claims was prejudicial error. Prior to this time, and upon the beginning of the trial, the appellee produced in court the shares of stock in question, and the record shows that he tendered the same to appellant upon payment of the amount due on the note. The record also shows that this stock was deposited with the clerk, for the use and benefit of appellant, upon payment by him of the judgment. This being true, we fail to see how he has been damaged by the exclusion of the evidence.

The deposition of C. H. Bowlds was taken on behalf of appellant, some time prior to the trial. In the deposition this question appears:

"Look at the statement headed 'Statement of Mr. C. H. Bowlds in Respect to the Case of Sandell v. Norment and Perry,' and state whether or not that is a statement made by you in the presence of A. B. Renchan and Stella V. Canny, and transcribed by her, and, if so, state whether that statement is true."

The answer to the question is not shown by the record. On the trial in the district court the appellant sought to introduce the statement in evidence, for the purpose of contradicting and impeaching the witness. The court held that the statement was not admissible under the showing made. This ruling was correct. The statement was not incorporated into the deposition at the time it was taken, and no proper foundation was laid for its introduction. Appellant did not even offer to show that the statement which he proposed to read to the jury was the same statement which had been exhibited to the witness at the time his deposition was taken.

[5] It is next insisted that the court erred in awarding attorney's fees, because there was no allegation in the complaint to support the same. In this counsel are mistaken.

The note is set out in the complaint, and contains an agreement to pay 10 per cent. attorney's fees upon the amount recovered by suit. The complaint also prays judgment for such recovery. *Exchange Bank v. Tuttle*, 5 N. M. 427, 23 Pac. 241, 7 L. R. A. 445.

The verdict returned by the jury, under the directions of the court, reads as follows:

"We, the jury, find the issues in this cause for the plaintiff."

Subsection 114, § 2685, C. L. 1897 (Code Civ. Proc. subsec. 114), reads as follows:

"When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery, etc."

Appellant contends that the verdict is not sufficient to support the judgment, which question was duly raised in the district court by motion in arrest of judgment and in his motion for new trial. The answer of the appellant confessed the execution of the note, its delivery to the Bessemer Bank, and every essential to constitute a confession of the obligation incurred, but set up in avoidance the defense of a violation of an alleged suretyship agreement. This defense presented the only issue for the jury to try. The amount of the note, the interest due, and attorney's fees was, under the provisions of the note and the averments of the answer, only a question of computation, which the court could make or direct the clerk to make. The statute, in our judgment, was only intended to require the jury to find the amount of recovery, when the question as to the amount due was one of the litigated questions in the case. It cannot reasonably be held to apply where the amount of recovery is admitted, if some other disputed question, upon which liability rests, is decided adversely to the party liable for the payment of the money. That this is the correct interpretation of the Code provision is established by the following cases: *Buzanes v. Frost*, 19 Colo. App. 388, 75 Pac. 594; *Hutchinson v. Superior Court*, 61 Cal. 119; *Cooper v. Poston*, 11 Duv. (Ky.) 92, 85 Am. Dec. 610; *Moke v. Fellman*, 17 Tex. 367, 67 Am. Dec. 656; *Wines v. State Bank of Hamilton*, 22 Ind. App. 114, 53 N. E. 389.

While the better practice would be to have the jury, in all cases for the recovery of money, state in the verdict the amount of the recovery, yet, where the amount of the recovery, if a recovery is to be had, is not in dispute and can be ascertained from the pleadings, the rule that that is sufficiently certain which can be rendered certain applies.

[8, 7] Appellant filed a motion for new trial and later filed an amendment to said motion setting up the fact that N. A. Perry would testify that Norment signed said notes as surety on an express understanding with him that he was to deposit the proceeds of the note with the Bessemer Bank, which

said deposit should remain on deposit with said bank as security for said loan, and that he had communicated all of said facts to Bowlds, the acting vice president of the Bessemer Bank at the time he made the loan; that the fact that said Perry would so testify was unknown to appellant. Diligence in procuring the testimony of this witness, and ascertaining what he would testify to, is set forth in the application in the following language:

"It was impossible to procure the said Perry as a witness because he was beyond this jurisdiction, and although for more than two years efforts were made by the defendant Norment and his counsel to procure either the attendance of the said Perry as a witness on his part, or a deposition from him, as to what he knew, the said Perry refused to answer communications on the subject, refused to become a witness, either by deposition or otherwise, and said Norment was without power, and the courts of New Mexico were without power, and it was impossible to procure the testimony of the said Perry in any way, because of his nonresidence as aforesaid, and only now has the said defendant Norment or his counsel been able to learn from said Perry the facts of the said case, or to get any response from him on the subject."

Did the court abuse its discretion in refusing to grant a new trial on the ground stated? Appellant knew necessarily that whatever knowledge the Bessemer Bank had, as to the conditions and terms upon which he had signed the note with Perry, was communicated to its officers and agents by Perry at the time he negotiated the loan. He does not claim that it derived knowledge from any other source. This being true, he knew from the time the suit was instituted, viz., July 13, 1910, that it was highly important for him to procure Perry's testimony, or at least to ascertain just what facts Perry had communicated to the officers of the bank at the time he made the loan. This being true, did he exercise the required diligence? Perry was beyond the jurisdiction of the court, and of course appellant knew that he could not require him to attend and testify at the trial. His only recourse was to take his deposition. Had this been done, even though he did not know what facts Perry would testify to, he could easily have ascertained. His defense depended entirely upon the facts Perry had communicated to the bank. Perry, of course, knew, and appellant was cognizant of Perry's knowledge. Consequently it was incumbent upon him to exercise due diligence in procuring his testimony. The showing made fails to show that he exercised the required diligence.

Where a party to a suit is cognizant of the fact that a witness, residing beyond the jurisdiction of the court, can testify as to certain facts, material to the issues in the case, it is his duty to take the deposition of the absent witness, and where he does not do so, or attempt to do so in good faith, he cannot procure a new trial, on the ground of newly discovered evidence, based on facts as to which such witness will testify.

Here the showing, excusing the failure to take his deposition, is that the "said Norment was without power, and the courts of New Mexico were without power, and it was impossible to procure the testimony of the said Perry in any way because of his non-residence as aforesaid." Appellant does not allege the place of residence of said Perry, nor that, under the laws of the state of his residence, the courts of such state had no power to compel the attendance and testimony of a witness to be used in juridical proceedings in other states. Where a party seeks to justify a failure to take the deposition of a witness, residing within another state, it is incumbent upon him to establish the fact that, under the statutes of the state where the witness resides, no power exists in the courts of that state to compel the attendance and testimony of the witness. This, it will be noted, appellant failed to do. Therefore there was no abuse of discretion in denying the motion for a new trial on this ground.

[8] Lastly it is urged that appellant's counsel were entitled to notice of the entering of the judgment, under subsection 136, § 2685, C. L. 1897. At the time the verdict of the jury was returned, the court announced that the motion for a new trial would be considered filed as of that date, and overruled, and judgment would be entered for the appellee. The statute provides:

"Upon any hearing before the judge of a court, wherein the judgment of the court upon such hearing shall not be rendered at the time of such hearing, but shall be taken under advisement by the judge, no judgment or order relative to the matters pertaining to such hearing shall be entered until notice of the same shall have been given to the attorneys for the respective parties in the action."

The statute itself discloses the lack of merit in this assignment. The judgment was rendered by the court immediately upon the return of the verdict by the jury although possibly not entered until a later date. This statute plainly refers to the formal announcement by the court of its judgment, not to the entry of the same by the clerk.

For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

PARKER, J., concurs. HANNA, J., did not participate in this opinion.

(74 Or. 240)

# SHERMAN v. CLEAR VIEW ORCHARD CO.

(Supreme Court of Oregon. Jan. 12, 1915.)

## 1. BROKERS (§ 43\*)—ORAL CONTRACT OF EMPLOYMENT—SALE OF LANDS.

A contract by an orchard company employing plaintiff to act as sales manager, organize a selling department, select suitable agents, and manage the company's selling force for a commission of 5 per cent. on sales made by such

agents or by himself was not a contract for the employment of an agent to sell real estate, and was therefore not invalid because not in writing, under L. O. L. § 808, subd. 8, providing that an oral agreement, authorizing or employing an agent or broker to sell real property on commission, shall be void.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43.\*]

## 2. EVIDENCE (§ 121\*)—RELEVANCY—RES GESTÆ.

In an action on a contract employing plaintiff as defendant's sales manager, evidence that, immediately after the interview with plaintiff at which he claimed the contract was assented to by defendant's president, the latter came into the next room, leaving the door open, and said in a loud voice to a director of the company that plaintiff wanted 5 per cent. on all sales, and had been told that there was "nothing doing," was admissible as *res gestæ*, though the court could not decide, as a matter of law, whether the language was used in plaintiff's hearing.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Action by G. E. Sherman against the Clear View Orchard Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This was an action to recover compensation for alleged services as sales manager of defendant corporation. The plaintiff, to sustain the issues on his behalf, offered evidence tending to show that the defendant, a corporation, owned a large tract of land in the state of Oregon, which it desired to sell in tracts for orchard purposes, and that early in the year 1911, at Portland, Or., the plaintiff entered into a parol contract with the defendant corporation to act as sales manager in the sale of defendant's lands within the state of Oregon, to appoint subagents to effect said sales, the scope of the employment as claimed by the plaintiff being as follows:

"Well, I was to assume the entire charge of the selling force. I was to organize a selling force. I was to have entire charge and control of all of the selling agents of the Clear View Orchard Company. I was to establish selling agents wherever the proper man could be found at proper points where I could find the right man. I was to make a trip to the eastern part of the country for the purpose of locating agents there. My expenses were to be paid while on the road—traveling expenses while I was on the road in the interests of the company—and I was to receive a commission of 5 per cent. on all sales made by the company. I was to have a desk in the office of the company, and it was provided that, if a sale was made by me directly, it would cost the company 5 per cent. only. There would be no outside sale commission, and I would get only 5 per cent. due to me as sales manager for the company."

To all of which evidence the defendant objected on the ground that the contract attempted to be proved by the plaintiff was within the statute of frauds, that the compensation was a commission on actual land

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sales, whether made through plaintiff individually, or through agents appointed by him, or through other agents of the company, and such contract was required to be in writing, which objection was overruled, and to which plaintiff excepted. Whereupon the testimony was permitted to go to the jury and to be considered by them in deliberating on their verdict; no evidence of a written contract or any contract other than parol contract being offered in said action. Plaintiff gave testimony further tending to prove that the total sales made by the company on which he was entitled to commission was \$91,666. The plaintiff further offered evidence tending to show that the defendant was a corporation, organized under the laws of the state of Oregon, and that C. J. Schei was president of the corporation, and that one C. G. Andrews was secretary and treasurer of the corporation, and gave evidence tending to show that the plaintiff had had some negotiations with C. G. Andrews, and plaintiff testified:

"On Saturday afternoon Mr. Schei, Mr. Andrews, and myself went into his private office, and we went over the details of this agreement, the organization and the selection of selling force, and Mr. Schei asked me a considerable amount of it. We discussed this matter until late in the afternoon and went over the details of it. I remember particularly that after we had been in the office for an hour or so Mr. Schei asked Mr. Andrews if we had got to any agreement on terms. Mr. Andrews said, 'Yes.' Mr. Schei said, 'What is it?' Mr. Andrews said, 'Five per cent. on the sales made.' Mr. Schei asked if that was to include the business done by Hambright-Mather & Wayland Co. (They were the Milwaukee agents.) They had been appointed, as I understand it, 60 days previous to this—to my coming out. There had been some dissatisfaction at that time. They said that the Milwaukee agents had been appointed for approximately two months. Mr. Schei and Mr. Andrews both said at that time that the business had not been as great as they had expected, and that was only as you could expect it in a new territory of that kind. The reply to Schei's question was, 'Yes, that the sales were to be included in my commission.' Mr. Schei wanted to know if that was agreed upon, and the answer was, 'Yes.'"

There was further testimony offered tending to show that President C. J. Schei and Secretary and Treasurer Andrews were persons authorized to make a contract for the company, and that at the conversation referred to, where the plaintiff was present, and President C. J. Schei and Secretary and Treasurer Andrews were also attendant, the contract was finally consummated and agreed to, whereupon the defendant offered evidence tending to show that the conference referred to was had between the officers of the company, Andrews and Schei, and that Schei refused to consent to the agreement to employ the plaintiff as a sales manager, or otherwise or at all, and refused to pay him 5 per cent. commission on all sales, and also offered testimony tending to show that one of the directors, Mr. Guisness, accompanied Mr. Schei to the office and, at the time of this conversation referred to, was in the room adjoining

the room where the conversation between Schei and Andrews was taking place; that he was only a short distance from them; that Schei came out of the room where Mr. Guisness was, leaving the door open between the two rooms, and in a loud voice, and as the defendant contended in the hearing of the plaintiff, made a declaration with reference thereto, whereupon the plaintiff objected to the defendant's proving the declaration of Mr. Schei to Mr. Guisness. The plaintiff offered further evidence, Mr. Schei testifying to the effect that the plaintiff and Andrews were in the room when he came out, and, referring to the conversation of the witness Schei with Mr. Guisness, Mr. Schei said:

"I came out of the room right into the adjoining room, and my tone of voice was pretty loud, and I was pretty mad about that time. The plaintiff was there and could hear what I said."

The witness said that he was familiar with the rooms there, and that from where he was and from where the plaintiff and Andrews were, in his opinion, the plaintiff could hear what he said. Upon motion of the defendant, the statement of the witness that the plaintiff could hear what he said was stricken out; the court saying:

"The court does not think it is proper to answer that question in the way it is; but you can show the relative position and all the circumstances surrounding it; and it is for the jury to say whether they could hear or not, and the motion to strike the answer will be allowed."

The plaintiff excepted, and the exception was allowed. The court excluded the testimony upon the objection of the defendant and would not allow Mr. Schei to state what he said to Mr. Guisness, and also refused to allow Mr. Guisness, when he was upon the witness stand, to state what was said there. Defendant offered to show what Mr. Schei said to Mr. Guisness when he came into the room in the manner aforesaid, which the court refused to allow to be stated in the presence of the jury, as follows:

"Mr. Schei to Mr. Guisness: What would you think that fellow wanted [referring to plaintiff]? He wanted 5 per cent. upon all the sales I made, and I told him that there was nothing doing."

And by the ruling of the court said evidence was excluded from the jury, and the jury was not permitted or allowed to hear or consider the same, to all of which the defendant excepted, which exception was allowed.

Thos. O'Day, of Portland (Samuel Olson, of Portland, on the brief), for appellant. Jay Bowerman and El. V. Littlefield, both of Portland, for respondent.

McBRIDE, J. (after stating the facts as above). [1] The first contention of defendant is that the contract disclosed by the foregoing statement is one for the sale of lands by an agent upon commission, and that, being wholly in parol, it is void, being within subdivision 8 of section 808, L. O. L., which provides that an agreement "authorizing or

employing an agent or broker to sell or purchase real estate for compensation on a commission" shall be void, unless in writing. The question thus raised is an important one, and the concrete case here presented is so close to the line that it has been given more than ordinary consideration. We have finally concluded that it is not a contract for the employment of an agent to sell real estate. The only characteristic it has of such a contract is the stipulation that the compensation shall be 5 per cent. of the sales made by any agent or by the plaintiff himself; but the evidence of plaintiff indicates that his principal business was to organize the selling department, select suitable agents, and generally manage that branch of the business. He was to create a selling force and manage it for the company, and it was this force which was to do the selling. For this service plaintiff was to receive 5 per cent. of the sales made and his expenses incurred in traveling and organizing the force. The 5 per cent. on sales was the measure of his compensation for these services, and not for making sales of land. It is true that the contract, as detailed by plaintiff, contained a stipulation that, in case he himself made a sale, he was to receive 5 per cent. commission on such sale, but this seems merely incidental to the principal contract; and while as to it he might be barred by the statute of frauds, yet, as no sale was made by him, that question does not arise here. There is a dearth of authorities precisely in point, but the following decisions seem to support the view announced above: *Griffith v. Daly*, 56 N. J. Law, 466, 29 Atl. 169; *Wilson v. Morton*, 85 Cal. 598, 24 Pac. 784.

[2] Another objection urged is the ruling of the court excluding the testimony as to Schei's statement to Guisness immediately after his conversation with plaintiff. The evidence offered tended to show that immediately after the interview with plaintiff, at which interview plaintiff claims the contract was assented to by Schei, Schei came into the next room, leaving the door open, and said in a loud voice to Guisness:

"What would you think that fellow wanted? He wanted 5 per cent. on all sales made, and I told him there was nothing doing."

This situation of the two rooms was detailed, from which it appears that plaintiff was sitting in the room which Schei had just left, and probably 12 feet from where Schei was standing when the remark was made; that the door was open; and that Schei was angry and spoke in a loud voice. No one will question that, if this had been uttered at that time in the hearing of the plaintiff, the testimony would have been admissible. If Schei had just assented to plaintiff's terms, it does not appear probable that he would in a few moments after have used this language in his hearing. Under the circumstances, the court could not decide, as a mat-

ter of law, whether or not the language was used in the hearing of plaintiff, but should have let the testimony go to the jury as part of the *res gestæ*.

For this error, the judgment is reversed, and a new trial directed.

EAKIN and BEAN, JJ., concur.

(74 Or. 220)

### McKINNEY v. WATSON et al.

(Supreme Court of Oregon. Jan. 5, 1915.)

#### 1. CONSTITUTIONAL LAW (§ 42\*)—VALIDITY OF STATUTE—PERSONS ENTITLED TO QUESTION.

A taxpayer, while entitled to resist by litigation the enforcement of an unconstitutional statute which will increase his taxes, cannot resist the enforcement of Act Feb. 28, 1913 (Laws 1913, p. 668), creating a corporation department to protect purchasers of stocks and bonds and prevent fraud in the sale thereof, though the act provided for considerable expenditures, where the moneys for the expenditures would be derived from license fees and other contributions demanded of corporations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.\*]

#### 2. CONSTITUTIONAL LAW (§§ 42, 46\*)—DETERMINATION—MOOT CASE.

The constitutionality of a statute will not be determined where the party attacking it has no interest, and the question is purely academic.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40, 43-45; Dec. Dig. §§ 42, 46.\*]

In Banc. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by W. B. McKinney against R. A. Watson, as pretended Corporation Commissioner, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The plaintiff styles himself a resident, citizen, and taxpayer, owning real and personal property in the state, subject to taxation, and brings this suit for himself and for all other taxpayers in the state. He seeks to enjoin the secretary of state from auditing, and the state treasurer from paying, claims for salaries incurred by the defendant Watson, as corporation commissioner, under the act of February 28, 1913, commonly known as the "Blue Sky Law," entitled:

"An act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department to administer this and other laws relating to the regulation and supervision of corporations, and providing penalties for the violation hereof." Laws 1913, p. 668.

The principal features of the act and the appointment of the defendant Watson as corporation commissioner are recited in the complaint. It is stated in general terms that the official mentioned has been operating under the sanction of the act and has incurred expenses which, together with his salary, will be audited and paid as other claims against the state, unless prevented by injunction. Many reasons are assigned by the plaintiff why the act in question is unconstitutional.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



He founds his right to bring this suit on the following allegation:

"That if claims certified by said pretended corporation commissioner are audited and approved, and warrants are permitted to be drawn upon any fund so attempted to be appropriated, and the same are paid by the said state treasurer, which said officer threatens to do, and will do, unless restrained by this court, the same will greatly increase the taxes of this plaintiff, and all other citizens and taxpayers of the state of Oregon, wrongfully and unlawfully, and to their great damage and irreparable injury."

The circuit court sustained demurrers to the complaint, and, as the plaintiff declined to plead further, entered a decree dismissing the suit, from which the plaintiff appeals.

George Rossman, of Portland (Wilson, Neal & Rossman, of Portland, on the brief), for appellant. Martin L. Pipes, of Portland (A. M. Crawford, of Salem, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). The act in question, like most of the laws providing for government by commission, devotes much space to salaries and expenses of administration and other matters well calculated to make the taxpayer look askance. It authorizes the establishment of a corporation department, and that all fees, charges, interest, fines, and penalties provided by the act itself or heretofore paid into the public treasury by foreign and domestic corporations, joint-stock companies, and associations shall go into a fund to be known as the "corporation fund," which shall be liable for the expenses of carrying on the corporation department. It is required that whenever the amount of money in that fund shall exceed \$15,000, all in excess of \$10,000 shall be transferred by the state treasurer to the general fund of the state.

[1] The controlling question presented by the demurrer is the right of the plaintiff to bring this suit. It is well established by precedents in this state that a taxpayer whose enforced contribution to the public funds will be increased has a right to resist by litigation in his own name the enforcement of an unconstitutional statute, or the misapplication of public money. Instances of such decisions are found in *Carman v. Woodruff*, 10 Or. 133; *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450; *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549; *Avery v. Job*, 25 Or. 512, 36 Pac. 293; *Brownfield v. Houser*, 30 Or. 534, 49 Pac. 843; *Burness v. Multnomah County*, 37 Or. 460, 60 Pac. 1005; *Sears v. Steel*, 55 Or. 544, 107 Pac. 3; *McKenna v. McHaley*, 62 Or. 1, 123 Pac. 1069.

In our judgment, however, the allegations of the complaint are not sufficient to show that the plaintiff's burden of taxation will be increased by the administration of the statute under consideration. That enactment contains various provisions designed to increase the revenues of the state in the form

of fees exacted from concerns subject to its regulation. It is true that the license fees and other contributions demanded of corporations and like institutions by previous legislation are to be turned into the corporation fund, which is apparently designed to be kept at the standard of \$10,000; the excess of that amount being returned to the general fund. Whether this shifting of the public money from one fund to another and back again will cause the plaintiff to pay more taxes than he otherwise would does not appear, if we remember the increment of revenue which the act provides. The plaintiff does not disclose that he is engaged in any business that is subject to the regulation of the act in question, and, in the absence of any showing of facts from which the court can deduce the legal conclusion that he is about to suffer a greater burden of taxation than before, his contention appears to be a mere academic proposition.

[2] The courts will not decide a moot question by enjoining a co-ordinate branch of the government from the execution of a law. It is of no concern to the plaintiff that corporations or business concerns with which he has no apparent connection may suffer illegal exactions under an unconstitutional statute. Under such circumstances sound public policy and due respect to the legislative and executive departments restrain the courts from interference with the operation of a statute at the instance of a private suitor, unless it appears that his personal interests are at stake.

For these reasons, the circuit court was right in refusing to entertain this suit, and the decree must be affirmed.

(74 Or. 247)

# GOLDSTEIN v. PACIFIC HOME MUT. FIRE INS. CO.

(Supreme Court of Oregon. Jan. 12, 1915.)

## 1. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

Where a witness testified that acting as agent of defendant he issued to plaintiff written permission, to be attached to plaintiff's policy, authorizing the removal of the insured property from its original location to the place where it was burned, it was proper to ask him on cross-examination whether he had not been discharged from defendant's service prior to issuing the permit.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

## 2. INSURANCE (§ 375\*)—ACTS OF AGENT—TERMINATION OF AUTHORITY—NOTICE.

Where plaintiff had obtained insurance in question from a particular agent of defendant and had obtained from him written authority to remove the insured property from one building to another, defendant was not entitled to repudiate such permission in an action on the policy on the ground that the agent had been discharged prior to issuing the permit in the absence of proof of notice thereof to plaintiff.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 948-951, 956-965; Dec. Dig. § 375.\*]

Department 1. Appeal from Circuit Court, Washington County; J. A. Eakin, Judge.

Action by Frank Goldstein against the Pacific Home Mutual Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover the amount of a policy of insurance issued by the defendant upon a stock of clothing and other like merchandise, together with furniture and store fixtures, contained in a brick building situated at No. 242 Burnside street, Portland, Or. It is alleged that a fire occurred during the life of the policy which totally destroyed the insured property. The complaint contains other appropriate allegations about giving notice to the company of the loss and demand for the payment of the amount named in the policy, together with the defendant's refusal to pay. The destroying fire happened at No. 33 North Second street, and concerning that the complaint contains this allegation:

"That on or about the 9th day of August, 1911, the defendant herein granted to the plaintiff in writing its permission to remove all items insured under policy No. 3152, located at No. 242 Burnside street, to the two-story frame shingle roof building No. 33 North Second street, Portland, Oregon, and attached said permission to and made it a part of policy No. 3152 of the Pacific Home Mutual Fire Insurance Company, of Forest Grove, Oregon."

This averment was denied by the answer, and the case turns upon the issue thus formed, according to the assignments of error. The result of a jury trial was a judgment in favor of the plaintiff, from which the defendant appeals.

Benton Bowman, of Hillsboro (J. N. Hoffman, of Forest Grove, on the brief), for appellant. D. Solis Cohen, of Portland, and E. B. Tongue, of Hillsboro (Bernstein & Cohen, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). To sustain the issues on his part, the plaintiff called Ralph Feeney, who testified that he was the agent who solicited and effected the insurance for the company and delivered the policy to the plaintiff. He also testified that, acting as agent for the defendant, he issued to the plaintiff a written permission to be attached to the policy authorizing the removal of the insured property from 242 Burnside street to the two-story frame shingle roof building at No. 33 North Second street, where the fire occurred. On cross-examination the attorneys for the defendant propounded several questions to Feeney designed to show that, prior to the time of issuing the permit mentioned, he had been discharged from the service of the insurer. The court sustained the objection of plaintiff to these questions on the ground that the testimony sought to be elicited was incompetent, irrelevant, and immaterial, and

not proper cross-examination. The question is presented in several different forms, but they all amount to the same thing.

[1, 2] It was proper cross-examination to ask the witness if his agency had not ceased prior to the issuing of the permit. The situation for the plaintiff, however, is saved by the principle that, where a party has dealt with another through an agent of the latter in any transaction, he is entitled to rely upon the acts of the agent until the termination of the transaction, in the absence of any notice to him that the agency has been ended. *Union Bank & Trust Co. v. Long Pole Lbr. Co.*, 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663.

There is no testimony in the record tending to show that the plaintiff had any notice of the cessation of Feeney's agency for the company, and there was no offer on its part to show that such was the fact. Under such circumstances, the error in denying the defendant the right to cross-examine the witness on that point becomes negligible because, taken alone, the mere termination of the agency through which the transaction was initiated would not affect the result. The case comes within the spirit of section 556, L. O. L., declaring:

"Upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant. \* \* \*

The judgment is therefore affirmed.

McBRIDE, BEAN, and BENSON, JJ., concur.

(74 Or. 539)

#### TILLOTSON v. PAQUET.

(Supreme Court of Oregon. Dec. 31, 1914.)

#### 1. PARTNERSHIP (§ 336\*)—ACCOUNTING—EVIDENCE.

In a suit for a partnership accounting, plaintiff was not chargeable with one-half the value of a pile driver acquired by him, in the absence of proof of its value and proof that he had acquired title to it or still had it in his possession.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 797; Dec. Dig. § 336.\*]

#### 2. PARTNERSHIP (§ 87\*)—ACCOUNTING—MISTAKE OF PARTNER.

Where a partner makes a mistake in the payment of an account, the loss is that of the firm.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 135; Dec. Dig. § 87.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit for accounting by J. B. Tillotson against Joseph Paquet. From judgment and decree for plaintiff, defendant appeals. Modified.

This is a suit for an accounting. During the years 1908 and 1909 plaintiff and defendant did some contract work in partnership

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

under a certain agreement, which is stated by Paquet as follows:

"He [meaning Tillotson] told me he would look after the work, and that all I would have to do was to furnish the money, and he had an office here over town, etc., and he said how, if I would look after the office, and furnish the money, he would look after the work, and we would divide the profits."

And apparently that is about the contract under which they worked. Tillotson attempted to keep a book account of the transactions, but it proved to be of no value when they attempted to settle. Being unable to satisfactorily adjust the differences between themselves, Tillotson called in W. C. Walker, an expert bookkeeper, who attempted to make up the accounts; and, not being able to come to an agreement therefrom, this suit was commenced, resulting in a judgment against Paquet for \$1,000, from which he appealed.

A. E. Gebhardt and Richard W. Montague, both of Portland, for appellant. John A. Jeffrey, of Portland (Jeffrey & Lenon, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). W. C. Walker testified that, Tillotson's books of accounts being unintelligible and of no aid to him, he called for Paquet's check and stub books, which Paquet turned over to him. It appears that all the expenditures were paid by Paquet by bank checks, and he received all the proceeds of the contracts, and plaintiff and defendant were both present with Walker when he made up his statements from the checks, which are in the record here as exhibits, showing the expenditures as to each particular contract separately, with the receipts on that particular contract. The list of checks is in typewriting. This method of making up the accounts seems to have been carried out on the understanding that Paquet received all the money on the contracts and paid by check all the moneys paid out. The evidence does not show the items of the account nor the particulars upon which Walker accounted. The first statement relates to the St. Johns dock contract, giving the amount and the payee named in each check, and the sum of the checks is \$37,032.66, and the total amount received from said contract, as shown by said statement, is \$37,435.78, showing the profits to be \$403.12. That is the only data we have before us in regard to the expenditures and receipts from that contract. The East Salmon and Third street contract is stated in the same way, showing a profit of \$1,099.54; the fish ladder contract, a profit of \$289.78; the Portland Heights contract, a profit of \$87.63; the Hawley Pulp & Paper Company contract, a profit of \$107.27; the Vancouver bridge contract, a profit of \$1,427.19; the Salem contract, a profit of \$218.30; the Northwest bridge work, a profit of \$394.80; the St. Johns Shipbuilding Company contract, a profit of \$836.98; the Country Club

work, a loss of \$859.27; the Vancouver burnt bridge, a profit of \$478.36; the Northern Pacific trestle, a profit of \$3,086.09. The list of checks or receipts for the last two items does not appear among the typewritten exhibits, and checks and receipts for the Vancouver burnt bridge appear only in pencil. There is no datum here from which we can determine the accounts as to the contracts for the two last items, but at the time the list of checks found among the exhibits was made plaintiff and defendant were present, and Walker testified that they agreed to these results. There being no data from which we can review the figures, evidently it is intended that we shall determine the accounts from the statements of Walker as to the profits on each contract. Mr. Walker says that Paquet agreed to his statement not only as to profits on each contract as he states it, but that he agreed the balance found due from him to Tillotson was the correct balance. We do not so understand the result of the meeting, but only that at the time of the accounting upon the separate contracts he agreed to the amount of profits as there stated. The items of the Northern Pacific trestle and the Vancouver burnt bridge are included in nearly all the statements, and neither of them is specifically controverted. We accept the statement marked "Plaintiff's Exhibit B" as the correct statement of profits of each contract therein mentioned, the total of which is \$7,569.79.

[1, 2] There are some other items about which there is a controversy. Tillotson contends that the partnership should allow him for the use of his engines \$1,267.50, being at the rate of \$2.50 a day; for rent of office, the hire of stenographers, his traveling expenses, and phone hire, \$930.38; also pay for piling which he furnished in the East Salmon and Third street contract, \$278.59. Paquet contends that a pile driver, valued at about \$300, was left in the possession of the plaintiff by the Seattle Company, which he says plaintiff kept, and still has it in his possession, one-half of the value of which he claims; but it is not shown that Tillotson got the title to it or what it is worth, nor that the partnership was entitled to it, and it cannot be considered here. Defendant also contends that a pile driver hammer of his, worth \$66, was lost in the work, for which he claims he is entitled to pay from the partnership. He claims that he is entitled to be remunerated by Tillotson for \$40.20, costs advanced by him on a Seattle lawsuit, as the suit was Tillotson's private affair. He contends that, when the Country Club paid him for their work, they paid him in Country Club bonds \$2,000, and he should have \$151.65 interest for delay in payment, or for some other reason not made plain. If he took the bonds in payment at par, and there was a loss, it might be a partnership loss, but the \$151.65 is claimed as interest, as though he had advanced the money for the bonds, and not

as a discount on the bonds, and is not a proper charge. He also claims credit for \$166, which he alleges Walker, in making up the accounts, threw out, being money that he paid upon the Murphy bill; but it is not shown that he overpaid Murphy, and without such proof it was error for Walker to disallow such payment. If he made a mistake in the payment, the loss is the loss of the firm, and he is entitled to credit for the \$166. The result of the statement as we have outlined above is as follows: J. B. Tillotson, in account with Joseph Paquet, profits on various jobs as follows: St. Johns dock, \$403.12, East Salmon, \$1,099.54; fish ladder, \$289.78; Northern Pacific trestle, \$3,086.09; Portland Heights, \$87.63; Hawley Pulp & Paper Company, \$107.27; Vancouver bridge, \$1,427.19; Salem, \$218.30; Northwest bridge work, \$394.80; St. Johns Shipbuilding Company, \$836.98; Vancouver burnt bridge, \$478.36; total, \$8,429.06. Deducting for the loss on Country Club of \$859.27, there is left \$7,569.79. Paquet should be charged with one-half the profits on the contracts, \$3,784.90; one-half the expense of Tillotson, \$465.19, including office rent, stenographer fees, and phone bill; one-half the amount of piling that Walker charged to Paquet, \$139.29; one-half of the bill for use of engine, \$633.75; total, \$5,023.12. Against which Paquet is entitled to credit for amount of advances made to Tillotson pending the contracts, \$1,972.55, as shown by the first page of typewritten statements; notes and interest due from Tillotson, \$1,787.50; cash paid on the Seattle suit for Tillotson, \$40.20; charged as overpayment, Murphy's bill, \$166; one-half the value of the pile driver hammer, \$33; one-half of the amount of the Porter Bros.' bill, \$92.70; one-half of the miscellaneous account, \$55.40; total, \$4,147.35. Deducting this from the \$5,023.12, leaves a balance of \$875.78.

The decree of the lower court will be modified to this extent. The partnership is hereby dissolved, and plaintiff is entitled to judgment and decree against the defendant, Joseph Paquet, for the sum of \$875.78, being the balance due him on said accounting. Neither party shall recover costs in this court.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

(74 Or. 225)

# GRIFFITH v. GRIFFITH et ux.

(Supreme Court of Oregon. Jan. 5, 1915.)

## 1. DOWER (§ 44\*)—RIGHTS OF WIFE.

A wife upon marriage acquires no interest in the personal property of her husband, which he may dispose of without her consent, but he cannot without her consent transfer his land so as to bar her dower rights.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 3, 130-143; Dec. Dig. § 44.\*]

## 2. DOWER (§ 14\*)—DOWER INTEREST—EQUITY.

There is no dower in an equity.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 45-47, 49-56; Dec. Dig. § 14.\*]

## 3. DOWER (§ 35\*)—PROPERTY RIGHTS OF WIFE.

Where a husband purchased land, taking title in the name of another, the wife may, the husband having died before judgment in her suit for divorce, alimony and separate maintenance, impeach the conveyance as if she were a creditor of the husband, and compel the holder of the legal title to hold the property in trust for her.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 35, 86; Dec. Dig. § 35.\*]

Department 2. Appeal from Circuit Court, Linn County; William Galloway, Judge.

Action by Ellen C. Griffith, individually and as administratrix of the estate of John H. Griffith, deceased, against George F. Griffith and wife. From a judgment for defendants, plaintiff appeals. Reversed.

This is a suit brought by the plaintiff, as administratrix of the estate of John H. Griffith and in her individual right, for the purpose of having the defendant Geo. F. Griffith declared a trustee of the title of certain real estate described in the complaint for the benefit of said estate. John H. Griffith and the plaintiff were married on July 12, 1909, and were not living happily together. On November 6, 1909, said John H. Griffith purchased the land in question, and had the deed executed in favor of his brother, the defendant, which deed was not delivered at the time of its execution but left in the hands of the grantor, H. J. Follis, and his wife until the same should be called for. Soon after the purchase of said land the defendant John H. Griffith deserted and abandoned the wife, and thereafter lived separately and apart from her. On the 19th of August, 1910, the plaintiff sued him for a divorce on the ground of cruel and inhuman treatment, and in the suit sought to recover alimony. About the 30th day of October, 1911, the said John H. Griffith died intestate before the said divorce suit had been terminated, and the suit was thereafter dismissed on account thereof. Subsequently, on the 18th day of May, 1912, plaintiff brought this suit, which resulted in a decree for the defendant. The plaintiff appeals.

M. E. Pogue, of Salem (W. T. Slater, of Portland, on the brief), for appellant. H. H. Hewitt, of Albany (Hewitt & Sox, of Albany, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). [1-3] A wife upon marriage acquires, by virtue thereof, no interest in the personal property of her husband, and he has a right to dispose of it as he pleases without her consent; but by a transfer of his real estate he cannot defeat her dower therein. She has an inchoate dower only in lands to which he has the title. There is no dower in an equity, but the rule in Oregon is that where the

wife occupies the position of a quasi creditor, as where she is suing to obtain alimony or separate maintenance, if there is an intent on the part of the husband to defeat the wife's recovery in such suit or finally at his death, such transfer as to her is fraudulent.

It is held in *Barrett v. Barrett*, 5 Or. 411:

"There is no reason why a wife, whose husband has deserted her and refused to perform the duty of maintenance, or who by cruel treatment has compelled her to leave his house, \* \* \* should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. \* \* \* When she is compelled to become a suitor for her rights, her relation becomes adverse and that of a creditor in fact, and she is not to be balked of her dues by his fraud.' \* \* \* The right of the wife to question conveyances made by the husband dates from the time the cause of suit arose."

In *Weber v. Rothchild*, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162, it is said:

"The facts and circumstances leave no doubt in the mind of the court that the conveyance to Rothchild was made and designed by Weber to defeat the plaintiff in the recovery of any part of his (Weber's) property, or of alimony in her contemplated suit for a divorce."

And it was held that, in order to make Rothchild an innocent purchaser in good faith, the burden was upon him to show that he paid value and was without notice of fraud. See, also, 21 Cyc. 1156. From the testimony in this case we find that the purchase of the property was made by John H. Griffith and title taken in the name of Geo. F. Griffith because of the anticipated trouble with his wife; he having deserted her soon after the purchase, and she subsequently having sued for a divorce on the ground of cruel treatment. It appears that the property was purchased and paid for by John H. Griffith, and that the title was taken in the name of Geo. F. Griffith without any consideration from him to John H. Griffith. Therefore it was a gratuitous disposition of so much of his real property and in fraud of the plaintiff's rights.

The testimony of Geo. F. Griffith shows that, a short time before John H. Griffith died, he told Geo. F. Griffith that he had bought the property and had the deed made in his brother's name and he wanted his brother to have it. Follis, the grantor, testifies:

"After I got the deed made out I handed it to Mr. Griffith. He looked at it, read it over, and handed it back to me, and says, 'Keep it until called for.' Q. What did he say, after his death, what was to be done? A. He said after he was done with it he wanted his brother to have it. He did not speak anything about dying at that time. \* \* \* Q. Who was to call for it? A. Wasn't any one named. The deed was made out to his brother Geo. F."

The evidence shows that he cut the brush from the land, fenced it, and planned to erect a home, and told a witness he expected to live on it alone; that it would be better to live over there than to be quarreling. Also he paid the taxes on it, so that it fully

appears that Geo. F. paid nothing for the land; and when attacked by a creditor, or as in this case, the wife, equity will treat the transfer as fraudulent and declare a trust in favor of the estate, which is the representative of the creditors.

The decree will be reversed and one entered in favor of the plaintiff declaring that the defendant Geo. F. Griffith holds the title to said land in trust for the benefit of the estate of John H. Griffith.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

(74 Or. 250)

## NORTHERN PAC. RY. CO. v. CLATSOP COUNTY.

(Supreme Court of Oregon. Jan. 12, 1915.)

### 1. TAXATION (§ 493\*)—ASSESSMENT—REVIEW—STATUTES—FILING RECORD.

L. O. L. § 3613, providing that, on appeal from an equalized assessment by the board of equalization, the tax board shall file so much of the record of the board as may be necessary etc., is in the alternative, intended to apply to the case of an appeal from an order of the board raising an assessment where there is no petition or application, and does not apply to an appeal from an order refusing to reduce an assessment and denying a petition therefor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.\*]

### 2. TAXATION (§ 480\*)—EQUALIZATION—PROCEDURE.

Rules of practice in civil actions or suits do not apply to proceedings before a board of equalization to correct tax assessments.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 853; Dec. Dig. § 480.\*]

### 3. TAXATION (§ 483\*)—ASSESSMENT—REVIEW—STATUTES.

So much of L. O. L. § 3609, as pertains to petitions or applications for reduction of tax assessments is mandatory.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 858, 859; Dec. Dig. § 483.\*]

### 4. TAXATION (§ 483\*)—ASSESSMENTS—REDUCTION—PETITION.

A petition to a board of equalization to reduce petitioner's taxes must show that the property was not assessed at its true value, and, for this purpose, must state what the true value is, and also make it conclusively to appear that the method by which the assessor arrived at the result complained of was incorrect.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 858, 859; Dec. Dig. § 483.\*]

### 5. TAXATION (§ 493\*)—ASSESSMENT—REVIEW BY CIRCUIT COURT—RECORD.

Where an appeal is taken to the circuit court to review a tax assessment by the board of equalization, it is petitioner's duty to make such a record before the board as will inform the circuit court of the issues to be tried.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.\*]

### 6. TAXATION (§ 493\*)—ASSESSMENT—EQUALIZATION—APPEAL—RECORD.

Where a petition of a railroad company to a board of equalization to reduce petitioner's assessment on lands in the county, merely protested against the valuation placed on the lands described in any attached list, on the ground that the valuations were in excess of the true and fair value of the lands, but did not contain

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any verified statement as to the value as required by statute, before the board was authorized to consider or act thereon, the petition amounted to no more than an objection, and was therefore insufficient to sustain an appeal from the order of the board denying the petition to the circuit court.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.\*]

Department 1. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

The Northern Pacific Railway Company having applied to the Board of Equalization of Clatsop County for reduction of its land assessment, and the circuit court having entered a decree dismissing an appeal from the Board of Equalization, the Railroad appeals. Affirmed.

This is an appeal by the Northern Pacific Railway Company from a decree of the circuit court for Clatsop county dismissing an appeal from the county board of equalization to the circuit court in the matter of the valuation of certain lands in Clatsop county for the year 1913.

On September 12, 1913, plaintiff filed with the board of equalization a protest as follows:

"To the Honorable Board of Equalization of Clatsop County, Oregon: Comes now the Northern Pacific Railway Company, a corporation, and protests against the valuation that has been placed upon the lands described in the list hereto attached by the assessor of Clatsop county for the purpose of taxation for the year 1913, on the ground that said valuations are in excess of the true and fair value of said lands; and said Northern Pacific Railway Company asks that said valuations be reduced from the valuations shown under the heading 'Assessor's Valuation' to the valuations assessed in 1912 on the lands shown in the attached list. [Signed] Northern Pacific Railway Company. J. C. Fairchild, Its Tax Agent."

The protest was verified by plaintiff's tax agent. A list of lands amounting to 5,830.77 acres was attached to the protest, but the valuations assessed for the years 1912 and 1913 were not included therein. On the 13th day of September, the protest was considered by the board, and denied. On September 25th the plaintiff's tax agent requested the board to reconsider its order and the petition was denied. A notice of appeal was filed on February 26, 1914. The cause coming on for trial before the circuit court, counsel for defendant objected to any evidence being offered, and moved to dismiss the appeal on the following grounds:

(1) "That there is nothing in the record showing or tending to show that any property belonging to the Northern Pacific Railway Company was assessed by the assessor of Clatsop county, or that the same was valued at any sum, or that the Northern Pacific Railway Company was the owner of any property which was placed upon the assessment roll of Clatsop county, or there valued or assessed; (2) that the record herein is insufficient to give the court jurisdiction, for the reason that there is nothing in the record on appeal showing, or tending to show, what action was taken by the board of equalization, and

there is nothing showing, or tending to show, in the record what, if any, valuation the board of equalization placed upon any property belonging to the appellant; (3) that the petition for the reduction of assessments upon the alleged property of the Northern Pacific Railway Company was insufficient to give the court jurisdiction, in that no fact whatever is therein alleged, or no issuable matter is set forth or alleged therein sufficient to give the court jurisdiction, or sufficient to raise an issue; (4) that this court has no jurisdiction to hear the appeal."

The motion was sustained by the trial court and the appeal dismissed. Plaintiff assigns that the circuit court erred in sustaining defendant's motion.

L. B. Da Ponte, of Tacoma, Wash. (Geo. T. Reid and J. W. Quick, both of Tacoma, Wash., on the brief), for appellant. G. C. Fulton and C. W. Mullins, Dist. Atty., both of Astoria, for respondent.

BEAN, J. (after stating the facts as above). Section 3609, L. O. L., relating to petitions for reduction of assessments, provides in part:

"Petitions or applications for the reduction of a particular assessment shall be made in writing, verified by the oath of the applicant or his attorney, and be filed with the board during the first week it is by law required to be in session, and any petition or application not so made, verified, and filed, shall not be considered or acted upon by the board."

Section 3613, L. O. L., makes provision that any person petitioning for the reduction of a particular assessment, or whose assessment has been increased by the board of equalization, and thereby aggrieved by such action, may appeal therefrom to the circuit court of the county. By subdivision 1:

"The party desiring the appeal from the action of such board of equalization may cause a notice, to be signed by himself or attorney, to be filed with the county clerk of the county within five days, excluding Sunday, from the time the assessment roll is returned to the county clerk by the board of equalization."

Subdivision 2 directs:

"Within five days of the giving of such notice the appellant shall file with the clerk of the circuit court a transcript of the petition for reduction of assessment, or so much of the record of the board of equalization as may be necessary, to intelligently present the questions to be decided by the circuit court, together with a copy of the order or action taken by the board of equalization, the notice of appeal and record of the filing thereof; thereafter the circuit court shall have jurisdiction of the matter, but not otherwise. The appeal shall be heard and determined by the circuit court in a summary manner, and shall be determined as an equitable cause. Either the appellant or the county as appellee shall be entitled to the compulsory attendance of witnesses and to the production of books and papers. If, upon hearing, the court finds the amount at which the property was finally assessed by the board of equalization is its actual full cash value, and the assessment was made fairly and in good faith, it shall approve such assessment; but if it finds that the assessment was made at a greater or less sum than the market value of the property, or if the same was not fairly or in good faith made, it shall set aside such assessment and determine such value. \* \* \*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

With the notice of appeal to the circuit court the plaintiff filed a list of its lands, with what appears to be the assessed valuations for the years 1912 and 1913. It nowhere appears that such valuations were made a part of the record in the proceeding before the board of equalization, and the certificate of the county clerk to the transcript on appeal to the circuit court extends only to the copy of petition, order, and notice of appeal of the plaintiff, and does not identify or authenticate the list or valuations.

[1] The provision in section 3613, L. O. L., relating to the filing of so much of the record of the board as may be necessary, etc., is in the alternative, and evidently was intended as a direction in case of an appeal from an order of the board raising an assessment where there is no petition or application, and does not apply to an appeal from an order refusing to reduce an assessment and deny a petition.

[2] In proceedings before a board of equalization to correct the assessment of the property of taxpayers the rules of practice in civil actions or suits do not apply. *Poppleton v. Yamhill Co.*, 18 Or. 377, 23 Pac. 253, 7 L. R. A. 449. The statutes governing the manner of making assessments for the purpose of taxation have been amended many times, and, while the same are liberal in regard to the procedure, there is apparently much emphasis placed upon the oaths of the officers and taxpayers relating to the matter. While the county judge, county clerk, and assessor are sworn officers and constitute the board of equalization, nevertheless section 3607, L. O. L., provides that, before proceeding to the equalization of the tax rolls, they shall each take and subscribe to an oath to faithfully and honestly examine, correct, and equalize at full cash value, the assessment roll and all property so returned by such assessor.

[3, 4] That portion of section 3609, L. O. L., above quoted, pertaining to petitions or applications for the reduction of an assessment, is mandatory in its provisions. It requires that, before the board is authorized to reduce an assessment, a petition or application therefor, verified by the oath of the applicant or his attorney, must be made and filed. While the statute is liberal as to form or procedure, it plainly contemplates that the petition should show a reason for the reduction of an assessment. If the property is not assessed at its true cash value, the petitioner should state what that value is. The powers granted to a board of equalization for all practical purposes constitute it a board of review. When engaged in such duties, the tax roll comes to it with the valuation *prima facie* established. The assessor, under his oath in making valuations, acts judicially, and, when established, they must remain fixed until revised by the board of equalization. The complainant or petitioner who attacks the assessor's valuation has the laboring oar, and

must overcome the *prima facie* case which the roll established. It is essential that a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessor arrived at the result complained of was incorrect, and that the assessment does not represent the true cash value of the property assessed. *Oregon Coal Co. v. Coos Co.*, 30 Or. 308, 310, 47 Pac. 851. It, indeed, seems strange that in such a proceeding before the board of equalization, in asserting that the valuations which have been placed upon lands by the assessor for the purpose of taxation are in excess of the true value, it would not occur even to a layman to state in some manner either that such land was assessed at double or one-fourth in excess of its value, or to show how much in excess of its true value it is claimed to be.

[5] Taxpayers may properly appear when they desire and discuss the matter of their assessment in an informal way before the board of equalization; but, when an appeal to the circuit court is desired to be taken, it is incumbent upon the petitioner or applicant to make such a record before the board as will inform the circuit court upon an appeal of the issues to be tried.

[6] The only statement contained in the protest which is verified is the following:

"Comes now the Northern Pacific Railway Company, a corporation, and protests against the valuation which has been placed upon its lands described in the list hereto attached by the assessor of Clatsop county for the purpose of taxation for the year 1913, on the ground that said valuations are in excess of the true and fair value of said lands."

The remaining portion of the protest or petition is the prayer or request. Nowhere is it stated and verified what the value of the lands is as required by the statute before the board or court would be authorized to consider the same or act thereon. The protest amounts to no more than an objection. It is practically entirely wanting in a statement of facts. Other exceptions to the protest or petition are taken by defendant's counsel, but we do not deem it necessary to consider anything except the lack of a statement of facts which would authorize the board or court to act.

The trial court correctly held that in the certified record the Northern Pacific Railway Company's lands are alleged to be of a certain description, with the number of acres, and that is all the record shows in regard to that matter. The railroad company protests against the valuation that has been placed upon the lands as described in the list thereto attached by the assessor of Clatsop county for the purposes of taxation for the year 1913, on the ground that the valuations are in excess of the true and fair valuation of said lands, and the Northern Pacific Railway Company asks that the valuations be reduced from those shown under the heading "Assessor's Valuation" to that assessed in 1912.

There is no allegation as to what they were valued in the assessment for 1913, nor what their true and fair valuation is, nor what their assessed valuation for 1912 was.

The decree of the lower court dismissing the appeal should therefore be affirmed; and it is so ordered.

MCBRIDE, BURNETT, and BENSON, JJ.,  
concur.

(74 Or. 258)

**KEMP v. PORTLAND RY., LIGHT & POWER CO.**

(Supreme Court of Oregon. Jan. 12, 1915.)

**1. CARRIERS (§ 347\*) — INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — PLAT-FORM.**

A street car passenger was not negligent as a matter of law in leaving her seat as the car approached her destination and going on the closed platform before the car stopped so as to bar her right to recover for injuries sustained by her being thrown from the vestibule and injured as the car suddenly rounded a curve.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.\*]

**2. TRIAL (§ 191\*)—REQUEST TO CHARGE—AS-SUMED FACTS.**

In an action for injuries to a passenger, a request to charge, assuming that the car was being operated in a careful and prudent manner, etc., which the jury under the evidence was not bound to find, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**3. CARRIERS (§ 348\*)—INJURIES TO PASSENGERS—ALIGHTING FROM STREET CAR—IN-STRUCTIONS.**

Where a passenger was thrown from a street car and injured, a request to charge, making her right to enter the vestibule of the car before reaching her destination dependent on whether there was room to accommodate her at the time inside of the car, was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1405; Dec. Dig. § 348.\*]

**4. CARRIERS (§ 321\*) — INJURIES TO PASSENGERS — ALIGHTING FROM STREET CAR — IS-SUES.**

Where a passenger's complaint for injuries from being thrown from a street car platform alleged failure of the conductor to warn her of the danger which might reasonably have been anticipated from passing over a curve which caused her to be thrown from the car, such allegation did not allege a breach of the servant's duty to physically restrain plaintiff, but merely to warn her against the danger; and hence a request to charge that if the conductor had no notice of any infirmity of plaintiff, and could not in the exercise of reasonable care have discovered that plaintiff was other than a reasonably prudent and careful person, defendant did not owe her the duty of restraining or attempting to restrain her from standing in the exit way of the car, was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

Department No. 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Bessie Kemp against the Portland Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for a personal injury. The negligence charged in the complaint is to the effect that the defendant's agents, though properly notified, failed to stop at the proper place an electric car on which the plaintiff, Mrs. Bessie Kemp, was a passenger; that without protecting her she was permitted by them to stand in a position where she was liable to sustain injury in preparing to alight at another regular crossing; and that they ran the car at a dangerous rate of speed over a curve which was known to them but unknown to her, whereby she was thrown to the ground and hurt. The answer denied the negligence alleged, and for separate defenses averred that the injury complained of was caused by the plaintiff's own carelessness whereby she "slipped or fell," and that the injury which she sustained was the result of an inevitable accident. The averments of new matter in the answer were controverted by the reply, and, the cause having been tried, the plaintiff secured a judgment for \$3,000, and the defendant appeals.

T. S. Robinson, of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for appellant. Morris A. Goldstein and F. S. Senn, both of Portland (Senn, Ekwall & Recken, of Portland, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). It is maintained that an error was committed in denying a motion for a judgment of nonsuit. The defendant owns in Portland, Or., a system of street railways and operates thereon electric cars. It maintains on the west side of the Willamette river a double line of tracks extending from the business section of the city south on Third street for quite a distance. The cars on such line, going in that direction, run on the west track and, in the vicinity of the accident, make regular stops only at alternate street crossings. The plaintiff at the time of the injury resided at the northwest corner of Lincoln and Third streets, at which intersection the cars were not halted. She testified: That on April 30, 1913, at 5:30 p. m., she became a passenger on a "pay as you enter," car, going from the business district to her home and carrying small packages in her arms. That in ample time before reaching College street, the crossing immediately north of the one near which she resided and the intersection where the cars going south were regularly halted, she signaled for the car to be stopped, by pressing an electric button near which she sat, and thereupon walked towards the rear of the car in order to alight. Her request not having been com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plied with, she resumed her seat, and gave another signal to halt at Grant street, the crossing immediately south of Lincoln street. That she thereupon vacated her seat, walked to the rear of the car, and stepped down into the vestibule beside the conductor, grasping with her right hand a handhold near the exit door and carrying the packages on her left arm. That the conductor was examining his tickets and gave no heed to her until the car suddenly struck the curve leading east into and downgrade on Grant street, when a lurch of the car caused her to release her hold, and she fell through the door to the pavement and was injured. The testimony of the plaintiff's witnesses who were fellow passengers, or who saw the accident, is to the effect that the car was then running very fast and passed the crossing at the entrance of Grant street half a car's length before a halt was made, notwithstanding a vigorous overhead pull of the bell cord was made when she fell; and that there were but few passengers in the car at that time. The testimony of the defendant's witnesses is, in substance, that, while the car was being operated at the usual and safe rate of speed, the plaintiff voluntarily walked into the vestibule and deliberately stepped backward off the car when it was in motion; and that the car was stopped at the regular place on the crossing.

[1] The question to be considered is whether the plaintiff's conduct, at the time she was hurt, evidenced that degree of carelessness which would authorize the court, as a matter of law, to decide that she was guilty of such negligence as would preclude a recovery, and thereby to take the case from the jury. No evidence was offered to show that the defendant had posted or even adopted any rule forbidding passengers from leaving their seats, preparatory to alighting from the cars, or from passing towards exits prior to halting at crossings. The vestibule into which plaintiff passed was closed, except the doors, and she was not riding on an open platform of a moving car. Whatever the doctrine may have been with respect to the conduct of a passenger who rode on a former open platform of a moving car that was propelled by a steam locomotive, it has but little application to the control of street railways. In referring to them a text-writer observes:

"In the case of street railway companies, however, neither the officers of such corporations, the managers of their cars, nor the traveling public, as a general rule seem to regard the practice of riding on the platform of their cars as hazardous, and the weight of authority is to the effect that a passenger thus riding is not per se negligent, unless the practice is forbidden by statute or by rule of the carrier brought to the notice of the passenger. \* \* \* Until they adopt some such regulations, and notify the public, it is but reasonable to hold them liable for injuries, resulting from their own negligent acts, to their patrons, who are themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars." 5 R. C. L. § 674.

In another part of that volume it is said:

"It is usually held not to be negligence per se for a passenger to leave his seat and approach the door of the car preparatory to disembarking after his destination has been announced and the train is approaching the station, or to go upon the platform of the car while the train is in motion, preparatory to alighting. \* \* \* Whether in a particular case the passenger is negligent in taking such position is for the determination of the jury." *Id.*, § 677.

An exception to this rule, as to the duty of a passenger, is noted by a distinguished law writer who says:

"If the train is approaching the station at a dangerous rate of speed, and if he is not invited by any servant of the carrier thus to go upon the platform, and if there is no necessity for him so to act, he cannot recover damages by reason of the fact of being jerked off the train by a sudden increase of its speed which it makes instead of stopping at the station." 3 *Thomp. Neg.* (2d Ed.) § 2953.

The decisions which gave rise to the departure from the general rule thus adverted to were evidently made when open platforms were a part of passenger cars that were propelled by steam locomotives. Platforms of that kind upon such cars have been superseded by vestibules the doors of which are, or should be, opened only when the train is brought to a halt, usually to receive and discharge passengers at stations. The exception noted has no application to modern cars, and a passenger who is approaching his destination when the station is announced may leave his seat, preparatory to his departure, and enter the vestibule, and if the door thereof has been carelessly left open, and by a sudden jerk of the car he is thrown therefrom, the question of his negligence is properly submitted to the jury. *Kearney v. Oregon R. & N. Co.*, 59 Or. 12, 112 Pac. 1083, 115 Pac. 593.

In *Young v. Boston & N. St. Ry. Co.*, 213 Mass. 267, 100 N. E. 541, 50 L. R. A. (N. S.) 450, Ann. Cas. 1914A, 635, the testimony tended to show that as a car on which the plaintiff was a passenger approached his journey's end, he signaled the conductor to stop, and, while the car was moving at a high rate of speed, he left his seat and proceeded to the door, holding on to the side of that opening; that as the car passed over a switch at an unusual speed it gave a sudden jerk, wrenching his grasp from the door, throwing him to the vestibule floor, and injuring him. The court, considering this testimony, held that he was not guilty of negligence as a matter of law; that there was evidence of careless management of the car on the part of the defendant's servants; and that the question of the plaintiff's due care was for the jury. The evidence in that case so nearly coincides in many particulars with the testimony given by the plaintiff's witnesses herein that we conclude no error was committed in denying the motion for a judgment of nonsuit.

Exceptions having been taken to the court's refusal to give requested instructions, it is contended that errors were committed in declining to charge the jury as follows:

"(1) If you find from the evidence in this case that while one of the street cars of this defendant was being operated in a careful and prudent manner on and around the curve leading from Third street to Grant street, and as the said car was being brought to a stop for the purpose of permitting such passengers as desired to alight from said car, but before the said car could be brought to a stop for such purpose, the plaintiff, in attempting to alight from said car, while the same was in motion, so carelessly, recklessly, and negligently walked, stood, or conducted herself that in attempting to alight from said car she slipped or fell, the plaintiff is guilty of negligence and cannot recover, and your verdict should be for the defendant.

"(2) If you find from the evidence in this case that the plaintiff voluntarily placed herself in the exit door of the street car and voluntarily remained in that position, and if you further find that there was sufficient room inside the car to accommodate the plaintiff, you are instructed that she should have remained inside the car, and that by voluntarily remaining in the exit door she assumed the risks and dangers incident to the ordinary movements of the car in the operation of same, and therefore, in that event, your verdict should be for the defendant.

"(3) You are instructed that if you find from the evidence that the servant of the defendant in charge of said car, to wit, the conductor, had no notice of any infirmity of the plaintiff, or in the exercise of reasonable care under the circumstances could not have discovered that plaintiff was other than a reasonably prudent and careful person, then the defendant did not owe the plaintiff the duty of restraining or attempting to restrain her from standing in the exit way of the said car."

[2] Considering these alleged errors in the order stated, it will be observed from the use of the word "while," as first employed in request No. 1, that the instruction desired to be given seems to assume as true the disputed facts that the car was being operated in a careful and prudent manner, etc. The jury were not thus explicitly to be told that if they found that the car was so run, and if they found it was being brought to a stop, and further found that under these circumstances the plaintiff attempted to alight and slipped or fell, they should conclude she was guilty of negligence and could not recover. The use of the word to which attention has been called appears to leave a doubt as to the finding which should have been made as a basis for determining the plaintiff's conduct, and also seems to consider as true the controverted facts referred to. A court cannot assume as established facts which should be left to the jury. *Yarnberg v. Watson*, 13 Or. 11, 4 Pac. 296; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461; *West v. McDonald*, 67 Or. 551, 136 Pac. 650. No error was committed in declining to give the first requested instruction.

[3] In the second requested instruction,

the plaintiff's right to enter the vestibule before reaching the crossing at which she ultimately expected to alight appears to be based upon a finding to be made by the jury that there was not at that time room inside the car to accommodate her. The rapid movement of street cars seem to require passengers transported thereby, who are not physically disabled, without unnecessary haste to be ready immediately to leave when the car is halted at their destination. In order that he may do so, it is not negligence per se for a passenger to vacate his seat as the car approaches his place of departure when announced, or when he has signaled for the car to be stopped, and to proceed towards the vestibule, or to stand there in waiting the halting of the car for him to alight. *Kearney v. Oregon R. & N. Co.*, 59 Or. 12, 112 Pac. 1083, 115 Pac. 593. In that case, as the car was propelled by a locomotive, the doors of the vestibule were expected to be closed at all times except when the train was not in motion. In the case at bar, as stops are frequently made to discharge passengers, it is not to be supposed that the exit door of the vestibule would remain closed for any great length of time. But, however this may be, it is believed that no error was committed in refusing to give the second requested instruction.

[4] In the third requested instruction, there was no averment in the complaint, nor did the court charge, that it was incumbent upon the defendant's agents to restrain the plaintiff from standing in the exit way of the car. It will be remembered that the plaintiff's primary pleading alleged that without protecting her she was permitted by the defendant's agent to stand in a position where she was liable to sustain injury in preparing to alight.

"The carrier," says a text-writer, "owes to the passenger the duty of protection during transportation in order that, while on the carrier's premises and in his vehicle, they may enjoy comfort, peace, and safety. This duty of care involves warning of danger so far as such warning might enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given, and also for injury resulting in the reasonable efforts of the passenger to avoid supposed danger, where the warning is improperly given." 6 Cyc. 600.

The averment of the complaint referred to, as we understand it, undertook an ascertainment of the rule last quoted, and the alleged protection which was neglected by the defendant's servant related to the failure of the conductor to warn the plaintiff of the danger which might reasonably have been anticipated from passing over a curve in the track of which he was supposed to have had knowledge. That part of the initiatory pleading under consideration related to such admonition, and not to any physical restraint which the defendant's servant was

required to exercise. No error was committed in denying the third request.

It follows that the judgment should be affirmed, and it is so ordered.

BURNETT, McBRIDE, and BENSON, JJ.,  
concur.

(74 Or. 229)

**FISHER v. PORTLAND RY., LIGHT &  
POWER CO. et al.**

(Supreme Court of Oregon. Jan. 12, 1915.)

**DEATH (§ 88\*)—DAMAGES—MEASURE OF DAMAGES.**

The measure of recovery for death under Employers' Liability Act (Laws 1911, p. 17) § 4, giving a right of action for death caused by a violation of the act, is the pecuniary loss sustained, and the jury may not consider as element of damages deprivation of comfort, society, support, and protection.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. § 88.\*]

In Banc. On rehearing. Judgment reversed, and cause remanded for new trial. For former opinion, see 143 Pac. 992.

R. A. Leiter, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant. M. W. Seitz, of Portland, and E. R. Ringo, of Salem (Seitz & Seitz and Graham, Davis & Young, all of Portland, on the brief), for respondent.

BENSON, J. There are a great many assignments of error, but upon the rehearing only two were seriously pressed for the consideration of the court:

(1) That the trial court erred in giving instruction No. 11, which contains the following language:

"But you may consider as an element of damage the fact that he is deprived of the comfort, the society, the support, and of the protection of his father—those are elements which go with the pecuniary damages which he may have sustained."

(2) That the trial court erred in denying defendants' motion for a nonsuit.

In considering the language referred to in the instruction challenged, it is not necessary to go into any extended discussion of the question raised, for the reason that a recent case decided by this court (*McFarland v. Oregon Electric Railway Co.*, 138 Pac. 458) has declared what we believe to be the correct doctrine, and sustained by the great weight of authority. In this case Justice Moore, in a well-considered and exhaustive opinion, concludes the matter in these words:

"Under a statute like section 4 of the Employers' Liability Act of Oregon [Laws 1911, p. 16], which creates a new cause of action, and does not revive a right, the rule is almost universal that the measure of the recovery in case of death is the pecuniary injury sustained, and that loss of society of the deceased does not constitute an element of the damages."

Consequently the instruction as given was erroneous, and necessitates a reversal of the judgment.

This assignment of error was not referred to in appellant's original brief, and was not seriously presented to the court until raised upon the petition for rehearing. It may also be worthy of note that the case of *McFarland v. Oregon Electric Railway Company*, supra, was not decided by this court until after trial of the case at bar in the lower court.

Since the case must go back for a new trial, because of the error already discussed, it is unnecessary to consider the other assignments of error. It may be remarked, however, that the question as to whether or not the trial court should have granted defendant's motion for a nonsuit is a close one, but, as this is a matter that goes to the sufficiency of the evidence, we are not prepared to say that upon another trial the evidence would be equally uncertain.

The judgment should be reversed, and the cause remanded for a new trial.

(74 Or. 268)

**STATE ex rel. WEST, Governor, et al. v.  
KAY, State Treasurer.**

(Supreme Court of Oregon. Jan. 12, 1915.)

**1. MANDAMUS (§ 154\*)—PETITION—INFORMALITY—WAIVER.**

Failure of the county attorney to sign in his official capacity the petition filed by him in mandamus proceedings instituted under instructions from the state land board was a mere informality, which, under the express provisions of L. O. L. § 72, was waived when defendant answered to the merits.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.\*]

**2. MANDAMUS (§ 147\*)—WHEN ALLOWED—PARTY IN INTEREST—STATE OFFICERS.**

Under L. O. L. § 614, providing that the writ of mandamus shall be allowed on the petition of the party beneficially interested, mandamus proceedings may be instituted by the state, on the relation of the Governor and Secretary of State, who constitute a majority of the members of the state land board, to compel the State Treasurer to surrender to such board funds and records to which it may be entitled; the people of the state in their collective capacity constituting the real party in interest.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 288; Dec. Dig. § 147.\*]

**3. STATES (§ 68\*)—FUNDS AND RECORDS—RIGHT TO CUSTODY—STATE LAND BOARD—STATE TREASURER.**

Under Laws 1855-56, p. 70, §§ 8, 9, 10, giving the territorial treasurer control of school funds, which statute was continued in force by Const. art. 18, § 7, until altered or repealed, and in view of the fact that such statute was not annulled by Const. art. 8, § 5, prescribing the powers and duties of the commissioners for the sale of school and University lands and investment of the proceeds, and has not been changed by the subsequent legislation relative to the state land board (L. O. L. §§ 3882, 3883, 3886; B. & C. Comp. § 3296; Laws 1913, p. 499), or the provisions relative to the powers and duties of the State Treasurer (Const. art. 6, § 4; L. O. L. §§ 2636-2638, 2654, 2658), the right to custody of notes and mortgages taken by the state land board on loans of the common or irreducible school fund, university fund, and Agricultural College fund of the state, and the records, books, and papers used in connection

therewith, is vested in the State Treasurer, rather than in the state land board.

[Ed. Note.—For other cases, see States, Cent. Dig. § 70; Dec. Dig. § 68.\*]

**4. MANDAMUS (§ 73\*) — RIGHT TO REMEDY — PERFORMANCE OF OFFICIAL DUTY.**

While, under the express provisions of L. O. L. § 613, a writ of mandamus may issue to compel the State Treasurer to perform an act which the law specifically enjoins, it will not issue, unless the duty sought to be enforced is legally defined.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144–149; Dec. Dig. § 73.\*]

In Banc. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Mandamus by the State, on the relation of Oswald West, Governor, and another, against T. B. Kay, State Treasurer. Peremptory writ issued, and defendant appeals. Reversed, and writ dismissed.

This is a proceeding in mandamus to compel the defendant, T. B. Kay, State Treasurer, to surrender to the clerk of the state land board the notes and mortgages taken by the board upon loans of the common or irreducible school fund, University fund, and Agricultural College fund of the state, aggregating \$5,992,758.71, and the records, books, and papers used in connection therewith. The circuit court granted a peremptory writ of mandamus as petitioned for, and the defendant appeals.

The action is brought upon the relation of Oswald West, Governor, and Ben W. Olcott, Secretary of State. The alternative writ shows, in substance, that the relators are the Governor and Secretary of State, respectively, of the state of Oregon, and are citizens and taxpayers thereof; that the defendant is the State Treasurer, and that the relators and the defendant comprise the state land board, of which G. G. Brown is clerk; that the state land board has loaned from the common or irreducible school fund, University fund, and Agricultural College fund of the state, in various amounts, the total sum of \$5,992,758.71, which loans are evidenced by the promissory notes of the respective borrowers, aggregating approximately 8,000 in number, payable to said board, and are secured by mortgages on Oregon real estate; that said notes are not due; that at a regular meeting of the board held at the capitol November 13, 1913, the board directed the defendant to deliver the notes and mortgages, and all records, books, and papers used in connection therewith and belonging to the board, to G. G. Brown, clerk; that on that date, and at all times since, defendant has had said notes, mortgages, records, books, and papers in his possession in Marion county, Or.; that said clerk, acting for himself and on behalf of the board, made due demand of the defendant for possession of the above-mentioned instruments and papers, and is entitled to the immediate possession thereof,

but that the defendant refused to comply with such demand.

The defendant first moved to dismiss the writ for the reasons: (1) That the same shows on its face that the state of Oregon has no interest in the result; (2) that the writ fails to show that the relators have any right to prosecute the action in the name of the state of Oregon. The motion being overruled, the defendant demurred upon the grounds: (1) That the plaintiff has no legal capacity to sue; (2) that there is a defect of the parties plaintiff; (3) that the complaint does not state facts sufficient to constitute a cause of action; and (4) that the court has no jurisdiction of the subject-matter. The trial court overruled the demurrer. The defendant answered, admitting, in effect, the material allegations contained in the alternative writ, and alleging that the defendant has the possession of the notes, mortgages, and records, as such treasurer and member of the state land board in his official capacity only, in the performance of his duties as required by law. The defendant further alleges that for more than 30 years last past the respective State Treasurers of the state have had the actual possession of the notes and securities mentioned in the writ, and that such has become and is the actual custom of the administration, care, and possession of the same; that the Treasurer holds them subject to the order of the state land board in relation to loaning the moneys, collecting the interest on the notes, paying out all moneys and interest received on the notes and securities and loaning the principal sum as directed by the board; that the various Legislatures of the state during the last 30 years, and prior thereto, have appropriated money at different times for the purpose of employing additional help in the State Treasurer's office to collect interest on the securities; that it would entail an expense of about \$2,000 to change the custom and make the proposed transfer; that the State Treasurer is under \$350,000 bonds to protect the state against loss of any such funds, interest, or securities.

A. M. Crawford, Atty. Gen., and James W. Crawford, Asst. Atty. Gen., for appellant. E. R. Ringo, Dist. Atty., and I. H. Van Winkle, both of Salem, for respondents.

BEAN, J. (after stating the facts as above). [1, 2] The first point made by the defendant is that the alternative writ of mandamus shows on its face that the state of Oregon has no interest in the result of this action, and that the relators have no right to prosecute the action in the name of the state. At a meeting of the state land board on November 13, 1913, two of the relators, being a majority of the members of the state land board, passed an order directing that the Treasurer deliver to G. G. Brown, clerk of the board,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the securities mentioned. It was unanimously instructed by the board that the district attorney bring proceedings to enforce the order. Pursuant to this request, the district attorney for Marion county instituted these proceedings. The petition, however, is not signed by him in his official capacity. This, however, we consider as an informality which was waived, in view of the fact that defendant answered to the merits. Section 72, L. O. L.; *State v. Chadwick*, 10 Or. 423; *Rutenic v. Hamakar*, 40 Or. 444, 454, 67 Pac. 196. This leaves the question as to the sufficiency of facts to constitute a cause of action and the jurisdiction of the court. Whether the law directs the action sought by the writ is the real question. It must be conceded that this is a public matter; that the state is vitally interested in the proper and legal transaction of all the business relating to the irreducible school fund and other funds referred to which are held by the state for a most beneficent purpose, and which should be sacredly guarded and cared for. In order that no danger of loss or impairment of said funds should be suffered to exist, no legal questions arising in regard thereto should be lightly brushed aside.

Section 614, L. O. L., provides that the writ should be allowed upon petition of the party beneficially interested. See *State ex rel. v. Ware*, 13 Or. 380, 383, 10 Pac. 885; *State ex rel. v. Grace*, 20 Or. 154, 157, 25 Pac. 382, 383; *State ex rel. v. Lord*, 28 Or. 498, 43 Pac. 471, 31 L. R. A. 473; *High on Ex. Remedies* (3d Ed.) § 431. In *State v. Grace*, *supra*, it was remarked by this court:

"While the authorities indicate some diversity of judicial opinion upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless its neglect entails some special injury or affects some particular interest, the decided preponderance of American authority. Mr. Justice Miller thinks, is 'in favor of the doctrine that a private person may move for a mandamus to enforce a public duty not due to the government as such without the intervention of the government law officers.' \* \* \* Hence, as the question at bar is one of public right, and the object of the mandamus is to enforce the performance of a public duty, the people being regarded as the real parties in interest, it is not necessary that the relators should show any special interest or particular right to be affected by the result."

In the case under consideration all the people of the state, in their collective capacity, constitute the real party in interest. The relators and the defendant are officers of the state, and in the inception of the controversy all apparently sought the aid of the court. It therefore becomes our duty to search the law to ascertain, if we can, who is the legal custodian of the securities named.

[3] The first stone in the legal structure which it becomes necessary to examine is article 8, § 5, of the Constitution of the state, which provides that the powers and duties of the board of commissioners for the sale of school and University lands and the investment of the funds arising therefrom

shall be such as prescribed by law. Section 3882, L. O. L., enacts in part that "the Governor, Secretary of State, and State Treasurer are hereby made a board of commissioners for the sale of state lands, and for the investment of the funds arising therefrom, and shall be styled the 'State Land Board.'" By section 3883, L. O. L., it is provided that the state land board shall have power to appoint a clerk, who shall be known as the clerk of the state land board and keep his office in the state house. The section authorizes him to take and certify the proof and acknowledgment of a conveyance of real property, or any other written instrument, keep the records, files, and other papers pertaining to his office, attend all the meetings of the board, keep a record of the transactions, administer oaths, receive and file applications for the purchase of lands or loans of money, receive and file communications addressed to the board, conduct correspondence required by the board, and "receive, receipt for, and make immediate payment to the State Treasurer of all moneys received for the sale of lands, taking his receipt therefor, specifying the particular fund to which such moneys belong, and whether received as principal or interest, and to perform such other duties and acts as the board may direct."

Section 3886, L. O. L., authorizes the state land board to make rules and regulations for the proper conduct of its business in conformity with the law. Therefore the efficiency of the order passed by the board depends upon whether or not it is in harmony with the statute or repugnant thereto. By an act passed in 1880 (Gen. Laws 1880, p. 11), in addition to the other duties enumerated, the clerk of the board of commissioners, as they were then styled, was to "receive, receipt for, and make immediate payment to the State Treasurer of all moneys of the state for the sale of lands (or payable to the board on any of the loans authorized by this act)." The clause inclosed in parenthesis remained in this statute until the act of 1907 (Laws 1907, p. 208), when it was eliminated. It also appears in the act of 1899 (B. & C. § 3296).

The powers and duties of the State Treasurer who is ex officio a member of the state land board are such as may be prescribed by law: Section 4 of article 6 of the Constitution. Section 2636, L. O. L., provides that the State Treasurer shall keep his office at the seat of government, shall receive and have charge of all moneys received and paid into the state treasury, and shall pay out the same as directed by law. Section 2637 specifies that the State Treasurer shall give a bond to the state in the sum of \$50,000, conditioned, among other things, that he will deliver over to his successor in office, or to any other person authorized by law to receive the same, all moneys, books, papers, records, and other articles and effects belonging to his office. Section 2658, L. O. L.,

makes provisions for an additional bond to be given by the State Treasurer. Section 2638 enumerates the general duties of the treasurer. They are, in effect, to keep the accounts of all moneys; to pay on demand out of the state treasury all sums authorized by law, etc.; to pay all warrants drawn on the treasury, etc.; to give receipts for all moneys paid to him, etc.; to permit all books, papers, and transactions of his office to be open at all times to the inspection of the Governor, Secretary of State, the Legislature, or any committee of either branch thereof, to examine the same; to deliver over to his successor in office all moneys, books, papers, furniture, and other effects belonging to or preserved in his office; and to perform all other duties imposed upon him by law. Section 2654 directs, among other things, that:

"Nothing in this act shall be construed to deprive the state land board of the power to invest or dispose of the funds derived from the sale of public lands as is now or may be provided by law."

By the Laws of 1913, c. 259, p. 499, the state land board may require the State Treasurer to deposit in qualified state depositories any surplus of the funds referred to, which are not loaned or invested in school district bonds.

By an act of the territorial Legislature passed in January, 1856 (Laws of Oregon 1855-56, p. 69), it was provided that the superintendent of schools of each county should offer for sale the school lands in his respective county. Provision was made for the advertisement of sales, price, and conditions of payment, to wit, one-fourth of the purchase money in hand and the remainder to be secured by a note of the purchaser payable to the territorial treasurer for the use of the common school fund. Section 8 is as follows:

"It shall be the duty of any superintendent of schools, within ten days after receiving any money, notes, or securities under the provisions of this act, to deposit the same with the territorial treasurer and file with the territorial auditor, duplicate receipts of all such deposits."

It was provided by section 9 of the act that it should be the duty of the territorial treasurer to loan any money belonging to the common school fund which might be in the territorial treasury, the loans to be secured by a mortgage on real estate. Section 10 authorized the superintendent of common schools of the respective counties to execute and deliver deeds of conveyance to purchasers of school lands when thereto entitled. It is contended by counsel for plaintiff that this territorial statute became obsolete upon the adoption of the state Constitution. However, when the Constitution became effective February 14, 1859 (article 18, § 7), all territorial laws then in force and consistent therewith were by virtue of the article just cited, continued in force until altered or repealed.

It may therefore be stated that, beginning in 1856, the portion of the duties now devolving upon the state land board in regard to the sale of school lands was imposed upon the several superintendents of schools in their respective counties. That part of the duties of the board relating to the loaning of the school funds was performed by the territorial treasurer, who was then the custodian of the notes and securities pertaining to the school funds. This is practically the only statutory signification that we find relating to this important trust. Under this law the ship of state sailed along without encountering any reefs or shoals of litigation in regard to who should be the custodian of these securities until A. D. 1914.

We have referred somewhat at length to the different statutes enacted since the state was admitted into the Union, not only for the purpose of ascertaining what the enactments are in this respect, but also to learn whether or not the Legislature has seen fit to annul or change the custom relating to the care and custody of the securities mentioned, which came into vogue by virtue of the territorial law. This law is perfectly consistent with the Constitution, and, with the aid of the learned counsel upon both sides, we are unable to find that it has ever been altered or repealed in so far as the same relates to the custody of the notes and mortgages referred to. By virtue of the Constitution it is therefore in full force. *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 417, 105 Pac. 895; *Stevens v. Myers*, 62 Or. 372, 121 Pac. 434, 126 Pac. 29. It is important to note that the clause in the act of 1880 authorizing the clerk of the state land board to receive and receipt for money payable to the board upon the securities in question was expressly repealed by the act of 1907 (Gen. L. 1907, p. 208), as under the act of 1880 there might be a necessity for the clerk of the board to have the custody of these documents for convenience in collecting interest, etc. The strictly official duties of the State Treasurer, as such officer, as distinguished from his duties as ex officio a member of the state land board, are to a certain extent blended and cannot be entirely separated. In the absence of statutory authority therefor, the State Treasurer cannot be relieved of his official responsibility as custodian of the notes, mortgages, and records described in the writ by delivering the same into the custody or entire control of the clerk of the board or any other officer. If any change is desired, the Legislature is now in session, and can provide therefor, or remove any doubt that may exist.

No question relating to the collection, investment, or paying out of the funds or any dealings with third parties who are not officers of the state is involved in this proceeding. Neither is there any complaint as to any representative of the state being denied

access to the securities and records involved.

[4] In order to promote justice, the writ of mandamus may properly issue to compel the State Treasurer or other officer to perform an act which the law specially enjoins, but the writ will not lie unless the duty sought to be enforced is legally defined. L. O. L. § 618. *Ball v. Lappins*, 3 Or. 56; *Mackin v. Portland Gas Co.*, 38 Or. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; *McGee v. Beckley*, 54 Or. 253, 102 Pac. 303, 103 Pac. 61; *First Nat. Bank of Topeka v. Hefebower*, 58 Kan. 792, 51 Pac. 225; 26 Cyc. 151, 234.

The lower court erred in granting the peremptory writ, and the judgment is reversed, and the writ dismissed.

(74 Or. 279)

### PEACOCK v. KIRKLAND et al.

(Supreme Court of Oregon. Jan. 12, 1915.)

#### 1. PRINCIPAL AND SURETY (§ 66\*)—OBLIGATION OF SURETY—CONSTRUCTION.

The obligation of a surety cannot be enlarged beyond the terms of his undertaking.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.\*]

#### 2. REPLEVIN (§ 119\*) — UNDERTAKING OF PLAINTIFF—LIABILITY—STATUTORY PROVISIONS.

L. O. L. § 286, requiring plaintiff in claim and delivery to give an undertaking conditioned "for the prosecution of the action," and for return of the property, etc., merely requires plaintiff to prosecute the action in good faith without unnecessary delay, and failure to prosecute the action to effect is not a breach of the undertaking.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 470-478; Dec. Dig. § 119.\*]

#### 3. PRINCIPAL AND SURETY (§ 145\*)—FORMER ADJUDICATION—QUESTIONS CONCLUDED.

A judgment on the merits dismissing an action in claim and delivery and for defendant for costs and disbursements conclusively determines the rights of the parties on the merits, in view of L. O. L. §§ 153, 198, permitting the parties to settle the status of the property, and bars an action on plaintiff's undertaking except for costs and disbursements.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 397-401; Dec. Dig. § 145.\*]

#### 4. JUDGMENT (§ 683\*)—CONCLUSIVENESS—PARTIES CONCLUDED—ASSIGNEES.

Under L. O. L. § 756, making a judgment conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the suit, a judgment is as conclusive on an assignee thereof as on the assignor.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1206; Dec. Dig. § 683.\*]

#### 5. REPLEVIN (§ 105\*)—JUDGMENT—RETURN OF PROPERTY — ALTERNATIVE JUDGMENT FOR VALUE.

Under L. O. L. §§ 153, 198, authorizing assessment of the value of the property in controversy in an action for the recovery thereof, and declaring that, where the property has been delivered to plaintiff and defendant claims a return, a judgment for defendant may be for a return or the value thereof, in case a return cannot be had, judgment for return is an essen-

tial condition precedent for an alternative judgment for value.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 412-415; Dec. Dig. § 105.\*]

Department 1. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Action by Ella Peacock against John E. Kirkland and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The plaintiff issued execution on a judgment in her favor against one Albert Peacock, and placed it in the hands of the sheriff of Linn county, who by virtue thereof levied upon and took into his possession certain chattels as the property of the defendant in the writ. At this juncture the defendant Kirkland commenced replevin against the sheriff to recover the property and gave an undertaking with the other defendants here as sureties in double the value of the property "for the prosecution of said action and for the return of said property to the said defendant, if return thereof be adjudged, and for the payment to the said defendant of such sum as may from any cause be recovered against the said plaintiff." In pursuance of this undertaking and the statutory affidavit, the coroner of the county took the chattels from the possession of the sheriff and delivered them to the defendant Kirkland. Afterwards, in the trial of the replevin action, the jury returned a verdict as follows:

"We, the jury impaneled in the above-entitled case, find for the defendant."

Upon this verdict the court rendered a judgment in these words:

"It is therefore ordered by the court that plaintiff's complaint herein be and the same is hereby dismissed, and that the defendant recover his costs and disbursements herein taxed at \$29.20."

It is without dispute in the testimony that the defendant Kirkland before the commencement of this action paid the costs and disbursements thus taxed in the judgment, although issue is joined in the pleadings on that subject. The breach of the undertaking is thus assigned in the complaint:

"That the action wherein John E. Kirkland was plaintiff and D. S. Smith was defendant, as hereinabove alleged, has long since terminated, and that the defendants have violated said undertaking in this: That they have not prosecuted said action according to the provisions of said bond and have failed and refused to return said property or any part or portion thereof, as conditioned in said undertaking above set out, and have failed to make payment for the value of said property of \$640 or any portion thereof, but that said defendants retain possession of said property, and that by reason thereof there is now due and owing and unpaid upon said undertaking the sum of \$640, with interest thereon at 6 per cent. per annum from the 7th day of November, 1910, and for the sum of \$29.20 costs, with interest thereon from the 4th day of October, 1911, no part of which has been paid."

Alleging an assignment to herself of the undertaking and judgment, the plaintiff

brings this action and demands judgment for \$640, as the value of the property, and the further sum of \$29.20, as costs, together with the taxable expenses of the present action. All the allegations of the complaint, except the breach assigned and the transfer of the judgment and undertaking to the plaintiff, are admitted by the answer. That pleading alleges the trial of the replevin action, the verdict of the jury and judgment above mentioned, and the payment to the clerk of the money awarded by that judgment. The defendants averred that they duly prosecuted the action to final determination and that otherwise they have duly performed all the conditions of said undertaking to be by them performed. The plaintiff traverses all the new matter in the answer. All the facts thus stated appear either by the record or by unchallenged testimony. At the close of plaintiff's case the defendants moved for a judgment of nonsuit in their favor, which was denied, and at the close of all the testimony asked for a directed verdict in their favor, which was also refused. Under instructions to which defendants excepted, and which are hereinafter set out, the jury returned a verdict for the plaintiff for \$640. From the ensuing judgment the defendants appeal.

Gale S. Hill, of Albany (Geo. W. Wright, of Albany, on the brief), for appellants. J. K. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] It is well settled in this state that the obligation of a surety cannot be enlarged beyond the terms of his undertaking. The authorities are collated in the case of *Woodle v. Settlemyer*, 141 Pac. 205, by Mr. Justice Ramsey in the latest utterance of this court upon that subject.

[2] The obligors in the instrument in question pledged themselves for the performance of three things: (1) For the prosecution of the action; (2) for the return of the property to the defendant in replevin if return should be adjudged; and (3) for the payment to the defendant of such sum as from any cause might be recovered from the plaintiff there. The payment of the money unquestionably has been performed. The action was prosecuted to a final determination. Many cases are cited by the plaintiff holding that the prosecution of an action in replevin must be to a successful conclusion on the part of the one claiming the goods. Without exception, however, the precedents upon which she relies are those arising under a statute where the undertaking must be given to prosecute with effect. Under such a law it is manifest that if the plaintiff fails in his action for claim and delivery he has effected nothing. In other words, he has not prosecuted with effect. Our statute imposes no such condition. It merely requires, besides

security for the payment of the money, judgment that the undertaking shall be "for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged." L. O. L. § 286. Our Code goes no farther than to require the replevin action to be carried on in good faith on the merits without unnecessary delay.

[3] It is stated in section 153, L. O. L.:

"In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

Further, in section 198, L. O. L., it is declared that in such actions—

"If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

In passing, we note that the pleadings in this action do not disclose whether the defendant in the replevin action claimed a return of the property or not. Neither is it directly alleged in the complaint here that the execution debtor was in fact the owner of the property in question. It is quite possible, under these circumstances, that a judgment merely for the defendant without reference to the return of the property would be a correct determination of the replevin action. It is not necessarily the case in all such litigation that the property taken on the writ must be returned to the defendant. It is easy to conceive of a case where a plaintiff might charge a defendant with the detention of property and even take possession of it under a writ, when, in fact, the defendant had never had custody of nor any claim upon the goods. In such a case the only judgment that could be rendered would be one simply for the defendant with costs and disbursements. There is nothing in the complaint in this action to distinguish the present dispute from one similar to the illustration given.

The plaintiff argues that, the judgment dismissing the action having been entered, that constituted a breach of the undertaking; but all the authorities cited for her on this subject are where the replevin action was either dismissed on the motion of the plaintiff or by the court for want of prosecution. In none of them was there a trial on the merits of the action, nor did the case go to the verdict of a jury in any instance.

In the replevin action here involved there was an opportunity offered by sections 153 and 198, L. O. L., to settle the status of the property and the amount of damages to be assessed against the plaintiff there if such was the right adjudication of the issue. The judgment there is conclusive of the rights



of the parties on the merits of the action, and while that decision stands we cannot go behind it and determine questions that should have been litigated in that action. The principle is enunciated by Mr. Justice Ramsey in *Yuen Suey v. Fleshman*, 65 Or. 606, 615, 133 Pac. 803, 806, in this language:

"A judgment or a decree upon the merits is a bar to a subsequent action or suit between the same parties, upon the same claim as to every matter that was, or might have been, litigated"—citing *Ruckman v. Union Ry. Co.*, 45 Or. 578, 78 Pac. 748, 69 L. R. A. 480; *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Belle v. Brown*, 37 Or. 588, 61 Pac. 1024; *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95.

[4, 5] By force of section 756, L. O. L., the conclusiveness of a judgment operates not only upon the immediate parties, but also with equal sanction upon "their representatives and successors in interest by title subsequent to the commencement of the action." The plaintiff here claiming as assignee of the judgment in replevin in favor of the then defendant sheriff stands in no better plight than he and cannot now enlarge that judgment beyond its terms. The demand for the value of the property cannot be visited upon these obligors because there was no judgment for a return of the property. Judgment of return is an essential statutory condition precedent for the alternative judgment for the value of the goods.

The defendants requested the court substantially to withdraw from the jury any question as to whether or not the bond was complied with in the prosecution of said action and the return of the property, and to charge them that the defendants have fulfilled the bond in these two conditions; but the court refused the request. On the contrary, the judge instructed the jury as follows:

"The term 'prosecution of the action' does not mean merely a bringing the case on for trial; nor does it mean the trial of the cause. It means, gentlemen of the jury, a prosecution with effect, a successful prosecution, a trial of a cause wherein the person bringing the action prevails. And if you find from the evidence that defendant herein, John E. Kirkland, did not carry his action against D. S. Smith to a successful determination, and that the amount of \$640 has not been paid, then you would be justified in finding that the condition of this bond in this particular has been broken, and you should bring in a verdict for plaintiff in the sum of \$640.

"The payment of the judgment of costs herein is not a bar to this action to recover the amount mentioned in the bond. The bond was given for three purposes at least: To successfully prosecute the action brought by Kirkland against Smith, which is in evidence here before you; to redeliver the property in the event the case was decided against Kirkland; and to pay the costs that were adjudged against Kirkland. The payment of the costs was a compliance with that term of the bond, but was not a compliance or a fulfillment of the other two terms of the undertaking."

There has never been an adjudication for the return of the property. The defendants

here did not delay the prosecution of the action, but carried it to final judgment. No situation is disclosed by the case which amounts to a violation of their undertaking. The following precedents illustrate the soundness of this conclusion: *Howard v. Wyatt*, 145 Ky. 424, 140 S. W. 655; *Daniels v. Mansbridge*, 4 Ind. Terr. 104, 69 S. W. 815; *Badlam v. Tucker*, 18 Mass. (1 Pick.) 284; *Ihrig v. Bussell*, 69 Wash. 70, 122 Pac. 609; *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 Pac. 116; *Vallandingham v. Ray*, 128 Ky. 506, 108 S. W. 896; *Lewis v. McNary*, 38 Or. 116, 62 Pac. 897.

The court was in error in refusing the defendants' motion for a nonsuit and for a directed verdict, as well as in giving the instructions mentioned and refusing the request of the defendants. For these reasons the judgment is reversed, and the cause remanded to the circuit court, with directions to enter a judgment dismissing the action.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(26 Colo. A. 468)

SNIDER et al. v. OSTRANDER. (No. 4047.)  
(Court of Appeals of Colorado. Jan. 11, 1915.)

1. PUBLIC LANDS (§§ 106, 127\*)—MISTAKE IN PATENTS—CORRECTION BY PATENTEE.

Equity at the instance of patentees may correct mistakes in patents to public lands, whereby land has been given one claimant which upon unmistakable facts belonged to another, and the decision of the Land Office is not conclusive on the courts.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 104, 301, 302, 343; Dec. Dig. §§ 106, 127.\*]

2. PUBLIC LANDS (§ 127\*)—CORRECTION OF MISTAKE IN PATENTS—DEFENSE OF LIMITATIONS.

The defense of limitation is not applicable to a suit in equity brought by a patentee of public land against other patentees to correct mistakes in the patents issued to the parties, whereby one claimant was given land clearly belonging to another.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 343; Dec. Dig. § 127.\*]

3. PUBLIC LANDS (§ 127\*)—PATENTS—CORRECTION OF MISTAKE IN PATENT—RELIEF AWARDED.

In a suit by a patentee of public lands to correct mistakes in patents whereby his land was given to another patentee, the court has no power to decree cancellation of the patents, though it has power to declare the legal title held in trust for the person entitled.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 343; Dec. Dig. § 127.\*]

4. APPEAL AND ERROR (§ 1178\*)—REMAND OF CAUSE—CONDITION OF PLEADINGS.

Where the pleadings, in an action to correct mistakes in patents for public lands, are more or less technical, and there is a chance of error, and judgment on the pleadings is partly erroneous because canceling the patents, the cause will be remanded, with instructions to permit amendments and determine the cause

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on evidence, though the pleadings entitle plaintiff to judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

Error to District Court, Grand County; Charles McCall, Judge.

Suit by Joseph N. Ostrander against Ida M. Snider and others. From a judgment for complainant, entered on the pleadings, defendants bring error. Reversed and remanded, with instructions.

Geo. B. Campbell, of Denver, for plaintiffs in error. Howard & McCrillis, of Denver, for defendant in error.

BELL, J. This is an equitable action brought in the district court of Grand county in the nature of a suit to quiet the title of Joseph N. Ostrander, defendant in error, plaintiff below, to certain lands in township 1 N., range 76 W., 6th P. M., in said county, Colo. A decree was rendered and entered on the facts found by the court to be admitted in the pleadings, or is what is generally termed a judgment on the pleadings.

If the complaint should be taken as confessed, it would seem to be conceded that Daniel N. Ostrander, the father of said Joseph N. Ostrander, settled upon certain lands in the township aforesaid, resided and made extensive improvements thereon, and purchased the same under the pre-emption laws of the United States, and the government of the United States endeavored to convey the same to him by its patent, but by inadvertence and a mutual mistake conveyed to him instead other lands in said township, which are situated about one mile east of the lands intended to be patented; also that James M. Spring, by his administrator, conveyed to said Daniel N. Ostrander the legal title to certain other lands in said township, which legal title was conveyed to said Spring by the government of the United States, by its patent issued therefor, through an inadvertence and mutual mistake; that said Spring actually settled and resided upon, improved, and claimed under the homestead laws of the United States different lands in said township from those patented to him, in which he owned the equitable title, and to which he sought to secure, through the patent issued to him, the legal title which was intended to be conveyed by his administrator to said Daniel N. Ostrander as aforesaid; and, further, that James W. Snider, predecessor in interest of the plaintiffs in error, defendants below, settled upon, improved, claimed, and purchased from the United States under the pre-emption laws, still other lands in said township, and attempted to obtain the legal title thereto from the government of the United States, and the government intended and endeavored to convey him such title through its patent, but by inadvertence and mistake, as

aforesaid, conveyed him the premises in controversy herein, which are situate one mile east of those intended to be patented to him, and which were settled upon, improved, claimed, and equitably owned by said Daniel N. Ostrander and James M. Spring at the time the patent therefor was issued to him.

[1] The contentions of the plaintiffs in error, heirs at law of said James W. Snider, are chiefly, among others, that the government of the United States, and not the defendant in error, is the proper party to bring a suit for the cancellation of the patent, and that the findings of the United States Land Office that Snider had occupied, settled upon, and improved the land described in his patent are res adjudicata and binding upon the parties and the court. We have examined the defenses set up by the plaintiffs in error and find them insufficient to defeat the equities set forth in the complaint. Their contention that the findings of the United States Land Office, made in an ex parte proceeding, that James W. Snider had occupied, settled upon, and improved the land described in his patent are res adjudicata and binding upon the parties and the court is untenable. The rule contended for applies to error of judgment in contests before the land officers where the only remedy is by appeal within the Land Department; but there has always existed in courts of equity the jurisdiction to correct mistakes where lands have been given one claimant which, upon unmistakable facts, belong to another. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Shepley v. Cowan*, 91 U. S. 340, 23 L. Ed. 424.

[2] Plaintiffs in error also insist that the defense of the statutes of limitation was set up in their answer and not replied to, and therefore was taken as confessed. We do not think that the statutes pleaded or argued by counsel have any application to the facts involved in this controversy.

Again, assuming the allegations of the complaint to be true, the positions urged by the plaintiffs in error on the merits of the controversy are utterly inequitable and founded upon a common mistake made in the official survey of township 1 N., range 76 W., 6th P. M., by which a strip of land extending the entire length of said township north and south, one mile in width at the north, and running to a point at the south, and lying between townships 1 N., ranges 76 and 77 W. of the 6th P. M., was left unsurveyed, and when the filings by the settlers hereinbefore mentioned were accepted, no recognition of this unsurveyed strip was taken by the land officers; and, by reason of said officials ignoring the existence of said triangular strip, they furnished the settlers aforesaid with descriptions of the public domain quite a mile east of the lands respectively settled

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon, improved, and purchased by them. The defendant in error, according to his complaint, seeks only to obtain the legal title to lands possessed and equitably owned by him and his predecessors in interest. The very suggestion of the conditions as set forth in the complaint, if true, ought to satisfy any litigant that he or she could have no standing on the merits in a court of equity, and a common duty should dictate to parties so situated that they lend all voluntary assistance on demand to correct such errors as are herein complained of so as to permit each one to secure a patent to the premises upon which his settlement, improvement, and residence were established; to accomplish any other result would be a flagrant defeat of the cardinal purposes of the homestead and preemption laws of the United States, which are intended to provide 160 acres of government domain to such qualified citizens of the United States as in good faith settle upon, improve, and occupy the same as permanent homes.

[3] The facts averred in the complaint are sufficient to entitle the defendant in error to a decree quieting his title to the premises in dispute and to justify the court in declaring that the plaintiffs in error hold the legal title thereof in trust for the defendant in error, and such relief is permissible under the general prayer of the complaint. The trial court decreed the United States patent to said premises canceled, and enjoined the plaintiffs in error from thereafter asserting any rights to said premises thereunder. We think the court exceeded its powers in canceling the patent under the conditions attending this controversy. There is a seeming conflict of authority as to whether the cancellation of a patent can be had upon complaint made by any other than the United States government; but there seems to be no doubt as to the right of the courts, in contests between private citizens, in which the United States has no interest or has parted with the legal title to the lands in dispute, to declare the holder of such title a trustee holding the same for the use and benefit of the true and equitable owner of the lands and require a transfer of such title in the manner approved by courts of equity, and we conclude that this is the appropriate remedy and the one that should be applied in this case, if the facts are as herein stated. 26 Am. & Eng. Encyc. of Law (2d Ed.) 397, and note 7, citing many cases; *Boggs v. Merced M. Co.*, 14 Cal. 363; *Gaines et al. v. Nicholson et al.*, 9 How. 364, 13 L. Ed. 172; *Steel v. St. Louis M. & R. Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; 19 Am. & Eng. Encyc. of Law (1st Ed.) 353, and notes 1 and 2, citing many cases; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848.

[4] In *Shwayder v. Clay*, 24 Colo. App. 836-

340, 133 Pac. 420, it has been said that judgments on the pleadings should be restricted; and, as the pleadings in this case, upon which the decree was rendered, are more or less complicated and burdened with technical descriptions which could readily admit of error and mistake, such as is herein complained of, and thereby result to the injury of either or both of the parties, therefore, to avoid any such error or injury that may result therefrom, it is hereby ordered and directed that the decree be reversed, and the case remanded, with instructions to the trial court to permit the parties to amend their pleadings as they may be advised, and to determine the cause upon such proper evidence as may be tendered and in conformity with the conclusions of law herein expressed.

Reversed and remanded, with instructions.

(26 Colo. A. 454)

ELLIS v. GIBBONS et al. (No. 3889.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

1. APPEAL AND ERROR (§ 80\*)—QUESTIONS REVIEWABLE—ORDER QUASHING LEVY UNDER EXECUTION—REVIEW BY WRIT OF ERROR—"JUDGMENT."

Under *Mills' Ann. Code*, § 141, providing that writs of error may be prosecuted from any final judgment in garnishment proceedings, and section 406 providing that writs of error shall lie to every final judgment of any court of record, and section 221 defining a "judgment" as the final determination of the rights of the parties, an order quashing a levy under execution on stock of a corporation pledged by the execution debtor to a creditor, and subsequently sold by the debtor to a third person, who joined in the motion to quash, has the force and effect of a final judgment because finally disposing of the questions of the lien of the execution acquired or preserved by the levy, and whether the interest of the execution debtor in the stock was subject to levy and sale under execution, though the proceeding should have been in equity, especially where the judgment operated to discharge the corporation and the pledgee summoned as garnishees incident to the levy on the stock.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.\*

For other definitions, see *Words and Phrases*, First and Second Series, Judgment.]

2. APPEAL AND ERROR (§ 5\*)—RIGHT OF REVIEW.

Where doubt exists as to a right of review on writ of error, the doubt is resolved in favor of a review, so that substantial rights involved may be determined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8-21; Dec. Dig. § 5.\*]

3. CORPORATIONS (§ 123\*)—PLEDGES—RIGHTS OF PARTIES—DECREE.

Where a transfer of corporate stock, though absolute in form and so appearing on the books of the corporation, was a pledge, a decree declaring that, while the legal title passed to the pledgee, it was held by him for the benefit of the pledgor, in whom the general property remained, merely declared the rights of the parties in view of the facts.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

4. CORPORATIONS (§ 65\*)—STOCK—CHARACTER OF PROPERTY—"PERSONAL PROPERTY"—"CERTIFICATE OF STOCK."

Mills' Ann. St. § 993, declaring that corporate stock is deemed personalty, applies to the shares or interest which a stockholder has in the assets of the corporation, and not to the certificates of stock which are mere evidence of the interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 165-171; Dec. Dig. § 65.\*]

For other definitions, see Words and Phrases, First and Second Series, Certificate of Stock; Personal Property.]

5. EXECUTION (§ 35\*)—PROPERTY SUBJECT TO—CORPORATE STOCK—"PERSONAL PROPERTY."

Mills' Ann. St. § 993, declaring that corporate stock shall be personalty, and sections 4167, 4172, providing that stock may be levied on and sold under execution in accordance with a method prescribed, and Mills' Ann. Code, § 140, providing that credits and effects, choses in action, and other personal property of a judgment debtor under the control of any third person may be levied on under execution, must be considered in *pari materia*, and, when so construed, authorize a levy under execution of the execution debtor's right to redeem stock pledged to a creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 103; Dec. Dig. § 35.\*]

6. EXECUTION (§ 35\*)—PROPERTY SUBJECT TO—CORPORATE STOCK.

A levy under execution on an equity of redemption in corporate stock, made after judgment establishing the equity of redemption, but before the expiration of time for an appeal or writ of error, is valid, though the possibility of an appeal or writ of error may operate disadvantageously in case of a sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 103; Dec. Dig. § 35.\*]

7. EXECUTION (§ 115\*)—LEVY—SUBSEQUENT PURCHASER.

Where a sheriff levied an execution on corporate stock and delivered to the president of the corporation a copy of the execution with a certificate that he levied on the interest of the execution debtor, and the president of the corporation furnished the sheriff with certificates and affidavits stating the number of shares, and the sheriff's return with the president's certificates were filed in court, a subsequent purchaser of the stock from the execution debtor took with knowledge of the levy and subject to the rights acquired thereby.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 257-265, 377; Dec. Dig. § 115.\*]

8. EXECUTION (§ 137\*)—LEVY—NOTICE—NECESSITY.

Failure to give notice of a levy of execution to the execution debtor is not fatal, in the absence of any statute requiring notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 325-329; Dec. Dig. § 137.\*]

9. EXECUTION (§ 35\*)—PROPERTY SUBJECT TO—PROPERTY IN CUSTODY OF LAW.

Pending time to appeal from or sue out a writ of error to review a judgment declaring that, while legal title passed to a pledgee of corporate stock, it was held by him for the benefit of the pledgor, in whom the general property remained, the property was not in the custody of the law, so as to prevent a levy under execution on the pledgor's interest, especially where there was no conflict or possibility of conflict between the court having jurisdiction of the execution and the court rendering the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 103; Dec. Dig. § 35.\*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Eva Prince Ellis, formerly Eva Prince, against Elizabeth M. Gibbons and others, to foreclose a mortgage. There was an order quashing an execution on a deficiency judgment, and plaintiff brings error. Reversed and remanded.

Bicksler & Bennett, Bartels & Silverstein, and Dana & Blount, all of Denver, for plaintiff in error. T. J. O'Donnell, J. W. Graham, and Canton O'Donnell, all of Denver, for defendants in error.

**PER CURIAM.** The facts necessary to an understanding of this case are substantially as follows: Mrs. Ellis (formerly Mrs. Prince), plaintiff in error, made a loan to Mr. and Mrs. Gibbons, taking as security therefor a trust deed on real estate. On default of payment, foreclosure proceedings were had, the trust deed being treated as a mortgage, resulting in a deficiency judgment against the Gibbonses for \$9,500, dated February, 1905. At and subsequent to the time of the foreclosure proceedings aforesaid, Joseph Gibbons claimed to be the owner of 3,333 shares of the capital stock of the Joseph Gibbons Mining & Milling Company, which stood on the books of that corporation in the name of one John F. O'Connor. Gibbons had brought legal proceedings against O'Connor to recover the stock, which resulted in a decree against Gibbons, but, upon appeal to the Supreme Court, said judgment was reversed and the cause remanded to the district court for a new trial; the Supreme Court holding that Gibbons had a right to show that the bill of sale of said stock, which appeared to be absolute was in fact a mortgage or a pledge. *Gibbons v. O'Connor et al.*, 37 Colo. 96, 86 Pac. 94, 11 Ann. Cas. 323. Upon the second trial the district court on June 6 or 7, 1907, rendered judgment in favor of Gibbons, finding that the transfer of stock to O'Connor was a pledge to secure payment of an indebtedness for money borrowed, that Gibbons was the owner of said stock, subject to the lien of O'Connor, and gave Gibbons 90 days in which to redeem the shares of stock by payment of said indebtedness, amounting at that time to about \$5,000, payment to be made to O'Connor or into the registry of the court. The decree required O'Connor to transfer the certificates to Gibbons or his assigns, and ordered the Joseph Gibbons Company and Sullivan, its president, to transfer the shares of stock on the books of the company "upon the assignment and transfer thereof by the said John F. O'Connor as he (the said Joseph Gibbons) may require or direct," and further provided that in case O'Connor, within 30 days, bring the shares of stock into the registry of the court, duly assigned to Gibbons, to be delivered upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

payment of the amount due into the registry of the court for O'Connor's use, and thereupon Gibbons fail to perform the decree by paying the sum of money awarded, the right of redemption as fixed in the decree should be at an end, and the cause stand dismissed. On June 7th Mrs. Ellis caused an execution to be issued on her deficiency judgment against the Gibbonses, under which, on June 10th, a levy was made or attempted to be made by the sheriff upon the interest of Gibbons in the mining stock in question. A bill of sale is found in the record, by which it appears that on August 2, 1907, Gibbons sold the mining stock to Joseph Bordelean "in consideration of \$5 and other valuable considerations," and which, for identification of the stock, refers to the aforesaid litigation and decree in *Gibbons v. O'Connor*, and authorizes and directs the clerk of that court to deliver the stock to Bordelean, and directs the secretary of the mining company to make the transfer on the corporate books and issue certificates to Bordelean. September 9th, while the sheriff was advertising the stock for sale under said levy, Gibbons filed a motion, in the *Ellis-Gibbons* action, to quash the levy and the sheriff's return thereof. Bordelean joined in said motion. September 10th the motion to quash was sustained. To review this judgment or order quashing the levy, the case is brought here by writ of error.

[1, 2] 1. Prior to the transfer of this cause by the Supreme Court to this court, defendants in error filed a motion, the purpose of which was to dismiss and recall the writ of error, for the reason, as therein alleged, that the Supreme Court was without jurisdiction to hear and determine the matters brought up by the writ; the theory of the movers being that the order of the trial court quashing or setting aside the levy was not a final judgment, and for that reason was not reviewable by writ of error. The Supreme Court denied the motion, with leave, however, to defendants in error to again raise the same on final hearing. We are therefore required, at the threshold, to determine a jurisdictional question. Section 406, *Mills' Ann. Code*, provides that writs of error shall lie from the Supreme Court to every final judgment of any court of record. Section 221 defines a judgment as "the final determination of the rights of the parties in the action or proceedings." Section 141 provides that writs of error may be prosecuted from any final judgment or order in garnishment proceedings, as in other civil cases.

From what has already been said, it will be seen that neither Mr. nor Mrs. Gibbons had any apparent interest in the stock at the time they filed their motion to quash or recall the levy, as they had parted with their interest therein by sale to Bordelean. Bordelean was not a party to the *Ellis-Gib-*

*bons* foreclosure proceeding, nor to the *Gibbons-O'Connor* litigation, relative to the mining stock, and was not made a party thereto, unless considered a party by virtue of the proceedings taken herein to quash the levy. His appearance is in the nature, though not in the form, of an intervention. But, inasmuch as no objection was made in the court below to his joining with Gibbons in the motion to quash the levy, we shall assume, for the purposes of this case, that he was a proper party to the proceeding, as he was, in fact, the real party in interest, and the only moving party ostensibly having a pecuniary interest in the stock. Notwithstanding the form in which this proceeding is brought, it is obvious that the judgment or order quashing the levy, for all practical purposes, meant to Bordelean precisely what a judgment in his favor as intervener or in an equity proceeding brought to restrain the sale of the stock would have meant, and from such a supposititious judgment, clearly, an appeal would lie. If it be conceded that the ruling of the trial court upon the motion to quash the levy is not, strictly speaking, a final judgment or decree, as the phrase "final judgment" is ordinarily understood, nevertheless it undoubtedly has the force and effect of a final judgment in that it has finally disposed of the controversy involved, to wit, the lien of the execution acquired or preserved by the levy, and the more important question as to whether the interest of Gibbons in the stock was subject to levy and sale under execution at all. Although, under the same execution, another levy on the same property might possibly be made, the priority of the lien acquired by the levy in question would probably be lost, and plaintiff in error thereby deprived of a substantial right. But it cannot be assumed that the court did not hold that the stock was not subject to the execution, and that ruling *res judicata* as against another levy. From the nature of the case, the doubtful and difficult questions presented, and the valuable property rights involved, it is evident that a summary proceeding such as this, where the issues are not made by appropriate pleadings, is not well adapted to secure a fair trial and determination of such issues. We think the proceeding should have been in equity, or perhaps by formal intervention in Bordelean's behalf; but inasmuch as he has seen fit to join with Gibbons in the motion to quash the levy, and thereby submit questions which should have been raised in a more formal proceeding, and has secured an award in his favor, in the nature of and having the force and effect of a final judgment, he may not successfully dispute the right of his adversary to have the same reviewed by writ of error. We will regard the substance of the proceeding rather than its form, and treat it accordingly.

As was said in *Balfe v. Rumsey et al.*, 55 Colo. 97, 104, 133 Pac. 417, 419 (Ann. Cas. 1914C, 692):

"The motion which plaintiff in error did file must be treated as equivalent to, and a substitute for, a bill in equity, and the judgment of the court \* \* \* reviewable here."

If the authority of the trial court to quash a levy is purely discretionary, and, as contended for by defendants in error, not subject to review for error or abuse of discretion, either by writ of error, certiorari, or otherwise, then it is manifest that a trial court might, through error as to the law, or by the grossest abuse of its discretion, altogether prevent a judgment creditor from collecting the judgment. *Pontius v. Nesbit*, 40 Pa. 309.

Furthermore, the record shows that, in connection with the usual statutory proceedings incident to levy upon stock in a corporation, garnishment writs in aid of the execution were served upon the Gibbons Consolidated Mining & Milling Company, O'Connor (the pledgee), and others, to which answer was made by the president of the corporation, in which, in response to the interrogatories, as well as to the request made by the sheriff for information as to any stock held by Gibbons or in trust for him, the president of the company stated that there was no stock standing on the books of the company in the name of Gibbons, nor of any one else to his use or in trust for him, but further stated that a decree of court had been rendered in the Gibbons-O'Connor suit aforesaid, and the substance of the decree, to wit, that it was there decided that Gibbons was the owner of stock standing on the books in the name of O'Connor; that O'Connor was pledgee; that the officers of the company were by said decree required to reissue the stock to Gibbons, or as he might direct, upon redemption as provided, and asserted the willingness of the company to comply with the decree. Upon this showing, the final order of the court quashing the levy *prima facie*, at least, operated as a discharge of the garnishees, and such an order is made reviewable by the special provisions of section 141, Mills' Ann. Code. That provision of the Code is not relied on by plaintiff in error, but, without expressly holding that of itself it is sufficient to sustain the writ, we think it may well be considered in connection with all other matters in aiding to resolve in favor of the plaintiff in error the serious doubt raised by decisions of the supreme court in *Good v. Martin*, 2 Colo. 292, and *Rockwell v. Dist. Ct.*, 17 Colo. 118, 121, 29 Pac. 454, 31 Am. St. Rep. 265, as to whether the judgment assailed may be reviewed upon writ of error. The rule is well established that where doubt exists as to the right of review, such doubt should be resolved in favor of a review, where substantial rights are involved. If we have erred as to jurisdiction, an adequate remedy is provided.

The following additional authorities sup-

port our conclusion that the ruling of the trial court here under consideration is so far a final judgment as to be reviewable: *Corning v. Ryan*, 3 Colo. 525; *Daniels v. Daniels*, 9 Colo. 133, 140, 10 Pac. 657; *Hutchinson v. McLaughlin*, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287; *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092; *Tomboy v. Dist. Ct.*, 23 Colo. 441, 445, 48 Pac. 537; *Standley v. Mfg. Co.*, 25 Colo. 376, 379, 55 Pac. 723; *State Bank v. Plummer*, 46 Colo. 71, 102 Pac. 1082; *Smith v. McCourt*, 8 Colo. App. 146, 157, 45 Pac. 239; *McKercher v. Green*, 13 Colo. App. 271, 58 Pac. 406; *Mackaness v. Long*, 85 Pa. 158, 162; *Ins. Co. v. Sturges*, 33 N. J. Eq. 330; *Baker v. Pierson*, 5 Mich. 458; *Bristol v. Brent*, 35 Utah, 213, 99 Pac. 1000. We are aware that some of the decisions cited are based on Code provisions not altogether like our Code.

[3] 2. Another point raised on behalf of defendants in error is that the interest of Gibbons in the stock was not subject to levy and sale on execution. This contention seems to be predicated upon the assertion that the only right which Gibbons had in the stock was an "equity of redemption" or "the equitable right to redeem the stock" from the pledge to O'Connor; that Gibbons was not the owner of the stock; that his rights were inchoate only. The latter position can best be stated by quoting from the brief of defendants in error:

"The rights of Gibbons were inchoate. They began with and by reason of the facts stated in the opinion in 37 Colo., but they were not in full existence or operation during the time the battle pending between him and O'Connor waged, and the decree did not of itself restore them to such full existence or operation until and unless its terms were complied with."

We cannot yield assent to the statement contained in the foregoing quotation. The actual ownership of the stock at all times by Gibbons, notwithstanding the pledge thereof to O'Connor, did not arise from nor begin with the decree or judgment of the court. Whatever right Gibbons had, the law gave. The court simply declared it. Gibbons prevailed in his action because of the fact, as found and determined by the court, that the transfer of the stock from Gibbons to O'Connor, although absolute in form, and so appearing upon the books of the corporation, was nevertheless a pledge, and to be so construed. In effect the decree declares that, while the legal title passed to the pledgee, it was held by him for the benefit of the pledgor, in whom the general property still remains. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Irving Park Ass'n v. Watson*, 41 Or. 95, 67 Pac. 945; *Mitchell v. Roberts* (C. C.) 17 Fed. 778, 5 McCreary, 425; *Gay v. Moss*, 34 Cal. 125, 132; *Dungan v. N. J. Mut. Ben. L. Ins. Co.*, 38 Md. 242, 252; 31 Cyc. 791, and cases cited.

[4, 5] Nor do we agree with counsel's contention that because corporate stock is a chose in action, and Gibbons's interest there-

in a mere right to redeem it from the pledge which is also a chose in action, a levy under execution could not be made thereon. Under the provisions of our statute (section 993, Mills' Ann. Stats.), shares of stock in a corporation are deemed to be personal property. This doubtless applies to the shares or interest which the stockholder has in the assets of the corporation, and not only to the certificates, which are held to be mere tokens or evidence of the shares or interest. *Mountain Water Works Co. v. Holme*, 49 Colo. 412, 428, 113 Pac. 501; *City and County of Denver v. Estate of Charles M. Hobbs et al.* (Sup.) 144 Pac. 874, handed down December 7, 1914; *People ex rel. v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, 363. The statute also provides that such rights and shares of stock may be levied on and sold under execution, and prescribes the method. Sections 4167 and 4172, Mills' Ann. Stats. The Civil Code also provides that the credits and effects, choses in action, and other personal property of a judgment debtor in the possession or under the control of any third person may be levied upon and taken under execution, to the same extent and in the same manner as they may be taken under attachment and garnishment proceedings. Section 140, Mills' Ann. Code. We think the provisions of the statute and of the Code are to be considered in pari materia, and, as such, applicable to the circumstances of this case, so far as the levy is concerned, and that even though the stock be considered as a chose in action, as held by many courts, and the right of Gibbons an equity of redemption, nevertheless it is subject to seizure under execution in the manner provided by the statutes and the Code. The shares of stock or interest, although personal property, are not capable of manual delivery, and therefore cannot be taken into the actual possession of the officer. This fact explains the reason for the statutory provisions as to levy, somewhat analogous to a levy upon interests in real estate. In this case, as there was no stock standing in the name of Gibbons on the company books, no showing on said books that any of the stock standing on the books in the name of a third person was held "in trust for or to the use of" said Gibbons, it was impossible for any officer of the corporation to certify from its books as to the true ownership of the stock sought to be levied upon; but it is evident from the record that not only the president of said corporation, but the sheriff, had information of the decree of the court and the real interest of Gibbons as therein declared, and we think the garnishment proceedings and the answers made by the corporation to the interrogatories therein were appropriate in aid of the execution, and that altogether the levy as made was valid. In *Metzler v. James*, 12 Colo. 322, 19 Pac. 885, the question as to whether an equity of redemption in personality is sub-

ject to levy and sale under execution was discussed. In that case an attempt had been made to levy upon personal property consisting of a stock of drugs of which the mortgagee had the legal title and possession. The court said:

"The maintenance of the second proposition depends upon whether an equity of redemption in personality is subject to levy and sale under an execution. It is not subject thereto at common law."

It is there shown that an equity of redemption in personality may be subjected to levy and sale under execution, by the use of the appropriate provisions of the statute and Code. We think that case is ample support for our conclusion that the equity of redemption of Gibbons as pledgor of the stock was subject to levy and sale under execution. If plaintiff in error failed in any respect to follow the course pointed out, that failure is not in evidence, nor does it appear that she is barred from still pursuing the necessary course. The stock, however, not being capable of manual delivery, it was not necessary, nor possible, for the sheriff to take physical possession thereof. It was not necessary for him to disturb the actual possession of the pledgee of the certificates of stock. Such possession as was possible and as the law contemplates, was secured by the sheriff by virtue of compliance with the provisions of the statute and the Code. In this connection, we quote the language of Mr. Justice Dickey in *People ex rel. v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, 363, having under consideration a levy upon capital stock under execution:

"The property of a stockholder consists of his right to a share in the net assets of the corporation, proportionate to the number of shares to which he has title. He has not, personally, a right as such shareholder to the custody or manual possession of any part of such assets. The corporation has the custody of the whole, and holds possession of his share for him. His title is evidenced by his stock certificates. This title can be passed from him to another only by a transfer thereof upon the stock books of the corporation. The corporation holds possession of each share of each stockholder in whose name the stock stands on the books of the corporation. The possession of the corporation, as to the share of each stockholder, is, in one sense, the possession of the shareholder, and is the only possession which a shareholder can lawfully have, and is the only possession which any grantee of any shareholder can acquire; and such possession by a vendee of a shareholder can only be obtained by a transfer of the stock to him upon the books of the corporation. Until that transfer be made, the possession of the corporation is the possession of him in whose name the stock stands upon the books. The certificate of stock does not constitute property in the assets of the corporation. \* \* \* When the sheriff has exhibited his execution, and on demand has received from the corporation, by virtue of his execution, a certificate of the shares standing in the name of the execution debtor, from that moment the possession of the corporation becomes, in fact, the possession of the sheriff, or rather a possession for the sheriff, in whom the title to the stock, by virtue of such actual levy, is, for the time, invested. The sheriff, then, has all the possession which the shareholder had be-

fore the levy. By giving the certificate provided for, \* \* \* the corporation, in substance, agrees to hold possession for the sheriff," etc.

Under the joint provisions of the statute and the Code, it appears to us that an equity of redemption in corporate stock may be levied upon and sold under execution with like effect as an equity of redemption in real estate may be sold under execution, by compliance with the statutory requisites. The decisions of courts of different states are in hopeless conflict on this question, and citations thereto would be of slight benefit.

[6] 3. We do not regard the fact that, at the time the levy herein was made, the time for an appeal from the decision of the court in the *Gibbons v. O'Connor* suit had not lapsed, as important, in the absence of any contention or showing that an appeal had been taken or writ of error prosecuted which would operate as a supersedeas. The levy could take nothing that did not belong to Gibbons, the execution debtor. The assertion that, in view of the litigation, the questionable character and amount of Gibbons' interest in the pledged stock, and the possibility of an appeal or writ of error, would, in case of forced sale, result in a sacrifice of such interest because no one would buy may be, and doubtless is, persuasive, and, for some purposes, should be considered; but we think that fact is not conclusive of the right to sell.

[7] 4. Defendants in error complain of the levy and the return made by the sheriff on the execution, pointing out certain alleged defects therein. A careful scrutiny of the manner of the levy, including the garnishment proceedings, leads us to the conclusion that the provisions of the statute were substantially complied with, and that the return of the sheriff correctly recites the levy made by him. Long before *Bordeleau* purchased the stock from Gibbons, the sheriff had delivered to the president of the corporation a copy of the execution, with a certificate that pursuant thereto he levied upon and seized all the interest or shares in said corporation belonging to Gibbons, and in response to the sheriff's request, and the interrogatories in the garnishment writ, the president of the corporation had furnished the sheriff with certificates and affidavits stating the number of shares which the court had decided were held in trust by O'Connor for the use of Gibbons, and these, with the sheriff's return, when filed in court, recited accurately and in great detail all the pertinent facts concerning the stock. Whatever rights *Bordeleau* has in the stock, it must be considered, for the purpose of this hearing, he took with knowledge or notice of the levy.

[8] It is also urged that no notice was given Gibbons of the attempted levy upon the mining stock. We have no statute which in terms requires notice to the defendant in execution prior to levy of the writ. *Victor*

*Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 351. Failure to give notice of the levy to the execution debtor was not fatal.

[9] 5. It is further urged that the stock was in custodia legis, and therefore not subject to levy. We think it was not in custodia legis nor in gremio legis at the time of the levy, granting that it had been so situated prior to the decree. As we have heretofore said, all matters in issue as to the ownership of the stock were settled by the decree. That litigation was at an end. The duty of the court in respect thereto had been performed. Neither the court nor any officer thereof was in possession of the stock. The corporation was in possession of the shares for Gibbons and his pledgee. O'Connor was in possession of the certificates, but what interest he had in the stock was held by him in trust for Gibbons, although coupled with an interest in himself to the extent of the debt for which it was pledged. By virtue of the decree, the parties might have used the clerk of the court or its registry as a medium of exchange of the redemption fund for the certificates. They were not required to use either, and there is no evidence that they did. There is no conflict, and no apparent possibility of conflict, between the court having jurisdiction of the execution and the court that had exercised its jurisdiction in deciding the controversy as to the ownership of the stock. For that reason, the numerous authorities cited by the eminent counsel for defendants in error in his persuasive brief, involving conflicts between state courts and federal courts, or different state courts, are not controlling, if in point at all, in considering the question as to whether the property was in the custody of the law. It was said in *Joseph v. Boldridge*, 43 Mo. App. 333, at page 337:

"Goods are not in possession of the law, simply because there is some litigation touching their true ownership pending in the courts."

A fortiori it may be said that property is not in the custody of the law merely because there has been some litigation touching its ownership.

In deciding the questions discussed in this opinion, we have sought to avoid a decision on any matter that, by becoming the law of the case, may embarrass the court on a new hearing or trial of this or any other appropriate proceeding, in determining the relative rights of all parties interested in the stock the subject of this controversy. While we hold the levy valid, and that it seized any interest in the stock belonging to Gibbons, the execution debtor, we do not decide what that interest was, nor what interest *Bordeleau* acquired by his bill of sale. Prima facie that instrument is an absolute transfer of the stock. It may, in fact, be a mere pledge, as was the bill of sale from Gibbons to O'Connor. Counsel, we think, suggest that such is or may be its true character, and,



if so, it is conceivable that Bordelean may be substituted for or take the same position as O'Connor with regard to the stock, and for that reason, or some other equitable reason, be entitled to priority over the lien of the execution creditor, to the extent of his investment. We gather from the briefs that at some time subsequent to the levy that investment was approximately \$5,000, but there is no proof that he paid anything. The condition of the record is such that we feel constrained, in reversing the judgment, to remand the cause in such form that the property rights of all the parties may be determined upon their merits and after a full hearing.

Judgment reversed, and cause remanded for further proceedings in conformity with the views herein expressed. The district court is directed to vacate the order quashing the levy.

Reversed and remanded.

(50 Mont. 122)

**WALL v. NORTHERN PAC. RY. CO.**  
(No. 3439.)

(Supreme Court of Montana. Dec. 18, 1914.)

**1. CARRIERS (§ 227\*)—TRANSPORTATION OF ANIMALS—ACTION—VARIANCE.**

Where plaintiff sued for breach of a carrier's common-law duty to transport stock without delay, proof that the stock was transported under contract did not constitute a fatal variance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. § 227.\*]

**2. CARRIERS (§ 218\*)—LIABILITY—LIMITATION—SPECIAL CONTRACT.**

A carrier by special contract may limit its common-law liability provided the terms of the contract are reasonable; the question of reasonableness depending on the facts and circumstances of the particular case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**3. CARRIERS (§ 218\*) — TRANSPORTATION OF ANIMALS — CONTRACT — REASONABLENESS — NOTICE.**

Where a carrier contracted to transport stock to a point beyond its own line, a provision that the shipper, as a condition precedent to his right to recover any damages for loss or injury to any of the stock, must give notice of his claim in writing to some officer or station agent of the company before the stock had been removed from the place of destination or mingled with other stock, was void for unreasonableness, in the absence of proof that the initial carrier had an officer or agent at the place of destination to whom such notice might be given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

**4. CARRIERS (§ 230\*)—LIVE STOCK—DELAY—INSTRUCTIONS.**

In an action against a carrier for delay in transporting cattle, the court charged that the burden was on plaintiff to prove defendant's negligence resulting in the damage claimed, then charged that proof of unusual delays alone was not sufficient to establish negligence, and imposed on the carrier the duty of exercising reasonable diligence in its business and to complete

the journey within a reasonable time, declaring that, if it did not do so and the stock was injured by the delay, the carrier would be liable, and that whether a given time was or was not reasonable was a question of fact for the jury under all circumstances of the case. *Held*, that such instructions should be construed together, and as so construed were not in conflict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 961, 962; Dec. Dig. § 230.\*]

**5. CARRIERS (§ 228\*) — TRANSPORTATION OF STOCK — DELAY — NEGLIGENCE — BURDEN OF PROOF—PRIMA FACIE CASE.**

Where plaintiff proved that defendant consumed substantially 13 days in transporting his cattle over a route which usually consumed only 6 or 7 days and that the cattle were injured thereby, plaintiff established a prima facie case that the delay was due to the carrier's negligence, and was not bound to show that each delay along the route was the result of specific negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

Appeal from District Court, Gallatin County; B. B. Law, Judge.

Action by R. P. Wall, as administrator of the estate of R. J. Wall, deceased, against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hartman & Hartman, of Bozeman, and Gunn, Rasch & Hall, of Helena, for appellant. Walter Aitken, of Belgrade, for respondent.

**HOLLOWAY, J.** On January 2, 1912, R. J. Wall shipped four car loads of beef cattle from Belgrade, Mont., to the Chicago market over the Northern Pacific Railway as the initial carrier. The shipment did not reach its destination until January 15th, and this action was instituted to recover damages which it is alleged resulted from unreasonable delays due to the railway company's negligence. From the judgment in favor of plaintiff and from an order denying it a new trial, the defendant appealed.

[1] The complaint counts upon the carrier's common-law liability. The answer sets forth a special contract under which, it is alleged, the shipment was made, and the execution of this contract is admitted by the reply. Appellant insists that the plaintiff was bound by the special contract; that he cannot sue for a breach of the carrier's common-law duty; and that, by pleading a tort and proving a breach of the contract, a fatal variance resulted. The precise question was presented fully, considered at great length, and determined adversely to appellant, in *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642. A review of that decision confirms us in its correctness, and further discussion would be of no avail.

Paragraph 6 of the contract pleaded provides:

"(6) The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim there-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rev'r Indexes

for to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

[2] In a few instances, provisions similar to this have been held to be in the nature of statutes of limitations; but the decided weight of authority holds, and the better reason is, that their effect is simply to limit the carrier's common-law liability. That a common carrier may by special contract limit the liability which it would otherwise incur, provided the terms of the special agreement are reasonable, was recognized in the Nelson Case and is the generally accepted doctrine in this country. 4 Rul. Case Law, §§ 230, 253. Whether such special contract is or is not valid depends upon its reasonableness; and this question is always referable for solution to the facts and circumstances of the particular case. *Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

[3] At the time the contract in question was executed at Belgrade, the shipper and agent for the carrier understood that the line of the Northern Pacific Company did not extend to Chicago, and that from the Minnesota transfer, near St. Paul, to Chicago, the stock would go forward over another line, the Chicago, Burlington & Quincy, which was designated in the contract as the connecting carrier. Notice of this claim was given on January 25th, but in the answer it is alleged that such notice was not given until long after the cattle in question had been removed from the place of destination and mingled with other stock, and this is admitted by the reply. If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington Road would not have been effective for any purpose. The company mentioned in paragraph 6 is defined by the preamble to the contract to mean the "Northern Pacific Railway Company." Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle at the Union Stockyards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and, if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings or

the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed postpaid at Chicago, would have sufficed for a literal compliance with the terms of this provision. But, in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the stockyards until the notice had been received and a reasonable time for inspection had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle, would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact.

If the carrier was negligent, resulting in unreasonable delay in the shipment and consequent damage, plaintiff's cause of action for a breach of common-law duty was complete without reference to notice. To escape liability, the burden was upon the carrier to plead and prove such a special contract as would effect a modification of the duty imposed by the common law. In the Nelson Case, Mr. Commissioner Poorman, voicing the opinion of the court, said:

"The effect of the special contract is therefore merely to create and define certain cases and conditions under which its full common-law liability shall not attach. The special contract is the evidence of such exception, and, to the extent to which it is valid, constitutes a defense, and as such must therefore be pleaded as a defense; the burden of proof resting on the defendant to establish it."

The validity of paragraph 6 above depends upon its reasonableness, and it was therefore incumbent upon the carrier to show that it was relieved by the provision of a contract valid; in this instance reasonable. *Houtz v. Union Pac. R. Co.*, 33 Utah, 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628, and note.

In *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574, there was presented a case in all particulars identical with the one before us, and the court there said:

"If a carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in

which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding, and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given and an inspection, if desired, speedily made, then a contract requiring notice to be given to any officer or agent of the carrier is not reasonable in its character."

To the same effect is *Baxter v. L. N. A. & C. R. Co.*, 165 Ill. 78, 45 N. E. 1003.

Our conclusion is that this provision of the special contract, in the absence of any showing that it was reasonable, was not binding upon the shipper, and this disposes of all other related questions.

[4] By instruction 4 the trial court imposed upon the plaintiff the burden of proving negligence on the part of the defendant which resulted in the damages claimed. By instruction 10 the jury were informed that proof of unusual delays alone was not sufficient to establish negligence. By instruction 23 the court declared that the law imposes upon the carrier the duty of exercising reasonable diligence in its business and to complete the journey within a reasonable time, "and, if he does not do so, and the stock is injured by the delay, the carrier will be liable." The court then told the jury that whether a given time was or was not reasonable was a question of fact to be determined by the jury from all the circumstances of the case as presented by the evidence. There is not any conflict in these instructions. They are to be construed together. No. 4 fixes the burden of proof. No. 10 warns the jury as to the quantum of proof required, and No. 23 does nothing more than refer the question of reasonableness, under the circumstances of the given case, to the jury for determination upon the evidence before them.

There is not any conflict between instruction 4, which fixes the burden of proof, and No. 24, which directs the jury how that burden may be met. Neither are we able to agree with counsel for appellant that instruction No. 24 is inherently erroneous. An instruction in all essentials identical with it was approved by the court in the *Nelson Case*.

[5] Appellant contends most earnestly that plaintiff failed to show that the delays in the course of transportation were chargeable to the carrier's negligence. No useful purpose would be served by reviewing the evidence at length; we content ourselves with saying we think the evidence in its entirety sufficient to sustain the verdict. If counsel for appellant mean that plaintiff did not show the cause of every delay and thereby

demonstrate that the delays resulted from negligence, then we agree with them; but we do not assent to the doctrine that plaintiff assumed any such burden. The movements of the train were under the exclusive management and control of the carrier, and the facts which caused the train to be delayed were peculiarly within the knowledge of the officers and agents of the railway company. As was pertinently remarked by the Supreme Court of Washington, in *Jolliffe v. Northern Pacific Ry. Co.*, 52 Wash. 433, 100 Pac. 977:

"A car may be sidetracked and delayed for one hour, or for twenty-four hours, by order of the train dispatcher, or somebody in authority hundreds of miles away, for a necessity which is apparent to him; and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is sidetracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to him. This court and other courts have frequently said that, where it is necessary to make a character of proof, which by reason of the circumstances surrounding the case is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof."

See, also, note to *Cleve v. Chicago, B. & Q. Ry. Co.*, 15 Ann. Cas. 33.

To impose upon the shipper the burden of ascertaining the cause of every delay in the transportation of his property and refuse relief in the absence of such proof would be tantamount to denying any right of action for damages resulting from negligent delays in transportation. Whatever may be said of the trial court's instruction No. 10, when the plaintiff showed that the carrier consumed substantially thirteen days in delivering his stock in Chicago, over a route which usually consumes only six or seven days, he met the burden imposed upon him to make out a prima facie case, and called upon the defendant for explanation, as the party possessing knowledge of the facts which occasioned the delays.

In *Nelson v. Chicago, B. & Q. Ry. Co.*, 78 Neb. 57, 110 N. W. 741, the court said:

"While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of live stock or other freight, yet, where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence."

In *Bosley v. Baltimore & O. R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871, the court quoted with approval from 5 Am. & Eng. Enc. Law (2d Ed.) 254, as follows:

"It seems, however, that on proof of a delay in delivery a prima facie case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by the shipper."

In *Johnson v. New York, N. H. & H. R. R.*, 111 Me. 263, 88 Atl. 988, the court said:

"If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries; the time occupied being 53 hours instead of 24 hours or less, the ordinary time. It is so far sufficient that it puts the onus of explanation on the defendant."

In 4 *Elliott on Railroads* (2d Ed.) § 1583, the rule is stated as follows:

"The fact that there was unusual delay does not always show a breach of duty. \* \* \* The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable; but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury, under proper instructions. Where the delay is an unusual one, and is not explained, it is held to be prima facie evidence of negligence, but that, in a case where there is only a slight delay, the rule is different." *Tiller & Smith v. Chicago, B. & Q. Ry. Co.* (Iowa) 112 N. W. 631; 6 Cyc. 506.

In justice to appellant's contention, it must be conceded that the authorities are by no means unanimous in supporting the rule as we have announced it, as a reference to 4 *Rul. Case Law*, § 464, and other texts, will demonstrate; but, without reference to the weight of authority numerically considered, we have adopted the rule which in our judgment is most reasonable and imposes the least hardship.

It is insisted by counsel for appellant that, even if it be held that plaintiff made out a prima facie case, it was completely overcome by the testimony of defendant in explanation of the delays. To give even a brief epitome of the testimony of defendant's 23 witnesses would extend this opinion needlessly. In our judgment, instead of fully exonerating the carrier, the evidence produced by it materially aided plaintiff's case.

We do not find any error in the record prejudicial to a substantial right of appellant, and direct that the judgment and order be affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(26 Idaho, 616)

### RISCHAR v. SHIELDS et ux.

(Supreme Court of Idaho. Dec. 23, 1914.)

#### 1. QUIETING TITLE (§ 15\*)—VENDOR AND PURCHASER (§ 339\*)—DEFENSE—DEFECT IN TITLE.

*Held*, that the complaint states a cause of action, and that the allegations and denials contained in the amended answer and cross-complaint contain no defense to the action.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 47; Dec. Dig. § 15;\* *Vendor and Purchaser*, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

#### 2. QUIETING TITLE (§ 15\*)—VENDOR AND PURCHASER (§ 339\*)—DEFENSE—DEFECT IN TITLE.

Where S. and wife contract to purchase certain land from R., and to pay the purchase price in installments at certain dates, and also agree to pay the taxes and assessments levied against said land, and time is expressly made of the essence of the contract, and S. and wife fail to make the payments as provided by the contract, and R. serves notice of forfeiture after a default in the payments, it is no defense to an action to quiet title and to recover possession of the premises for the defendants to allege a defect in title and ask to have the money paid returned to them, and the vendor may rescind the contract for the failure to pay any of the installments preceding the last without tender of the deed, since the payment of the last installment and the delivery of the deed are mutual, concurrent, and dependent obligations.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 47; Dec. Dig. § 15;\* *Vendor and Purchaser*, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.\*]

#### 3. PLEADING (§ 345\*)—JUDGMENT ON PLEADINGS.

*Held*, that the court did not err in entering judgment on the pleadings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by Marie D. Rischar against W. W. Shields and wife to quiet title and regain possession of certain real estate. From judgment for plaintiff, defendants appeal. Affirmed.

James H. Frazier, of Cœur d'Alene, for appellants. C. H. Potts, of Cœur d'Alene, for respondent.

SULLIVAN, C. J. This action was brought by the respondent to quiet her title to a certain lot situated in or near Cœur d'Alene City and to recover possession thereof. A demurrer to the complaint was filed, and overruled by the court. Thereafter an answer, an amended answer, and a cross-complaint were filed, and a motion to strike the amended answer and counterclaim and for judgment on the pleadings was made by the respondent, which was granted by the court. A motion was also made to amend the answer, which was denied by the court, and judgment was entered in favor of the plaintiff for the possession of said lot and quieting her title thereto. The appeal is from the judgment and from the order denying the defendant's motion to amend the answer.

The following facts appear from the record: On April 28, 1911, the plaintiff and defendants entered into a contract whereby the plaintiff agreed to sell, and the defendants agreed to purchase, the tract of land in controversy. The defendants agreed to pay to the plaintiff \$4,000 for said land as follows: Five hundred dollars on the execution of the contract (which was paid); \$1,500 on the 1st of May, 1911; and \$2,000 on the 1st of May, 1914, with interest at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the rate of 7 per cent. per annum, payable semiannually—and to pay all taxes and assessments that might be legally levied against said land, and in case of failure by the defendants to make either payment, or any part thereof, or to perform any of the covenants by them to be performed, the contract, at the option of the plaintiff, might be forfeited, and the defendants should forfeit all payments made on the contract, and such payments might be retained by the plaintiff in full satisfaction and liquidation of the damages sustained by her, and she should have a right to enter into the possession of the premises in case of the default in making such payments. The plaintiff agreed to furnish a complete abstract of title to the defendant, and convey said lot clear of all incumbrances by good and sufficient warranty deed, upon the completion of said contract. It was mutually agreed that the time of making the payments was of the essence of the contract. The defendants did not make the \$1,500 payment agreed to be made on the 1st of May, 1911, but thereafter paid \$1,000 on said payment, and the defendants failed to pay the taxes legally levied on said premises for the years 1911, 1912, and 1913, and failed and refused to make any other payments on the purchase price of said land. On December 13, 1913, the plaintiff notified the defendants in writing that she intended to declare said agreement and contract forfeited and ended on January 1, 1914, unless they should comply with the terms of said contract and make the payments due for said land on or before January 1, 1914. Defendants neglected and refused to make such payments and thereafter in March, 1914, this action was brought.

The assignments of error are to the effect that the court erred in overruling the demurrer to the complaint, and in sustaining the plaintiff's motion to strike the answer and affirmative defense, and denying the defendant's right to amend their answer and affirmative defense.

[1-3] On an examination of the complaint we find that it states a cause of action, and the court therefore did not err in overruling the demurrer to the complaint. As above stated, this action was based on a contract for the purchase of real estate, by the terms of which, if the appellants failed to make the payments as stipulated, and to pay all taxes and assessments against said land, the plaintiff was authorized to declare a forfeiture of the contract, and time was made of the essence of said contract. By the answer and cross-complaint of the defendants, they admitted that they entered into said contract; that they had failed and neglected to make the payments as stipulated, but undertook to justify such failure by alleging that the plaintiff did not have title to a part of said lot, and hence could not convey it to them by warranty deed as she

had agreed to do, and could not furnish them an abstract of title showing a clear title in her. By their cross-complaint they sought to recover back the amount of money paid and a further sum by reason of the removal of certain electrical fixtures.

Under a well-established rule of law the allegations contained in said amended answer and cross-complaint were no defense to this action. The defendants ought to have tendered a compliance on their part with the provisions of said contract. They ought to have tendered the purchase price as stipulated, and then, if the plaintiff failed to produce an abstract of title showing a clear title and a warranty deed, as provided in the contract, they would have been in a position to recover back whatever damages they had sustained by reason of the plaintiff's failure or inability to comply on her part with its provisions. The vendees could not retain possession of said land and refuse and neglect to pay the price when due, or offer to pay it, since the failure of title would not give them the right to continue in possession, and also the right to recover back the payments made on the land. In *Brentnall v. Marshall*, 10 Kan. App. 488, 63 Pac. 93, it was held that where payments are to be made in installments, and deed given on the payment of the last installment, the vendor may rescind for failure to pay any of the installments preceding the last without tender of a deed. A similar case is that of *Voight v. Fidelity Inv. Co.*, 49 Wash. 612, 96 Pac. 162, wherein it was held that the covenant to pay the first installment and the covenant to convey were not concurrent; hence a forfeiture of the contract for the nonpayment of the installment might be made without tendering a deed. It is only the payment of the last installment and the delivery of the deed that are mutual, concurrent, and dependent obligations. *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455. To the same effect is *Reese v. Westfield*, 56 Wash. 416, 105 Pac. 837, 28 L. R. A. (N. S.) 956.

In the case at bar there was a written notice of intention to declare a forfeiture given to the defendants, and more than a month given to them to make payment and defeat the proposed forfeiture. Under that state of facts, and under the terms of the contract of sale, the defense set up in the answer and cross-complaint is no defense, since the payment of the last installment and the delivery of the deed and abstract were mutual, concurrent, and dependent obligations, and in case the plaintiff failed to produce the proper abstract and the deed, upon the tender of the last payment, then the defendants would have placed themselves in a position to demand and recover damages they had sustained by reason of such failure on the part of the plaintiff.

In this view of the case, it is not neces-

sary to pass specifically upon the question of whether the court erred in striking out the amended answer and cross-complaint, since the defendants could not recover from the plaintiff until she had defaulted in some of her covenants embodied in said contract.

The judgment of the trial court must therefore be affirmed; and it is so ordered, with costs in favor of the respondent.

TRUITT and BUDGE, JJ., concur.

(45 Utah, 295)

**SHEPHERD v. DENVER & R. G. R. CO.**  
(No. 2607.)

(Supreme Court of Utah. Dec. 1, 1914. On Application for Rehearing, Jan. 6, 1915.)

**1. APPEAL AND ERROR (§ 231\*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—SUFFICIENCY.**

Objections that testimony as to the contents of an account book was irrelevant, incompetent, and immaterial, and wholly collateral and hearsay as to plaintiff, were sufficiently specific to entitle plaintiff to a review of the ruling admitting the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

**2. WITNESSES (§ 405\*)—IMPEACHMENT—IMMATERIAL MATTERS.**

Where a witness, having testified to his presence at the place of the accident, stated on cross-examination that he was at that time hauling lumber to another town which he delivered the next day, the fact whether the witness delivered lumber is material, and he may be contradicted and impeached on that matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.\*]

**3. WITNESSES (§ 406\*)—IMPEACHING EVIDENCE—ACCOUNT BOOKS—ADMISSIBILITY—HEARSAY.**

In an action by one injured by a train, where a witness accounted for his presence at the place of the accident by stating that he was hauling a load of lumber which was delivered at a store the next day, the manager of the store cannot testify that its books showed no delivery of lumber by the witness at that time; for the books which related to transactions between third persons, were *res inter alios acta* and hearsay, and the manager by testifying to their contents was not merely refreshing his memory, but was putting the books in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.\*]

**4. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.**

The erroneous admission of testimony as to the contents of an account book, offered to contradict the explanation of plaintiff's witness as to why he was at the place of the accident, is prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

On Application for Rehearing.

**5. EVIDENCE (§ 354\*)—ACCOUNT BOOKS—ADMISSIBILITY.**

Entries made in a record book or document by one in the ordinary course of his business, employment, or profession, having personal knowledge of the fact, may be received in evidence, where the entrant is dead, insane, be-

yond the jurisdiction of the court, or, if living, is unable to recall the facts, or refresh his memory by referring to the books, although able to testify as to the authenticity of the entries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.\*]

McCarty, C. J., dissenting.

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by Joseph G. Shepherd against the Denver & Rio Grande Railroad Company, a corporation. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. A. Walton, of Salt Lake City, for appellant. Van Cott, Allison & Riter, of Salt Lake City, for respondent.

STRAUP, J. The plaintiff brought this action to recover damages for the loss of a leg. In the complaint it is alleged that he was in the defendant's employ as a laborer shoveling cinders in its yards at Thistle, and in the performance of his work was required to be on the track between the rails; and that the defendant, without observing a lookout or giving warning, ran over him with one of its engines. The defendant answering admitted the injuries on the day alleged, the 5th of January, 1911, denied the charged negligence, and pleaded contributory negligence and assumption of risk. The case was tried to the court and a jury, and resulted in a verdict in favor of the defendant. The plaintiff appeals.

The principal assignment relates to the admission of certain evidence over the plaintiff's objections. The bill recites that evidence on behalf of plaintiff was given to support the allegations of his complaint, and on behalf of the defendant to disprove them; and that a verdict either in favor of the defendant or the plaintiff would be supported by evidence. There is no dispute that the plaintiff, while working on the track in the defendant's yards at Thistle, was injured on the 5th day of January, 1911, by an engine operated or pushed against him. In that respect the bill recites that the plaintiff adduced evidence tending to show that the engine in the yard, without notice or signal, was operated towards him, who, at work on the track, did not see the approaching engine because of a dead engine between him and the approaching engine; and that the approaching engine was operated against the dead engine, causing it to be pushed or moved against him. The defendant adduced evidence tending to show that two engines coupled together were moved along the track in the yard in clear view of the plaintiff for 500 feet or more, and that timely signals and warnings were given of their approach, and that it was not, but the plaintiff was, negligent.

The plaintiff called as a witness in his be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

half one Ralph Lewis, who testified that he was acquainted with the yards at Thistle, and while traveling from his ranch to Spanish Fork with a load of lumber, and passing through Thistle, witnessed the accident about 75 feet away. He testified that two engines coupled together were, without warning or signals, operated against a third engine, which was pushed against the plaintiff and injured him. On cross-examination he testified that he was taking the lumber to Spanish Fork, a town beyond Thistle, and reached Spanish Fork on the night of the day of the accident and there made delivery of the lumber the next morning to the Farmers' Co-op store, and was given credit for it. He further testified that one Joseph Hanson was the owner of the Co-op, and that he did the business with him.

The defendant called Joseph Hanson, who testified that he was the manager of the Co-op store and that the witness Ralph Lewis had had an account at the store. Then he was asked by counsel for defendant:

"Q. Have you the books with you that show his account A. Yes, sir. Q. Will you turn to his account, please? (Witness opened book.) When did he open up his account with you? (That was objected to by counsel for plaintiff as 'irrelevant, incompetent, and immaterial; wholly collateral, and hearsay as to this plaintiff.') Counsel for Defendant: If these books, your honor—the witness testified with respect to a load of lumber that was delivered, and that he had an account there and got credit for it. Counsel for Plaintiff: We submit that it is immaterial and entirely collateral—collateral issues—if he took his answer on immaterial matter on cross-examination. Counsel for Defendant: But it was not an immaterial matter; it was of vital importance. (The objection was overruled, to which the plaintiff excepted.) The witness answered: His account was opened up February 23, 1911, on the books—his individual account. Q. That was the beginning of his account? A. Yes, sir. Q. Now, do your records disclose any credits that the Farmers' Co-op gave him for any load of lumber? A. Yes, sir. Q. On what date? Counsel for Plaintiff: Now, that is objected to as irrelevant, incompetent, and immaterial. The Court: I think that would be incompetent, probably. I don't see on what theory you would be able to get that in. Counsel for Defendant: The witness testified that on January 4th (5th) he came down the canyon with a load of lumber, and he said that on the very next day he made delivery of that load of lumber."

Here, on the settlement of the bill, a controversy arose between counsel as to a statement or remark made by counsel for plaintiff. As shown by the transcript of the official reporter, what counsel said was, "I shall withdraw the objection." Counsel for plaintiff, however, urged, at the settlement, that his remarks were not correctly reported, and that what he in fact said was, "I still insist on the objection," but that the objection was overruled, to which ruling he excepted. The court, in such particular, settled the bill as shown by the reporter's transcript, but at the same time, and in that connection, put in the bill this statement by the court:

"I feel very confident that counsel for plaintiff protected himself in the matter of the in-

troduction of that testimony. While I could not remember it as to the specific questions and answers, that matter was in my mind all the way along there that he was strenuously objecting to that contradicting testimony. I thought at that time it was proper to be admitted. I think now that it should have been admitted, or else I should have granted a new trial on the theory that that evidence had been admitted over the objection of counsel for plaintiff. I understood all through and in the matter of the argument for a new trial that counsel for plaintiff had saved the record on the introduction of that testimony."

Recurring to the further examination of the witness Hanson with the books, counsel for defendant further asked him:

"Q. Now, the question was, on what date were any credits given him (the witness Ralph Lewis) for a load of lumber? A. The first credit we have here, or, at least, one credit we have, is May 15, 1911, 'By lumber, \$19.53.' Q. And do your records disclose how much lumber? A. No, sir. Just the amount of dollars and cents he got for his lumber."

The witness further testified that when a load of lumber was delivered credit slips in duplicate were made, one given to the customer and one retained by the store, "and every morning they were copied on the day-book, and from the daybook onto the ledger." On cross-examination he was asked:

"Q. The books you have here are merely ledgers? A. Yes, sir; they are ledgers. Q. And the course of your business, I assume, was to have some other book of original entry? A. Yes, sir. Q. What do you call it? Daybook? A. Yes, sir. Q. And before that entry there would be a slip? A. Yes, sir. They should all correspond in dates."

In response to further questions on cross-examination, the witness testified that Ralph Lewis had no individual account prior to February 23, 1911, but that Lewis Bros. had an account covering January 4, 1911, and that there was a balance due them on January 3, 1911, and that they had an account with them in December, 1910. He was further asked on cross-examination:

"Q. Do you remember whether or not he (Ralph Lewis) delivered some lumber to you on any account, or delivered lumber to you in January, 1911. A. No, I don't remember. He might brought lumber, and might not have brought lumber. There was several loads of lumber came in with different boys, and it is two years ago, and I don't try to remember those things, because we keep track of them on our books."

On redirect the witness was asked:

"Now, will you be good enough to look at the account of Lewis Bros., which you said was in December, 1910? A. Yes, sir. Q. Is that account credited with any lumber, and, if so, what? A. There is a little credit in December, 1910. Q. Now, turn to the Lewis Bros. account in the other book, if you please. A. The two Lewis Bros.? Q. Yes. (Witness opens book.) Is the account that you are now looking at the one subsequent to December, 1910? A. Yes, sir; that is carried from this book into this one. That is a corresponding chain of accounts. There is a \$62.82 credit to Lewis Bros. Q. Did you carry the account from this book into the one that you have in your hands? A. Yes, sir. Q. On what date does the credit appear there? A. It appears January 3d, when it was transferred. Q. And when did you balance up this account? A. It was

balanced on January 3d. Q. Confine your attention to this account. Will you please examine it and tell me whether there were any credits for lumber, and, if so, when? Counsel for Plaintiff: I object to that as incompetent, hearsay, irrelevant, and immaterial. This book is not competent as against the plaintiff in this case. It is between other parties. Counsel for Defendant: But this is redirect examination of the matter which you went into on your cross-examination. Counsel for Plaintiff: I submit it. (The objection was overruled and an exception noted.) Counsel for the Defendant (proceeding with the witness): Q. I am referring now to the account which begins January 3, 1911, which you say is a continuation of the other one. A. You ask for all the credits? Q. No, merely the credits for any lumber, all the lumber credits. A. (Witness looking at the book.) We have one July 7, 1911; July 18th, \$41.83; July 28th, \$13.99; August 28th by lumber. That is the last credit of lumber to the Lewis Bros."

Thus, it is made to appear that the defendant was permitted, by the account books of the Farmers' Co-op store—books of a third party showing accounts of transactions between him and another, both strangers to both litigants—to contradict and disprove the testimony of plaintiff's witness that he, on the morning after the accident, delivered to the Co-op store a load of lumber and was given credit for it. It is urged by plaintiff that this was improper: (1) Because the witness was permitted to be contradicted and impeached on a wholly collateral and immaterial matter; and (2) that, though it was proper to so contradict and impeach him, the evidence by which the contradiction and impeachment was permitted was incompetent for two reasons (a) the books themselves were *res inter alios acta* and hearsay; and (b) were not books of original entry. The plaintiff, however, is not entitled to a review of the ruling on the last alleged ground (b), because no such objection was made to the offer in the court below.

[1] It is contended by the respondent that no sufficient and proper objections were made to the offer and admission of the evidence on the other alleged grounds. The bill as settled shows a record somewhat uncertain as to whether an objection was made to the particular question asked the witness Hanson heretofore referred to; that is, though made, whether it was not withdrawn. But even as to that, the court certifies to us that counsel for plaintiff strenuously objected to "that contradicting testimony," and that the court felt confident that he had protected himself and saved the record in such particular. However, independently of that, we think the record shows sufficient and proper objections to the evidence and exceptions to the rulings complained of. At the very threshold, when the witness Hanson was called to the stand with the books of the Co-op store and was asked to turn to the account of the witness Ralph Lewis, and upon opening the book was asked to state when Ralph Lewis opened his account with the store, plaintiff's counsel objected, upon the grounds that the

evidence sought was "irrelevant, incompetent, immaterial, and wholly collateral, and hearsay as to this plaintiff," and when the witness Hanson's attention was called to the account beginning January 3, 1911, and was asked to examine it and to state whether there was any credit for lumber, and if so to state when it was, further objections were made on the grounds that the testimony called for was "incompetent, hearsay, irrelevant, and immaterial" and that "this book is not competent as against the plaintiff in this case." We think therefore the record discloses sufficient objections upon the grounds, not only that the testimony related to collateral and immaterial matters, but also that it was hearsay and incompetent; and that the objections were sufficiently specific to call attention of the court and counsel to the grounds upon which it was claimed the proffered evidence was objectionable and to entitle plaintiff to a review of the rulings in such particular.

[2] Counsel do not dispute the familiar rule that a witness may not be contradicted or impeached on collateral, immaterial, or irrelevant matters; and that his answers, as to such matters drawn out on cross-examination, are generally conclusive on the cross-examining party, except such as bear on the recollection of the witness, or tend to show a state of feeling or bias, or source of knowledge, or interest in the litigation, or relation to the parties. The further well-known rule is also conceded that the test of whether the matter is collateral or not is whether the party seeking to introduce the evidence for the purpose of contradiction or impeachment would be entitled to prove it as a part of his case, or otherwise to prove the fact in his behalf. Now, measured by this test, appellant asserts that, since the exact time and place of the accident were wholly without dispute, the answer of the witness on cross-examination that he, the next morning after the accident, delivered a load of lumber to the Co-op store at Spanish Fork, was testimony respecting a wholly collateral and immaterial matter; and, though it was proper cross-examination, the answer of the witness was nevertheless conclusive on the cross-examining party. At first blush that may seem plausible, but, on reflection, we are of the opinion that the fact of whether the witness delivered lumber at the store at Spanish Fork, as testified to by him, had some relation to the circumstance of his presence at the accident. The witness testified that he passed the place of the accident with a load of lumber, witnessed the accident, and then drove from there with the lumber to Spanish Fork, arriving there in the evening, and made delivery of the lumber the next morning; and, when asked when he drew his pay, stated he was given credit for the lumber. Now, the fact that he did not deliver the lumber the next morning at the store as testified to by him, and made no delivery of lumber



until some time thereafter, tended to discredit the statement of the witness that he had a load of lumber with him at the time of the accident; and that tended to discredit the statement that he was at the place of the accident and witnessed it. A case, as we think, in point is *East Tennessee, V. & G. R. R. Co. v. Daniel*, 91 Ga. 768, 18 S. E. 22. The syllabus reflects the point decided. It is:

"Where a witness, by way of accounting for his presence at the scene of the killing of an animal, states that immediately before going there he made a particular purchase at a certain store, evidence is admissible, in behalf of the opposite party, showing or tending to show that he made no such purchase on the occasion referred to. While this fact is not directly material on the circumstances of the killing, it is indirectly material, because it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence."

The following, on principle, are to the same effect: *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292; *Boche v. State*, 84 Neb. 845, 122 N. W. 72; *M., K. & T. Ry. Co. v. Milam*, 20 Tex. Civ. App. 688, 50 S. W. 417.

We are therefore of the opinion that the defendant, to impeach and contradict the witness, was entitled to prove the fact that he did not deliver the lumber at the Co-op store as testified to by him the next morning after the accident, and to show when, if at all, he made delivery of lumber at the store.

[3] The serious question is as to the competency of the evidence by which the defendant was permitted to prove such fact. It was entitled to prove it by any witness who had knowledge of the fact, but not by hearsay evidence. The defendant was permitted to prove it by entries in the account books of the Co-op store, books of a third party showing accounts of transactions between him and plaintiff's witness both strangers to both litigants. It did not attempt nor offer to prove it any other manner. While the defendant did not offer nor put the books themselves in evidence, yet it called the witness Hanson, the manager of the store, identified the books by him, required him to take and open them and to turn to and examine the accounts between the witness Ralph Lewis and the Co-op store, and to then state what the entries, as shown by the books, indicated respecting the delivery of lumber by Lewis and the credits given him therefor. Nowhere was the witness Hanson asked to testify, nor did he testify, as to the fact of whether the witness Ralph Lewis delivered lumber to the store, and, if so, when such delivery was made. All that he was asked to state, and all that he did state, was what the books in such particular themselves showed. We think, as between the plaintiff and the defendant, the account books of the Co-op store, books showing accounts of transactions between parties both of whom were strangers to both litigants, were *res inter alios acta* and hearsay and not admissible. 2 Ency. Ev. 667, and numerous cases there referred to;

3 Jones, Coms. on Ev. § 574, and cases. To permit a witness, as was done, to state what the books themselves showed—a witness to take them, turn to them, examine the accounts between the plaintiff's witness and the Co-op store, and to state what they showed and indicated with respect to the delivery of lumber by Ralph Lewis and the credits given him therefor—was equally hearsay and inadmissible. Thus, the fact that lumber was not delivered by the plaintiff's witness to the Co-op store the next morning after the accident, as testified to by him, and that no delivery of lumber was made by him until some time thereafter, was not proven by the testimony of the witness Hanson, nor by any evidence, except by the books of the Co-op store. We think that was error.

It is claimed, however, that the rule as stated is not "inflexible," in support of which references are made where entries in books of strangers, used to refresh or aid the memory of a witness, or entries made in regular or due course of business, were admitted. The rule admitting books of account as primary and independent evidence of the facts therein recited, as was here done, is one thing. The rule permitting a witness to refresh or aid memory by referring to entries in books of account, or other books, documents, writings, or memoranda, is another and wholly different thing. When the memory of a witness may be refreshed, and the circumstances or conditions under which the book, document, or memorandum used for that purpose may then be put in evidence, not as primary and independent evidence of the facts therein recited but in connection with the testimony of the witness, is stated and illustrated in 11 Ency. Ev. under the heading "Refreshing Memory," especially on pages 95, 136, 137, and 142. The familiar rule as there stated clearly shows that no sufficient or any foundation was here laid to permit the books to go, nor were they offered or received, in evidence on any such theory, or for any such purpose. The record shows that the witness testifying to the contents of the books was not asked to refresh, nor did he aid, his memory by referring to the books; nor did he give any testimony concerning the delivery of lumber by plaintiff's witness, nor as to credits given him, except to identify the books and to state their contents to the jury. So is the distinction between books of account, and entries made in regular and due course of business, marked and well settled. 5 Ency. Ev. 255. They both are exceptions to the hearsay rule. The misapplication of the one cannot be excused or vindicated by pointing to the other. So, of course, may a witness, who testified having made or seen, or otherwise testified concerning, an entry or statement in a book or instrument, be contradicted by the book or instrument itself, in which case it matters not whether the book or instrument be that of one of the parties, or of another. But

the question in hand is not that, nor when books may be used to refresh or aid memory and then be put in evidence, or when entries made in due or regular course of business are admissible; but when may entries in books of account, not referred to or used to refresh or aid memory, be put in evidence as primary and independent evidence of the facts so entered and recited? We think they are inadmissible for such purpose, and hearsay, when they are, as they were here, entries in books of account of a third person of transactions or accounts between him and others not parties to the litigation. We do not find the authorities discordant as to this. To regard the rule as here inapplicable is, we think, to disregard the basic principles upon which the shop-book rule rests, and to unsettle long and well-established rules of evidence.

[4] We are also of the opinion that the ruling was prejudicial. *East Tenn., V. & G. R. R. Co. v. Daniel*, supra; *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100. As is contended for by the defendant, and as we hold, the fact as to whether the plaintiff's witness delivered lumber to the Co-op store as testified to by him was material; the defendant says, "of vital importance." But, as has been seen, the only evidence by which the defendant disproved or contradicted that testimony was by incompetent and hearsay evidence. It did not disprove it, nor offer, nor attempt, to disprove it by any other evidence. Where thus a material fact is established by competent evidence on the part of one litigant, and against his objection his adversary is permitted to contradict or disprove it by nothing but incompetent and hearsay evidence, prejudice will not only be presumed, but appears. The natural tendency of such evidence, under such circumstance, is harmful. To say that it did not have any harmful effect is conjectural and speculative.

The judgment of the court below is therefore reversed, and the case remanded for a new trial. Costs to the appellant.

FRICK, J. I concur. My first impression was that the legal effect of what was permitted by the trial court amounted to no more than to permit the witness Hanson to refresh his memory from what was contained in the books offered in evidence. After a careful examination of the record, however, and upon further reflection, I am forced to the conclusion that what was actually permitted was the introduction of the Farmers' Co-op books as primary evidence of the facts therein recited. Mr. Hanson did not make the entries in the books, nor was he asked, nor did he testify, as to the correctness of the entries; hence what was done was not an attempt to refresh the witness' memory from past events, but it was an attempt to prove a fact which we have held was material and relevant by book entries

which, as to the appellant, were hearsay pure and simple. This constituted error according to all authorities.

Nor are the cases of *Davenport v. Cummings*, 15 Iowa, 219, and *Costello v. Crowell*, 133 Mass. 352, and other authorities cited by the Chief Justice, in point here. A mere cursory reading of the excerpts quoted by him alone shows that what was held in those cases in no way supports the rulings of the trial court in this case. Neither do the first two illustrations offered by the Chief Justice answer appellant's objections to the book entries involved here. This is so for reasons so obvious that it requires no further comment. Upon the other hand, while the illustration with regard to the hotel register would, under certain circumstances, be proper evidence, yet, again for obvious reasons, that illustration does not come within the rule laid down by Mr. Justice STRAUP, and hence can have no controlling influence here.

Nor can the entries in the Farmers' Co-op books be used to impeach the statements of the witness Lewis. He did not make the entries in the books. Nor did he testify that any were made, or that he saw any made; nor that, if made, they were correct. Nor did he testify to anything concerning any entry or statement in the Co-op books. All that was testified to in such particular by him was that he delivered the load of lumber to the Co-op store, and that he was not paid therefor, but was given credit for it. In fact, there is nothing in the record whatever to indicate that he saw or even knew of the entries contained in the books, or that he testified concerning any such subject. It needs no argument to show that a witness may not be impeached by the declarations or statements of a third person where such witness knew nothing concerning the statements. The book entries in question here represent the statements or declarations of a third person not made in the presence of the witness Lewis and of which, so far as the record discloses, he had absolutely no knowledge and no connection therewith.

Under the circumstances, therefore, there is no escape from the conclusions reached by Mr. Justice STRAUP.

McCARTY, C. J. (dissenting). I think the judgment should be affirmed. Ralph Lewis testified that as he was passing the railroad yards at Thistle, Utah, with a team and a wagon loaded with lumber, he saw the accident in which the plaintiff received the injuries described in the complaint. It is admitted that the accident occurred January 5, 1911. The witness further testified:

"I was taking lumber to Spanish Fork for the Farmers' Co-op. I reached Spanish Fork after night and made delivery of the lumber next day. Q. When did you draw your pay for it, if you got any? A. Why, we just put it on credit there. We had a Farmers' Co-op and we had credit there. Joseph Hanson runs the Farmers' Co-op. He was the man with whom I did the business."

It will be observed that the witness accounted for his presence, at Thistle at the time the accident occurred in which plaintiff received the injuries complained of, by stating that he, at the time, was passing through Thistle with a load of lumber which he delivered to the Farmers' Co-op of Spanish Fork the following morning. The import of his testimony is that he was given credit on the books of the Farmers' Co-op for the lumber. It will be observed that the witness made a somewhat detailed statement concerning his movements and as to what he did immediately after the accident as corroborative and in aid of his testimony that he was at Thistle and witnessed the accident. The books showed that he did not have an account with the Farmers' Co-op on January 6, 1911, but they did show that he opened an account February 23, 1911, and was first given credit for lumber May 11, 1911. For the purpose of showing, or tending to show, the improbability of the truth of Lewis' testimony on this point, defendant had the right to show that the witness was not given credit on the books of the Farmers' Co-op for the lumber which he claims he delivered to that institution the day after the accident occurred. In one of the prevailing opinions it is said that:

"He (Lewis) did not make the entries in the books. \* \* \* In fact, there is nothing in the record whatever to indicate that he ever saw or even knew of the entries contained in the books."

It is quite evident that Lewis did not make the entries, and it is also very clearly shown that "he never saw or even knew of the entries (regarding which he testified) contained in the books," because the record conclusively shows that the books contained no such entries of that date. It is also suggested that he did not testify that he saw the entries made, or, if they were made, they were correct. What he did testify, as shown by the bill of exceptions, was that on the day after the accident in question he delivered a load of lumber to the Farmers' Co-op and was given credit for it. He said, "We just put it (referring to the payment for the lumber) on credit there." This was a direct and positive statement of the witness that he was given credit for the lumber. It was to impeach him on this point that the book entries were admitted in evidence. The books having been offered and admitted for the purpose of impeachment only, the question of whether the entries therein contained were correct or incorrect was, under the circumstances, wholly immaterial. 4 Chamberlayne, Ev. § 2685. If the alleged transaction of the delivery of the lumber on January 6, 1911, and the giving of credit therefor by the Farmers' Co-op on its books, were the subject-matter of the action, then of course the question of whether the entries in the books respecting such credit were correct or incorrect might be of controlling importance, and

the shop-book rule in such case might properly be applied. It is the invoking of that rule in this case, where I contend it can have no application whatever, that gives rise to the difference of opinion respecting the disposition that should be made of the case on this appeal.

The books constituted the best evidence of what they contained and did not contain. In 2 Wigmore, § 1531, the author says:

"The absence of an entry, when an entry would naturally have been made if a transaction had occurred, would ordinarily be equivalent to an assertion that no such transaction occurred, and therefore should be admissible for that purpose."

And again, in section 1556, he says:

"The absence of a debit entry in a book containing both debits and credits should be regarded as in effect a statement that no such goods or services had been received, and should therefore be admissible."

I also invite attention to a note in Ann. Cas. 1914B, 1256, where the annotator cites and reviews many cases in which the question of whether private books or records are admissible as evidence of the nonexistence of matters not entered therein is discussed. In concluding his review of the cases, the compiler, among other things, says that:

"Private books and records are sometimes admissible as evidence of what they do not contain in corroboration or contradiction of other evidence."

I recognize the general rule to be that entries made in books of a third party of accounts and transactions between persons who are not parties to the proceedings before the court are not admissible in evidence, but I do not understand the rule to be an absolute or inflexible one. The authorities, as I read them, make a distinction in the application of the rule between cases where entries in private books of account are offered as evidence for the purpose of contradicting the testimony of a witness who, in aid of his testimony given in a matter—the subject-matter of the action—that has no connection with or relation to the books or the entries therein contained, and cases where the entries are offered for the purpose of maintaining or defeating some claim based upon the transactions concerning which the entries were made. In the class of cases first referred to, the books of third parties are admissible; whereas, in the class last referred to they are not admissible as evidence. The books in question tended to contradict the testimony of Ralph Lewis on a material point, and were offered and admitted in evidence for that purpose only. As was held in the case of Dale v. Kempton, 46 Vt. 76:

"In this respect, and for such a purpose, the introduction of the books bears no analogy to the use of books as evidence to prove the sale and delivery of merchandise, or to prove any other transaction upon and in virtue of which the party claims the right to make a charge, and to hold the other party liable."

Passing the informal way in which the entries in the books in question were offered

and received in evidence, I am clearly of the opinion that the court did not err in admitting them.

This question was involved in *Davenport v. Cummings*, 15 Iowa, 219. There the court, in the course of a well-considered opinion, said:

"It is claimed that books of account are admissible as between the parties to them and to the suit in which they are offered. But when witnesses refer to books in aid of their statements, and especially when, as in this case, they state that they only know certain matters from having seen them in the books, such books are clearly competent to show the improbability of, or mistake in, their testimony. It is the same as if they had referred to any other memorandum or writing. *Who made such memorandum is not material.* \* \* \* When the books referred to by the witness were sufficiently identified, they were properly admitted." (Italics mine.)

A question similar to, if not identical with, the one here presented, was involved in *Costello v. Crowell*, 133 Mass. 352. In that case the action was brought to recover on two promissory notes. The defense was that both notes were forgeries. Judgment was rendered in favor of the plaintiff on one note but denied him as to the other. The court said:

"The remaining exception of the plaintiff is to the admission of the entry in the books of Korff & Co. to prove the date of the delivery of the blanks by them to Groom & Co., on one of which the note in suit was written. (Korff & Co. was not a party to the action, nor was it directly or indirectly interested therein.) These entries were first used to refresh the memory of the witness Armstrong. They were clearly competent for that purpose. \* \* \* This use of the entry did not make it evidence, nor authorize it to be submitted to the jury, unless for the purpose of testing the memory which had been refreshed by it. Subsequently the defendant offered the book itself in evidence, and it was admitted, and the entry read to the jury. We think it was properly admitted. Armstrong testified to the delivery of the blanks, but he could not, from recollection, fix the date, which was a material fact. For the purpose of doing this, the entry made by the witness at the time of the transaction, in the regular course of business, was competent."

In 2 Wigmore Ev. § 1005, the author says:

"When the memory is tested by asking for the witness' recollection of facts not otherwise material, his errors of recollection cannot be shown by extrinsic testimony. But circumstances which form the alleged grounds of his recollection of material facts testified to by him should be subject to contradiction. \* \* \* In general, the exclusionary rule seems to be too strictly enforced. 'Everything,' said Lord Denman, 'is material that affects the credit of the witness.' The discretion of the trial court should be left to control. *It is a mistake to lay down any fixed rule which will prevent him from permitting such testimony as may expose a false witness.* History has shown, and every day's trials illustrate, that not infrequently it is in minor details alone that the false witness is vulnerable and his exposure is feasible." (Italics mine.)

I know of no good reason, and certainly none has been suggested, why books that contain no entries regarding the subject-matter in litigation should be received in evidence for the purpose of impeachment when such books belong to and are kept by one of the

parties to the suit in which they are offered, and rejected as incompetent if perchance they belong to and are kept by persons not parties to the action. For the purpose of illustrating the unsoundness of such a rule and the injustice that may often result from its application, we will suppose a case is on trial in which it is necessary for one of the parties to the suit, in order to maintain the action or establish a good defense thereto, as the case may be, to prove that a certain transaction—the subject-matter of the action—took place in this city on January 5, 1911. A witness is called by the party seeking to make such proof, and testifies that he was in the city on that date, was present, heard, and saw all that transpired relating to the transaction, and relates in detail what he claims the circumstances were. On cross-examination he testifies that he has a clear and distinct recollection as to the date because the transaction occurred on the day he arrived in the city, namely, January 5, 1911; that just before he witnessed the transaction he opened an account with a certain local bank by making a deposit of money; that he then witnessed the transaction in controversy, and immediately thereafter he went to the office of a certain real estate firm and leased a cottage by the month, paying one month's rent therefor in advance; that he saw one of the clerks in the office make an entry in the books of account kept by the firm crediting him for the rent paid. The other party to the action discovers, on investigation, that the records of the bank show that the witness opened an account with the bank February 11, 1911, and that he never had an account with the bank prior to that date. He also discovers that the books of the real estate firm from whom the witness leased the cottage show that that transaction also took place February 11, 1911, and fail to show that he did any business with the firm prior to that date. The employees of the bank with whom the witness claims he did the business when he made the deposit of money are called as witnesses, and testify that they have no recollection whatever of the transaction and have no knowledge respecting it except what the books show. To further illustrate: A party is charged with and is on trial for a heinous crime. His defense is an alibi. Two or more witnesses called by the defendant to prove the alibi testify that on the day the crime is admitted to have been committed they were with the defendant at a town or city several hundred miles from the place where the crime was committed; that on that day they, in company with the defendant, registered and put up at a certain hotel in such town or city; that they saw the defendant write his name in the hotel register; and that they were with him during that entire day. It transpires that neither defendant's name nor the names of his witnesses appear in the hotel register. The clerk at the hotel who was

the custodian of the book (the register) is called as a witness, but is unable to remember whether the defendant and his witnesses, or any of them, were at or about the hotel on the date specified in the evidence. Under these circumstances, I think it is clear that the records of the bank and the books of the real estate firm and the hotel register, on being properly identified, would be admissible as evidence for the purpose of contradicting and impeaching the witnesses who, in aid of their testimony given on the issues pertaining to the subject-matter of the action, referred to certain transactions which they claimed were entered in the books. In fact, I think it would be a reflection on our system of jurisprudence to hold, under such circumstances, that in the one case a litigant must be the victim of perjured testimony and his property rights thereby sacrificed and taken from him, and in the other case that crime must go unpunished because of a strained and in my judgment unreasonable application of a court-made rule of law—a rule that was promulgated to promote justice and never was intended, as I read the authorities, to be applied so as to shield a corrupt and designing witness in giving false testimony. Moreover, to hold in such cases that when the books offered as evidence belong to and are kept by a third party they are, under the shop-book rule, inadmissible, but when they belong to and are kept by one of the parties to the action or proceeding they are admissible as evidence, even though they contain no entry concerning the subject-matter of the action, as I view the question, is to reduce the rule to an absurdity.

Since the foregoing was drafted and submitted to my Associates, it is suggested in the concurring opinion written by Mr. Justice FRICK that the foregoing illustration regarding the hotel register does not come within the rule laid down by Mr. Justice STRAUP in the prevailing opinion. If not, why not? It is common knowledge that the hotel register is one of the most important and indispensable of books of account kept by hotels. Upon this book the day, and, in many instances, the time of the day, is noted when parties become guests at the hotel, the numbers and grades of the rooms occupied by the different guests, and also the time when a guest severs his connection as such with the hotel. To hold that in this class of cases a hotel register is admissible as evidence, but that books of account of other business institutions are not, is to make a distinction where, in principle, there is absolutely no difference.

Mr. Justice STRAUP, in the prevailing opinion, states:

"So may a witness who testified having made or seen, or otherwise testified concerning, an entry or statement in a book or instrument, be contradicted by the book or instrument itself, in which case it matters not whether the book or instrument be that of one of the parties, or the witness, or of another." (Italics mine.)

This is a clear and concise statement of the law as I understand it to be; and the case at bar, I think, comes clearly within it. I again invite attention to the testimony of Lewis wherein he said, referring to the terms on which he claims he delivered a load of lumber to the Farmers' Co-op on January 6, 1911, "We just put it on credit there." This, in a literal sense, is a statement that he, at least, assisted in making the entry giving credit for the lumber. I think, however, a fair construction of the language, under the circumstances, is that he was present, saw the entry made, and acquiesced in what was done in that regard. Let that be as it may, he not only testified "concerning" the alleged entry, but that he had something to do with the making of it. Therefore I insist that this case comes within the rule of law so well stated by Mr. Justice STRAUP in the concluding part of the prevailing opinion.

#### On Application for Rehearing.

STRAUP, J. A petition for a rehearing is filed by the respondent. Our attention is called to the testimony of another witness, the bookkeeper of the Co-op store, by whom it is claimed it was shown the books were properly authenticated and that the entries were made by him in due course of business. It is claimed we overlooked this testimony, and hence the case ought to be reopened, reargued, and re-examined, especially on the question of whether the entries in the account books were not properly received in evidence as entries made in regular or due course of business. It is apparent from the opinion that we did not hold the books inadmissible because they were not properly authenticated or not shown to be account books of original entries or not regularly kept in due course of business, but because the books confessedly are account books, and nothing else, of a third party as to transactions with another, both of whom were strangers to both litigants, and, as such, do not come within the exception to the hearsay rule admitting account books in evidence as primary and independent evidence of the facts therein recited. The testimony of the bookkeeper was not overlooked. It, as we then thought, and as we still think, added nothing whatever to the question in hand. But let us again look at it. After showing that the witness was the secretary, treasurer, and bookkeeper of the Co-op store, he was then asked by respondent:

"Q. Will you be good enough to tell me whether this book contains the account of Ralph Lewis? A. Yes, sir. Q. Is that the book of account of the Farmers' Co-op? A. Yes, sir, Q. And will you turn to Ralph Lewis' account? A. Yes, sir. Q. I will ask you if you now have turned to the page beginning his account? A. Yes, sir. Q. It begins on what date? A. The account was opened up February 23, 1911. Q. Let me ask you if the entries on that sheet you are now looking at are in your handwriting? A. Yes, sir. Q. When credits are given men who have an account with you, on account of

any materials that may be delivered, and received by you as a credit, who enters them on the books? A. On these books? Q. Yes. A. I do. Q. Do you find any credit for lumber delivered by Ralph Lewis? A. Yes, sir. Q. On what date? A. May 15, 1911."

He gave similar testimony as to an account with Lewis Bros., and when, as shown by the books, the first and the last credit was given them.

[8] Upon this, counsel contend that the entries were admissible on the theory of another well-recognized exception to the hearsay rule—entries made in due or regular course of business. By that is meant entries made in a record, book, or document setting forth a fact or transaction made by one in the ordinary course of his business, employment, office, or profession, which it was his duty in such manner to make, and who had personal knowledge of the facts entered, or, as put by some of the cases, had a duty to inform himself of the truth of the matters recorded or entered by him, and that the entries were made reasonably contemporaneous with the facts or transactions entered or recorded. And then, the further general rule in such respect is that, before such entries are admissible, it is essential to further show that the entrant was dead, insane, permanently beyond the jurisdiction of the court, or was otherwise unavailable as a witness; or, as some of the authorities and cases say, if living and present at the trial and called to give testimony, had forgotten the facts entered and thus was unable to recall them or to revive his memory by looking at the entry, but, nevertheless, was able by his oath to authenticate it and to testify that it was made by him at or near the time of the transaction, in the due or regular course of his duty or business, and that he then had knowledge of the facts entered and correctly entered and recorded them, or that he would not have made the entry if it had not been true. 5 Ency. Ev. 264-266; 1 Elliott, Ev. § 488; 2 Jones, Com. Ev. §§ 319, 320, 321, and cases there referred to. It, however, is more proper to say in such latter instance, the entrant living and called as a witness, that the entry made by him serves the purpose only of a document or memorandum to refresh memory, and is more properly within the rule as stated in 11 Ency. Ev. 137, under the head of "Refreshing Memory," that:

"When the witness' memory is not so revived, but he is able to swear as to the authenticity of the writing, his testimony and the writing in connection with each other are both competent evidence."

And so, counsel have referred us to a number of cases where entries, made by one, a stranger, in due or regular course of business, were admitted, but where it was also shown that the entrant was dead, or was beyond the jurisdiction of the court, or was otherwise unavailable as a witness; and to other cases, where the books were those, not of a stranger, but of a party, or where the party, not

the witness, against whom they were offered was privy to the books. And then, are we especially referred to notes in 53 L. R. A. 526, where it is shown that entries in due course of business in account books of a stranger had been admitted. The general rule, as there stated, is:

"The earlier cases tended in the direction of regarding no entries in books of account as admissible in evidence on issues between third parties, unless they were against the interest of the party making them, or such as to constitute a part of the *res gestæ*. But the tendency of the later cases, particularly in America, has been to eliminate the condition that the entry should be against interest; and the more modern rule would seem to be that entries and memoranda made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, are, in case of his death, admissible evidence of the acts and matters done."

After illustrating the rule by notes and cases for several pages, the annotator then, on page 540, says this:

"While the rules as to admissibility of proper entries in books of account on issues between third persons are as above stated, such rules do not apply, and entries in such books are not admissible until the proper preliminary proof has been given, which must establish their accuracy and originality, and that they were duly and properly made at or near the time of the transaction, and that the clerk or person who made them is either dead or not within reach of process."

Here the bookkeeper, the entrant, was not dead, nor insane, nor beyond the jurisdiction of the court, or otherwise beyond reach of process, or unavailable as a witness. He was present at the trial and was called as a witness. So the entries were not admissible on the theory that the entrant was unavailable as a witness.

Now, were they admissible on the theory that when made he had knowledge of the facts entered, but looking at the entries his memory was not revived and the facts not recalled? Manifestly not, for no such preliminary proof was made and no such foundation laid. We think that hardly debatable. We have set forth what there is of it. The witness was not asked, nor was it shown, what, if any, present knowledge he had of the facts entered, or whether his memory was revived by looking at the entries, and if, aided by them, he could recall and testify to the facts, or had knowledge of them when the entries were made but had so forgotten the facts that his memory was not revived and the facts not recalled, still knew the entries were correctly made in the due course of business or of his duty, and reasonably contemporaneous with the transaction, or that he would not have made them had they not been true. Nothing of that was even attempted to be shown, especially that the witness had not present knowledge of the facts, or with or without the aid of the entries could not recall nor testify to them. The record but shows that this witness did no more than did the witness Hanson, merely,

read to the jury, without the preliminary proof referred to, the contents of the books as primary and independent evidence, just as though the books had been a party's book. That is all there is to it. And that is what we say was improper.

Let the petition be denied.

FRICK, J., concurs.

MCCARTY C. J. (dissenting). In view of the elaborate briefs filed by the respective parties in which the questions presented by the petition are thoroughly and somewhat exhaustively discussed and the position of counsel clearly stated, I do not think anything would be gained by reopening the case for further oral argument. I am of the opinion, however, that the case should be reconsidered by this court, and the judgment of the lower court affirmed.

(11 Okl. Cr. 201)

SILLIX v. STATE. (No. A-2121.)

(Criminal Court of Appeals of Oklahoma. Nov. 18, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1172\*)—APPEAL—GROUND FOR REVERSAL—FAILURE TO INSTRUCT.

Procedure Criminal, § 5933 (Rev. Laws 1910), provides that in all cases of a verdict of conviction, the jury may, and shall upon the request of the defendant, assess and declare the punishment in their verdict within the limitations fixed by law. *Held*, that on the trial of an information charging a misdemeanor, the failure of the court to instruct the jury that in the event they found a verdict of guilty they should assess and declare the punishment in their verdict, will not necessarily require a reversal of the judgment, but this court upon appeal may so modify the judgment as will prevent injustice to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

Appeal from County Court, Pittsburg County; B. P. Hammond, Judge.

C. E. Sillix was convicted of a violation of the prohibitory law, and appeals. Modified and affirmed.

G. Rosenwinkel and J. R. Miller, both of McAlester, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error was in the court below convicted of the offense of maintaining a place where intoxicating liquors were received and kept for the purpose of selling the same. On the 3d day of September the court rendered judgment and sentenced the defendant to be confined in the county jail for a period of 30 days and to pay a fine of \$300 and the costs.

It is only necessary to a determination of the case to pass upon one question. It appears from the record that the court did not instruct the jury as to the punishment pre-

scribed by the statute for the offense, and did not instruct the jury that in the event they found a verdict of guilty, they should assess and declare the punishment in their verdict. The Attorney General's brief concedes: "That in this regard the defendant was prejudiced in that the court rendered judgment for a greater punishment than the minimum fixed by law. We, therefore, suggest that, under the power of this court to modify judgments, the judgment be modified so as to provide that the defendant be imprisoned in the county jail for a period of 30 days, and that he pay a fine of \$50"—citing *McSpadden v. State*, 8 Okl. Cr. 489, 129 Pac. 72.

Under the law the punishment for the offense charged in the information is both fine and imprisonment. See sections 3610, 3634, Rev. Laws.

Finding no other error in the record, that part of the judgment imposing the fine will be modified to read and to pay a fine of "\$50 and the costs."

The judgment as modified is hereby affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(11 Okl. Cr. 234)

PETITTI v. STATE. (No. A-1915.)

(Criminal Court of Appeals of Oklahoma. Dec. 28, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 576\*)—DISMISSAL—DELAY —"GOOD CAUSE TO THE CONTRARY."

"In all criminal prosecutions the accused shall have the right to a speedy and public trial." Bill of Rights, § 20. "When a person has been held to answer for a public offense, if an indictment or information is not filed against him at the next term of court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown." Procedure Criminal (Rev. Laws 1910), § 6095.

In this case it appears that two terms of court had passed before the committing magistrate returned to the clerk of the trial court the papers in the case, and three terms of said court had passed without an information being filed against the defendant.

*Held*, that the dereliction on the part of the magistrate, and the want of time and press of business on the part of the county attorney, is not "good cause to the contrary," within the meaning of that phrase as used in said section. It was therefore error to deny the defendant's motion to dismiss the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

Appeal from Superior Court, Pittsburg County; W. C. Liedtke, Judge.

Tony Pettiti was convicted of arson, and appeals. Reversed.

Horton & Smith, of McAlester, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—20

DOYLE, J. This appeal is prosecuted from a judgment and sentence that Tony Petitti, plaintiff in error, be imprisoned in the state penitentiary at McAlester for the term of five years for the crime of arson.

The information alleges, in substance, that on the 12th day of December, 1910, Tony Petitti did willfully and feloniously set fire to and burn certain goods and chattels, the property of the said Tony Petitti, to wit, a certain stock of merchandise located in a certain store building in the town of Alderson, Pittsburg county, Okl., and in the possession of said Tony Petitti, with the unlawful and felonious intent thereby to injure and defraud certain corporations, to wit, Hamburg-Bremen Fire Insurance Company of Hamburg, Germany, and the Fire Association of Philadelphia. It appears from the record that on the 14th day of December, 1910, a complaint was filed before a justice of the peace at McAlester, charging Tony Petitti, John Petitti, and Jasper Petitti with the crime above charged, and all three were held to answer to the next term of the superior court, commencing on the first Monday in January, 1911. The transcript of the justice of the peace in said case was not filed in the superior court until June 30, 1911, and no information was filed in said court until November 21, 1911, or nearly a year after the preliminary examination was had. No information was ever filed against John and Jasper Petitti. Upon arraignment the defendant filed his motion to dismiss, and that he be discharged for want of prosecution, under section 6095 of the Code of Criminal Procedure. That section is as follows:

"When a person has been held to answer for a public offense, if an indictment or information is not filed against him at the next term of court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown."

To this motion the state replied by the county attorney as follows:

"(1) That it is true that the defendant had his preliminary and was held to the superior court on December 20, 1910, and that the transcript in the case was not filed by the justice of the peace with the clerk of said court until July 30, 1911, but your respondent shows to the court that the preliminary was held so shortly before the January term of the superior court that said cause could not have been brought to hearing at said term for want of time.

"Respondent further shows to the court that defendant was on bond from the date of the preliminary, and had attorneys residing in the city of McAlester, and that the delay of the justice of the peace in sending up his transcript was not called to the attention of the justice of the peace, the county attorney, or the court, and that said transcript was in fact filed by the justice of the peace after the setting of the criminal docket for the July term of said court, and that the county attorney did not find such transcript until shortly before the filing of the information herein; that when he did find it he filed the information immediately, set the cause down for hearing at the present term of the court, and is now ready for trial.

"Respondent further shows to the court that

the county was without funds with which to hold an April term of the court, without power to make a debt for such expenses, and therefore could not hold said term.

"Your respondent submits that he has shown sufficient cause for not bringing this case to a trial sooner, and submits that said motion should be denied."

The provision of Procedure Criminal above quoted was enacted in the light and under the operation of section 20, Bill of Rights, providing that "in all criminal prosecutions the accused shall have the right to a speedy and public trial." Const. art. 2, § 20. The authorities uniformly hold that such statutes are enacted for the purpose of enforcing the constitutional right, and that they constitute a legislative construction or definition of the constitutional provision. *Eubanks v. Cole*, 4 Okl. Cr. 25, 109 Pac. 736.

It was the duty of the justice of the peace, as the committing magistrate, to return immediately to the clerk of the superior court of Pittsburg county the original complaint, with his order holding the defendants to answer the same indorsed thereon, also the warrant and transcript of the testimony of the witnesses examined before him, and all undertakings of bail taken by him, together with a certified transcript of the proceedings as they appear on his docket. Procedure Criminal, §§ 5680, 5692.

It is undisputed that two terms of said court had passed before the magistrate returned to the clerk of the said court the papers in the case, and if no cause existed other than appears in the record for his failure to return them earlier than he did, he was guilty of inexcusable negligence. Three terms of said court had passed without an information being filed against the defendant. Under the facts as shown, the court below should have granted the defendant's motion, and dismissed the prosecution against him. The want of time and press of business on the part of the county attorney is not "good cause to the contrary," within the meaning of that phrase as used in said section. The bond mentioned in the county attorney's reply was for the appearance of the defendant at the next term of said court, and we know of no law that requires the defendant or his attorneys to call the county attorney's attention to the dereliction of the committing magistrate. The filing of the information in the trial court could not be affected by the condition of the court fund.

We are constrained to think that the reply of the county attorney to the motion to dismiss was in effect a confession that the motion was well founded. It follows that the judgment should be reversed, and the court below directed to dismiss the prosecution and discharge the defendant.

ARMSTRONG, P. J., and FURMAN, J., concur.



(11 Okl. Cr. 203)

KIRK et al. v. STATE. (No. A-2122.)

(Criminal Court of Appeals of Oklahoma. Nov. 16, 1914.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 376\*)—CHARACTER OF DEFENDANT—RIGHT TO ATTACK.**

The state cannot attack the character of a defendant unless he first puts that in issue by introducing evidence of his good character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. § 376.\*]

**2. WITNESSES (§ 277\*)—CROSS-EXAMINATION OF ACCUSED—RIGHT.**

A defendant, by availing himself of the statutory privilege of becoming a witness in his own behalf, has voluntarily changed his status from defendant to witness, and consequently may be cross-examined within the usual boundaries, and thus be discredited and impeached.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 632-635; Dec. Dig. § 277.\*]

**3. WITNESSES (§§ 337, 343\*)—IMPEACHMENT—REPUTATION—SCOPE OF INQUIRY.**

Where the purpose of testimony is to impeach a witness for want of truth and veracity, the inquiry and the answer must be as to his general character or reputation for truth and veracity in the community in which he resides, and testimony as to the general reputation of a defendant for being a boot-legger is incompetent to impeach the credibility of a defendant as a witness in his own behalf, or for any other purpose.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 793-796, 800-803; Dec. Dig. §§ 337, 343.\*]

**4. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.**

Where the evidence relied upon by the state is entirely circumstantial, it is error for the court to refuse to give a requested instruction on the law applicable thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

Appeal from County Court, Bryan County; J. L. Rappolee, Judge.

Floyd Kirk and Charley Masoner were convicted of violating the prohibitory law, and appeal. Reversed.

Kyle & Newman, of Durant, for plaintiffs in error. Chas. West, Atty. Gen. (H. G. Spilman, Asst. Atty. Gen., of counsel) for the State.

DOYLE, J. The plaintiffs in error and one Clint Durant were jointly informed against for the offense of unlawfully conveying intoxicating liquor. When the case was called for trial, on the request of the county attorney, the case as to the defendant Durant was by the court dismissed. Upon their trial the jury found the defendants guilty and assessed their punishment at a fine of \$100 and 90 days' confinement in the county jail. The judgment was entered on the 15th day of September, 1913. To reverse the judgment, the defendants appeal.

The evidence offered by the state tended to prove the following facts: That on the night

of the day named in the information Irb Heart and Tom Tabor, officers, went to the house of one Vanhoy, in the southern part of Durant, where, a dance going on, they secreted themselves in the alley, and shortly after three boys came out of the house; that they heard something rattling like bottles; that it was too dark to see, and they ran up and arrested them; that they searched them, but found no intoxicating liquor on them. They then secured a light and found three half-pint bottles of alcohol on the ground near where they arrested the defendants. The defendants as witnesses in their own behalf, and for each other, denied ever having possession of or of having conveyed the alcohol, or any other intoxicating liquor.

The first assignment of error is that the court erred in admitting testimony relating to the reputation of the defendants. It appears that, over the objection of the defendants, three witnesses were permitted to testify that they knew the reputation of the defendants for being bootleggers, and that it was bad.

The Attorney General contends that under the doctrine of the Wilkerson Case, 9 Okl. Cr. 662, 132 Pac. 1120, the general reputation of the defendants as to being bootleggers was competent and admissible. We do not assent to this contention. The Wilkerson Case was a prosecution for unlawful possession with intent to violate provisions of the prohibitory law. It is held in that case, and uniformly in all cases where the offense charged was unlawful possession that testimony tending to show that the defendant had previously sold other liquor, or kept other liquor for sale, is admissible on the question of intent, and if such liquors were kept at a place at which the public generally resorted, and the circumstances of the case indicated that such place was used for the purpose of selling intoxicating liquor, the general reputation of such place is admissible on the question of intent. The charge in this case is a violation of that subdivision of the enforcement act which provides that it shall be unlawful "to ship or in any way convey such liquor from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized," and it was only necessary for the state to prove such unlawful conveyance. It was not necessary to prove unlawful intent, and character was not an element of the offense, and did not tend to prove the issue to be tried. Proctor v. State, 8 Okl. Cr. 537, 129 Pac. 77.

[1] It is a fundamental principle of criminal law that the character of the defendant cannot be impeached or attacked by the state, unless he puts his character in issue by introducing evidence of good character.

Says Bishop:

"Bad character is never admissible in evidence against a defendant as ground for presuming

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

guilt. This doctrine is absolute; thus, the evidence of stealing a horse cannot be reinforced by showing that the defendant is an associate of horse thieves." 1 Bishop's New Cr. Proc. par. 1112.

And we hold, the fact that an offense has been committed cannot be proved by common rumor or general repute.

It appears that the jury were instructed, over the defendants' objection:

"That the testimony touching the general reputation of these defendants as to being bootleggers is to be considered by you only touching the credibility of these two defendants and for no other reason or purpose."

The question presented is whether such evidence is competent and admissible to impeach the credibility of the defendants as witnesses.

[2] In general, it may be said that a defendant, by availing himself of the statutory privilege of becoming a witness in his own behalf, has voluntarily changed his status from defendant to witness, and consequently may be cross-examined within the usual boundaries, and thus be discredited and impeached. *Buxton v. State*, 11 Okl. Cr. —, 143 Pac. 58.

Our statute provides (section 5046, Rev. Laws) that a witness may be discredited by showing on cross-examination his conviction of a criminal offense.

[3] In the case of *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244, it is held that:

"For the purpose of affecting the credibility of a witness, he may be asked as to whether or not he has ever been convicted of a violation of the prohibitory liquor law of the state."

In the absence of any further specific provision in our Code of Criminal Procedure, the common-law rule prevails (section 5543, Rev. Laws); and, when it is sought to impeach a witness by general reputation, the inquiry and the answer must be as to his general character or reputation for truth and veracity in the community in which he resides. In other words, where the purpose of testimony is to impeach a witness for want of veracity, the testimony, to be competent, must be confined to witness' general character or reputation for truth in the community in which he resides. To impeach him on this inquiry the testimony must show that his general reputation for truth is bad. *Knobe v. Williamson*, 17 Wall. 586, 21 L. Ed. 670.

If it were the law that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the state would doubtless be hard to answer; but the law is otherwise. It is the law that a defendant in a criminal case is presumed to be innocent until the contrary is proved by competent evidence beyond a reasonable doubt. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether

it affords too great protection to the criminal, or too little to society, are not questions with which we have to do. It is not the province of the courts to change and relax the rules of evidence in order to facilitate convictions in a particular class of offenses. Until the lawmaking power intervenes and prescribes differently, the same rules of evidence must govern the trials of defendants in this class of offenses, which govern in all other criminal trials.

It follows that evidence of the general reputation of the defendants as to being bootleggers was incompetent to impeach the credibility of the defendants as witnesses, or for any other purpose. Its admission was therefore prejudicial to the substantial rights of the defendants.

[4] The next assignment is that the court erred in refusing a requested instruction on the law on circumstantial evidence. The evidence relied upon by the state was entirely circumstantial, and the court not only refused the instruction requested, but failed to charge the law on circumstantial evidence.

In *Rutherford v. United States*, 1 Okl. Cr. 194, 95 Pac. 753, it was held that:

"Where, in a criminal case, circumstantial evidence solely is relied on for a conviction, it is error for the trial court to fail and refuse to instruct on the law applicable thereto when the defendant requests it."

Under the evidence in the case the requested instruction, or one similar, should have been given.

We do not deem it necessary to consider the other assignments of error.

For the errors noticed, the judgment of conviction is reversed, and the case remanded.

ARMSTRONG, P. J., concurs. FURMAN, J., not participating.

(11 Okl. Cr. 131)

SEIGLER v. STATE. (No. A-1951.)

(Criminal Court of Appeals of Oklahoma. Nov. 19, 1914.)

(Syllabus by the Court.)

1. HOMICIDE (§ 127\*)—INFORMATION—SUFFICIENCY.

For an information charging murder, approved and held sufficient, see opinion.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 192-194; Dec. Dig. § 127.\*]

2. CRIMINAL LAW (§ 596\*)—APPEAL—DISCRETIONARY RULING — DENIAL OF CONTINUANCE.

The denial of an application for continuance, although sufficient on its face, will not justify a reversal of a judgment of conviction when under the light of other proof in the record it is clear that the evidence desired from the absent witness would have been of no value if produced, or at best merely cumulative.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. CRIMINAL LAW (§ 413\*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Declarations which are self-serving in their nature, and which do not form a part of the res gestæ, constitute no part of competent proof in the trial of a homicide charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

### 4. HOMICIDE (§ 189\*)—EVIDENCE—STATEMENTS BY DECEASED—SELF-DEFENSE.

When the issues in a homicide case are based upon the contention that the plaintiff in error acted in his necessary self-defense from actual and impending danger, proof of statements made by the deceased relative to remote difficulties he had had with others are not properly admissible, at least when there is no contention based upon apparent danger and when the state's case must stand or fall upon the homicide being established as a deliberate, unwarranted, and premeditated murder. The purpose of this character of testimony in all cases is limited to a proper and well-defined sphere.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 898; Dec. Dig. § 189.\*]

### 5. CRIMINAL LAW (§ 1152\*)—APPEAL—DISCRETIONARY RULINGS—VIEW BY JURY.

The rulings of the trial court in sending or declining to send the trial jury to the scene of a homicide for the purpose of permitting them to make a personal inspection of the premises and surroundings will not be disturbed by this court unless it is made clearly to appear that such court acted arbitrarily and abused its discretion under circumstances which tend reasonably to indicate that the substantial rights of the person on trial were prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.\*]

### 6. CRIMINAL LAW (§ 1153\*)—WITNESSES (§ 40\*)—APPEAL—DISCRETIONARY RULING.

(a) Objections to receiving the testimony of a witness on the ground that he was of such tender age as to be incompetent are addressed to the sound discretion of the court.

(b) In reviewing an assignment of error based on this contention, this court will examine carefully the whole record of the examination of such witness, testing his intelligence and qualifications as well as the testimony given by him at the trial, and unless a clear abuse of discretion is apparent the rulings of the trial court will not be disturbed.

(c) In this case the objection to receiving the testimony of witness Verne Stanford on this ground is wholly without merit, and the trial court properly permitted him to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\* Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.\*]

### 7. CRIMINAL LAW (§§ 683, 684\*)—ORDER OF PROOF—"REBUTTAL TESTIMONY."

(a) When the state makes out a clear case in chief, the fact that certain testimony was reserved for rebuttal which would have been admissible in establishing the case in chief, but which is clearly in rebuttal of the material defense, or testimony introduced in defense, does not render the same inadmissible in rebuttal.

(b) Rebuttal testimony is properly that testimony which is given to explain, repel, counteract, disprove, or destroy facts given in evidence by an adverse party. Any evidence may be given in rebuttal which is a direct reply to that produced by the other side or a contradiction thereof, or which tends to de-

stroy the effect of the same. For testimony held to be admissible in rebuttal, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1618; Dec. Dig. §§ 683, 684.\*]

For other definitions, see Words and Phrases, First and Second Series, Rebuttal Evidence.]

### 8. CRIMINAL LAW (§§ 822, 829\*)—INSTRUCTIONS—SUFFICIENCY—REPETITION.

(a) Instructions of the court are to be considered as a whole and, when so considered, if they do not disclose prejudicial error, will be sustained on appeal.

(b) Assignments of error based on the refusal to give requested instructions, when the record discloses that the material and proper elements of the instructions are given by the court, are without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 2011, 3158; Dec. Dig. §§ 822, 829.\*]

### 9. CRIMINAL LAW (§§ 945, 1156\*)—APPEAL—DISCRETIONARY RULING — NEW TRIAL — GROUNDS.

(a) A motion for a new trial based on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and, unless an abuse of that discretion is disclosed by the record brought here for review, the rulings of the trial court will not be disturbed.

(b) The entire record of the trial, as well as the record made upon the hearing of the motion for a new trial on the ground of newly discovered evidence, will be examined by this court in determining whether or not the trial court properly exercised its discretion in passing upon such motion.

(c) For facts which sustain the rulings of the trial court in denying a motion for a new trial on the ground of newly discovered evidence, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336, 3067-3071; Dec. Dig. §§ 945, 1156.\*]

Appeal from District Court, Comanche County; J. P. Johnson, Judge.

Henry A. Seigler was convicted of murder, and appeals. Affirmed.

Stevens & Myers and J. F. Thomas, all of Lawton, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., John Fain, Co. Atty., and W. C. Henderson, Asst. Co. Atty., both of Lawton, for the State.

ARMSTRONG, P. J. The plaintiff in error, Henry A. Seigler, was convicted at the May, 1912, term of the district court of Comanche county on an information charging him with the murder of W. A. Stanford, and the death penalty imposed as his punishment.

[1] The information upon which the conviction is based is as follows:

"I, J. A. Fain, county attorney of the county of Comanche and state of Oklahoma, duly authorized and empowered by law to inform of offenses committed and triable within said county and state, in the name and by the authority of the state of Oklahoma, come now here and give the court to understand and be informed, that at and within said county and state, on the 8th day of January, 1912, Henry A. Seigler, then and there being, did then and there, willfully, unlawfully, purposely, feloniously and with malice aforethought, and without authority of law, and with the premeditated design then existing in the mind of the said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Henry A. Seigler to effect the death of a certain person in being, to wit, W. A. Stanford, with certain deadly and dangerous weapons, to wit, a rock weighing about three pounds, did strike the said W. A. Stanford in and on the head and body, and with a certain shotgun did shoot bullets and leaden shot into the face, head and body of the said W. A. Stanford, and so made mortal wounds in and upon the face, body and head of the said W. A. Stanford, of which mortal wounds so made as aforesaid, the said W. A. Stanford then and there on the 8th day of January, 1912, in the county of Comanche and state of Oklahoma, did die, as was intended by the said Henry A. Seigler he should do; and so the said Henry A. Seigler, at the time and place aforesaid, and in the manner aforesaid feloniously, and with malice aforethought, did without authority of law, and with a premeditated design to effect the death of the said W. A. Stanford, him, the said W. A. Stanford, kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state."

A demurrer was filed by counsel for plaintiff in error which was overruled by the court.

Many assignments of error are set out in the petition in error. Most of them, however, are wholly without merit.

The homicide out of which this conviction grew occurred in the northwest part of Comanche county on the 8th day of January, 1912. Some time prior the plaintiff in error and the deceased had made settlements on the same quarter section of land, each in the endeavor to enter it under the homestead laws of the United States. The settlements were apparently made at the same time. The plaintiff in error made his first settlement some distance from where the deceased made his. Later, plaintiff in error built a hut at or near the place upon which the deceased entered the premises and attempted to establish his settlement. There was a small log cabin on the premises at the time these men began their efforts to acquire the land under the homestead laws of the United States. This cabin apparently was claimed by one Spencer. Under rulings of the United States land office, Seigler was awarded the homestead entry. Stanford immediately filed a contest in which Spencer was joined. Some other person was also joined with Seigler. Pending a determination of the contest proceedings Stanford went upon the premises and occupied the log cabin, and in addition placed thereon a tent immediately adjoining the cabin. A space of only a few feet intervened between the cabin occupied by Stanford and the hut erected by plaintiff in error. After making original settlement, it appears that the deceased went away to visit his family who lived at Coyle, Okla., and upon his return the plaintiff in error had put up some wire which was attached to the log cabin. This wire was taken down by the deceased. The plaintiff in error was away from home at work and returned that night.

The testimony on behalf of the state and that on behalf of the accused differs in many

material respects from this time until after the homicide. The testimony on behalf of the state tends to establish the fact that the plaintiff in error was a large man physically, possessed of an overbearing disposition; that upon finding the deceased on the premises he ordered him to take down his tent and get his belongings off the place, using emphatic language and profanity. The deceased declined to comply, contending that he had a lawful right to joint occupancy pending the determination of the litigation. Upon another occasion the plaintiff in error demanded the deceased to move away and told him that the quarter section was too small for both of them to live on. Numerous threats to kill the deceased and threats which implied that he intended to kill him if he did not abandon the premises were introduced in evidence by the state. Other circumstances were introduced which tended to show that plaintiff in error had attempted hostile demonstrations against the deceased. Growing out of the differences between these two men and their families, several complaints were filed by deceased against the plaintiff in error, none of which were prosecuted to a successful termination. On the day prior to the homicide, the deceased had filed two or three additional complaints against the plaintiff in error. On the morning of the homicide the deputy sheriff in whose hands warrants, based on the complaints, had been placed, called the plaintiff in error on the telephone of one Allen, a neighbor, advising that he had the warrants and arranged for the plaintiff in error to come down to meet him at the office of the township justice of the peace. Plaintiff in error went back to his house and cut a little wood for the use of his wife, and made preparations apparently to go to the office of the justice of the peace. He took his gun and left the house, and, according to the proof introduced by the state, also took a large rock in his hand. The deceased, Stanford, was cutting wood at the corner of his cabin only a few feet from the door of the hut occupied by the plaintiff in error. The plaintiff in error came out of his hut, walked directly toward where Stanford was, and just before reaching him was seen by Mrs. Stanford, who opened the door and ran out, whereupon the plaintiff in error threw the rock and hit the deceased, who was stooping over chopping wood, on the head, fractured his skull, and knocked him down. Mrs. Stanford interceded with the plaintiff in error and begged him not to kill her husband, whereupon he pointed the gun which he had brought from his hut into her face. She stepped back a short distance. In the meantime the deceased had turned over on his back and had raised up his head slightly. The plaintiff in error pointed the gun immediately upon him and fired, the charge of shot entered the face to the left of the nose, and through the lips. Death ensued immediately.

A little son of the deceased, Verne Stanford, was out in the yard where his father was cutting wood at the time of the homicide. Two other children had gone to a well or spring a few hundred yards away for water. As soon as they returned to the house the children were sent to notify neighbors living in the community, a few of whom arrived before the officers reached the scene. The deceased was found lying on his back. The ax with which he had been cutting wood was under his body, the blade being about his hips, the handle extending out from his right side. The right hand of deceased was lying across the ax handle on his right side. His left hand was folded on his breast. A number of the teeth of deceased were picked up around the body. The stove wood which he was cutting was lying under and near his body.

Mrs. Stanford and her little son testified to the facts occurring immediately before and at the time of the homicide; each of whom say that no other person except themselves, the deceased, and the plaintiff in error, were present. Other witnesses testified to the wound on the head of the deceased and in response to questions of the county attorney certain witnesses testified there was a large knot on the back of the deceased below the shoulder.

The plaintiff in error and his wife testified in his behalf. Each say that they were both present. Their testimony is to the effect that the plaintiff in error had started to meet the officer according to his promise; that he took his gun and dogs and started along the usual route; that as he approached the cabin of the deceased the deceased was chopping wood; that Mrs. Stanford ran out of the cabin, grabbed hold of plaintiff in error, and began to excoriate him for the way he had treated their family; that the little son, Verne Stanford, began to hack him in the back and on the legs with a bucksaw; that the deceased drew his ax and advanced several steps toward him with the ax uplifted in a manner which induced in him (the plaintiff in error) the belief that he was about to be killed; that thereupon he shot the deceased; that the muzzle of the gun was elevated; that the shot ranged upward; that he killed Stanford in his necessary self-defense; that he did not strike deceased with a rock and had no rock or other heavy instrument in his hands at the time.

Immediately after the shot was fired, the plaintiff in error went to the home of a near neighbor, called the deputy sheriff whom he had agreed to meet at the office of the justice of the peace, and advised him to come up at once. The officer asked him what the trouble was. He replied: "Trouble enough! Come on up and see." This neighbor Allen and a brother who lived with him accompanied the plaintiff in error back to the scene of the homicide, where the plaintiff in error

pointed out certain objects, among them a bucksaw lying in the yard. In his testimony the plaintiff in error denied each and every threat to kill or injure the deceased that was proved by the state, but admitted each and every conversation in which the state contended the threats were made. He also admitted the times and places and the persons with whom the conversations were had; there being no material difference except his denial that any threat was made in any of the conversations.

Other witnesses testified for the plaintiff in error, among them an undertaker, who said that he saw the knot on the back of the deceased, saw it removed, and that it was a fatty tumor.

On rebuttal the state introduced the testimony of physicians who held a post mortem examination upon the body of the deceased. Their testimony tended to show that the wound in the back of the head was inflicted with a rugged instrument and fractured the skull from the crown of the head to the base thereof, and that this was in itself a fatal wound and was made by an external injury; that the shot which entered to the left of the nose and through the upper lip of deceased ranged downward and lodged in the muscles of the neck; that none of the shot ranged upward, and none of them penetrated the brain. These physicians removed the skull and brain and made a thorough examination, and all agree that no shot entered the brain and nothing indicated any upward range or any deflection of the charge. The tongue was practically severed at its base.

Verne Stanford was called as a witness by the state and testified that he was eight years old; that he was in the yard at the time of the homicide; that he did not have the bucksaw out in the yard at that time; that he did not attack the plaintiff in error with the bucksaw; that his mother did not take hold of said plaintiff in error before he threw the rock and fired the shot; that he brought a bucksaw out into the yard after his father had been killed and left it there when his mother told him to run over to a neighbor's for assistance. A large rock was found near the body of deceased. There were a number of other rocks in the yard, but they were imbedded in the ground and could not be removed on account of the frozen condition of the earth. A large pile of rocks similar to the one found near the body of deceased were shown to have been lying on the ground near where the plaintiff in error had been cutting wood.

On behalf of plaintiff in error, certain testimony was introduced in surrebuttal tending to show that there was a blood splootch on a certain log opposite where plaintiff in error contended deceased was standing when he was shot. The log from the hut was introduced in evidence, and, according to the testimony of a physician who made a microscopic examination thereof, the blood splootch

was human blood. One witness testified that he noticed the blood on this log on the day of the homicide and that it appeared to him to be a fresh stain.

The state introduced witnesses, among them Justice of the Peace Meers, who said he examined the log on the day of the homicide; that he took no testimony in reference to it because the blood was old and had been dry a long time. Other witnesses for the state testified that a rabbit and opossum had been fastened to a nail driven in one of the logs of the cabin near where this blood splotch was found and had been skinned and dressed a few days before the homicide.

After the conviction, counsel filed a motion for a new trial, and among other grounds set out an allegation of newly discovered evidence. They had had certain tests made of the dried blood found on the log of the hut that was introduced in evidence. These tests were made by an army surgeon at Ft. Sill and the state chemist at Norman, Okla. Each of them testified that in their judgment the splotch was made by human blood. Upon this testimony and supporting testimony as to diligence the allegation of newly discovered evidence was predicated. The motion for a new trial was overruled by the trial court, the death sentence was pronounced in accordance with the verdict of the jury, and the cause appealed to this court. The appeal was filed on March 26, 1913; but no briefs were filed on behalf of plaintiff in error until the 21st day of March, 1914.

The first assignment of error is based on the contention that the court erred in overruling the demurrer of the plaintiff in error to the information in this cause. The demurrer was wholly without merit and frivolous and was properly overruled.

[2] The next assignment of error presented is based on the contention that the court erred in overruling a motion for continuance. The affidavit for continuance was based on the ground that Albert Decker had been served with a subpoena to attend as a witness, but that he had left the jurisdiction of the court and could not be obtained at the trial. The application sets out that if Decker was present he would testify that he heard a conversation between plaintiff in error and Art Hinson; that he (plaintiff in error) did not say that if Stanford interfered with him any more he would make him look more like a half-breed coyote than he was; that the plaintiff in error did not state in substance or words that he could not stand to be drug into court by Stanford any more, nor that if Stanford pulled him any more that he (Stanford) would not be at the trial.

In the light of other proof in the record, this evidence would not have been of value if produced. *Bethel v. State*, 8 Okl. Cr. 61, 126 Pac. 698.

[3] The next assignment of error is that the court erred in refusing to permit witness Allen to testify to certain conversations

which he had had with plaintiff in error. Counsel attempted to introduce by this witness statements that he had been associated with the plaintiff in error intimately for a long time, and that he never heard him say anything against the deceased nor manifest any anger or use any violent language toward the deceased. The objection to this character of examination was properly sustained. It clearly appears from the record that this witness was a strong partisan of plaintiff in error. Such statements were not offered as part of the *res gestae* and could have only been self-serving statements which constitute no part of competent proof under the issue on trial.

[4] The next assignment of error is based on the contention that the court erred in refusing to permit witness Allen to testify to a certain statement which had been made to him by the deceased relative to having shot a man some time in his past life in the state of Texas, and had spent \$1,800 getting out of the trouble; that upon another occasion he had drawn a gun on a banker who refused to pay him for some work, and forced a collection of his debt, and one or two other similar transactions. This testimony was not admissible and was properly excluded by the trial court. It was entirely too remote and worthless to be of value as indicating any ill feeling on the part of the deceased toward the plaintiff in error. On the trial of this cause the sole and only reliance of the plaintiff in error was that he acted in his necessary self-defense from an assault then being made upon him with a deadly weapon, and not in the reasonable apprehension of danger on account of threats or the violent disposition of deceased. Under no state of the case presented by the record was this testimony competent. This character of testimony would be admissible only for the purpose of tending to show that the accused acted in a reasonable manner and under circumstances which disclosed an apparent danger of immediate bodily harm. His testimony and theory of defense was not based on apparent danger, but on actual and impending danger. If the state of facts produced were true, the homicide was justified on the ground of necessary self-defense.

The next assignment of error urged is based on the contention that the county attorney was guilty of misconduct in making objection to the introduction of the foregoing testimony by using the language: "I think it is time this rot was stopped; it violates every rule of evidence." The rulings of the court disclosed by the record indicate no prejudicial error. The use of such language by counsel on either side should not be indulged in whether justified or not.

[5] The next assignment of error to be considered is that the court erred in declining to send the jury to the scene of the homicide for the purpose of permitting them to inspect

the premises and surroundings. This contention is wholly without merit. The scene was some 25 or 30 miles from the county seat in a remote and mountainous country. The trial judge in considering the application stated that he had no means of transporting the jury in a body to the scene; that nothing had developed in the trial to indicate any necessity for such action; that he had no objection to sending the jury to the scene if they desired to go and would do so at any time a request might be made by the jury before a verdict was reached, that they would like to make a personal inspection of the scene of the homicide. There is not a single suggestion in the record that would indicate in the remotest degree that any information or light would have been gained by such a visit. It would have been a useless expense of the taxpayers' money of Comanche county and an unnecessary hardship on the officers and jurors to have required such a trip. The rulings of the trial court in declining the request were in our judgment entirely proper. A plat of the scene was made by a civil engineer which was introduced in evidence. Photographs of the buildings and surroundings were also introduced and detailed explanations of all made by experts. A man of ordinary intelligence could have understood all the surroundings of the homicide from the testimony.

[6] The next assignment of error is based on the contention that the court erred in permitting witness Verne Stanford to testify on account of his tender age. After a thorough and grilling examination by counsel for plaintiff in error, this witness disclosed a remarkable degree of intelligence for a person of his age and opportunities. He showed entire frankness and a thorough understanding of his duties as a witness. Objections to this character of testimony are addressed to the sound discretion of the court, and unless an abuse of that discretion is shown this court will not reverse a conviction on that ground. Upon a careful examination of the testimony of this child and the grilling he received at the hands of counsel, we are of opinion that the trial court exercised its discretion properly. The witness apparently was a much more capable and intelligent one than many persons of mature age. The assignment is without merit.

[7] It is further contended by counsel that the testimony of this witness was not competent because it was not proper rebuttal. This contention is also without merit. The major portion of his testimony was wholly in rebuttal. Certain incidental statements possibly were not strictly rebuttal. The plaintiff in error had testified in his own behalf that this witness assaulted him with a bucksaw. The witness testified that he did not make such an assault; that the bucksaw was not even in the yard at the time. Plaintiff in error testified that he did not throw

a rock and strike the deceased. This witness testified that he did throw a rock and strike the deceased. Plaintiff in error had also testified that the deceased was standing up in the act of striking him with an uplifted ax when the shot was fired. This witness testified that the deceased was lying on the ground when he was shot. We are unable to determine under what theory this evidence would not be considered rebuttal. Counsel fail to advance any reason in their argument. *Hampton v. State*, 7 Okl. Cr. 291, 123 Pac. 571, 40 L. R. A. (N. S.) 43.

The next assignment of error is based on the contention that the court erred in permitting Drs. Meeker, Gooch, and Broshears to testify to the facts disclosed by their post mortem examination. This assignment is based on the contention that these facts should have been introduced by the state in the case in chief and that plaintiff in error was greatly prejudiced by reason of the fact that they were reserved for rebuttal. In support of this contention no authority is cited in the brief and no reasonable argument is advanced. In this case the killing was admitted; the defense was that of self-defense. All the state was required to prove was the unlawful killing and the circumstances thereof. This was done. In the defense, testimony was introduced tending to establish facts in justification of the killing. Among them was testimony by plaintiff in error himself to the effect that he had the butt of the gun below the waist band of his pants, the muzzle of the gun elevated, and shot the deceased when the deceased was approaching him in an effort to strike him with an ax, and that the shot ranged upward. This testimony in rebuttal exploded the theory of defense and was necessarily strong testimony tending to establish the real facts in connection with the homicide, and in a great measure must have convinced the minds of the jury that the homicide was a ruthless murder. The fact that testimony is admissible in chief does not necessarily exclude it in rebuttal. This testimony was in rebuttal of the theory of self-defense interposed by counsel on behalf of plaintiff in error and shattered his testimony and his contention that he killed the deceased at a time when he was being assaulted by him. It also strengthens the contention of the state that the deceased was lying on the ground when he was shot. This defense was evidently made upon the theory that the state expected to rely on the contention that the rock thrown by the accused hit him in the back and made the knot which was afterward shown by them to be a fatty tumor and not made by a rock. The proceedings disclose the fact that the county attorney knew all the while that the knot was a tumor and at no time contended that it was made by the rock. The only contention disclosed is that he relied on the theory that the rock

was thrown by plaintiff in error and fractured the skull of the deceased and that he was lying on his back in a helpless condition when he was shot in the face by plaintiff in error. The testimony, in our judgment, was properly reserved for rebuttal, and the objection to its introduction properly overruled by the trial court.

Assignments based on certain other evidence in rebuttal are urged, but they are all covered by the disposition of the foregoing. We fail to find any error in the proceedings of the trial court in reference to the introduction of testimony. In fact, out of abundant precaution, the trial court was eminently fair to the plaintiff in error.

[8] Certain assignments are stated in the brief as being based upon prejudice growing out of instructions of the court. An examination of the instructions indicates that they are entirely fair. Counsel present no plausible argument to the contrary. Not an authority is cited and not a line of argument pointing out a defect applicable to the state of facts disclosed by the record. Taken all together—and instructions must be considered as a whole—they were fair and properly submitted all issues.

Certain assignments are based on the failure of the court to give instructions requested by counsel for plaintiff in error. An examination of the record discloses that all material elements of the instructions requested were given, and no error is disclosed by the action of the court in refusing to give the requested charges.

[9] The next and only assignment urged which was entitled to serious consideration by the trial court is based upon an allegation in the motion for a new trial on the ground of newly discovered evidence. The examination of Dr. Farrinbaugh, an army surgeon stationed at Ft. Sill, was lengthy and thorough. From his testimony there is no doubt that the blood he examined, and which the testimony indicated was taken from a log in the wall of the cabin occupied by the deceased, was human blood. He is supported in this contention by Dr. De Barr, state chemist. There is other testimony in support of the contention, all, however, bearing on the diligence of counsel in connection with this feature of the case and in support thereof by other witnesses. In order for this court to be in position to reverse this conviction on this contention, it would be necessary for us to say that the testimony offered by these witnesses is such that the jury in all reasonable probability would have reached a different conclusion had the same been offered at the trial. *Howey v. State*, 9 Okl. Cr. 453, 132 Pac. 499. It will be remembered that the state's witness Meers, justice of the peace of the township in which the homicide occurred, testified at the trial that he discovered this blood in question upon the log in question on the day of the homicide, and

that he made no note of it in the minutes taken by him at the inquest, and examined no witnesses in reference to it, for the reason that it was old, dry blood and apparently had been on the log for a long time. This witness was apparently frank and not a partisan of either side. Another witness, who was a partisan of plaintiff in error, and whose testimony as disclosed by the record in many particulars impeached, shows that he discovered the blood on the log and that he thought it was fresh on the day of the homicide. This latter witness had been in attendance at the examining trial, acting as clerk in taking down the testimony at the inquest, had been at all times in attendance at the final trial in the district court, and only at the close of the trial did he divulge the information to counsel. It will be remembered, also, that a local physician in Lawton testified that in his opinion the blood in question was the blood of a human being. He admitted, however, that it was possible for him to be mistaken. The two experts examined on the motion for a new trial were very positive in their statements that it was human blood. In our judgment the state could have admitted that the blood in question was human blood; that is all the testimony would have established, and then a verdict of guilty would not only have been warranted under all the facts, but a reasonable jury could not have concluded otherwise than that this plaintiff in error was guilty of the ruthless and wanton murder of W. A. Stanford. This being true, there was no error committed and no abuse of discretion by the trial court in denying the motion for a new trial on this or other grounds. *Martin v. Territory*, 18 Okl. 370, 90 Pac. 18; *Smiley v. Territory*, 15 Okl. 314, 81 Pac. 433; *Hurst v. Territory*, 16 Okl. 600, 86 Pac. 280; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837; *Ryan v. State*, 8 Okl. Cr. 623, 129 Pac. 685; *Drew v. State*, 6 Okl. Cr. 348, 118 Pac. 677; *Johnson v. State*, 5 Okl. Cr. 1, 112 Pac. 760; *Cagle v. State*, 3 Okl. Cr. 621, 105 Pac. 681.

This record is voluminous, containing about 1,500 pages, all of which have been read and carefully examined by this court, and we are unable to find from a careful and studious examination of the same where a single right of the accused was denied.

The judgment of the trial court is therefore in all things affirmed.

It appears from the record that while this appeal was pending the act of March 29, 1913, regulating the infliction of the death penalty, became effective. As the day fixed for the execution of the judgment and sentence has passed, the cause is remanded to the district court of Comanche county for the purpose of appointing another day for the execution of the judgment, as provided by sections 5979 and 5980, Rev. Laws Procedure Criminal. Proceedings to be had in accordance with the rule prescribed by this court in the case



of *Alberty v. State*, 10 Okl. Cr. 616, 140 Pac. 1025.

The warden of the penitentiary will surrender the plaintiff in error to the sheriff of Comanche county, who will hold him in custody pending the proceedings in the trial court, and until his custody is changed by due course of law.

DOYLE, J., concurs. FURMAN, J., absent and not participating.

(11 Okl. Cr. 259)

NELSON v. STATE. (No. A-2297.)

(Criminal Court of Appeals of Oklahoma. Jan. 9, 1915.)

(Syllabus by the Court.)

LARCENY (§ 19\*)—ROBBERY (§ 6\*)—ELEMENTS —“LARCENY FROM THE PERSON” DISTINGUISHED.

To constitute “robbery,” as distinguished from “larceny from the person,” there must be force or intimidation in the act; therefore, where a thief slipped her hand into the pocket of the prosecuting witness, and took his purse, and in doing so, without putting him in fear, used no more force than was necessary to take the purse from his person, *held*, that the crime is larceny from the person, and not robbery in the first degree.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 46; Dec. Dig. § 19; Robbery, Cent. Dig. § 6; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, First and Second Series, Larceny from the Person; Robbery.]

Appeal from District Court, Choctaw County; Summers Hardy, Judge.

Gabriel Nelson was convicted of robbery in the first degree, and appeals. Reversed.

T. C. Humphrey, of Hugo, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the district court of Choctaw county, in which the defendant was found guilty of robbery in the first degree, and her punishment fixed by the jury at imprisonment in the penitentiary for a term of 10 years. On the 18th day of April, 1914, judgment was rendered and the court sentenced the defendant in accordance with the verdict of the jury.

The information charges that on or about the 28th day of August, 1913:

“The said Gabriel Nelson did then and there unlawfully, wrongfully, willfully, and feloniously and forcefully take from the person of E. B. Turner certain personal property, to wit, the sum of \$45, lawful money of the United States, of the value of \$45, then and there in possession of the said E. B. Turner, without the consent and against the will of the said E. B. Turner by means of force and fear employed by the said Gabriel Nelson toward, on, and upon the said E. B. Turner as follows: The said Gabriel Nelson did then and there with her hands and arms seize and take hold of the said E. B. Turner, and did thereby overpower and overcome the resistance of the said E. B. Turner, and then

and there took the said money in the manner and form aforesaid, contrary to,” etc.

The principal question urged on this appeal as a ground for a reversal of the judgment is the insufficiency of the evidence to warrant a conviction.

The prosecuting witness testified that he was engaged in running a transfer hack in the city of Hugo; that he first hauled a washstand and rug to the defendant's resort in the negro quarter of Hugo, that two or three months afterwards she passed him on the street and told him to come and get the washstand and rug, and that he went to her house. His testimony as to what occurred at the defendant's place is as follows:

“A. She unlocked the door, and I walked in, and it was sitting right where I put it and she slapped the door, too, and locked it and pulled the curtains down and asked me to do business with her. I told her no; I wouldn't do business with her. I told her to let me out of here. I haven't got any business in here, if that is what you are looking for, and I took hold of the door, and she run her hand into my pocket and took my purse, and says, ‘If I can't get your money one way, I will get it another.’ Q. What else occurred down there, if anything? A. We run together then; of course I was trying to get my money, and in the scuffle she hollered for help, and there was a negro man came in, and he says, ‘What is the matter here?’ and I says, ‘This woman has robbed me,’ and he says, ‘If she has robbed you, she has got to give your money back,’ and she says, ‘There lays your money,’ and I stooped down there and picked some of it up, and the negro ordered me out of the house, and I told him I would go out when I got my money, and I counted it, and, says I, ‘There is \$17 of my money gone.’”

J. W. Millam testified: That he was police judge; that the defendant was arrested and brought before him and pleaded guilty to stealing \$17.50 from Mr. Turner. That she related the circumstances as follows: That Turner had made improper proposals to her and wanted to have intercourse with her, and they got into a quarrel over the price; that he wanted to give her 50 cents or 75 cents and she wanted \$1, and he had his pocketbook in his hand, and she either grabbed or knocked the pocketbook out of his hand. That Mr. Turner's money was returned to him. The defendant, as a witness in her own behalf, testified that she was about 19 years old; that the prosecuting witness met her on the street, and said he wanted to do a little business with her, and she told him to come down whenever he felt like it; that when she returned home he was standing in her door. Her further testimony is as follows:

“Q. What did you do? A. I walked in and pulled the curtain down on the right-hand side, and on the left-hand side by the bed the curtain was already down; I had never raised it up that morning. Q. When you got the curtain down it was pretty dark in the room? A. Yes, sir; it was. Q. Well, what took place, what about the door? A. I locked the door. I pushed it to and thumb-latched it. Q. You didn't lock it, just thumb-latched it? A. Yes, sir, and asked him was he ready to do it, and he said ‘Yes,’ and he asked me, ‘What are you going to charge me?’ and I says, ‘A dol-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lar,' and he says: 'That is too much. I will give you a quarter.' And I says 'No,' and he says, 'Well, I will give you 50 cents,' and I says, 'No; I won't do that.' And he says, 'That's all a negro whore is worth, two bits or 50 cents,' and I says, 'Well, I won't do anything.' He says, 'I will give you a quarter to get rid of you,' and I says, 'Give me the quarter,' and I wouldn't of took the quarter, but he put his hand in his pocket and got his pocketbook out, and I knocked the pocketbook up that way, and the money went all over the floor and the bed. Q. Did you get on the bed? A. Yes, sir; we was scuffling on the bed. Q. Well, were you mad or in a good humor? A. No, sir; I was not mad; we were both laughing. Q. It was a kind of love struggle, was it? A. Yes, sir."

The Attorney General has filed a confession of error, based upon the holding of this court in the case of *Monagham v. State*, 10 Okl. Cr. 89, 134 Pac. 77, 46 L. R. A. (N. S.) 1149, which concludes as follows:

"When the facts in this case are considered in connection with the *Monagham* opinion, we cannot say that the evidence supports the charge of robbery. It appears from the evidence that the defendant in this case did no more than did *Monagham* in the reported case, except after the pocketbook was snatched there was a "scuffle" between them. We are of the opinion, therefore, that the judgment is not supported by the evidence, but that the defendant should be prosecuted for the offense of larceny from the person."

The crime of robbery is defined in our Penal Code as follows:

Section 2364, Rev. Laws:

"Robbery is a wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear."

Section 2365:

"To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery."

Section 2366:

"When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial."

The crime of grand larceny is defined in our Penal Code as follows:

Section 2655:

"Grand larceny is larceny committed in either of the following cases: First. When the property taken is of value exceeding twenty dollars. Second. When such property, although not of value exceeding twenty dollars in value, is taken from the person of another."

Here the allegation is that the property was taken by means of force and fear. There was no evidence tending to show that the prosecuting witness was put in fear, and there was no evidence of force sufficient to constitute robbery as distinguished from larceny from the person. The difference between robbery and larceny from the person of another lies in the force or intimidation used. The Legislature has formally and fully recognized the distinction by the enactment of section 2655 above quoted, and if the force used was only such as was necessary to take the money from the person of the

prosecuting witness, without resistance on his part, it was not sufficient to constitute robbery, as otherwise there would be no distinction between robbery and larceny from the person. *State v. Paisley*, 38 Mont. 237, 92 Pac. 566; *State v. Parker* (Mo.) 170 S. W. 1121.

In the *Monagham* Case it was held that:

"To constitute 'robbery' as distinguished from 'larceny from the person,' there must be force, violence, or intimidation in the taking. Therefore, where there is no evidence tending to show that the defendant obtained or retained the personal property alleged to have been taken by force and violence or by putting in fear, the crime is grand larceny, and not robbery, and a verdict of guilty of robbery in the first degree is contrary to law and the evidence."

We here repeat what is said in the opinion in that case:

"It would seem, and we would suggest, that always in a case of this character, where the line of demarcation between offenses, as in this case, has a very narrow margin, the safe practice, where the proof may be uncertain, is to charge the lesser offense."

It follows that the confession of error should be sustained. The judgment of the court below is reversed. The warden of the penitentiary is directed to deliver the defendant to the sheriff of Choctaw county, who will hold her in custody until she shall be discharged therefrom, or as otherwise ordered according to law.

ARMSTRONG, P. J., and FURMAN, J., concur.

(45 Okl. 70)

*ÆTNA LIFE INS. CO. v. BRADFORD et al.*  
(No. 3805.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

# 1. CONTRACTS (§ 164\*)—CONSTRUCTION.

Where a contract is executed which refers to and makes the conditions of another instrument a part of it, the two will be construed together as the agreement of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 746-748; Dec. Dig. § 164.\*]

# 2. INSURANCE (§ 631\*)—ACTION ON POLICY—PETITION—SUFFICIENCY.

Where the petition discloses that an interim insurance was issued for ten days from the date of the "binder" and "pending the issue of a regular policy at the rate and subject to limits of liability stated therein, and subject also to the agreements and conditions of the policy form E. L. 20, \* \* \* as issued by this company, \* \* \*" and the plaintiff declared upon the "binder" alone, without setting forth the policy subsequently issued pursuant to the terms of the "binder," and declaring thereupon as a part of the contract of insurance, *held*, a demurrer to the petition should have been sustained.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1588, 1589; Dec. Dig. § 631.\*]

Error from District Court, Carter County; S. H. Russell, Judge.

Action by Louis H. Bradford and another against the *Ætna Life Insurance Company*.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment for plaintiffs, and defendant brings error. Reversed for new trial.

Potterf & Walker, of Ardmore, for plaintiff in error. Cruce & Potter, of Ardmore, for defendants in error.

TURNER, J. On March 8, 1911, Louis H. Bradford, defendant in error, in the district court of Carter county, sued Ætina Life Insurance Company, plaintiff in error, on the following "binder," issued to him by defendant, for value:

Accident and Liability Department,  
Ætina Life Insurance Company,  
Hartford, Connecticut.

No. 41324. Limits: One person, \$5,000.  
One accident, \$10,000.

Binder.

Date, Nov. 24, 1909.

The Ætina Life Insurance Company of Hartford, Conn., hereby binds insurance for a period of ten days from the above date, pending the issue of a regular policy at the rate and subject to the limits of liability stated herein and subject also to the agreements and conditions of the policy form E. L. 20, PL H GL V AV and WC, as issued by this company on the risk of, name, the Ardmore Steam Laundry, L. H. Bradford, Prop., address, Ardmore, Okla.

Class E Pay Roll \$5,000. Rate, 75c.

Description of business: Laundry (with guards), Ardmore, Oklahoma.

Notice.—It is hereby agreed that if policy when issued is not accepted by the assured or if this insurance is not accepted by the company, the assured will pay the premium earned under this binder from the date thereof until the binder is returned to the agent issuing same.

Report Accidents Immediately.

This binder will be void if the agent or other representative of the company has changed or waived any clause thereof.

The insurance under this binder covers only the risk described above. If the risk is accepted by the policy, the policy will bear even date with the binder. If the risk is not accepted the agent will collect the earned premium at the rate named for the period of this binder. This binder is not valid unless signed by an authorized agent of the company.

Slaughter & Verschoyle, General Agents.

After setting it forth, his petition substantially states that, within the specified ten days, one of his employes within the risk was injured by having her hand caught and crushed in a mangle used in said laundry; that he had been sued and paid a judgment in damages for said injury; that the loss to him was covered by the "binder," and prayed judgment over against defendant for \$1,050, the amount of the loss.

[1, 2] The petition fails to set forth the terms of the policy referred to in the "binder," and proceeds upon the theory that the "binder" contained all the terms and conditions of the contract of insurance. To this defendant filed a motion to make more definite and certain, the object of which was to require plaintiff to set forth and declare upon the policy. But the same was overruled, as was also a demurrer to the petition. Thereupon defendant answered, and inter-

posed a general denial, and pleaded in substance that the "binder" was only intended to furnish ad interim insurance on a laundry with guards, and that the premium paid therefor was only applicable to such; that, by the terms of said "binder," said insurance was subject to the agreements and conditions contained in defendant's policy for E. L. 20, which was alleged to be an employers' liability policy used for steam laundries whose mangle is duly guarded, and that at the time the injury was sustained, resulting in the loss complained of, the mangle causing the injury was unguarded; that the policy issued to plaintiff pursuant to the terms of said "binder" was in accordance with said form No. 20 and was thereafter in due time delivered to him and by him accepted and retained. There was trial to a jury and judgment for plaintiff, and defendant brings the case here. On the trial defendant offered in evidence a copy of the policy. There was no question that it was in form E. L. 20, as pleaded, or that the original duly issued to and was in possession of plaintiff at the time he sued. But the court sustained an objection thereto, excluded it from the jury, and defendant excepted. It provided:

"It is hereby understood and agreed that all the mangling machines owned or operated by the assured shall be provided with fixed guards or safety feed tables adjusted to the point of contact of the rolls, so as to prevent the fingers or hand of the employe from being drawn into the rolls, and that such guards shall be maintained during the term of this policy. Any failure on the part of the assured to provide and maintain such guards shall relieve the Ætina Life Insurance Company from liability on account of personal accidents due to such neglect, and this policy is accepted by the assured accordingly."

The mangle in which the employe's hand was caught was unguarded, and there can be no doubt that the loss was excepted by the terms of the policy. The recovery was perhaps owing to the fact that the court adopted plaintiff's theory and, in effect, instructed the jury that the policy was no part of the contract. The court was wrong. If the policy formed a part of the contract, which was executed and delivered, the failure to set out its terms and conditions and allege a compliance therewith or excuse a failure to comply was properly raised by the demurrer, which should have been sustained. This was precisely the fact in *Home Ins. Co. v. Favorite et al.*, 46 Ill. 263, which was a suit upon a "binder," as here. The declaration failed to set forth the policy to which the "binder" referred, and the defendant set it up, relied upon it as a part of the contract of insurance, and sought to escape liability under its terms and conditions by introducing it in evidence. The court held that it was a part of the contract, and said:

"If such a policy formed a part of the contract, which was made and delivered, the failure to set out its terms and conditions in the declaration, and to have averred a compliance

therewith, or an excuse for a noncompliance, should \* \* \* have been taken advantage of upon demurrer."

And, after reversing the case, in the syllabus said:

"Where a contract is executed which refers to and makes the conditions of another instrument a part of it, the two will be construed together as the agreement of the parties."

This case was relied on by us in *United States Fidelity & Guaranty Co. v. American Bonding Co.*, 31 Okl. 669, 122 Pac. 142. There the "binder" recited that it was "subject to all the covenants and conditions set forth and expressed in the bond of this company to be issued on even date herewith." In passing on the legal effect of this "binder," we said:

"Of course the 'binder' and the bond referred to were thus made a part of one and the same agreement, and should be construed together in determining what the contract of insurance was, and the liability, if any, of the company thereon."

We are therefore of opinion that the demurrer to the petition should have been sustained, and the cause should be reversed for a new trial.

It is so ordered. All the Justices concur, except Kane, C. J., absent and not participating.

(45 Okl. 142)

BYRD et al. v. HARRISON et al. (No. 6988.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564\*)—PERFECTING APPEAL—TIME—NEW TRIAL.

Where a case is tried upon an agreed statement which eliminates all questions of fact, a motion for new trial is unauthorized by statute, and the time for making and serving a case for this court runs from the date of the judgment, unaffected by such motion or the order overruling the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

2. APPEAL AND ERROR (§ 564\*)—TIME FOR PERFECTING APPEAL—EXTENSION—VALIDITY.

An order extending the time, and a case-made served in accordance therewith, after the expiration of the time specifically given by statute, are nullities, and a petition in error with such case-made attached gives this court no jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action between William Byrd and others and H. H. Harrison and others. From the judgment, the parties first mentioned bring error. Dismissed.

F. E. Kennamer and Chas. A. Coakley, both of Madill, for plaintiffs in error. Rider & Hurt, of Madill, for defendants in error.

LOOFBOURROW, J. [1, 2] This case was tried upon an agreed statement of facts

in the court below, and the record discloses no other facts except those shown in the stipulation. Judgment was rendered May 27, 1913. A motion for new trial was filed May 28, 1913, and overruled May 28, 1914. Defendants in error have moved to dismiss the appeal, for the reason that more than six months have elapsed between the date of the rendition of the judgment and the filing of the petition in error and case-made.

Upon the authority of *C. R. I. & P. Ry. Co. v. City of Shawnee*, 39 Okl. 728, 136 Pac. 591, and cases therein cited, the appeal is dismissed.

TURNER, RIDDLE, and BLEAKMORE, JJ., concur.

KANE, C. J., absent and not participating.

(45 Okl. 372)

SELZER v. SELZER. (No. 3657.)

(Supreme Court of Oklahoma. Oct. 13, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONFLICTING EVIDENCE—SUIT AGAINST ADMINISTRATRIX.

Where, in a suit against an administratrix on a claim against deceased's estate, the evidence is conflicting, but sufficient to induce the jury to believe that the claim, over the amount allowed by the administratrix, is not made in good faith, the court will not disturb a verdict in favor of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

2. EXECUTORS AND ADMINISTRATORS (§§ 453, 456\*)—TAXATION OF COSTS—CLAIM AGAINST ESTATE—VERDICT—JUDGMENT.

In a suit against an administratrix on a claim, part of which has been allowed against the estate, the court, on a verdict for defendant, should enter judgment for the amount so allowed and tax plaintiff with the costs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884-1908, 1941-1967; Dec. Dig. §§ 453, 456.\*]

Error from District Court, Kingfisher County; Jas. B. Cullison, Judge.

Action by Louis Selzer against Rena Selzer, as administratrix of the estate of John F. Selzer, deceased. Judgment for defendant, and plaintiff brings error. Reversed, with directions to enter judgment for plaintiff.

F. L. Boynton, of Kingfisher, for plaintiff in error. R. F. Shutler and Hinch & Bradley, all of Kingfisher, for defendant in error.

TURNER, J. On July 22, 1911, plaintiff in error, Louis Selzer, in the district court of Kingfisher county, sued Rena Selzer, as administratrix of the estate of John F. Selzer, deceased. Paragraph 1 of his petition substantially states that in June, 1911, John F. Selzer died, and thereafter defendant was duly appointed and qualified as his administratrix; that in November, 1906, plaintiff loaned deceased \$150, payable on demand on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his parol promise to repay the same, and that the same was unpaid, and that there was due and owing thereon \$195. Paragraph 2 was in effect that on September 14, 1908, plaintiff loaned deceased \$800, and that the same was due and unpaid. Paragraph 3 was in effect that in September, 1910, while deceased was engaged in farming in Kingfisher county, plaintiff furnished him cash to the amount of \$50, seed wheat of the value of \$60, seed oats of the value of \$50.40, in three different items of \$16.80 each on different dates, hay of the value of \$15, work in sowing grain of the value of \$10, in all \$185.40, on which account \$15 has been paid, leaving a balance due thereon of \$170.40. In paragraph 4 he alleges that on August 6, 1909, plaintiff loaned deceased \$10, no part of which had been repaid. He further alleges that when his sworn claim was presented to the administratrix she indorsed thereon:

"The above claim was presented to me this 17th day of July, 1911, for allowance, and on the 20th day of July, 1911, said claim was by me disallowed (except the following items by me allowed, namely: To cash loaned to John F. Selzer, September, 1910, amount, \$15.00; to 60 bushels of seed wheat, \$60.00, October 10, 1910; 60 bushels seed oats, March, 1911, \$16.80. All the rest of said claim is by me disallowed)."

—and that the disallowance was signed by defendant and concurred in by the county judge. Attached to the petition was an itemized claim, including the items allowed, for all of which he prayed judgment. By way of an amendment to the petition, plaintiff sought to charge the \$800 as a lien on certain lands (described) located in Jefferson county, which he says were paid for in part with that amount. For answer, defendant alleged that the \$91.80 allowed was sufficient to cover all liability of the deceased to plaintiff, and further pleaded a general denial, except as to matters set forth in paragraphs 1 and 2, to which she pleaded the bar of the statute. After reply, in effect a general denial, and trial to a jury and judgment for defendant, plaintiff brings the case here.

[1, 2] Various errors are assigned, but none of them, if error, are reversible. The facts disclose that no note or memorandum in writing of any kind evidenced the claim of the plaintiff for money alleged to be due him from deceased. The plaintiff was the father of the deceased, and was the only witness who testified directly concerning the \$800 alleged to be due him. It was his contention that when he bought the Bongham place in 1908, there was a mortgage on it for \$1,000; that he borrowed \$800 more on the place, and sent that amount to deceased in the shape of a certificate of deposit on the People's State Bank, which he indorsed and which was in evidence, indorsed by deceased. The claim was defended on the theory that deceased had relinquished a claim on said place at the time plaintiff bought it, and thereby contributed to the purchase price

\$1,000, and that the \$800 thus sent him was in part payment of that amount. As to the \$150 item, it was conceded that the same was barred by the statute. The other items of the claim were supported by parol evidence only, adduced principally by plaintiff and his immediate family. On the other hand, it was shown that for years deceased had kept careful book accounts, even "to a postage stamp," in which none of the claims were mentioned. It is unnecessary to recite the testimony pro and con concerning the various items. The most that can be said of it, after a careful reading of it all, is that the same is conflicting and was sufficient to lead the jury to believe that the claim over and above the \$91.80 allowed was not made in good faith. And it may be, too, that a young widow in tears with a "winsome baby" in her arms had something to do with the verdict, as claimed by plaintiff, but with this we have little concern. The jury had a right to believe her, which they did, and the books kept by her honest hard-working husband in preference to his father, mother, brother, and friends. And we will not disturb the verdict except to say that the court should have instructed the jury to bring in a verdict for at least the amount of \$91.80 allowed by defendant on the claim. This pursuant to section 6349, Rev. Laws 1910, which reads:

"Whenever any claim is presented to an executor, or administrator, or to the judge of the county court, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in an action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed."

But this will not work a retrial of the cause. Let the judgment be reversed, with directions to enter judgment in favor of plaintiff and against defendant as administratrix for \$91.80 and tax plaintiff with the costs. All the Justices concur, except KANE, C. J., not participating.

(45 Okl. 215)

KELLY et al. v. STATE. (No. 2633.)  
(Supreme Court of Oklahoma. Sept. 15, 1914.  
Second Petition for Rehearing Denied  
Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. BAIL (§ 87\*)—ACTIONS—PARTIES.

The state is a proper party plaintiff in a suit on a forfeited bail bond against the defendant and his sureties, which suit must be instituted by the county attorney in the name of the state.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 382, 383; Dec. Dig. § 87.\*]

2. BAIL (§ 89\*)—ACTION—PLEADING—SUFFICIENCY OF ANSWER.

In this case suit was filed by the county attorney in the name of the state upon a forfeited bail bond against the defendant and his sureties. The defendant in the original case failed to appear. The sureties appeared and filed their answer, alleging, in substance, that

the defendant was not guilty of any offense under the law, and that the petition did not show that he had violated any law of the state. Motion was filed for judgment on the pleadings, which motion was by the court sustained. *Held*, the answer constituted no legal defense, and the court committed no error in granting judgment on the pleadings.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 384-400, 402; Dec. Dig. § 89.\*]

Error from District Court, Blaine County; James R. Tolbert, Judge.

Action by the State against W. R. Kelly and another. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 40 Okl. 355, 138 Pac. 167.

Seymour Foose and Baker & Bloss, all of Watonga, for plaintiffs in error. A. L. Emery, Co. Atty., and J. P. Wishard, both of Watonga, for the State.

**RIDDLE, J.** This suit was instituted in the district court of Blaine county by the state of Oklahoma, through its county attorney, against W. R. Kelly and D. H. Haskins upon an appearance bond in the sum of \$1,000, executed by one T. B. Smith, as principal, and plaintiffs in error, defendants below, as sureties; said bond conditioned for the personal appearance of said Smith before the district court on the 7th day of August, 1908, and from day to day and term to term until legally discharged by the court. Smith failed to make his appearance, and the bond was duly forfeited and an order entered to that effect.

[1] The petition, in substance, alleges the filing of a complaint, issuance of a warrant, and the arrest of Smith, charged with an offense against the laws of the state; the preliminary examination, the order holding defendant to await the action of the district court; the execution and filing of said board with plaintiffs in error as sureties; the indictment of the defendant by the grand jury; the failure of the defendant Smith to make his appearance before the court, and that an order was duly made forfeiting the bond; and that judgment was entered thereon. Plaintiffs in error filed motions to dismiss and abate the action, which motions were by the court overruled. The main ground of the motions was that the suit was not prosecuted in the name of the real party in interest. They each filed a demurrer to the petition, which demurrers were by the court overruled and exceptions taken. The demurrers raised substantially the same questions relied upon in the motions to dismiss. Plaintiffs in error thereafter filed answers, consisting: First, of a general denial; second, that defendant Smith was not guilty of any offense against the laws of the state, and particularly the offense of which he is charged; third, that the petition does not allege that defendant was guilty of any offense under the law. The county attorney filed a motion for judgment on the pleadings, which

was by the court sustained. Exceptions were taken to the judgment, and the case is now in this court upon a petition in error.

The alleged errors relied upon for reversal of the cause are: First, error in the court in overruling the motion to dismiss and abate said action; second, error in overruling the demurrers filed by each of said defendants; third, error of the trial court in sustaining the motion of the state for judgment on the pleadings. These various assignments raise only two propositions of law: First, was the suit prosecuted in the name of the real party in interest? Second, did the answer constitutes any defense to the cause of action set up in the petition? We have carefully examined the record, and, in our judgment, there is no merit in the contention that the suit was not prosecuted in the name of the real party in interest. The written instrument sued upon, as by law required, was made payable to the state of Oklahoma. It is clear from the record that the suit was prosecuted in the name of the state by and through the duly authorized and acting county attorney; and the contention made by the defendants that the petition is contrary to section 7112, Comp. Laws 1909, is purely technical, and cannot be sustained. This section provides that, after the forfeiture, the district attorney shall proceed with all diligence by action against the bail upon the instrument so forfeited. The record discloses that the county attorney did institute this suit in behalf of the state, and that he proceeded with due diligence.

[2] It is next contended that the allegations in the answer that the principal defendant, Smith, was not guilty of any offense under the law, and that the petition did not show that he had violated any law of the state, constituted no defense whatever to the cause of action. The appearance bond which he executed and which was signed by plaintiffs in error as sureties did not provide that the defendant should make his personal appearance only upon condition that his codefendant was proven guilty, or that he should appear only in the event that it was shown that he was guilty of the offense; but the condition was that he would personally appear before the district court on the 7th day of August, 1908, and from term to term and from day to day of each term, and to abide the order of said court, and to do and receive what shall be enjoined by said court upon him, and shall not depart the said court without leave thereof. The purpose of the law requiring the execution and filing of the appearance bond was that he should appear before the court, so that his guilt or innocence could be determined.

We find no merit in any of the contentions made by the plaintiffs in error, and the judgment of the trial court is accordingly affirmed. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(44 Okl. 783)

MOBLEY v. CHICAGO, R. I. & P. RY. CO.  
(No. 3934.)(Supreme Court of Oklahoma. Dec. 1, 1914.  
On Rehearing, Jan. 9, 1915.)*(Syllabus by the Court.)*1. APPEAL AND ERROR (§ 564\*)—PERFECTING  
APPEAL—DISMISSAL.

The party desiring to have a judgment or order reviewed by the Supreme Court must prepare and serve his case-made on the opposite party within three days after the judgment or order is entered; and, unless the case is served within that time or within an extension of time allowed by the court or judge within such time, the case will not be considered in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—  
EXTENSION OF TIME—VALIDITY.

A purported order of the trial judge extending the time in which to make and serve a case-made is without force, where the case-made fails to show affirmatively that such order was made and is entered of record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

3. APPEAL AND ERROR (§ 494\*)—PRESENTA-  
TION FOR REVIEW—RECORD—DISMISSAL.

A record which fails to contain a copy of the final order or judgment sought to be reviewed, and in which it is not made to appear that the same is of record in the trial court, presents no question to this court for its determination, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2286; Dec. Dig. § 494.\*]

Commissioners' Opinion. Division No. 2. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by Anna B. Mobley, as administratrix, against the Chicago, Rock Island & Pacific Railway Company. Demurrer to plaintiff's evidence sustained, and she brings error. Dismissed.

H. H. Smith and W. T. Williams, both of Shawnee, for plaintiff in error. R. J. Roberts and W. H. Moore, both of El Reno, and J. W. Shartel, of Oklahoma City, for defendant in error.

GALBRAITH, C. The plaintiff in error, a sister of John G. Mobley, deceased, commenced this action in the trial court to recover damages for his wrongful death, charged to have been caused by the negligence of the defendant in error, its servants and employes. At the close of the evidence on behalf of the plaintiff a demurrer was interposed thereto and sustained. It is sought by the appeal to have that order reviewed. The recitals of the case-made relative to this order are as follows:

"That thereafter on the 10th day of June, 1911, it being one of the regular judicial days of the regular June, 1911, term of the district court of Pottawatomie county, the plaintiff rests, and closes its case, whereupon the defendant files its demurrer to the evidence of the plaintiff,

which demurrer is in words and figures as follows, to wit: 'Mr. Low: Comes now the defendant and demurs to the evidence of the plaintiff herein, at the conclusion of the same, for the reason that it, together with all reasonable inferences therefrom, is insufficient to prove a cause of action under the allegations of the petition herein; and for the further reason that the evidence offered by plaintiff does not show a state of facts which will sustain a cause of action in favor of the next of kin dependent upon the said John Guy Mobley.' Thereupon Mr. Smith asks leave of court before the demurrer was considered by the court to file the following amendment, which by leave of court was granted, and the defendant thereupon withdrew his said demurrer. The said amendment to the plaintiff's petition is as follows: 'Comes now the plaintiff at this time and asks leave of the court to amend the amended petition of plaintiff by adding, after the amendment, the following words: "That at this time the deceased, Guy Mobley, was injured, from which injuries he died, he was engaged in the employment of and riding on a switch engine of the defendant, to which switch engine he was attached as switchman at said time, and working in aid of an interstate passenger train of the defendant, which said switchman at said times was engaged in interstate commerce between the states of Oklahoma and Arkansas, to wit, it was moving over a switch which connected the tracks of the Chicago, Rock Island & Pacific Railway Company, and the tracks of the Atchison, Topeka & Santa Fe Railway Company, for the purpose of meeting and assisting over said connecting track passenger train No. —, then moving and in transit from the state of Arkansas into the state of Oklahoma, and over said track and through the city of Shawnee, where was located said track in said state; and defendant was engaged in the operation of said train, and at said time, of intrastate and interstate commerce." The court thereupon permitted and gave leave for the plaintiff to file the said amendment without objection on the part of the defendant. Thereupon defendant renewed its demurrer to the evidence of the plaintiff for the reason that the facts proven and all reasonable inferences drawn therefrom are sufficient to sustain a verdict in favor of the plaintiff, and for the further reason that the plaintiff is not a dependent within the meaning of the statute. Which demurrer was by the court thereupon sustained, to which ruling of the court the plaintiff excepts. The defendant thereupon asks judgment on the demurrer of the defendant to the plaintiff's evidence. Thereupon the court granted judgment upon the demurrer of the defendant, to which ruling the plaintiff excepts. Which order is—"

A motion is presented in this court to dismiss the appeal: First, because the purported case-made does not show that judgment was rendered or entered. Second, because the purported case-made contains no final order of the court overruling the motion for a new trial. Third, because the purported case-made was not filed within the extensions allowed by the court, as shown by the records of the clerk's office. Fourth, because the plaintiff in error has exhausted her advance cost deposit in this court, and has neglected and refused to make additional cost deposit or put up satisfactory cost bond with the clerk.

[1-3] At least three of the grounds of this motion seem to be well taken. There is no journal entry of judgment in the record of

the court's ruling on the demurrer to the evidence, nor is there a journal entry of the judgment in favor of the defendant and against the plaintiff for cost, as would naturally follow the court's order in sustaining the demurrer to the evidence. This seems to be a fatal defect in the record, as would appear from the following authorities: *Gardenhire v. Burdick*, 7 Okl. 212, 54 Pac. 483; *Sproat v. Durland*, 7 Okl. 230, 54 Pac. 458; *Commissioners v. Moon*, 8 Okl. 205, 57 Pac. 161; *Denny v. Wright & O'Rourke*, 13 Okl. 256, 74 Pac. 104; *High v. United States*, 14 Okl. 399, 78 Pac. 100; *Brown v. Territory of Oklahoma*, 15 Okl. 362, 82 Pac. 647; *Ford v. McIntosh*, 22 Okl. 423, 98 Pac. 341; *Meadors v. Johnson*, 27 Okl. 543, 117 Pac. 198; *Kansas City v. M. & O. R. Co.*, 34 Okl. 164, 124 Pac. 70; *Olentine v. Powell*, 23 Okl. 363, 100 Pac. 556.

In the last case above cited, Chief Justice Hayes, speaking for the court, says:

"An examination of the case-made discloses that it contains no copy of any final judgment or order of the court below upon the issues before it, and from the recitals in the record it appears that no final order or judgment has been made. At most, the case-made fails to show that any judgment or final order was rendered by the trial court upon the issues before it. The matters quoted from the case-made above would constitute a finding of the fact upon the issues before the court, but do not constitute any order thereupon. Where the case-made to be reviewed by this court fails to show that a judgment or final order was rendered by the trial court, or fails to contain a copy of such judgment or final order, such case-made presents nothing to this court for review, and cannot be considered."

Again the third ground of the motion that the case-made was not served and filed within the extension allowed by the court, as shown by the records, likewise seems to be well taken. The order on the demurrer was made on the 6th day of November, 1911, and on that day the time for making and serving case-made was extended for 90 days. This order would permit the case-made to be served at any time prior to February 5, 1912. There appears in the case-made an order under date of January 19, 1912, extending the time for serving the case-made 30 days additional to the 90 days above mentioned; but the record fails to show that this order was filed with the clerk of the trial court or ever became a part of the record in the case. The case-made was not served upon the defendant in error until March 4, 1912.

In the case of *Fife v. Cornelous*, 35 Okl. 402, 124 Pac. 957, the second paragraph of the syllabus reads as follows:

"A purported order of the trial judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made and is entered of record."

In the instant case the record fails to show that this order of January 19, 1912, purporting to extend the time for serving the case-made, was ever filed or entered of record in the trial court, and it is therefore without legal force or effect. This third

ground is sufficient alone to justify the court in granting the motion to dismiss the appeal. The record was filed in this court on May 4, 1912, and it is now too late to supply the defects in the record above referred to.

The motion to dismiss is well taken and should be sustained. We recommend that the appeal in this case should be dismissed.

#### On Rehearing.

The grounds urged for rehearing are: (1) That the journal entry of judgment was actually made and filed in the trial court and was omitted therefrom through inadvertence or mistake, attaching a copy thereof certified by the clerk of the trial court; (2) that the order of January 19, 1912, extending the time for making and serving the case-made, was actually filed in the trial court, attaching a copy thereof duly certified by the clerk; (3) that "an application" was prepared and mailed to the clerk of this court prior to the decision dismissing the appeal, but was not filed because plaintiff in error's cost deposit was exhausted.

It will be observed that no effort has been made in the preparation of this petition to comply with the requirements of rule 9 (137 Pac. ix) of this court governing petitions for rehearing, and that none of the reasons set out in the petition are recognized grounds for rehearing.

It appears from the record in this case that the motion to dismiss the appeal was regularly served, prior to the time the cause was set down for argument and submission, and an argument in support of the motion was made in the defendant in error's brief; that on the day the cause was set down for argument at the October, 1914, term, counsel for the defendant in error appeared and made an oral argument in support of the motion to dismiss. Counsel for the plaintiff in error did not appear and made no written response to the motion. The cause was regularly submitted, and on December 1, 1914, an opinion was handed down sustaining the motion and dismissing the cause. On December 7, 1914, counsel for the plaintiff in error filed a petition for rehearing on the grounds above set out. While the reasons therein set out are not recognized grounds for a rehearing, if they had been made in response to the motion to dismiss and in the proper time they would have received the careful consideration of the court; but, presented at this time and in this manner, they are not entitled to consideration. Counsel do not attempt to offer any excuse for their failure to make response to the motion to dismiss, nor for their failure to appear in court on the day the cause was set down for argument, nor to show why they permitted the cost deposit with the clerk of this court to become exhausted so that no papers in the cause could be properly filed. Such attitude of counsel does not appeal to the indulgence of the



court. If counsel do not take enough interest in their cases to make a reasonable effort to comply with the rules of court, which are formulated for the purpose of facilitating the dispatch of business before it, they come in ill form asking something by grace to which they are not entitled as of right. The petition for rehearing is denied, and the original opinion filed herein adhered to in all respects.

PER CURIAM. Adopted in whole.

(44 Okl. 523)

**PRIVETT, Register of Deeds, et al. v. BOARD OF COM'RS OF GRANT COUNTY.**  
(No. 3895.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

**1. REGISTERS OF DEEDS (§ 7\*) — ACTION ON BOND.**

The action of a board of county commissioners, settling reported accounts of the county register of deeds, is not a bar to an action against such register and his bondsmen for fees collected and misappropriated by him.

[Ed. Note.—For other cases, see Registers of Deeds, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.\*]

**2. OFFICERS (§ 100\*)—REGISTER OF DEEDS—COMPENSATION—AMOUNT—CHANGE DURING TERM.**

A register of deeds, who was elected in 1907 and held office from November 17, 1907, to January 9, 1911, was entitled to compensation under Laws 1897, c. 15, § 17 (section 3382, Comp. Laws 1909) throughout his term, notwithstanding the act of March 19, 1910 (Laws 1910, c. 69, § 3), purporting to put a different measure of compensation into effect on and after June 17, 1910, as section 10, art. 23 (Williams' § 359), of our Constitution inhibits any change in the salary or emoluments of a public officer during his term.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Grant County; W. M. Boles, Judge.

Action by the Board of County Commissioners of Grant County against E. P. Privett, Register of Deeds, and his bondsmen, for fees collected and unpaid to county. Judgment for plaintiff, and defendants bring error. Reversed and rendered.

Sam P. Ridings, of Medford, for plaintiffs in error. Emery H. Breeden, of Medford, for defendant in error.

**THACKER, C.** Plaintiffs in error will be designated as defendants and defendant in error as plaintiff, in accord with their respective titles in the trial court.

The plaintiff county, by its board of commissioners, brought this action against E. P. Privett, its register of deeds, from November 17, 1907, to January 9, 1911, as principal, and his codefendants, as his sureties, upon his official bond for \$552.72 and recovered thereon \$474.12 upon items of its demand as

shown by the following quotation from the journal entry of judgment:

That there is due on report 12-31-07	\$ 64 15
That there is due from chattel mortgages not reported	21 00
That there is due on error in addition on reception records and reports	42 47
That there is due fees for November, 1910, not paid into the county treasurer	346 50
	<hr/> \$474 12

[1] The action of the plaintiff's board of county commissioners in approving the accounts of said register under section 1838, Stat. 1890 (section 1645, Rev. Laws 1910), from which no appeal was taken, is not a bar to this action. *Anderson v. Board of Commissioners*, 143 Pac. 1145; *Huntington et al. v. Board of Commissioners*, 144 Pac. 385; *Ziegler v. Board of Commissioners*, 144 Pac. 381; *Orendorff v. Board of Commissioners*, 144 Pac. 383; *Hamilton et al. v. Board of Commissioners*, 144 Pac. 386; *Russell v. Board of Commissioners*, 144 Pac. 580; *Walker v. Board of Commissioners*, 144 Pac. 793.

[2] Under Laws 1897, p. 168 (section 3382, Comp. Laws 1909), enforced throughout the register's term, he was entitled to a salary of \$1,600 per annum, plus 50 per cent. of the specified fees collected by him in excess of that amount, until the census of 1910 operated to raise his compensation to a salary of \$2,000 per annum, plus 50 per cent. of such fees so collected in excess of that amount, notwithstanding an act of March 19, 1910, purporting to take effect on June 17, 1910, and to supersede the former law in this regard.

Section 10, art. 23 (Williams' § 359), of our Constitution inhibits any change in the "salary or emoluments" of a public office during the term of its incumbent; and we think there can be no doubt of the correctness of the foregoing statement that the act of March 19, 1910, did not affect the register's right to compensation under the former law. *Board of Commissioners of Beaver County v. Culwell et al.*, 41 Okl. 712, 139 Pac. 979; *Board of County Commissioners of Greer County v. Henry et al.*, 33 Okl. 210, 126 Pac. 761.

It follows that for the fractional quarter year prior to the first Monday in January, 1908, the register was not entitled to the \$64.15 retained by him out of the fees then collected and reported by him in excess of compensation for the actual time of his service at the rate of salary and excess fees above stated; that he was not entitled to the \$21 on account of chattel mortgages received and not reported; that he was not entitled to the error in his favor in addition in the reception records and reports amounting to \$42.47; and that the trial court did not err in finding against the defendants for each and all these items. But the item of \$346.50, for which judgment was also given, does not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.\* Indexes

appear to be warranted by the pleadings and the agreed statement of facts, upon which this case was tried. It appears that from the 1st day of July, 1910, to (but not including) the 9th day of January, 1911, the fees collected by the register amounted to \$1,949.70, while he was entitled to \$1,044.40, plus 50 per cent. of the fees collected in excess thereof, amounting to \$452.65, aggregating \$1,497.05; and it does not appear that he retained or received from the plaintiff, as against this sum, more than \$1,364.93, including \$892.43, which he received directly, and \$472.50 which the plaintiff, without authority of law, paid out for him in clerk hire. The three items to which plaintiff is entitled, as aforesaid, aggregate \$127.62; but it appears from the foregoing figures that after charging the defendant with this additional amount the plaintiff was indebted to him, upon a full and complete accounting, in the sum of \$4.50.

The judgment of the trial court should be reversed and here and now rendered for the defendant E. P. Privett for the sum of \$4.50.

PER CURIAM. Adopted in whole.

(44 Okl. 446)

FRANCIS, Sheriff, et al. v. GUARANTY  
STATE BANK OF TEXOLA.  
(No. 2854.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. REPLEVIN (§ 10\*)—RIGHT OF ACTION—OFFICERS—POSSESSION.

Replevin by the rightful owner, entitled to possession of chattel property, will lie against an officer who has levied thereon, without regard to such officer being at the time in the actual possession, if the latter's possession be such that, when interfered with, he would have the lawful authority to repossess himself thereof.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 69-82; Dec. Dig. § 10.\*]

2. REPLEVIN (§ 69\*)—PLEADING—GENERAL DENIAL—PROOF.

An answer containing a general denial, in a replevin proceeding, puts in issue the title and right of possession of the plaintiff, and under such answer the defendant may prove title or right of possession either in himself or a stranger, or make such defense as will defeat the plaintiff's claim or right to possession as against the defendant.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257-279; Dec. Dig. § 69.\*]

3. REPLEVIN (§ 69\*)—PLEADING AND PROOF—OWNERSHIP—CHATTEL MORTGAGE.

Where the plaintiff in his petition alleges ownership generally, defendant need not set up in his answer that a bill of sale under which plaintiff claims title, is in fact and was intended only as a mortgage, in order to introduce evidence to that effect.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257-279; Dec. Dig. § 69.\*]

4. REPLEVIN (§ 76\*)—WRONGFUL DETENTION—MEASURE OF DAMAGES—USABLE VALUE.

One of the exceptions to the general rule as to the measure of damages for the wrongful

taking and detention of personal property is where the property so taken has a distinct usable value; and horses broken and trained to do work would have, under ordinary circumstances, such usable value; and where such property has been wrongfully taken by one, and detained from another, such other has the right to recover as damages the reasonable value of the use of such property during the period of its wrongful detention; and this value is ordinarily to be determined by the ordinary market price of the use of such property at the time of taking and during the period of the detention.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 305, 306; Dec. Dig. § 76.\*]

5. REPLEVIN (§ 70\*)—DAMAGES RECOVERABLE—USABLE VALUE—PROOF.

A plaintiff in replevin who has but a special interest in the property replevined is not entitled to a verdict for the usable value thereof, in the absence of proof that the special interest carried with it the right to the use.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 280-284; Dec. Dig. § 70.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Beckham County; John C. Hendrix, Judge.

Action by the Guaranty State Bank of Texola against R. B. Francis, Sheriff of Beckham County, and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

T. Reginald Wise, of Sayre, for plaintiffs in error. D. W. Tracy, of Sayre, for defendant in error.

SHARP, C. On August 24, 1910, plaintiff in error R. B. Francis, sheriff of Beckham county, under authority of an order of attachment issued in another action, levied upon seven head of horses, at the time in the possession of defendant in error, the Guaranty State Bank of Texola. The following day said bank commenced the present replevin action to recover possession of the horses so taken from its possession by the sheriff. On August 27th thereafter Ira Speed and the First Bank of Texola filed their motion alleging that they were plaintiffs in the respective actions under which the sheriff had made the foregoing levy, and were the real parties in interest, and asked to be made parties defendant. It appears that the parties to the proceedings have proceeded as if such order was made, though the record in this particular is incomplete. Both in its original and amended petitions plaintiff alleges that on the date of the levy it was the absolute owner of the horses seized by the sheriff. It was further charged that the defendant Francis had taken said animals from the plaintiff's possession over its protest, and had continued to wrongfully withhold them from plaintiff; that plaintiff was entitled to their return, with damages of 50 cents per day for each animal during the period of wrongful detention, or, in lieu thereof, the sum of \$525, the value of said property, with interest at the rate of 6 per cent. per annum from August 4, 1910, and for oth-

er expenses incurred on account of the wrongful detention of said horses. Defendant gave a redelivery bond and retained possession of the horses. The answer of the defendants consisted of a general denial. The trial resulted in a verdict for plaintiff.

[1] It is insisted by plaintiffs in error that the court erred in overruling their demurrer to plaintiff's evidence, predicated the alleged error upon the charge that plaintiff had failed to establish an essential element of the action of replevin; to wit, that the property was at the time the action was begun in the possession of the defendant Francis. The contention cannot be sustained. The evidence sufficiently showed that Francis was in possession of the horses. Defendant Francis testified as follows:

"Q. Did you have in your possession at any time the seven head of horses involved in this case? A. Yes, sir. Q. How came them into your possession? A. How came them into my possession? Q. Yes, sir. A. Through an attachment of Mr. Speed's. Q. Came into your possession among other property? A. Yes, sir. Q. Your records show that they were taken from the Guaranty State Bank? A. Yes, sir."

After the horses had been seized under the original attachment writs, it appears that the deputy sheriff, Allsup, left them in a livery stable, and after the institution of the present action made an offer to return them to the plaintiff. There is no question but that at the time the present action was instituted the horses were in at least the constructive possession of said defendant, whether at the precise time in his actual possession or not is immaterial. The animals were under his control and direction, and for any interference therewith the sheriff would have had the undoubted right to have repossessed himself of said horses. Discussing the question of what constitutes possession of an officer in a replevin action, it is said in section 62, *Cobbey on Replevin* (2d Ed.):

"If the officer's possession, be it actual or constructive, is such that, when interfered with, he could recapture by replevin, then replevin will lie against him; but where an officer has not possessed himself of chattels under a writ in such a manner that he could maintain trespass or replevin against a wrongful taker, replevin will not lie against him by the real owner, who is a stranger to the writ." *Hadley et al. v. Hadley*, 82 Ind. 95; *Flynn et al. v. Jordan*, 17 Neb. 518, 23 N. W. 519.

In addition to the testimony, it was virtually conceded by the attorney for defendants below, in his opening statement, that the officer was possessed of the horses when suit for their recovery was begun.

[2, 3] Among the errors assigned is that the court erred in sustaining objections to certain questions which sought to bring out the fact that plaintiff was not the absolute owner of the animals in controversy; as alleged in both its original and amended petition, and by which it was sought to prove that the bill of sale given by H. B. Cox, acting through his wife, to the defendant in error was intended only as a mortgage, and

that the legal title to the horses was either in H. B. Cox or his wife, to whom it appears Cox had subsequently transferred them. If the instrument was so intended, and if there was an agreement between either Cox, or his wife acting in his behalf, and the Guaranty State Bank that the latter was to hold the property until a time agreed upon, when Cox should pay such indebtedness as he may have been owing the bank, then it is obvious that plaintiff was not the absolute owner of the property. The allegation of ownership had been, as we have seen, put in issue by defendants' general denial. Where the plaintiff in a replevin action claims title in himself, he must prove title against the world, as on such an issue a general denial puts in issue the right on which plaintiff bases his writ. A general denial in replevin puts in issue both the title and right of possession of plaintiff, and under an issue so framed defendant may prove title or right of possession either in himself or in a stranger. *Cobbey on Replevin* (2d Ed.) §§ 784, 785; *Shinn on Replevin*, § 509. Where the property belongs to, and the right to possession is in a third party, the plaintiff cannot recover, and if the property has been taken from the defendant there must be judgment for its return. Anything going to show that the plaintiff in replevin has no right to the possession when suit was commenced is a complete bar to the action. Under our Code, the gist of the action of replevin is the wrongful detention by the defendant as against the plaintiff, and under a general denial the defendant may prove anything that will tend to show that he does not wrongfully detain the property as against the plaintiff. *Payne v. McCormick Harvesting Mach. Co.*, 11 Okl. 318, 66 Pac. 287; *Broyles et ux. v. McInteer*, 29 Okl. 767, 120 Pac. 283; *De Hart Oil Co. v. Smith et al.*, 140 Pac. 1154. Where the plaintiff in replevin alleges a special interest in the property, evidence of general ownership is inadmissible. *McMillan Hdw. Co. v. Ross*, 24 Okl. 696, 104 Pac. 343; *International Bank v. Bowser*, 33 Okl. 316, 125 Pac. 458.

A case where the facts appear identical is that of *Kerron v. North Pac. Lbr. Co.*, 1 Wash. 241, 24 Pac. 445, wherein the court, in the course of the opinion, said:

" \* \* \* But, as it contented itself with the allegation of ownership, without showing how it was acquired, and thus entitled itself to establish such ownership by any competent proof, it must follow that, when such proof was introduced, the defendants were entitled to meet the case made by plaintiff's evidence by any competent proof that tended to show that such evidence was untrue; and that the bill of sale introduced was not, in fact, a conveyance of the property, but was only a mortgage thereon, as fully and completely as though the matters in defense had been fully set out in their answer. The proof offered by the defendants was wrongfully excluded, and the error \* \* \* assigned was well taken."

See, also, *Idaho Placer Min. Co. v. Green*, 14 Idaho, 249, 93 Pac. 954; *Cobbey on Replevin* (2d Ed.) § 1002.

[4, 5] Not only was the evidence competent, in the first instance, for the purpose of meeting plaintiff's testimony of ownership and its right to possession, but upon the question of damages. Ordinarily, unless the property in suit has a usable value, and the damages may be estimated on that basis, the prevailing party in replevin will be awarded interest on the value of the property during the time of the wrongful detention. Wells on Replevin (2d Ed.) § 537. But where the property in litigation has a usable value which exceeds the lawful rate of interest, the successful party is entitled to recover as damages for the detention the value of such use during the period of deprivation; such value to be estimated by the ordinary market price of the use of such property during the time of its wrongful detention. *Thomas et al. v. First Nat. Bank*, 32 Okl. 115, 121 Pac. 272, Ann. Cas. 1914A, 376; *Bell v. Campbell*, 17 Kan. 211; *Añen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Shinn on Replevin*, § 646 and note; *Wells on Replevin* (2d Ed.) § 579-583.

If, in fact, the bank was the absolute owner of the horses, and a usable value was shown by competent evidence, then a verdict for such usable value would be proper. If, however, on the other hand, the bank had but a special interest in the horses which conferred no right to their use, then a verdict for the usable value for the bank could not be sustained. *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81; *McArthur v. Howett*, 72 Ill. 358; *Wells on Replevin* (2d Ed.) § 584 et seq. It being competent for defendants to attack plaintiff's title, it follows that it was error for the court to exclude competent evidence offered for that purpose. Other errors pertaining to the amount of the verdict, in view of our conclusion, need not be considered.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(45 Okl. 351)

FOWLER et al. v. STATE. (No. 5793.)  
(Supreme Court of Oklahoma. Sept. 27, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. BAIL (§ 94\*)—DECISIONS REVIEWABLE—“FINAL ORDER”—FORFEITURE OF BAIL—REFUSAL TO VACATE.

Plaintiffs in error, as sureties on a certain bond in a criminal proceeding pending in the district court of Jackson county, after the forfeiture of said bond, appeared and moved the court to set aside the forfeiture, which motion was by the court overruled. From the order overruling said motion, error is prosecuted in this court. The principal defendant in the criminal case deposited with his sureties, plaintiffs in error, sufficient money to protect them on said bond. Motion is filed to dismiss this appeal. Section 5237, Rev. Laws, 1910, reads: “An order affecting a substantial right in an

action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article.” *Held*, that the order sought to be reviewed by this proceeding is not a “final order,” affecting any substantial rights of plaintiffs in error, within the purview of this section.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 418-423; Dec. Dig. § 94.\*

For other definitions, see *Words and Phrases*, First and Second Series, Final Order.]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 1023\*)—APPEAL—ORDERS REVIEWABLE—“ACTION.”

The term “action,” as used in section 5327, Rev. Laws 1910, providing that “an order affecting a substantial right in an action, when such order determines the action, \* \* \* is a final order,” includes both civil and criminal actions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.\*

For other definitions, see *Words and Phrases*, First and Second Series, Action.]

Error from District Court, Jackson County; Frank Mathews, Judge.

J. E. Fowler and others, sureties on the bail bond of Percy Belcher, moved to set aside an order forfeiting the bail, and, the motion being overruled, they bring error. Dismissed.

S. B. Garrett and M. L. Hankins, both of Altus, for plaintiffs in error. Chas. West. Atty. Gen., C. E. Hall, Co. Atty., of Altus, and W. C. Austin, of Eldorado, for the State.

RIDDLE, J. This is a proceeding in this court, whereby plaintiffs in error seek to reverse an order made by the trial court in a criminal action. The undisputed facts show that one Percy Belcher was under indictment in the district court of Jackson county upon the charge of statutory rape. He was tried and convicted, and made an appearance bond to supersede the judgment, and appealed his case to the Criminal Court of Appeals. He thereafter left the state. The case in the Criminal Court of Appeals was dismissed, upon the ground that he was a fugitive from justice. Mandate was issued by said court, directed to the trial court to proceed to execute the judgment. By an order of court, he was required to appear for sentence. He failed to make his appearance. His bail was forfeited under section 6110, Rev. Laws 1910, which reads:

“If, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond or undertaking, either for hearing, arraignment, trial or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the recognizance, bond or undertaking of bail, or the money deposited instead of bail,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as the case may be, is and shall be thereupon declared forfeited. But, if at any time before the final adjournment of court the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture, the county attorney must proceed with all due diligence, by action against the bail upon the instrument so forfeited. If money deposited instead of bail be so forfeited, the clerk of the court or other officer with whom it is deposited, must, immediately after the final adjournment of the court, pay over the money deposited to the county treasurer."

A few days thereafter, his bondsmen appeared in court and filed a motion, praying the court to set aside the order forfeiting the bail; which motion was by the court overruled, and an order entered of record directing the county attorney to proceed in the suit upon said bail. It is from this order of court refusing to vacate and set aside the order forfeiting the bail that plaintiffs in error attempt to prosecute this appeal.

Defendant in error has filed its motion to dismiss this proceeding, upon the ground, among others, that the order sought to be reversed in this proceeding is not a final order or judgment entered in the court below, but is an order made on a motion involving the exercise of discretion by the trial court, in which no abuse is shown, and the same is not appealable. It is the contention of the Attorney General that this is not an order of court which can be reviewed by this court on appeal. The only statute called to our attention, under which this proceeding is prosecuted, is section 5237, Rev. Laws 1910, which reads:

"An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article."

It will be noted that this section defines a "final order" which may be reviewed by this court. Under section 5236, Rev. Laws 1910, defining judgments which may be reviewed and corrected by the Supreme Court, it is provided:

"The Supreme Court may reverse, vacate or modify judgments of the county, superior or district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof."

[1,2] Unless the order in question is a final order, as defined by section 5237, supra, then there is no law whereby this court is given jurisdiction to review such order. It is too well settled to require citation of authorities, that an interlocutory order is not reviewable by the Supreme Court, except by virtue of a special provision of the organic law or statute, authorizing it. The question arises: Is the order sought to be reviewed here a "final order," as defined by said section of the statute? There are three characters of orders defined by section 5237,

supra, each of which, under the law, is a final order: (1) An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment. There can be no question but what this order made by the court is an order in an action, although it was made in a criminal and not a civil action; but, inasmuch as the provisions of the statute do not confine orders to a civil action only, an "action" under the statute includes both a civil and criminal action. This statute would probably cover the order in question, although made in a criminal action, were it not for the fact that it must be such an order that in effect determines the action and prevents a judgment. It needs no argument to demonstrate that this is not such an order. The judgment had been taken against the principal defendant, from which he had appealed; and the appeal has been dismissed. Neither is this an order affecting a substantial right, made in a special proceeding. The proceeding out of which this order grew was in a criminal action, and was not a special proceeding under the statute. The most difficult portion of this section to construe is as to whether or not this is an order upon a summary application, in an action after judgment. We are inclined to hold that it is such an order. Judgment had been rendered in the action in which this order was made, and it had become final; and, if this was all that was required to make it a final order, we would be inclined to sustain the appeal. But it is also required to constitute a final order, and it must be an order affecting a substantial right. We are unable to see, from the record before us, in what way a substantial right of plaintiffs in error has been affected. The undisputed testimony shows that the money to cover the amount of this bail is on deposit with one of plaintiffs in error and placed there especially for the protection of said bail. Had it been deposited as a cash bond, there could be no question about the authority of the court to have required the money paid over to the county treasurer. Suppose we should entertain this appeal on the merits, and should conclude that the proceedings resulting in the forfeiture of the bond were irregular, and that the court had abused its discretion, and should reverse the case. The only result which would follow would be that the court would again proceed to take another forfeiture; and the fact that defendant has made ample arrangements to protect the bail seems to us sufficient answer that plaintiffs in error's rights could not in any way be affected by this preliminary or interlocutory order. If the principal defendant was making this fight on appeal, there might be involved a more serious question, inasmuch as the order might ultimately affect his property rights and bring it within the spirit, as well as the letter, of the statute.

Counsel for plaintiffs in error cite and rely upon the case of *State v. Hines et al.*, 37 Okl. 198, 131 Pac. 688. We have carefully examined this case, and it is clear to us that the point now before us was not involved in that case, and it was not necessary to have considered it in determining all the questions therein involved. Neither does it appear in that case that the court decided that an order similar to the one in question was such that could be reviewed by this court. There are some inferences, however, which would indicate that such might have been the holding, had the point been involved.

We are therefore of the opinion that the order sought to be reviewed by this proceeding is not a final order, as defined by section 5237, Rev. Laws 1910, for the reason that from the record before us it does not appear that it could in the least affect the substantial rights of plaintiffs in error.

The proceeding in this court is therefore dismissed. All the Justices concur.

(45 Okl. 140)

MYERS et al. v. HUNT et al. (No. 6969.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

APPEAL AND ERROR (§ 786\*)—FRIVOLOUS APPEAL—DISMISSAL.

It clearly appears from the motion to dismiss the petition in error and the judgment appealed from that this appeal is prosecuted for delay, and that plaintiffs in error had no valid defense to defendants in error's cause of action, and that this appeal is manifestly frivolous. *Held*, that said motion to dismiss should be sustained under the authority of *Skirvin v. Bass Furniture & Carpet Co.*, 143 Pac. 190, and *Skirvin v. Goldstein*, 40 Okl. 315, 137 Pac. 1176.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3128; Dec. Dig. § 786.\*]

Error from District Court, Garvin County; R. McMillan, Judge.

Action between Joe F. Myers and others and Miles H. Hunt and others. From the judgment, the parties first named bring error. Dismissed.

Blanton & Andrews, of Pauls Valley, for plaintiffs in error. Everest & Campbell, of Oklahoma City, for defendants in error.

RIDDLE, J. Motion to dismiss the appeal has been filed upon the grounds, among others, that the appeal is frivolous and not taken within the time allowed by law. No response has been filed to this motion. Judgment was rendered in the court below on May 14, 1914, sustaining motion of defendants in error for judgment on the pleadings. The judgment of the court recites that:

"And thereupon the plaintiff announced ready for trial upon his motion for judgment upon the pleadings, and upon the merits of said cause, and said defendants, appearing, announced in open court that they had no defense to the action of the plaintiff herein."

From the language quoted, *supra*, and the petition in error and motion to dismiss, it appears beyond doubt that this appeal is prosecuted for delay, and that the same is manifestly frivolous and without merit. It clearly appears from said judgment and motion to dismiss that defendants had no valid defense to plaintiffs' cause of action.

In *Skirvin v. Bass Furniture & Carpet Co.* (recently decided but not yet officially reported), 143 Pac. 190, the third syllabus reads:

"The motion to dismiss the petition in error shows that plaintiff in error had no legal defense to the cause of action, and in the trial court the cause of action was admitted; that the appeal is manifestly frivolous and without merit. *Held*, that it is proper for this court to sustain such motion and dismiss the appeal."

See, also, *Skirvin v. Goldstein*, 40 Okl. 315, 137 Pac. 1176.

For the reasons stated herein, the appeal is dismissed. All the Justices concur.

(45 Okl. 277)

HARTSOG et al. v. BERRY et al. (No. 3435.)†  
(Supreme Court of Oklahoma. Nov. 24, 1914.)

*(Syllabus by the Court.)*

1. JURY (§ 13\*)—JURY TRIAL—RIGHT.

Where a party in possession of real estate brings an action to rescind a contract, cancel the deed thereof, and to quiet title, and the defendant's answer is in the nature of ejectment, to which a general denial is filed, the suit is one in equity, and the plaintiff is not entitled, as a matter of right, to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 85-83; Dec. Dig. § 13.\*]

2. GUARDIAN AND WARD (§ 79\*)—SALE—HOMESTEAD.

A ward's interest in a homestead may be sold by the guardian under order of court, and a good title to the minor's interest passed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 331; Dec. Dig. § 79.\*]

Error from District Court, Noble County; Hon. W. M. Bowles, Judge.

Action by Henry J. Hartsog and others against O. B. Berry and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Henry S. Johnston and P. W. Cress, both of Perry, for plaintiffs in error. Harris & Nowlin and W. H. Zwick, all of Oklahoma City, for defendants in error.

LOOFBOURROW, J. On November 17, 1908, O. B. Berry, as party of the first part, defendant in error, and Henry J. Hartsog and Clara Hartsog, parties of the second part, plaintiffs in error, entered into a written agreement whereby the first party was to convey, by warranty deed, certain lots in the city of Enid and the town of New Cordell, to the party of the second part, subject to a mortgage of \$1,500, and the second parties were to convey to the first party 160 acres of land in Noble county, Okl.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

† Rehearing denied January 5, 1915.

subject to a mortgage of \$2,700, and the second parties were to give a mortgage to the first party in the sum of \$1,200 upon the property in Enid and New Cordell. This contract or agreement was signed, "O. B. Berry, by Okla. Texas Land Company, Agent," and Berry claimed that his agents were not authorized to make the contract as made, but that the same should have contained a condition whereby he, Berry, should receive \$300 cash difference, and he refused to carry out the contract as made, whereupon plaintiffs brought suit for specific performance in Garfield county. After the commencement of this suit the plaintiffs and their agents and H. W. Thies, agent of Berry, entered into a compromise settlement and agreement whereby plaintiffs were to pay to Berry the amount of commission due to the Texas-Oklahoma Land Company on said trade, in the sum of \$300, and Berry agreed to accept the note of plaintiffs for said sum; the suit for specific performance being dismissed.

A part of the lots to be conveyed by the party of the first part were erroneously described in the contract as lots 9 and 10 in block 2, Reed's Second addition to Reed Hill in Enid, Okl. The word "Second" should have been omitted. It seems that there were four additions to Enid, being Reed's addition to Enid, Reed Hill addition to Enid, Reed's First addition to Reed Hill, and Reed's Second addition to Reed Hill, and that the lots intended to be conveyed were, prior to closing the deal, shown to plaintiffs. It further appears that these lots were held in the name of the heirs of one Allen, deceased, but that at the time of the trade the equitable title was in Berry, and that the legal record title could not pass until the completion of certain probate proceedings then pending, relative to this property. There is evidence tending to show that the condition of this title was fully understood during all of the negotiations, and that the defendants in error offered to give to plaintiffs a good and sufficient and satisfactory bond for title and deed to said lots, and that they offered to deposit cash in escrow in lieu thereof, and that, after discussion of the matter and advising with their attorney, Mr. Carter, plaintiffs waived the cash deposit or the bond, and agreed to make the trade, and that the lots involved in the probate proceedings could be conveyed when such proceedings were completed. This was an agreement in parol at the time of the settlement which resulted in the dismissal of the action for specific performance. Thereupon the plaintiffs in error executed deed and mortgage in conformity with the terms of their contract, and delivered the same to the defendants, and the defendant executed and delivered deeds to his property to the plaintiffs, except a deed to lots 9 and 10, block 2, Reed's addition to Reed Hill, city of

Enid. Thereafter plaintiffs, Hartsogs, commenced this action to rescind the contract, to cancel the deeds, and to quiet title of the Hartsogs in the 160 acres of land by them deeded to the defendant Berry, and also in their prayer asked for damages in the sum of \$1,000. The defendants answered with a general denial, and alleged the facts to be substantially as hereinbefore stated; alleged the payment of certain mortgages upon the property involved, the payment of certain taxes, asked that in the event the court should grant a rescission of the contract, then that Berry should be subrogated to the rights of the mortgagees to the mortgages by him paid and satisfied, including the right to collect the taxes so paid by defendant Berry, etc., and the prayer, in part, is as follows:

"And that defendant Berry be decreed to be the legal and equitable owner of said land [the 160 acres conveyed by the Hartsogs] and entitled to the immediate possession thereof, and that he have execution for the enforcement of such judgment and rights and such further judgment and decree as should be just and equitable."

The court found the issues in favor of the defendant Berry, and that Berry was the absolute owner and entitled to the immediate possession of the 160 acres of land; that the plaintiffs in error were in the possession of the land without right and in violation of the ownership and right of possession of Berry, and that Berry had the immediate possession of said land upon certain conditions, to wit:

"That Berry reduce all liens and incumbrances upon the property conveyed by him to the plaintiff to the amount due thereon at the time of the trade, including the note executed by the plaintiff to the defendant Berry, provided, however, that the defendant Berry shall be entitled to all rents and profits arising from said property from the 17th day of November, 1908, to the 31st day of May, 1911."

And continued the further hearing of the case until the 20th day of June, 1911, within which time Berry should comply with the requirements of the court. At that time, upon request and showing of Berry, the cause was continued until the 10th day of July, 1911, at which time the court found that Berry had complied with the court's order, and further found that the plaintiffs were entitled to a credit of \$125.74 upon the note and mortgage executed by them to the defendant Berry. The court also found that the contract contained a misdescription of lots 9 and 10 in block 2, and reformed the same in accordance with the intention of the parties. From this judgment plaintiffs in error appeal.

[1] At the time of the trial of the case plaintiff in error demanded a jury, which demand was by the court refused, the same now being assigned as error. The plaintiffs seek, by this suit, to rescind the contract, cancel the deeds and mortgages, and quiet their title, and in their prayer ask for dam-

ages in the sum of \$1,000. The relief prayed for by the defendant is, in part, in the nature of ejectment. This court has heretofore indicated and discussed whether or not all issues of fact are, as a matter of right, to be tried by a jury, and has uniformly held that issues of fact arising in equity proceedings may be tried by the court subject to its power to submit the issues to a jury or order a reference, and that in the event that such issues of fact are submitted to a jury the jury, in such cases, sits only in an advisory capacity, and the conclusions of the jury may or may not be adopted by the court. See *McCoy v. McCoy*, 30 Okl. 379, 121 Pac. 176, also reported in *Ann. Cas.* 1913C, 147, with notes; *Oklahoma Trust Co. v. Stein*, 39 Okl. 757, 136 Pac. 746; *Barnes v. Lynch*, 9 Okl. 191, 59 Pac. 1008; *Maas v. Dunmyer*, 21 Okl. 434, 96 Pac. 591.

In *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091, plaintiffs alleged the ownership and possession of land, and that defendant claimed title thereto under forged deeds and prayed for a cancellation of such deeds, and that defendant be restrained from claiming thereunder. Held, that such was an equitable action, and that it could not be changed into a legal action by defendant filing a cross-bill in the nature of ejectment so as to entitle defendant to a jury trial.

In *Larkin v. Wilson*, 28 Kan. 513, it is held:

"Where an action is brought to quiet title against a party out of possession of real estate, and the defendant sets up a counterclaim in the nature of ejectment, to which a general denial is filed, the defendant is not entitled, as a matter of right, to a jury trial."

The action brought was an equitable one, and the answer setting up a counterclaim in ejectment did not alter the case. The plaintiff was in possession of the real property, and his action is not one for the recovery of such property, and the counterclaim was not, within the letter of the statute, an action for the recovery of real property. It is well settled that a court of equity, having obtained jurisdiction, will retain it for final determination of all the issues, legal as well as equitable, germane to the subject of the bill. The court found the issues in favor of the defendants; that plaintiff had no right to possession against defendants. The equitable question being determined in favor of the defendants, the question of who was entitled to the possession of the property was a mere incident, but one which the court had a right to determine without the intervention of a jury.

Counsel for plaintiffs cite *Sherman v. Randolph*, 13 Okl. 224, 74 Pac. 102, a foreclosure case in which it is held that, when an issue is joined as to the amount due, the trial must be had before a jury. That is correct. The gist of that action is the recovery of the mon-

ey due upon the note, and the foreclosure is a mere incident.

The next contention is that the contract to convey lots 9 and 10 in block 2, Reed's addition to Reed Hill, was against public policy and void and in violation of section 2026 of the Criminal Statutes of 1893, citing *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721. In that case it is held that a conveyance of land, made in contravention of the provisions of section 2026, Stat. Okl. 1893, by the rightful owner, is utterly void as against the person holding adversely, claiming to be the owner thereof under color of title, but as between the parties and all the rest of the world it is good and passes the grantor's title. The statute and case cited are not applicable to the facts in this case. Defendant Berry derails title from the Allen heirs, and the question of adverse possession is not involved.

[2] It is next contended that because lots 9 and 10 in block 2, Reed's addition to Reed Hill, were the homestead of Allen, deceased, and that a part of his heirs were minor children, the legal and equitable title in the property could not be conveyed, citing *Rockwood v. Estate of St. John*, 10 Okl. 476, 62 Pac. 277, which in effect holds that the homestead cannot be subjected to forced sale to satisfy the debts created prior to the death of the father. The principle involved in that case is not applicable to the case at bar. This was not a forced sale. California has the same probate procedure as Oklahoma, and in *re Hamilton Estate*, 120 Cal. 421, 52 Pac. 708, it is held:

"The exemption of a homestead from forced sale does not preclude a sale of a ward's homestead by the guardian for a ward's benefit. A probate homestead, set apart by the court, under Code Civil Procedure, § 1465, to a surviving wife and children, some being minors, the adults all concurring, and the court deeming the sale advantageous to the estate of the minors, may be sold, and a good title to the minor's interest passed. Therefore a purchaser of such a minor's interest cannot avoid his purchase on the ground of insufficiency of title."

This disposes of every question presented in the brief of plaintiff in error, with the possible exception that some of the statements contained in the brief might present the question as to whether or not the findings and judgment of the trial court are supported by the evidence. The record in this case is quite voluminous, and is not indexed, nor have counsel complied with rule 25 of this court (137 Pac. xi), by setting forth the material and controlling parts of the testimony. But we have examined the record, and there is evidence amply supporting the findings and conclusions of the trial court.

The judgment of the trial court is affirmed. All the Justices concur, except KANE, C. J., absent and not participating.



(45 Okl. 192)

CHICAGO, R. I. & P. RY. CO. v. McBEE.  
(No. 5226.)(Supreme Court of Oklahoma. Nov. 24, 1914.  
Rehearing Denied Jan. 5, 1915.)*(Syllabus by the Court.)*

## 1. APPEAL AND ERROR (§ 171\*)—ACTION—NATURE AND FORM—CHANGE OF CONTENTION.

"A party is bound, in the appellate court, as to the nature and form of the action, by the theory upon which it was tried." 2 Cyc. 671.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

## 2. EVIDENCE (§ 20\*)—JUDICIAL NOTICE—INTERSTATE COMMERCE—RAILROADS.

It is not a matter of such general knowledge as to dispense with proof that any specific portion of the equipment, or any particular employé, of a railroad is engaged in interstate, rather than intrastate, commerce at any precise time or place.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

## 3. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—BURDEN OF PROOF.

While the state court will recognize that the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) is supreme with respect to the responsibility of railroads engaged in interstate commerce to their employés injured or killed in such commerce, yet, before a state court is called upon to administer the federal law in any case, the party desiring to avail himself of any right, privilege, or immunity thereunder must, by appropriate pleading, or by evidence, bring to the attention of the trial court the fact that his cause of action or his defense falls within its terms.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Error from District Court, Marshall County; Summers Hardy, Judge.

Action by Edith McBee, administratrix of the estate of John M. McBee, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, R. J. Roberts, W. H. Moore, J. G. Gamble, and K. W. Shartel, all of El Reno, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error.

BLEAKMORE, J. This case presents error from the district court of Marshall county. The parties will be referred to herein as they appeared in the trial court.

On the 10th of September, 1912, Edith McBee, administratrix of the estate of John M. McBee, filed her petition in the district court of Marshall county against the defendant for damages by reason of the death of the intestate, alleged to have occurred on the 18th day of January, 1912, as the result of injuries received by him on the 31st day of December, 1911, by reason of the explosion of a boiler of an engine which he was at the

time engaged in caring for as watchman at Anadarko. It is alleged that, while said John M. McBee was upon the engine of defendant engaged in the performance of his duties and as an engine watchman said engine and boiler exploded, and the crown sheet thereof gave way, resulting in his injury and death; that the crown sheet of the engine was made of iron or steel, and was so old, worn, and badly burned that it failed to withstand the heat and pressure of the steam, and so gave way, permitting the steam and hot water to escape into the fire box; that said engine and boiler were old, antiquated, dilapidated, and out of repair, and the boiler was badly leaking at the time of the injury, so that the water leaked into the fire box, and, in order to keep the engine alive, required a much hotter fire to overcome the effect of said leakage, and on that account that parts of the crown sheet and bolts and metal holding the same became overheated and burned and less able to withstand the steam pressure, and the said crown sheet gave way under the steam pressure, and thereby scalded, burned, and injured intestate, resulting in his death; that defendant had failed to wash out the boiler of the engine for several weeks before the accident, as it was its duty to do, and on account of sediment and dirt deposited from the water accumulated on the crown sheet between the water in the boiler and said crown sheet, that the fire from the fire box underneath so heated the said crown sheet, the bolts and metal connected therewith, that the same did not have the power to withstand the steam pressure, and, as a result, said crown sheet and said bolts and metal gave way. It is further alleged that John M. McBee was 24 years of age, in good health, sound in mind and members, earning and able to earn \$65 per month; that at the time of his injury he was inexperienced in the railroad business and knew little about the mechanism of an engine or boiler or operating same.

Defendant answered by general denial. The case was tried to a jury, and resulted in a verdict for the plaintiff in the sum of \$15,000.

Under the sole assignment of error—that the court erred in overruling the motion for a new trial—defendant urges: (1) Error of the court in refusing to instruct the jury to return a verdict for defendant, in that no negligence was proved, and that the federal Employers' Liability Act of 1908 applies; (2) error in the instructions given and in the refusal to instruct the jury as requested by defendant; (3) error in the admission of incompetent evidence; and (4) excessive damages.

The evidence developed the fact that the engine upon which plaintiff was engaged as a watchman was used in hauling a passen-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ger train from Enid to Waurika, Okl., carrying passengers received at Enid to local points, or received at local points and carried to Waurika; that it was what is known as an oil burner, using oil for fuel; that it arrived at Anadarko about 6 o'clock in the evening on the day the injury occurred, and was left there because of an insufficient supply of fuel oil to take it to the end of the run at Waurika; that its tanks were filled with oil and water, and the engine run upon the side track and turned over to the intestate, John M. McBee, to be watched and cared for during the night. The evidence shows that on the night of the accident the engine was leaking badly, and that it had leaked some four or five months before. The testimony further shows, by defendant's witnesses, that the engine so leaking was in a dangerous condition. The testimony shows that the water used in this engine, both at Enid and Waurika, was, perhaps, not of the best; that it was the custom of the defendant company to wash out its engines once a week; that at the time of the washing out of an engine a card was left in the cab showing the date that same had been washed. There was found in the cab of the engine in question, after the explosion, a card upon which appeared: "Last date boiler washed, 11—17—11." However, employes of defendant testified that the engine had been washed out a number of times between the 17th of November and the time of the accident, the night of December 31st, and the last washing occurred only a few days before the accident. It was also shown that the engine in question was built in 1887; that the life of a crown sheet is of an indefinite period, but that the crown sheet of an oil burning engine lasts from four to six years, and that if dirt and sediment is permitted to accumulate upon the crown sheet with a hot fire underneath that the same is likely to become burned and weakened. It was also shown that the water at Waurika was muddy. There was evidence showing that said engine had been repaired in June previous to the injury, but there was none as to when, if ever, the crown sheet had been renewed.

The theory of the defendant was that the deceased had negligently permitted the water in the boiler to become so low that it did not cover the crown sheet, and that the intense heat in the fire box so burned and weakened it that it gave way to the steam pressure above; that deceased was not attending to his duties as watchman, but was asleep at the time of the explosion; and there is in the record the testimony of his brother, an employe of the company, that deceased shortly after the explosion stated that he was asleep and did not know how the accident occurred. There is testimony also tending to show that, if deceased had kept the boiler properly filled with water, the explosion could not have occurred.

While the evidence is conflicting, yet there

was sufficient evidence to take the case to the jury.

The rule established in this jurisdiction is that:

"This court will not disturb the finding of fact by a jury or by a court sitting in the place of a jury, if there is any evidence reasonably tending to establish the allegations of the petition." *Wicker v. Dennis*, 30 Okl. 540, 119 Pac. 1122; *Yukon Mills & Grain Co. v. Imperial Roller Mills Co.*, 34 Okl. 817, 127 Pac. 422; *McCall v. Farley & Skinner*, 39 Okl. 389, 135 Pac. 339.

[1-3] In the trial court both the plaintiff and defendant treated the case as one arising under the state statute; yet upon appeal it is here contended by defendant that the action is based upon and controlled by the federal Employers' Liability Act of 1908. Nowhere in the petition is it alleged that the injuries which caused the death of plaintiff's intestate were received while he was engaged in interstate traffic, nor did the defendant in its answer or upon the trial attempt to invoke any right, privilege, or immunity which it is claimed it might have asserted under the federal act. Defendant now urges that it is an interstate carrier and it, together with the deceased, was engaged in interstate commerce when the injury occurred; that, although this matter was not, by the pleadings or the evidence, brought to the attention of the trial court, yet this court is bound to take judicial notice of the fact that the defendant, owning and operating a great system of railway extending through many states and into Oklahoma, was necessarily engaged in interstate commerce, and its engine which was being watched by the deceased, McBee, and McBee himself, were so engaged at the time the injuries resulting in his death were received. It is a rule of universal application that, where both parties to a cause act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought to an appellate court for review.

In 2 Cyc. 670, the rule is laid down as follows:

"One of the most important results of the rule that questions which are not raised in the court below cannot be reviewed in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, but that such party is restricted to the theory on which the cause was presented or defended in the court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review. As to the law which governs: When a case is tried by both parties upon the theory that the law of the forum governs, a party cannot, on appeal, take the position that the laws of another state should have been applied."

In *Harris v. First National Bank*, 21 Okl. 189, 95 Pac. 781, Mr. Chief Justice Kane, speaking for this court, said:

"The appellant bases his right to retention of the property on his absolute ownership of it prior to the execution and delivery of the mort-

gage to the bank, and when that claim failed he is not entitled to have his theory of verbal mortgage considered for the first time in the Supreme Court."

In *Checotah et al. v. Hardridge et al.*, 31 Okl. 742, 123 Pac. 846, it was said:

"The case, however, seems to have been tried in the lower court upon the theory that the Greek law applied to the entire devolution, and, if so, the parties will not be permitted to change front in this court, and take a new hold on another theory. This has been the uniform holding of this court. *Harris v. First National Bank of Bokchito*, 21 Okl. 189, 96 Pac. 781; *Queen Insurance Co. v. Cotney et al.*, 25 Okl. 125, 105 Pac. 651; *Wattenbarger v. Hall*, 26 Okl. 815, 110 Pac. 911; *St. Louis & S. F. R. Co. v. Key*, 28 Okl. 769, 115 Pac. 875; *Perry Water, Light & Ice Co. v. City of Perry*, 29 Okl. 593, 120 Pac. 582 [39 L. R. A. (N. S.) 72]."

The rule seems to be well settled that a defendant, as in the instant case, will not be permitted for the first time in an appellate court to invoke the protection of a federal statute. *Midland Valley Co. v. Lemoyne*, 104 Ark. 327, 148 S. W. 654; *C., R. I. & G. Ry. Co. v. Rogers* (Tex. Civ. App.) 150 S. W. 281. See Volume 1 Encyc. U. S. Supreme Court Reports, pp. 620, 621. Numerous cases are there cited, all to the same effect.

While this court may properly, in certain cases, take judicial cognizance of the fact that any one of the many great trunk lines of railway extending through the various states is engaged in interstate commerce, yet the fact is equally as notorious and as much the subject of judicial notice that every such railway is also engaged in intrastate traffic; and clearly it is not a matter of such general knowledge as to dispense with proof that any specific portion of the equipment or any particular employé of such railway is engaged in interstate, rather than intrastate, commerce at any precise time or place. The only evidence in this case as to the character of commerce in which defendant and deceased were engaged is that the engine which was being watched by, and exploded and caused the death of, the said John M. McBee was used in hauling a passenger train between points in this state.

While state as well as federal courts are presumed to be cognizant of the Employers' Liability Act, and to recognize that such law is supreme with respect to the responsibility of railroads engaged in interstate commerce to their employes injured or killed in such commerce, yet, before a state court is called upon to administer the federal law in any case, the party desiring to avail himself of any right, privilege, or immunity thereunder must, by appropriate pleading, or by evidence, bring to the attention of the court the fact that his cause of action or his defense falls within its terms. Obviously, the federal Employers' Liability Act supersedes all state laws and regulations as to causes of action falling within its terms; yet in an action

where, as in the instant case, neither the pleadings nor the evidence bring the cause within the purview of that act, and the trial in the court below proceeded upon the theory that the state statute governed, this court is precluded from holding that the federal statute should have controlled; for, necessarily, in such case the state law alone could be applied.

Defendant complains that there was prejudicial error in permitting a witness to describe the construction of the fire box of an engine of the character used by railroads generally; he having stated that there was a similarity in the construction of all engines used by the various roads. With this contention we cannot agree.

It is further urged that the court erred in refusing to instruct the jury, as requested by defendant, upon the subject of contributory negligence and assumption of risk. An examination of the instructions discloses that the propositions, so far as applicable to the instant case, were substantially covered by the instructions given, and the questions were fairly submitted to the jury.

It is also contended that the instructions of the court were erroneous, because based upon an assumed state of facts contradictory to the evidence. There is no merit in this contention. The instructions of the court fairly and fully covered the allegations of the pleadings substantiated by the proof, and all the propositions of law applicable to the issues presented were adequately embraced by the charge.

It is also urged in this connection that there was error in permitting certain hypothetical questions propounded to an expert witness to be answered, because there was not contained therein a full summary of the testimony introduced. It has been held by this court that a hypothetical question sufficiently comprehensive to cover the essential facts testified to is not improper, for the reason that it does not embrace all the facts in the record. *C., R. I. & G. Ry. Co. v. Bentley*, not yet officially reported, 143 Pac. 179.

It is contended also that the damages awarded were excessive. The evidence discloses the fact that the deceased was a man 24 years of age, mentally and physically sound, earning \$65 a month. There is nothing in the evidence indicative of the claim that the verdict of the jury was influenced by passion or prejudice, and, in our opinion, a judgment in the sum of \$15,000 in a case like the one before us is not excessive.

It follows, from the foregoing, that the judgment of the trial court should be affirmed; and it is so ordered.

LOOFBOURROW and RIDDLE, JJ., concur. KANE, C. J., and TURNER, J., absent and not participating.

(44 Okl. 511)

LOVETT v. JETER et al. (No. 3846.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. INDIANS (§ 18\*)—ALLOTMENT—DESCENT.

Upon the death, on August 27, 1907, of a one-sixteenth blood enrolled member of the Choctaw Tribe of Indians, without having had issue, but survived by both of her parents, and by brothers and sisters, her homestead and surplus lands, theretofore allotted to her in what is now Choctaw county, Okl., passed, with fee-simple title and as if by inheritance, to her parent or parents of the same tribal blood, and her brothers and sisters took no interest in the same, under sections 2522 and 2531 of Mansfield's Digest of the Statutes of Arkansas then in force in the Indian Territory.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.\*]

2. APPEAL AND ERROR (§ 1169\*)—GROUND FOR REVERSAL—CANCELLATION OF DEED.

A judgment canceling a petitioner's deeds to lands and predicated upon the erroneous assumption that he had some right, title, or interest in or to such lands, in which he never had any, will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Choctaw County; A. H. Ferguson, Judge.

Action by W. W. Jeter and others against George A. Lovett to cancel deeds. Judgment for plaintiffs, and defendant brings error. Reversed.

J. L. Dickson and Cocke & Willis, all of Hugo, for plaintiff in error. A. M. Works, of Hugo, for defendants in error.

THACKER, C. Plaintiff in error will be designated as "defendant" and defendants in error as "plaintiffs," in accord with their respective titles in the trial court.

The defendant's wife, Mrs. Gertrude Lovett, a one-sixteenth blood Choctaw Indian duly enrolled as a member of that tribe and free from restrictions upon her right to convey her surplus lands by virtue of an order of the Secretary of the Interior, died, without having had issue, on August 27, 1907, seised and possessed of the following described homestead and surplus lands allotted to her in what is now Choctaw county, Okl., to wit: S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of section 3, S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of section 4, township 6 S., range 16 E., and W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 3, township 8 S., range 19 E. (less five acres cut off by Red river). Mrs. Lovett left, surviving her, her father and mother, J. B. and Sarah Jeter (one of the plaintiffs), and a minor, without guardian, J. T. Jeter, Hattie Larecy, and Mary Jeter, who, on September 17, 1907, joined in a warranty deed purporting to convey this land to the defendant in consideration of \$5 paid each such maker and apparently to give effect to the wishes of Mrs. Lovett. On April 11, 1908, the plaintiffs, having married, and

statehood having come in the meantime, made another deed of the same lands to the defendant without any new consideration therefor; and on July 28, 1908, all the makers of the first said deed united in still another deed of the same lands upon the original consideration; the later deeds having been intended to confirm and make more certainly effective the first one. The plaintiff W. W. Jeter was between the ages of 18 and 21 when each of these three deeds were executed, and was a single man when he executed the first one, but was a married man and joined by his wife, his coplaintiff here, when he made the other two deeds. The petition admits that the plaintiff Molina Jeter has never owned any interest in these lands.

This action was brought to cancel the plaintiffs' said deeds and to establish a fee-simple title in and to an undivided one-fourth of said lands in the plaintiff W. W. Jeter, upon the erroneous assumption that at the death of Mrs. Lovett the fee-simple title to all these lands passed to her four brothers and sisters subject only to a life estate in her father and mother, and upon the further assumption that, notwithstanding the fact that the plaintiff W. W. Jeter was married when the last two deeds were executed and the Indian Territory had been admitted to statehood, he was incapable by reason of his minority and the federal laws in this regard to so make such deeds. The plaintiffs brought into court and offered to return the said \$5 received as consideration for the deeds. Judgment was for plaintiff in the trial court.

[1, 2] In the case of Shulthis v. McDougal et al. and Merryhill v. Shulthis et al., 170 Fed. 529, 95 C. C. A. 615, it is held that, under subdivision 2 of section 2522 and section 2531 of Mansfield's Digest of the Statutes of Arkansas in force in the Indian Territory prior to statehood, and at the time in question, upon the death of the allottee, such property passes in such cases, as if by inheritance, to the father or mother or both, being blood members of the tribe, and that the collateral kin take no interest in the same. Also, see Pigeon et al. v. Buck et al., 38 Okl. 101, 131 Pac. 1083, and cases therein cited.

It thus appears that neither of the plaintiffs ever had any right, title, or interest in or to any of these lands, which their deeds could in any way affect; and, the judgment in their favor being predicated and dependent upon the finding that the plaintiff W. W. Jeter had such interest, this case should be reversed.

This view renders it unnecessary to examine the proposition in respect to W. W. Jeter's assumed incapacity to convey upon which the judgment of the trial court was in part predicated.

PER CURIAM. Adopted in whole.

(44 Okl. 492)

**PALMER v. GALLOWAY**, Mayor, et al.  
(No. 3731.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 773\*)—BRIEF—FAILURE TO FILE—DISMISSAL.**

Where plaintiff in error fails and neglects to file brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Custer County; James R. Tolbert, Judge.

Action by Robert Palmer against C. A. Galloway, Mayor of the City of Weatherford, and others. Judgment for defendants, and plaintiff brings error. Dismissed.

T. W. Jones, Jr., of Weatherford, for plaintiff in error. G. W. Cornell, of Weatherford, for defendants in error.

**SHARP, C.** The petition in error and case-made were filed in this court on March 26, 1912, and the cause regularly submitted July 14, 1914. The plaintiff in error has failed to file and serve brief, as required by rule 7 of this court (95 Pac. vi), and the appeal should therefore be dismissed. *Douglas v. Clayton Townsite Co.*, 29 Okl. 9, 115 Pac. 1016; *Turner Hdw. Co. v. John Deere Plow Co.*, 39 Okl. 633, 136 Pac. 417.

**PER CURIAM.** Adopted in whole.

(44 Okl. 532)

**CAULK v. CARLSON.** (No. 3924.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

**1. EVIDENCE (§ 601\*)—FINDING—VALUE.**

Evidence by a witness that a span of horses is worth "in the neighborhood of \$300," and of the owner that he would not sell them at all, and would not take, if he had to sell them, less than \$375 or \$400, is not sufficient to support a finding that the actual value is \$400, and when coupled with other errors will require a reversal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.\*]

**2. PAYMENT (§§ 73, 77\*)—PROOF—POSSESSION OF NOTE—INSTRUCTIONS.**

Possession of a promissory note, after maturity, is ordinarily prima facie evidence of payment; but a naked statement to this effect in an instruction to a jury is not a sufficient charge, where the main controversy regards the manner of obtaining possession, that is, whether fraudulent or not.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 220, 222-225, 232-238, 249; Dec. Dig. §§ 73, 77.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Caddo County; C. Ross Hume, Judge.

Action by H. F. Caulk against E. W. Carlson. Judgment for defendant, and plaintiff

brings error. Reversed, and new trial ordered.

A. J. Morris, of Anadarko, for plaintiff in error. H. W. Morgan, of Anadarko, for defendant in error.

**BREWER, C.** The plaintiff in error, Caulk, brought this suit in replevin for possession of a span of horses, alleging a special ownership in the property and a right to possession thereof because of the terms of a chattel mortgage describing the property, and which was given to secure the payment of a promissory note for \$162.50, which it was alleged had not been paid when due, the same being a breach of the conditions of the mortgage. Several amendments were made to both the petition and the answer, which it is not necessary to particularize. The plaintiff alleged that the note underlying the mortgage had been lost by him and could not be found after diligent efforts so to do. The defense was that of payment. At a trial had, by agreement, before a jury of five men, four of the jurors signed and returned a verdict in favor of the defendant in the sum of \$400 as the value of the team and \$100 damages. An original motion and later a supplemental motion for a new trial were filed, setting up many grounds, including that of newly discovered evidence. These motions were later overruled by the court and exceptions allowed, from which the plaintiff appeals by case made properly certified.

[1] From the brief statement made above it would appear that but slight difficulty would be encountered in reviewing this case; but because of the numerous amended pleadings filed, and the wide and peculiar range the evidence took, we have found considerable difficulty in following the proceedings below, which resulted as we have stated; and, without going into the very numerous points urged for a reversal in detail, a study of the case has convinced us that it ought to be reversed for the following reasons: First. The evidence does not sufficiently support the amount awarded as the value of the horses. The defendant undertakes to show that it is sufficient, but we cannot agree with the view taken. The only evidence he relies on in the brief is the testimony of a witness, who answers, "A. They were worth something in the neighborhood of \$300," coupled with the answer of the defendant himself, who answered thus: "A. I would not sell it for no money. If I had to sell them, if I was bound to sell them, I would take no less than \$400 or \$375." On this testimony alone the defendant was awarded judgment for \$400 as the actual value of the two horses. While great latitude is allowed in placing value on this class of property, and it has been often held that an intelligent, well-informed farmer may give his opinion as to the value of animals of this character, in the

community, without a strict qualification as an expert on values, yet, when you read the evidence above set forth, it appears the only real testimony as to value is that the horses were worth "in the neighborhood of \$300." The defendant, it is true, says he "would not take less than \$400 or \$375," but this is a very different thing from saying that they were actually worth that sum of money. He nowhere says what their value was. If this was all the trouble presented in the case, we might attempt to adjust the matter by a remittitur, but it is not. The defense of payment as shown by the record was weak, and the instruction on this phase of the case was misleading, because of the peculiar situation developed by the evidence. To make what we mean clear, we will state what the defense of payment was predicated upon. At the time the note in suit was executed, the defendant had certain dealings with one Meeks, by which he bought from Meeks his claim on a quarter section of school land for the consideration of \$550, of which he paid one-half in cash and executed his note, with some kind of a lien, for \$275, the balance due on the land. At the same time the defendant bought the horses in question from Meeks for a consideration of \$325, paying one-half cash and giving his note for the balance, secured by a chattel mortgage on the horses. This is the note and mortgage involved here. This last note was sold by Meeks to the plaintiff, and transferred by written indorsement, immediately after its execution. It was to run for one year. The defendant knew that plaintiff had acquired the ownership of the note.

As we understand defendant's evidence, he claims that, after he bought the school land from Meeks, a question arose about a string of fence on it, which he had heard was being claimed by the plaintiff. So the defendant claims that he complained to Meeks about this fact of the fence, and that to make it right with him, Meeks surrendered the note for \$275, representing one-half of the original purchase price of the land, and also agreed to surrender and cancel the note for \$162.50, which had been assigned to the plaintiff, and that Meeks had surrendered the larger note about February 5, 1910, and that later, about March 8th or 9th, a week or two before this suit was brought, Meeks brought the note involved here over to defendant, and delivered it to him, and that in that way he had paid it, although he does not deny that he knew that the plaintiff was claiming to be the owner of the note. In other words, defendant's contention amounts to this: That the man Meeks had compromised the fence matter with him by turning over the two notes as fully satisfied, in settlement of the fence dispute, the two notes amounting, with interest, to at least \$450. As we understand it, the undisputed evidence shows that this piece of fence, made the basis for the claim of settlement, was worth

between \$20 or \$30. It is further shown that the plaintiff made no claim to the fence, had never attempted to take it from the defendant, and that the defendant still had and was using it at the time of trial. As we understand the evidence, which we have examined with some care, this substantially states the basis of the claim of payment. But the thing that caused the trouble in the case was the fact that when the defendant went on the witness stand, he had in his possession the note in controversy, and which the plaintiff alleged in his pleading had become lost. When the note was produced by the defendant the issue then became very sharply defined on the question of how he came in possession of it. It may be here mentioned, and there appears to be no controversy over it, that Meeks did surrender to the defendant the \$275 note, and the defendant had it in his possession; but that the surrender was made at the time the obligation was renewed by the giving of a new note and lien. The plaintiff and Meeks both testified that after the note involved here was due, and on March 15, 1911, they went to the home of the defendant for the purpose of allowing him to renew it by giving a new note and mortgage. The plaintiff says that he took defendant's note with him, and had it there in defendant's home, with other papers, in discussing the giving of new papers by which the time of payment would be extended; that the defendant declined to give new papers, although making no claim that he had paid the note at the time, explaining privately that his wife was opposed to his signing the papers, but that he would come into town in a few days and fix them up. The plaintiff and Meeks left defendant's home, without a renewal, and as soon as plaintiff got back to his own home he discovered that he had lost the note which he had gone to defendant's to have renewed; so the plaintiff went back to the defendant's house that same day, and told defendant that he had left the note, his bank book, and some other papers on defendant's center table, and asked him if he had found them, which defendant denied; that defendant made no claim that he had the note, or had paid it off, or in any way became in possession of it. Both plaintiff and Meeks testified that plaintiff had the note with him at defendant's home on that visit, March 15, 1911. The defendant claims that on March 7th or 8th, just before plaintiff's visit, Meeks had delivered the note to him out in the woods, where he and his son were at work, in compliance with a previous promise to do so, made when he delivered the land note; that he had the note in his possession when plaintiff and Meeks were in his home, to get him to execute new papers. And he claimed that the note had been paid, as hereinbefore stated, in settling the fence dispute.

[2] The court instructed the jury, in substance, that if they believed from the evi-

dence that the defendant was in possession and control of the note before the commencement of the action, such possession was presumptive evidence of ownership, and that unless they found from the evidence that the plaintiff owned the note, the presumption would be that it really belonged to the defendant. This instruction, as an abstract proposition, and in so far as it states any rule of law at all, is perhaps correct; but it was wholly insufficient under the peculiar situation presented, and we have no doubt that the jury were misled into attaching undue importance to the fact that defendant had the note in his possession. The crux of the matter was as to how he came into possession of the note, coupled with the facts in evidence as regards its payment. If plaintiff's evidence was true that he had the note with him at defendant's home and left it inadvertently with other papers on the table, and plaintiff found it there, his possession would be fraudulent and amount to nothing; and if defendant even came into possession of the note in the manner in which he claims, the fact of whether or not he had paid it, and was entitled to have so received it, would depend upon the evidence he offered relative to its payment. This point was the controlling one in the case, and was doubtless the deciding one with the jury, and, being such, the law applicable to these facts should have been much more clearly stated to them. It is true that possession by the maker of a promissory note, of itself and standing alone, is *prima facie* evidence of payment. 30 Cyc. 1268, note (d), and cases cited. But this case did not rest upon the naked question of possession, but upon evidence from both sides, not disputing the possession, but explaining how it came about. We are satisfied, that for want of adequate instruction as to the law applicable to the peculiar situation presented, the jury attached far more importance to the possession of this note than it would have done under proper instructions.

As this case must be tried again, we shall refrain from commenting in detail upon the evidence presented.

Third. There is another point raised in the motion for a new trial, which of itself perhaps insufficient to require a reversal, would, under the peculiar circumstances of the case, in our judgment, have justified the granting of a new trial. Plaintiff claimed that he was utterly without any information of defendant's possession of the note, until it was produced in the trial, under a plea of payment, and that, therefore, he had not anticipated, and was not called upon to anticipate, that he would have to meet this issue, so he set up in his motion for a new trial the fact that his sister kept in her possession his notes and papers, and that she would testify, if granted a new trial, that she had had in her possession for plaintiff the note in ques-

tion, since it was transferred to him, and that she delivered it to the plaintiff on March 15th, when he went down with Meeks to the defendant's to have it renewed. If this was true, and it is supported by her affidavit, it could not be true that defendant obtained the possession of the note, as he claimed, seven or eight days before plaintiff was at his house, seeking to have it renewed; and this evidence, coming from a witness with less interest, presumably, than had the other parties who testified, of itself would probably have changed the result, and, taken together with a fuller and better instruction of the law applicable, it seems more certain that it would have changed the result, so it is clear to us the ends of justice require a retrial of the whole controversy; and we conclude, for the reasons given, that the case should be reversed and a new trial ordered.

PER CURIAM. Adopted in whole.

(48 Okl. 14)

DR. KOCH VEGETABLE TEA CO. v. DAVIS et al. (No. 3596.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 351\*)—PROCEEDINGS IN ERROR—COMMENCEMENT—STATUTE.

Section 4659, Rev. Laws 1910, is applicable, by analogy, to the commencement of proceedings in error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1915-1919; Dec. Dig. § 351.\*]

2. APPEAL AND ERROR (§ 351\*)—PROCEEDINGS IN ERROR—"COMMENCED"—WHAT CONSTITUTES—ADDING NEW PARTY.

Where two or more parties are necessary as defendants in error in this court, and the petition in error with case-made has been filed within the time allowed by law, and legal service of summons had within such time on one of the necessary defendants in error, the proceeding in error has been "commenced" as to all the defendants in error, in so far as the limitation on the commencement of proceedings in error is concerned, in cases where the necessary defendants in error are all "joint contractors or otherwise united in interest."

(a) In such a case a necessary party defendant may be summoned into this court, even though 60 days have elapsed after the time allowed by law for filing petitions in error in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1915-1919; Dec. Dig. § 351.\*]

For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

Commissioners' Opinion, Division No. 2. Error from District Court, Major County; W. L. Moore, Judge.

Action by the Dr. Koch Vegetable Tea Company, a corporation, against William Davis and others. Judgment for defendants, and plaintiff brings error. Former opinion with-

drawn, petition for rehearing granted, and motion to dismiss overruled.

Carlisle & Edwards, of Oklahoma City, for plaintiff in error. A. Fairchild, of Enterprise, Or., and R. N. McConnell, of San Francisco, Cal., for defendants in error.

BREWER, C. A joint judgment was entered in this case against William Davis and William Iams, on a written obligation, September 26, 1911. On February 13, 1912, a petition in error was filed in this court, naming both Davis and Iams as defendants in error. Defendant Iams waived service of summons in this court, and entered his appearance. Defendant Davis has never been brought into this court by summons, appearance, or otherwise. On November 5, 1913, defendant in error, Iams, filed a motion to dismiss the appeal on the ground that Davis, one of the judgment debtors, had not been brought into this court. On November 11, 1913, plaintiff in error filed a motion, asking to withdraw the case-made and have same corrected by striking the name of Davis from the judgment, because no judgment had been taken against him, and the insertion of his name in the judgment entry was a mere clerical error. Leave to withdraw and correct, under the supervision of the trial court, was allowed on November 25, 1913. The matter was heard by the trial judge December 18, 1913, and he refused to allow and certify the proposed correction. On December 30, 1913, the plaintiff in error filed a motion, reciting the above motion to withdraw case-made, the order allowing same, and the refusal of the trial judge to allow and certify the corrections requested, together with averments that Davis was not served with process and had not appeared in the proceedings below, and that the attorneys who filed pleadings for Davis were without authority so to do, etc., and prayed:

"That this court, or some judge thereof, hear and settle the facts in dispute and to make an order correcting and amending said case-made by including a copy of the summons \* \* \* and the statements contained in the affidavit of the clerk, etc., \* \* \* including \* \* \* the statement of the firm of Fairchild and Brady made in open court as set forth in the affidavit of F. W. Madison and V. M. Lord, filed herein, and by *striking out the name of Wm. Davis from the journal entry of final judgment,*" etc.

On January 6, 1914, the following order appears to have been made in this court:

"And now on this day it is ordered by the court that the motion of plaintiff in error herein to correct case-made be, and the same is hereby, sustained."

Within 15 days thereafter the defendants in error filed a motion for a rehearing on the order above set out, and that it be set aside, and renewing the motion theretofore made to dismiss the appeal for want of necessary parties. This motion was pending, undisposed of, and was not called to our attention, and the case was written on its merits, under the supposition that the motion to dis-

miss had been finally passed on and was no longer a question in the case. The condition of the record, and of this important and undisposed of motion, is strenuously urged upon us on motion for rehearing, and it is again insisted that the appeal should be dismissed.

[1, 2] (1) We have examined the multitude of motions and counter motions in this case, only a part of them being specially mentioned above, and feel certain that the order herein above recited, which had the effect of amending and correcting the case-made in this court in many particulars, and especially by striking out of the judgment a joint judgment debtor, on ex parte affidavits, was inadvertently made, under a misapprehension of the facts. The order having been erroneously made on the facts shown by the record, it is not necessary to consider or discuss the enlarged powers conferred on the appellate courts by new sections inserted in the Harris-Day Code (5245-5247, and especially 5249, Rev. St. 1910). The important thing accomplished by the order was to strike Davis from the judgment. The defendant Davis was not served with process, it is true, but if the record of the proceeding show any one thing beyond question, it is that Davis appeared in the case. By attorney he filed his motion to require the plaintiff to separately state and number its causes of action. The journal entry shows he appeared by attorney and argued this motion, and when it was overruled was allowed an exception and, on request, 10 days to further plead. At the trial the record recites: "Defendant Davis appeared by his attorney, but was wholly in default, having filed no answer." The journal entry of judgment recites: "The court finds that the plaintiff is entitled to judgment against \* \* \* Wm. Davis and Wm. Iams," etc. The journal entry is O. K.'d by A. Fairchild, attorney for Wm. Davis. The service of case-made was accepted by Wm. Davis, by his attorney. Likewise was an agreement as to amendments. The appeal bond ran in the name of both Davis and Iams. The petition in error filed in this court, long after the trial, brought Davis in as a defendant in error. Plaintiff in error's brief in this case, before it reached the motion stage, pointed out the default judgment against Davis, and argues error, because the judgment was for only \$38.55, while as principal debtor in the written contract it clearly should have been for more. So the defendant Davis was in this case in the proceedings below, and in the judgment entered, if a record in this court amounts to anything. It follows that he is a necessary party, and ought to have been brought into this appeal. The order striking Wm. Davis from the case-made should be set aside.

(2) With Davis in the record, it is apparent that he is a necessary party. Any judgment this court may render will affect him and his codefendant Iams alike. This being true, this court cannot proceed to final judg-



ment without his having been properly brought into this court by process, actual or constructive, or by waiver. At this point we are met with the contention that it is now too late to summon Davis into this court; the contention being that, as the time for filing the proceeding in error and the 60 days thereafter allowed, under certain circumstances, for service of summons, having passed, it is now too late. This requires a somewhat detailed consideration of some of our former opinions. The whole question turns on the one inquiry: Is the proceeding in error, as against Davis, barred by the provision of the statute, limiting the time within which proceedings may be commenced in this court to six months after the final order appealed from? Chapter 18, Sess. Laws 1910-11, page 35.

This brings up the question, What constitutes the commencement of a proceeding in error in this court, in so far as the limitation of such proceedings is concerned?

In *School Dist. 39 v. Fisher*, 23 Okl. 9, 99 Pac. 646, it is held that the general statutes regulating the commencement of ordinary actions, as affected by the statute of limitations, apply in this court to proceedings in error by analogy. The statute (section 4218, Wilson Rev. Stat. 1903 [section 5552, Comp. Laws 1909; section 4659, Rev. Laws 1910]) is as follows:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

In the *Fisher Case*, supra, the petition in error was filed two days before the expiration of one year, then allowed, and a summons was served after such time had expired; this summons, being void, was quashed. An alias summons was issued and served more than 60 days after the expiration of one year; and it was held that the proceedings had not been commenced in time, and the case was dismissed. A line of cases, of which the above case is perhaps the leading one, is relied on by defendants in error to sustain their contention that, more than 60 days having elapsed after the time allowed for filing the appeal, the proceeding has not been commenced as to Davis, and is therefore now barred. But the case of *First State Bank v. Clingan*, 26 Okl. 150, 109 Pac. 69, is cited by plaintiff in error as destructive of the contention mentioned. The *Clingan Case* reasserts the rule that the general statute as to commencement of actions, supra, is applicable in this court by analogy, and refused to dismiss that case

on May 10, 1910, when it had been filed in this court November 29, 1909, the last day allowed by law for filing, although one of the necessary parties had not been brought into this court at the time the opinion was written. Therefore, under the facts in the *Clingan Case*, it is obvious that the 60-day clause of the statute was not considered applicable. Were we to stop with what has been said, it would appear that the *Fisher Case* and the *Clingan Case* are in conflict. Not so. They are both right under their facts and the law applicable. In the *Fisher Case*, it will be remembered, there was no service on any one. One had been attempted, but it was void. There being then no service on any defendant, the second clause of the statute involved was resorted to. That clause deals with a situation where no service has been had within the time allowed for bringing the appeal, but where an attempt in good faith has been promptly made. It says:

"An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

So in the *Fisher Case*, there having been no service on any one within the time allowed for filing a proceeding in error, and the attempt to commence the proceeding not having been followed by "the first publication or service of the summons within sixty days," the leniency of the statute had been exhausted, and no proceeding commenced. Therefore with the passing of this period, the statute bar, limiting the time within which proceedings may be commenced in this court, attached, and the case was properly dismissed.

The *Clingan Case*, however, is where one of two necessary parties, had in fact been served with valid process within the time allowed. The other necessary party had not been brought into court, and the 60-day provision had long since expired. But as the two parties necessary as defendants in error were joint contractors or otherwise united in interest, it was held that the first clause of the statute we are discussing applied, and that therefore in such a case the service of process on one of such defendants—defendants united in interest—was the commencement of the proceedings as to all of them. The first clause mentioned, when read independent of the second, makes the correctness of the holding apparent. It says:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor, or otherwise united in interest with him."

To sum up the matter, the *Clingan Case* was one where all that was necessary to be done had been done to commence the proceedings, under the terms of the statute.

The service on the one, within lawful time, commenced the proceedings as to all, where they were joint contractors or otherwise united in interest; and this, being all that was necessary to commence the proceedings, it necessarily stopped the running of the statute of limitations as to the commencement of the proceedings and prevented the application of the statute bar.

In the Fisher Case, supra, under the second clause of the statute, what was done was merely an attempt to commence the proceedings, and in such cases the attempt must be completed in the manner pointed out within 60 days or not at all. So in that case, the attempt having failed within the time allowed for perfecting it, no proceedings were ever in fact commenced. Therefore the statute bar, as to the commencement of proceedings attached, and necessarily any further attempt to commence the proceedings was futile, and the cause was properly dismissed.

The provisions of our statute held to apply by analogy to proceedings in this court are identical with section 20, Kansas Code. This section was borrowed by Kansas from Ohio. The Ohio Supreme Court first applied it to appellate proceedings by the doctrine of analogy. *Buckingham v. Commercial Bank*, 21 Ohio St. 131; *Sidener v. Hawes*, 37 Ohio St. 533; *Secor v. Witter*, 39 Ohio St. 218; *Bank v. Green*, 40 Ohio St. 431. The Kansas Supreme Court approved the rule of the Ohio Court, in *Thompson v. Wheeler & Wilson Mfg. Co.*, 29 Kan. 476 (2d Ed.) 340. This cause in the Kansas Court involved the second clause of the statute, and is made the basis of the Fisher Case, supra, in this court. In *Paving Co. v. Botsford et al.*, 50 Kan. 331, 31 Pac. 1106, the first clause of the statute came under review by the Kansas Court, and it was held applicable by analogy, and was treated independently of the second clause, which was dealt with by that court in *Thompson v. Wheeler & Wilson*, supra. And this court in the *Clingan Case*, supra, found authority in the *Paving Co. v. Botsford et al.* Case, supra. The distinction we have attempted to show here between the effect of the two clauses of our statute has not been clearly pointed out in any of the decisions, but it has been applied; for in the *Botsford Case* the court refused to dismiss, although a necessary party had not been brought into court when the opinion was written, which was five months after the time allowed for filing in the Supreme Court had expired. The Ohio courts also applied the distinction without specially discussing it. So we conclude that Davis was erroneously stricken from the judgment and record in this case; that he is a necessary party to a determination of the same; that he should have been brought into this court; but that as his codefendant, Iams, who was united with him in interest, was properly brought

into court in apt time, the proceedings in error, in so far as the limitation is concerned, have been commenced as to Davis, and he can be brought into this court by summons or publication, if such action is promptly had. We would be inclined to refuse this at this late day, on the grounds of failure to prosecute the action, were it not for the reason that the order of court, herein set aside, remained in force for a long period of time, and while in force plaintiff in error was excusable for not bringing Davis into court.

This leads us to grant a rehearing; to set aside the previous order striking Davis from the record; to overrule the motion to dismiss this case; to allow Davis to be brought into court by process allowed by law, if efforts to that effect are promptly and diligently pursued. The former opinions filed in this case should be withdrawn, and this opinion filed in the case.

PER CURIAM. Adopted in whole.

(44 Okl. 452)

ST. LOUIS & S. F. R. CO. v. WALTON-CHANDLER LUMBER CO. (No. 3020.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. CARRIERS (§ 189\*)—SHIPMENTS—RIGHT TO REFUND—CONDITIONS PRECEDENT.

At different dates between May 27, 1907, and February 27, 1908, plaintiff shipped rough lumber to a milling point on defendant's line of railroad. At the time a milling in transit privilege was given by defendant's tariff schedule, under which the finished product was required to be shipped out in certain quantities to destinations on said defendant's line of railroad, and under certain named tariffs carrying specified freight rates then in force. Before plaintiff shipped out any of the lumber, such schedule of rates on intrastate shipments had been canceled, and lower rates established to conform to an order of the State Corporation Commission, and thereafter plaintiff shipped under such lower rates. Held that, not having complied with the conditions under which the right to a refund on inbound shipments was given, plaintiff was not entitled to the benefit of it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.\*]

2. CARRIERS (§ 189\*)—SHIPMENTS—REFUND—CONDITION.

Plaintiff's right to a refund of the difference between the local distance tariffs paid on inbound shipments and the milling in transit or lower rate was dependent upon the shipper causing the lumber to be moved under the existing tariffs. When this was not done, but, instead, the lumber was shipped out under reduced rates, put in force by lawful authority, an action to recover such refund cannot be maintained.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 162, 854, 855, 859-865; Dec. Dig. § 189.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Choctaw County; Tom D. McKeown, Special Judge.

Action by the Walton-Chandler Lumber Company against the St. Louis & San Fran-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

isco Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error. T. C. Humphry, of Hugo, for defendant in error.

SHARP, C. This is an action brought by the Walton-Chandler Lumber Company, hereinafter referred to as the Lumber Company, a corporation doing a wholesale and retail lumber milling, sawing, and planing business, with offices and mills at Hugo, Okl., against the defendant, St. Louis & San Francisco Railroad Company, hereinafter referred to as the Railway Company, to recover \$1,563.02, claimed by it to be due as a refund under a milling in transit arrangement accorded by a certain published tariff of defendant Railway Company, under which, at different dates beginning May 7, 1907, and ending February 27, 1908, plaintiff, under the then corporate name of Walton-Rogers Lumber Company, made inbound shipments of rough lumber from various points in Oklahoma, over defendant's line of railway to Hugo (formerly Indian Territory, afterwards state of Oklahoma), amounting in the aggregate to 4,481,200 pounds, for resawing, planing, dressing, and reconsignment privileges. The tariff in question was known as St. Louis & San Francisco No. 25-D. Item 17 thereof prescribed the scale of rates which governed when reference thereto was made. Item 18 applied the scale of rates to shipments of lumber car loads to be resawed, planed, tongued, grooved, seasoned, or manufactured into vehicle and agricultural shapes, at resawing points, which included Hugo. Item 20 concerned the application of such milling in transit rates, and provided that:

"These rates apply only when shipments of lumber to be reconsigned are billed into milling or stop-over points at local tariff rates. The difference between local rates and the above rates will be refunded when lumber is shipped via the Frisco, the weight of lumber reshipped to be sixty-five (65) per cent. of the inbound weight."

In making said inbound shipments to Hugo, plaintiff paid freight thereon at the established and then existing rates for local shipments of rough lumber, and which rates were in excess of the rate named in item 17 of tariff 25-D. The effect of these various provisions of the tariffs in force prior to June 26, 1907, was that the shipper was permitted to avail itself of the published milling in transit privilege, provided it shipped into Hugo at local tariff rates, and re-shipped via the Frisco 65 per cent. of the inbound weight, when the difference between local rates and the rates fixed in item 17 should be refunded to such shipper. June 26, 1907, defendant in error filed and made effective amendment No. 11 to said tariff 25-D, which made the following modification of that tariff:

"The rates named herein, unless otherwise specified, will only apply on shipments of forest products car loads, which move into milling, resawing, reconsigning or concentration points, and when the manufactured products or reshipments that have concentrating privileges are reshipped by the St. Louis & San Francisco Railroad from such milling or resawing, reconsigning, or concentrating points to destinations named in and under rates covered by tariffs Nos. 186, 200, 368, 546, 599, 900, and 904 series, but will not apply on shipments as moving between points within the state of Arkansas or between points within the state of Missouri."

As a result, then, both of tariff 25-D and amendment No. 11 thereto, shippers of rough lumber into concentrating points who paid thereon the local distance tariff rate were entitled to the benefit of the lower or milling in transit rate whenever the lumber should be manufactured and 65 per cent. thereof shipped out via the St. Louis & San Francisco Railroad Company to destinations named in and under rates covered by the tariffs named and referred to in said amendment. November 16, 1907, Oklahoma and Indian Territories were admitted into the Union as the state of Oklahoma. On March 2, 1908, the State Corporation Commission promulgated and put in force between all stations in Oklahoma a scale of rates (1st Annual Rep. Corp. Comm. pp. 226-231), which was lower than the outbound rates under the tariffs in force when the inbound shipments were made. In obedience to an order of the Corporation Commission by which it was required to enforce the rates named in said published tariffs, the Railroad Company published amendment No. 33 to tariff 25-D, by which it canceled the milling in transit privileges and rates applicable thereto on intrastate shipments, which cancellation became effective March 2, 1908, or the same day that the Corporation Commission put in force its scale of rates. The outbound shipments of finished product from Hugo to the points named in the expense bills attached as exhibits to plaintiff's petition were all made after March 2, 1908; hence after the cancellation of the tariffs giving milling in transit privileges and rates. These outbound shipments, being intrastate, moved under the rates put in force by the State Corporation Commission, and which rates, as we have seen, materially reduced the amount of the freight charges. It was the latter rates, and not those in force at the time the inbound shipments were made, that the Lumber Company paid. It was upon the Railroad Company's offer to refund as and when provided in item 20, tariff 25-D, that the Lumber Company bases its claim. There is no dispute as to any of the material facts. It is not claimed but that all tariffs and amendments thereto were duly published and filed as required by law.

[1, 2] The contention of the Lumber Company is thus expressed in its brief:

"While the contention of the defendant in error is that the rate of freight paid by the de-

fendant in error on the outbound shipments of dressed lumber is wholly immaterial and no part of the contract, as it paid the amount of freight the plaintiff in error demanded and the rate in existence at the time the outbound shipments were made, and because the Corporation Commission had reduced the rate from what it was prior to statehood on the outbound shipments, did not change the obligation of plaintiff in error to refund the excess money paid by defendant in error, when it sent out the outbound shipments to the amount of 65 per cent. in weight of the inbound shipments just the same as if there had been no statehood."

On the part of the Railroad Company it is insisted that the plaintiff is not entitled to a refund, for the reasons following: (1) Because said milling in transit arrangement had been canceled prior to the date of the movement of any outbound shipment; (2) because this court is without jurisdiction to enforce a claim depending upon a tariff not in existence at the time the shipment moved; and (3) because, under the undisputed evidence, plaintiff has failed to comply with the conditions provided in said tariffs.

As a result of the Lumber Company's insistence, it is claimed that it is entitled to a judgment for the difference between the local distance freight rate paid on inbound shipments from points where such shipments originated to Hugo, and the milling in transit rate between said points. This difference is 4 cents per hundredweight, and, if plaintiff's contention be sound, its judgment for \$1,790, including interest, should stand. But this result can only be reached by wholly leaving out of view the outbound shipments, which were a part of the milling in transit agreement. It is not claimed by the Lumber Company, but rather conceded, that it would not be entitled to a refund unless upon the outbound shipment via the Frisco of 65 per cent. of the inbound tonnage. This is true, but, alone, is not sufficient. The outbound shipments to the extent indicated, via the Frisco, were not only to be made, but were to be under rates covered by tariffs 186, 200, 368, 546, 599, 900, and 904 series. Plaintiff's outbound shipments, while made to the extent, and probably to destinations, named in said tariffs were not made under the tariffs in force when the inbound shipments were made; and the refund was not due the Lumber Company, unless the shipments were made under the then existing tariffs. In other words, the milling in transit rate was an entirety, and its provisions must be accepted and carried out in its entirety, or not at all. Such was the conclusion reached by the Circuit Court of Appeals, in *Carson Lumber Co. v. St. Louis & S. F. Ry. Co.*, 209 Fed. 191, 126 C. C. A. 139, a case arising in the United States Court for the Eastern District of Oklahoma, and wherein the facts appear to be the same as in the case under consideration. It was there said, with reference to the milling in transit rate:

"It is applicable only when all its substantial terms and provisions are observed. The

railroad, in tendering such a privilege, undoubtedly relies upon the revenues which it expects will accrue from such a traffic arrangement. These depend upon the terms and conditions of the tariffs then in force. An inspection of those in effect when those inbound shipments moved make it apparent that, to entitle a shipper to refund, he must not only pay the existing local tariff rates upon inbound shipments, but must thereafter bill out under prescribed outbound rates. If the shipper pays less than the outbound rate in force when his inbound shipment was made, he has not complied with the express terms of the tariff, nor has the carrier received the full rate which induced it to concede the milling in transit privilege. \* \* \* Therefore it has not complied, either in letter or in spirit, with the terms and conditions of the tariffs upon which its cause of action is based."

The opinion of the trial court, reported in (D. C.) 198 Fed. 311, after setting out in extenso the history of the cause of action, announced the following rule:

"Freight rates are not the subject of contract; they are the creatures of the law and of those charged with its administration. If it were otherwise, a very low milling in transit rate might be established at the instance of some favored shipper without limitation of time as to the outbound movements, and when he had completed his inbound movements the rate might then be raised by lawful process, the result of which would be that the favored shipper would thus secure for an indefinite period of time a vested right to the application of the low rate to both inbound and outbound shipments, while other shippers would be required to pay the higher rate. It is well settled such contracts of shipment entered into between the shipper and the carrier may not be enforced in the face of a published tariff rate for the service."

No question of bad faith is charged against the Railroad Company in the cancellation of its milling in transit privileges and rates. On the admission of Oklahoma into the Union as a state, the jurisdiction of the general government and of the Interstate Commerce Commission over local rates within the state ceased, and the jurisdiction thus relinquished was taken up and exercised by the state authorities. The state put into effect a new schedule of rates applicable to the outbound movements in question, and those rates became the only lawful charge therefor. It results, therefore, that plaintiff paid the lawful rates then in effect upon the inbound movements, and the lawful rates in effect upon outbound movements, and therefore it has no complaint as to shipments in controversy, which had both origin and destination within the state. The Lumber Company was charged with notice that the milling in transit privileges and rates were subject to change in the manner provided by law. In *Armour Packing Co. v. United States*, 209 U. S. 58, 28 Sup. Ct. 428, 52 L. Ed. 681, it was held that a shipper was guilty of accepting transportation at less than the carrier's published rates, in violation of the Elkins Act of February 19, 1903 (U. S. Comp. St. 1913, §§ 8597-8599), where, after the carrier had duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, pub-

lished, and filed rate when the contract was made, since the statute, being then in force, was read into such contract, and became a part of it. It was said, in disposing of this contention:

"It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the lawmaking branch of the government. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 399, 26 Sup. Ct. 272, 50 L. Ed. 524. It may be that such contracts should be recognized, giving stability to rates for limited periods; that, the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted; not to make them to suit their own views of propriety or justice. The statute, being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it. If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

We believe that the courts have uniformly held that contracts for interstate transportation at special rates, though antedating the enactment of the federal Interstate Commerce Act, forbidding discrimination in freight rates, became invalid upon enactment of the statute. *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.*, 38 Mo. App. 191; *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70; *Fitzgerald v. Fitzgerald & M. Construction Co.*, 41 Neb. 374, 59 N. W. 838; *Bullard v. Northern Pac. R. Co.*, 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246. The Lumber Company's misfortunes came about in not availing itself of the milling in transit privilege while in effect, and in waiting until after the rate had been canceled. This loss, however, it appears, was largely, if not wholly, compensated by the reduced rate under which it was enabled to make its outbound shipments. It did not pay; neither could the Railroad Company have continued to charge the original outbound rates, as fixed in the tariffs and amendments thereto, the same having prior thereto been canceled.

The judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

(44 Okl. 510)

GIBBS v. DIETRICH. (No. 3811.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—FAILURE TO FILE BRIEF—DISMISSAL.

Where the plaintiff in error fails to file brief, as required by rule 7 of this court (137 Pac. ix), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by E. H. Dietrich against Laura Gibbs. Judgment was for the plaintiff, and the defendant brings error. Dismissed.

J. C. Dougherty, of Dewey, for plaintiff in error. W. D. Cope, of Sapulpa, for defendant in error.

GALBRAITH, C. The petition in error with case-made attached was filed with the clerk of this court April 10, 1912, and the cause regularly submitted at the October, 1914, term. No brief has been filed by either party. The appeal should therefore be dismissed for failure to serve and file brief as required by rule 7 of this court (137 Pac. ix).

PER CURIAM. Adopted in whole.

(45 Okl. 139)

THOMPSON et al. v. BROWN. (No. 6598.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 548\*)—PRESENTATION FOR REVIEW—RECORD.

Rulings of a trial court upon motion to vacate a judgment of dismissal cannot be reviewed by this court unless made part of the record by bill of exceptions or case-made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.\*]

Error from County Court, Stephens County; J. W. Marshall, Judge.

Action by W. J. Thompson and another against J. W. Brown. From an order denying motion to vacate judgment and reinstate action, plaintiffs bring error. Dismissed.

Carr & Field, of Pauls Valley, for plaintiffs in error. E. H. Bond and Chillon Riley, both of Duncan, for defendant in error.

BLEAKMORE, J. This case presents error from the county court of Stephens county. The parties appear here as in the court below.

On September 15, 1913, judgment was rendered dismissing the cause for want of prosecution. On December 6, 1913, plaintiff mov-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed the court to vacate said judgment and reinstate the action, which motion was on January 6, 1914, overruled.

The proceeding is here upon a purported transcript of the record. The assignments of error go only to the action of the trial court in overruling the motion to vacate the judgment dismissing the cause. Defendant in error moves to dismiss this proceeding for the reason that the record presents no error the subject of review. The ruling of a trial court upon motion cannot be reviewed here, unless made a part of the record by bill of exceptions or case-made. Putnam et al. v. Western Bank Supply Co., 38 Okl. 152, 132 Pac. 483; Cable v. Myers (not yet officially reported) 142 Pac. 1114.

The case is therefore dismissed. All the other Justices concur, except KANE, C. J., absent and not participating.

(44 Okl. 493)

WELLSVILLE OIL CO. v. MILLER et al.  
(No. 3785.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. EQUITY (§ 65\*)—CLEAN HANDS—PETITION—OIL AND GAS LEASE.

Where the alleged cause of action set out in a petition in a suit in equity shows that the right or claim relied upon for relief is based upon a breach of a contractual obligation existing between the parties thereto, the plaintiff in such suit does not come into court with clean hands, and a general demurrer to the petition for want of equity is well taken and should be sustained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.\*]

2. MINES AND MINERALS (§ 73\*)—OIL AND GAS LEASE—"CONDITION SUBSEQUENT"—"CONDITION PRECEDENT."

A condition subsequent operates upon estates already created and vested, and renders them liable to be defeated; while a condition precedent is one that must be performed before the estate can vest or be enlarged. A void condition subsequent in a lease contract cannot operate to defeat an estate already vested thereunder, but a void condition precedent prevents any estate from vesting and renders the lease void, unless the condition is performed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.\*]

For other definitions, see Words and Phrases, First and Second Series, Condition Precedent; Condition Subsequent.]

3. INDIANS (§ 16\*)—OIL AND GAS LEASE—CONDITION PRECEDENT—WHAT CONSTITUTES.

In the year 1907, upon the petition of the guardian of a minor full-blood allottee, the United States Court for the Northern District of the Indian Territory, sitting in equity, made an order directing the minor to join in executing an oil and gas mining lease upon the ward's allotment upon condition that the lease should be approved by the Secretary of the Interior. Held, that this condition requiring the approval of the Secretary of the Interior was a condition precedent in the lease contract, and no estate vested thereunder until this condition

was performed, although the condition may have been void.

[Ed. Note.—For other cases, see Indiana, Cent. Dig. § 45; Dec. Dig. § 16.\*]

Commissioner's Opinion, Division No. 2. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by the Wellsville Oil Company against Martha Miller and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Jas. A. Veasey, of Tulsa, Lloyd A. Rowland and L. G. Owen, both of Bartlesville, and Samuel W. Hayes, of Oklahoma City, for plaintiff in error. Hurley, Mason & Senior, of Tulsa, Tillotson & Elliott and A. C. Hough, all of Nowata, and W. J. Gregg, of Tulsa, for defendants in error.

GALBRAITH, C. This was a suit in equity commenced by the plaintiff in error against the defendants in error for the purpose of validating an oil and gas lease which it held on 80 acres of Martha Miller's allotment, and to cancel a like lease held on said land by the Alpha Oil Company. There was a demurrer to the petition, which was sustained. The plaintiff in error refused to amend, and judgment was entered for the defendants in error. To review this judgment the plaintiff in error has perfected an appeal to this court.

The assignments of error are considered in the brief and argument as one; to wit, that the trial court erred in sustaining the demurrer to the petition.

The petition was in two counts. In the first count it was alleged that the plaintiff originally had an oil and gas mining lease on 80 acres of the allotment of Martha Miller (née Everett), a full-blood minor of the Cherokee Nation, which expired with her minority on March 16, 1908; that in February, 1907, more than a year before the allottee reached her majority, she, by her guardian filed a petition in the United States District Court for the Northern District of the Indian Territory. It does not appear from the petition, but the record shows, that this petition was filed in equity, although the allottee's guardianship case was pending on the probate docket of said court at that time. The allottee asked in this petition that she, by her guardian, be authorized to enter into a new lease with the Wellsville Oil Company for a term of 15 years, which lease would run 14 years beyond her minority; that the execution of this new lease was necessary in order to protect her property; that the Wellsville Oil Company, under its lease, had drilled 17 wells upon her property, 15 of which were producing oil wells, and that said company, owing to the shortness of the term to run under its lease, were crowding the pumps and operating the same at full capacity for 24 hours each day, and were draining the land of oil; that the price of oil was abnormally low,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

and that if she was authorized to enter into a new lease this company would cease its strenuous operation, and she would therefore be saved irreparable loss; that this petition was by the court referred to a master in chancery, who took testimony and reported to the court, recommending the new lease as prayed for in the petition; that upon the filing of this report the court made an order authorizing and directing the guardian to join the minor allottee in executing a new oil and gas mining lease to the Wellsville Oil Company, and that, in compliance with this order, such lease was made, attaching a copy thereof to the petition; that a bonus of \$1,600, as provided in the lease, had been deposited in the Union Bank & Trust Company, of Chelsea, Indian Territory, and that on the 24th day of July, 1907, the guardian filed his report showing the making of the lease, and that the court in all things confirmed the execution of the lease in an order approving the report, a copy of the order being attached to the petition; that the Wellsville Oil Company entered into the possession of the land, tendered the bonus to the minor allottee, and, upon her refusal to accept it, tendered the same in court for her use and benefit; that the Alpha Oil Company claimed an interest in the land covered by plaintiff's lease by virtue of a lease executed subsequent to the date of the Wellsville Oil Company's new lease; that, notwithstanding the condition in the order of the United States District Court authorizing the new lease that it should be approved by the Secretary of the Interior, there was no law to justify this condition, and it was therefore of no legal force and effect; that the order of said court alone made said lease a binding obligation; that the allottee, after she reached her majority, in disregard of her lease to the Wellsville Oil Company approved by the United States Court for the Western District of the Indian Territory, had executed another lease covering the same land to the Alpha Oil Company, and, acting under that lease, the said Alpha Oil Company had dispossessed the plaintiff and interfered with its development of the land; and further alleging that the defendants were incapable of responding in damages, and that the plaintiff had no plain, speedy, or adequate remedy at law. In the second count it was alleged that on the 18th day of March, 1908, the date upon which the new lease became effective, the plaintiff was in the peaceable possession of the premises, and continued for many months thereafter, when the Alpha Oil Company fraudulently obtained possession of the premises and withheld the same from the plaintiff until July or August, 1910, when it abandoned the lease, and the plaintiff thereupon again took possession, and has since been operating the oil lease thereon; that it placed improvements thereon to the amount of \$8,000, and has expended \$2,500 in caring for and in the production of oil on said lease, and prays

that its new lease may be declared valid, and that the defendant be enjoined from interfering with the operation thereof, and that the lease to the Alpha Oil Company be vacated, and that, if it be decreed that the plaintiff's lease is not valid, it be reimbursed for necessary and proper expenses incurred while operating under its lease, and for the value of the improvements placed on the premises.

The order made on the 7th day of June, 1907, by the United States Court for the Northern District of the Indian Territory, sitting in equity, in response to the petition of the guardian filed therein, was as follows:

"Comes now Calvin Everett, guardian of the above-named minor, and the matter of the petition of said guardian to be authorized to execute a lease upon the allotment of said minor coming on in its order to be heard, the court, being satisfied in the premises from the verified petition of said guardian and the testimony in support thereof, finds:

"First. That said minor was born on the 17th day of March, 1890, and that her minority will extend but for the period of about one year and one month.

"Second. That on the 5th day of April, 1905, under the proper order of court, a lease for oil and gas mining purposes was executed on the allotment of said minor to Sidney R. Bartlett and Edward H. Smith, of Independence, Kan., which said lease has been subsequently assigned to the Wellsville Oil Company, of Wellsville, N. Y., with the approval of the Secretary of the Interior.

"Third. That since the approval of said original lease said Wellsville Oil Company has drilled 17 oil wells on the allotment of said minor, all but 2 of which are producing wells.

"Fourth. That, owing to the fact that said lease is to endure for such a short time, said Wellsville Oil Company is pumping said producing wells both day and night to such an excessive and unreasonable extent that the greater part of the oil underlying said land will be exhausted by the time said lease terminates.

"Fifth. That the price now paid for crude petroleum is so low that it is not to the interest of the estate of said minor to have said oil produced in the quantities now being done, but that said oil should be pumped in the usual and normal manner, so that the production from said wells shall extend over a considerable period, and said minor receive the benefit of such advance in price as she may obtain in the case of crude oil.

"Sixth. That said Wellsville Oil Company is willing to discontinue the unusual and excessive pumping of oil from said land, provided it receives a lease for oil and gas mining purposes to continue for 15 years on the lands of said minor, for which new and additional lease said company will pay an additional royalty of 2½ per cent. or 12½ per cent. in all, and a bonus of \$20 an acre, which said additional royalty and bonus are reasonable in view of all the circumstances in the case.

"Seventh. That the making of a lease on the allotment of said minor under the terms hereinbefore set out would be to the advantage of the estate of said minor, and great and irreparable loss would result to said estate, were said proposition not to be accepted.

"It is therefore considered, ordered, and adjudged by the court that Calvin Everett, guardian of the person and estate of the above-named minor, Martha Everett, be, and he is hereby, authorized and empowered to join with said Martha Everett in the execution of an oil and gas mining lease on the allotment of said Martha Everett to the Wellsville Oil Company, a

corporation of Wellsville, N. Y., which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserve a royalty of 12½ per cent., continue for 15 years from its date, and for which lease the guardian shall receive a bonus of \$20 an acre for the use and benefit of said minor, which said bonus shall be deposited in the Union Bank & Trust Company, of Chelsea, I. T., there to be and remain in escrow until the approval of said lease by the Secretary of the Interior, at which time the same shall be paid to said guardian for the use aforesaid.

"It is further ordered and adjudged by the court that, upon the approval of the lease herein authorized by the Secretary of the Interior, the lease hereinbefore authorized by the court and the order of the court authorizing the same, as well as the order of court confirming the same, on April 5, 1905, stand vacated and be of no further force or effect.

"It is further ordered and adjudged by the court that said guardian shall, upon the execution of said lease, make a full report of his doings in connection therewith, and that upon receiving said bonus of \$20 an acre that he execute to the United States of America an additional bond in the sum of \$3,200, conditioned for the faithful accounting of the proceeds of said lease."

On the 24th day of July following the court made a further order concerning the lease:

"On the 24th day of July, 1907, comes on to be heard the report of Calvin Everett, guardian and next friend of Martha Everett, relative to leasing the lands of said minor unto the Wellsville Oil Company, and the court, being sufficiently advised, finds that the said guardian has fully complied with the court's order in the execution of such lease, and that he has filed a bond in the sum of \$3,200, conditioned as required by law.

"It is therefore ordered that said lease and said bond be, and they are hereby approved, ratified, and confirmed.

"Done at Nowata in open court."

In pursuance to the order of June 7th, above set out, the guardian and ward joined in executing a lease for the term of 15 years. This lease was on a form prescribed by the Secretary of the Interior for oil and gas leases on restricted Indian lands, and contained all of the usual recitals, giving the Secretary direction and control of the development to be made thereunder, and this lease was submitted in regular order for the approval of the Secretary as provided in the court's order above set out. This appears from the following indorsements thereon:

"Department of the Interior, U. S. Indian Service. Union Agency, Muskogee, Ind. T., Oct. 3, 1907. The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

"Department of the Interior, Office of Indian Affairs, Washington, D. C., Oct. 22, 1907. Respectfully submitted to the Secretary of the Interior with recommendation that it be approved subject to regulations of June 11, 1907, as amended October 14, 1907, and Department letter of September 26, 1907, (5-34)

"C. F. Larrabee, Acting Commissioner.

"Department of the Interior, Washington, D. C., Nov. 6, 1907. Disapproved.

"Jesse E. Wilson,

"Assistant Secretary of the Interior."

It is contended by the plaintiff in error that the United States Court for the Northern

District of the Indian Territory, sitting in equity, had jurisdiction to make the order above set out, authorizing the guardian to execute this new lease, extending beyond the minority of the allottee, and that the order made approving the lease made it a legal and binding obligation without the approval of the Secretary of the Interior. Upon thorough investigation of the authorities we seriously doubt the jurisdiction of that court in equity to make the above order, for the reason: First, we know of no statute conferring the jurisdiction; and, second, for the reason there was no necessity to apply to the chancellor in this instance, since that court had jurisdiction of the guardianship of this minor allottee and the management of her estate in the probate cause pending before it, and no good reason appears why the guardian should not have invoked the court's probate jurisdiction in the guardianship case for authority to execute the same; and for the further reason that section 20 of the act of Congress of April 26, 1906 (34 Stat. 145, c. 1876), conferring power upon the United States courts in the Indian Territory to provide for leasing the allotments of minors and incompetents, was not an act removing restrictions, and did not take away from the Secretary of the Interior control over the alienation of the lands of adult full bloods. However, inasmuch as this court, in *Cowles v. Lee et al.*, 35 Okl. 159, 128 Pac. 688, has used language that might be interpreted to mean that, in the opinion of this court, the power of that court to make the order was in chancery as well as in probate, we will assume for the purpose of this case that the court had the jurisdiction contended for by the plaintiff in such a case properly brought before it.

[1] 2. The first question presented by the demurrer to the petition and raised by the assignments under consideration is: Were there sufficient equities stated in the petition to justify the court in granting the relief prayed for? If a negative answer is returned to this question, the ruling of the trial court complained of was correct, and should be sustained. It will be observed that the cause of action in the instant case is based wholly upon the pleadings, orders, and judgment of the United States Court for the Indian Territory relied upon as authority for the plaintiff in error's lease involved in this case. All these are set out and made a part of the petition in the instant case, and their construction thereby invited. A consideration of the power of the court to make the order and decree relied upon as authorizing the lease is necessarily involved in answering the question above suggested.

It is contended by the defendant in error that the plaintiff in error does not come into court with clean hands, and for that reason was properly denied relief in the trial court.

Mr. Pomeroy, in his *Equity Jurisprudence* (volume 1, par. 397), says:



"On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy."

And in paragraph 398 this author says:

"Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction of those rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of the plaintiff whose own conduct in connection with the same matter or transaction has been unconscientious or unjust, or marked by want of good faith, or has violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, 'He who comes into a court of equity must come with clean hands'; and, although not a source of any distinctive doctrines, it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights."

Judge Sanborn, in rendering the opinion of the Circuit Court of Appeals, in the Michigan Pipe Co. et al. v. Fremont Ditch, Pipe Line & Reservoir Co. et al., 111 Fed. 284, at page 287, 49 C. C. A. 324, at page 327, said:

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion; not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands,' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 1 Pom. Eq. Jur. 397, 398, 400; Medicine Co. v. Wood, 108 U. S. 218, 227, 2

Sup. Ct. 436, 27 L. Ed. 706; Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955."

It seems, under the allegations of the petition and the findings of the court in the order of June 7th, that the guardian and the minor allottee were driven into court with the petition for authority to make the new lease by reason of the manner in which the Wellsville Oil Company was operating its first lease; the court finding on this point that its manner of operating was "to such an excessive and unreasonable extent that the greater part of the oil underlying said land will be exhausted by the time the lease terminated," and that "the unusual and excessive pumping would result in great and irreparable loss to the estate." It seems from these findings that the plaintiff in error "was wanting in good faith, honesty, and righteous dealing," and that it had breached its duty and violated its contract obligation, and thereby forced the guardian to petition for authority to make the new lease.

It was said by Mr. Justice Van Devanter, in rendering the opinion of the Circuit Court of Appeals, in Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213, in regard to the mutual obligations assumed in an oil lease:

"In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. \* \* \* The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule of all other contracts where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases."

And again, in the course of the same opinion, it is said:

"Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence, which, as before shown, is also made a condition of the lease under consideration."

It follows from this rule that a plain and substantial disregard of its duty to operate the lease in such a manner as would be reasonably expected of operators of ordinary prudence, having regard to the interests of both the lessor and lessee, would be a breach of its contract, and that this obligation might be violated as much by a too strenuous as by a too dilatory operation of the lease. Both the petition of guardian and the order of the court show a flagrant violation of this duty in the manner of operating the first lease. Then it seems that the ground upon which the Wellsville Oil Company forced the guardian and the allottee into a court of

equity to obtain the authority for executing a new lease was a breach of its plain obligation to the minor allottee under its first lease with her. This being true, the plaintiff in error does not appeal to the conscience of the chancellor with "clean hands," and cannot invoke the powers of a court of equity for its relief. The very right of action set out in the first count of the petition in the instant case is based upon the breach of duty, the wrongful operation of the first lease, its own iniquity. The principle that no one can take advantage of his own wrong, much less found a right of action thereon, is as old as jurisprudence itself. "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." The record shows that the plaintiff not only came into court with unclean hands, but had been guilty of iniquity as well, and the trial court properly denied it relief.

[2, 3] 3. Again, in the court's order authorizing the lease to be made, it is provided that the guardian "be, and he is hereby, authorized and empowered to join with the said Martha Everett in the execution of an oil and gas mining lease on the allotment of said Martha Everett, to the Wellsville Oil Company, \* \* \* which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserve as royalty, \* \* \* and for which lease the guardian shall receive a bonus of \$20 an acre, \* \* \* which said bonus shall be deposited in the Union Bank & Trust Company, of Chelsea, I. T., there to be and remain in escrow until the approval of said lease by the Secretary of the Interior, at which time the same shall be paid to said guardian for the use aforesaid." The order further provided "that, upon the approval of the lease herein authorized by the Secretary of the Interior," the present lease under which the allottee held the premises should be vacated, and also that said "guardian shall, upon the execution of said lease, make a full report of his doings in connection therewith, and that, upon receiving said bonus of \$20 an acre, he execute to the United States of America an additional bond in the sum of \$3,200, conditioned for the faithful accounting of the proceeds of said lease."

We cannot agree with the contention of the plaintiff in error that this provision in the order authorizing the lease providing that it should be subject to the approval of the Secretary of the Interior, and should be executed in accordance with the rules and regulations prescribed by him, and directing the guardian to make a full report when the order had been complied with, and providing for the bonus to be placed in escrow in the bank until the Secretary had approved the lease, were mere idle and useless provisions. We rather think that they had a fixed and set purpose understood by the court and

the parties at that time, and that the provision requiring the approval of the Secretary of the Interior was intended as a condition precedent to be complied with in order to complete the execution of the lease contract, and that, not having been complied with, the contract was not complete, and no estate, vested in the lessee thereunder.

In Blackstone, book 2, p. 157, following a discussion of conditions subsequent, it is said:

"But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee, here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed."

Chancellor Kent, in book 4, at page 125, says in regard to this condition:

"These conditions are also either precedent or subsequent; and, as there are no technical words to distinguish them, it follows that whether they be the one or the other is matter of construction, and depends upon the intention of the party creating the estate. A precedent condition is one which must take place before the estate can vest or be enlarged; as if a lease made to B. for a year, to commence from the 1st day of May thereafter, upon condition that B. pay a certain sum of money within the time, or if an estate for life be limited to A. upon his marriage with B., here the payment of the money in the one case and the marriage in the other are precedent conditions, and, until the condition be performed, the estate cannot be claimed or vest. Precedent conditions must be literally performed, and even a court of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed."

As to the rule of construction, the same authority, at page 133, says:

"Whether the words amount to a condition, or a limitation, or a covenant may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed as to its operation and effect will, after all depend less upon the artificial rules than upon the application of good sense and sound equity to the subject and spirit of the contract in the given case."

Mr. Hargrave, in argument in the case of *Scott v. Tyler*, 29 Eng. Rep. (full reprint) at page 253, said:

"The condition precedent is of quite an opposite nature; there the estate cannot commence until the condition is performed, or the contingency has happened. \* \* \* A passage in Plowden conveys an idea of the dependent nature of the estate on such a condition. Judge Brown says (Plowd. 272): 'If I grant to you that, if you will do such a thing, you shall have a lease in such particular land of mine, there the condition precedes the lease, as the needle precedes the thread; and as the needle draws the thread after it does the condition the lease.' The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words. Co. Lit. 218a, 219b. \* \* \* Therefore, though the

condition be impossible or illegal, no estate can arise, and it is the same as if none had been given. Co. Lit. 206a and b, 217b, 218a; Fulbeck's par. 2, part. 67a. The result is that, although penal conditions to destroy estates may be dispensed with, beneficial conditions to raise estates must always be complied with. If this doctrine is important at law, it essentially affects the jurisdiction of equity; from the penal nature of conditions subsequent, they, in general, fall within that lenient principle by which courts of equity relieve against penalties: but there is no connection between this and a condition precedent, which operates by giving an estate and conferring a benefit. Upon such a condition equity cannot interpose; equity cannot raise an estate which the donor has not given. If such a power was to be assumed over one subject, it might soon extend over the others, and overlap all boundaries."

These authorities, we consider, justify the conclusion that the provisions in the order requiring the approval of the lease by the Secretary of the Interior, interpreted according to the rules of common sense, and considering the circumstances surrounding the court and the parties at the time it was made, must be held to be a condition precedent, and it was placed in the order with the purpose and intent that the lease should not be complete or effective without the approval of the Secretary of the Interior. This is true notwithstanding the fact that the Secretary of the Interior had, at that time, no legal authority to approve or disapprove the lease. *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391. For that reason the condition was void, but, having been made a condition precedent in the court's order authorizing the lease, no estate vested until this condition was complied with.

Much reliance is placed upon the case of *Morrison v. Burnette*, supra, wherein the Circuit Court of Appeals, in construing section 20 of the act of April 26, 1906, held that the proviso therein contained as follows: "Provided, that allotments of minors and incompetents may be rented or leased under order of the proper court"—taken in connection with the provisions of the act of July 28, 1904, conferring "full and complete jurisdiction" upon district courts in the Indian Territory, dispensed with the approval of the Secretary of the Interior to mining leases on Indian lands, and that after the passage of the act of April 26, 1906, the Secretary had no further authority to approve such leases, but full and complete authority to do so conferred upon the United States courts in the Indian Territory.

The conclusion we have reached in this case is not in conflict with the decision in *Morrison v. Burnette*, supra. The distinction between a condition subsequent and a condition precedent marks the distinction between these cases. In the former the estate vests before the condition is to be performed, and, where void, the condition cannot operate to divest the estate, while in the latter the performance of the condition precedes the vesting of the estate, and where the condition

is void no estate vests. In the instant case the condition requiring the approval of the lease by the Secretary was written in the order authorizing the lease, and was a condition precedent, while in the *Morrison* Case the master advertised and sold the lease containing a condition for its approval by the Secretary, and the court approved the report of the master, and the condition requiring the Secretary's approval to that lease was to be obtained later, and was therefore a condition subsequent. The court in that case held that the condition was void, for want of authority in the Secretary to approve the lease, as provided in the condition. The estate, however, under that lease had vested, and the condition subsequent, although void, was not ground for forfeiture.

4. We cannot agree with the contention made that the plaintiff in error was compelled by "duress" to accept this condition, as the Secretary of the Interior was claiming authority to approve such leases, and the court was conceding it, and it could not have obtained the order for the lease without this condition. It is doubtless true that the court would not have made the order without this condition incorporated in it. This fact, instead of supporting the claim of duress, tends to confirm the finding hereinabove made that this condition was knowingly and purposely written in the order, and that it was intended by the court and understood by the lessee to be a condition precedent. At any rate, the plaintiff in error cannot escape the consequences of failure to comply with it on the ground of duress. There is nothing in the record to show duress. It does not appear that this provision was even objected to at the time the order was made. In fact, there is evidence in the record that would possibly justify the inference that the attorney for the plaintiff in error prepared this order with this condition in it and presented it to the court for his signature.

5. Again, the order of July 24th cannot be given the force contended for by the plaintiff in error. It is not clear that the court was not imposed upon and induced to make this order through mistake of fact; that the order of June 7th had been fully complied with, and the approval of the Secretary of the Interior to the lease had been secured. It will be remembered that the lease was directed to be executed under the rules and regulations of the Secretary of the Interior, and the bonus money was directed to be placed in escrow until the Secretary had approved the lease, and then delivered to the guardian, and the guardian was directed to execute an additional bond for \$3,200 when he received the bonus money, and, when all these things had been done, the order directed the guardian to make a "full report" to the court. The guardian made a report on or prior to July 24th. What he reported does not appear; for his report is not in-

cluded in the record. It does appear from this order of July 24th that he had filed the additional bond for \$3,200, and, though he was not directed to do this until after the lease had been approved by the Secretary of the Interior, this fact tends to show that the guardian reported to the court that he had fully complied with the order authorizing the lease. These things justify the inference that either the court was misled and deceived by the report of the guardian, and led to make the order of July 24th, under a misapprehension of the facts, or that he considered that this order was one of the necessary steps to be taken in the completion of the lease. The fact that the lessee, subsequent to July 24th, proceeded in its attempt to secure the approval of the lease by the Secretary of the Interior, having previously filed the same with the Commissioner to the Five Civilized Tribes, and caused it to be forwarded to the Secretary for his approval, would indicate that the lessee regarded this order of July 24th as one of the necessary steps to be taken in perfecting the lease. There is nothing in this order to indicate any purpose on the part of the court to vacate or set aside the condition requiring the approval of the Secretary of the Interior in the order of June 7th, and we are constrained to decline to give it such effect.

We therefore conclude that the demurrer was well taken to the first cause of action on the grounds that the facts set out were not sufficient to justify the chancellor in granting equitable relief, inasmuch as the plaintiff did not come into court with clean hands and had failed to comply with a condition precedent upon which the lease was authorized; namely, had not secured the approval of the Secretary of the Interior. We are equally certain that the demurrer was good as to the second cause of action, in which the claim was made for compensation for expenses in operating the lease and for improvements placed on the premises. The plaintiff is in possession. It invokes the jurisdiction of equity to have the lease under which it is claiming declared valid and the lease of the Alpha Oil Company declared invalid. It may be that the plaintiff in error could not be dispossessed without being compensated in a manner and as it claims it should be, but that cannot be done in this suit. The facts alleged in the two counts were not sufficient to justify the court in granting the relief prayed for, or, in fact, any relief. The trial court was right in sustaining the demurrer.

We recommend that the exception be overruled, and that the judgment appealed from be affirmed, and that the former opinion filed herein be withdrawn, and this substituted therefor, and that a rehearing be denied.

PER CURIAM. Adopted in whole.

(44 Okl. 555)

BOTHWELL et al. v. WAY et al. (No. 3897.)  
(Supreme Court of Oklahoma. Nov. 24, 1914,  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1011\*)—MARRIAGE (§ 13\*)—JUDGMENT—CONFLICTING EVIDENCE—“COMMON-LAW MARRIAGE.”

To constitute a valid common-law marriage, it is necessary that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such a contract, consummated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations. And in an action where it is necessary to determine the issue whether such actual agreement was entered into, and whether there was a matrimonial relation maintained between them, permanent and exclusive of all others, or whether they maintained a continual living together as man and wife, or openly assumed mutual duties and obligations towards each other as man and wife, and where there is a conflict in the testimony as to facts which go to show whether or not the parties actually maintained those marital duties and obligations required by the common law, the judgment of the trial court upon such facts will be given the effect of a verdict of a jury upon conflicting testimony, and, if reasonably supported by the evidence, will not be disturbed in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011; \* Marriage, Cent. Dig. § 4; Dec. Dig. § 13.\*

For other definitions, see Words and Phrases, First and Second Series, Common-Law Marriage.]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Thomas J. Way and others against E. C. Bothwell and others, to cancel deeds and remove cloud from title. Judgment for plaintiffs, and defendants bring error. Affirmed.

N. A. Gibson, H. C. Thurman, and T. L. Gibson, all of Muskogee, for plaintiffs in error. N. B. Maxey and J. F. Brett, both of Muskogee, for defendants in error.

HARRISON, C. This action was begun in May, 1911, by Thomas J. Way, Irvin Blanchard, and D. S. Squires, a minor, suing by J. F. Brett, her next friend. The plaintiffs alleged that they were owners of and in possession of a certain 160-acre tract of land situated in Muskogee county, and that E. C. Bothwell had what purported to be a deed of conveyance from defendant Thomas Brown and his wife to the same tract of land, and that such deed was a cloud upon plaintiffs' title, wherefore they prayed the cancellation of same and for an injunction against defendants from claiming any interest under such deed and from interfering with plaintiffs' possession of the land. And for further cause of action plaintiffs alleged that they were the owners and in possession of the land described by virtue of title acquired

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereto from the heirs of Cita Barnett, a deceased Creek Indian woman, to whom, in her lifetime, the land had been allotted. Defendants answered, denying generally and specifically each and every allegation in plaintiffs' petition, and by way of cross-petition alleged that they were the owners of and entitled to the possession of an undivided one-half interest in the land in question by virtue of a warranty deed from Thomas Brown, who, it was alleged, was the surviving husband of Cita Barnett, deceased. Plaintiffs replied, denying that Thomas Brown was or ever had been the husband of Cita Barnett, denying that he had any interest or title whatever in the said land, and charging defendants with conspiracy to cloud plaintiffs' title. The case hinged upon the question whether Thomas Brown was in fact the husband of Cita Barnett. A number of witnesses were introduced for the purpose of showing that he was her husband, and a number introduced for the purpose of showing that he was not. After hearing the testimony of both parties, the court decided that Brown was not the husband of deceased, and rendered judgment in favor of plaintiffs, decreeing the cancellation of the deed from Thomas Brown to E. C. Bothwell, and from such judgment and decree the defendants appeal.

It is claimed by plaintiffs in error that but one material question is involved, and that is whether Thomas Brown was Cita Barnett's husband. We fully agree with counsel that this is the decisive question involved. If he was her husband and entitled to one-half of her estate under the law of descent and distribution then in force in the Creek Nation, then a deed from him to E. C. Bothwell of his undivided one-half interest in her allotment was valid, and the court was in error in decreeing the cancellation of same. But if he was not her husband, and had never been legally married to her, nor acquired any interest or title to her allotment through other sources, then the deed from him to Bothwell conveyed no title, and the court was not in error in decreeing its cancellation.

Evidence was introduced by defendants tending to show that a common-law marriage relation existed between Thomas Brown and Cita Barnett, and evidence was introduced by plaintiffs for the purpose of showing that no such relation existed. Plaintiffs in error, defendants below, contend that they showed conclusively by positive testimony that Thomas Brown and Cita Barnett entered into a marriage contract according to Creek tribal customs, and afterwards, up to the time of her death, maintained the relations of husband and wife, and that the contract entered into between the parties, and the relations thereafter maintained between them, were sufficient to constitute a common-law marriage. It is further contended by plaintiffs in error that the testi-

mony of plaintiffs for the purpose of showing that they were not married was all of a purely negative character which did not, as a matter of law, in any wise weaken the effect of the positive testimony introduced by defendants. On the other hand, it is contended by defendants in error that the testimony introduced by them for the purpose of disproving such marriage was not of a purely negative character, but strongly tended to show that the parties were never married, and that no marriage relation between them was ever maintained, and that the trial court having heard the testimony of the respective parties, and upon same decided in favor of plaintiffs, the judgment had the effect of a verdict of a jury upon conflicting testimony, and, being reasonably supported by evidence, should not be disturbed by this court. These contentions necessitate an examination of the testimony.

On behalf of the defendants, Thomas Brown testified that he and Cita Barnett were married about the month of May, 1899; that she died some time in February, 1900; that they had lived together about a year and a half, and that she was his wife when she died; that she died at Old Man Snow's; that a child was born dead; and that she lived something over a day and a half before she died.

Melissa Pence, who was a cousin of Tom Brown's, and whose first husband was Johnson Barnett, stated that Tom and Cita came to her house and both told her they were married; that they stayed there one night and occupied the same bed. She said: "They came over there to stay all night, two days, and went on back." She did not say to where they went back. She also said they lived together a long time, over a year. To the question, "How did the family consider them?" she answered:

"I don't know. Q. Did they consider them married or not? A. Yes, sir; I think so."

She also testified that about three months after they were at her house she saw them together at Susana Barnett's.

George Brown, the father of Thomas Brown, testified that Tom and Cita were married. They lived together about a year. In answer to the question, "How did they happen to get married?" he said:

"Well, George Barnett, Cita Barnett's father, came to my house and talked to me about Cita and Tom being so they could get married, and George Barnett told me that it would be well if Tom and Cita were married to live together and support each other. According to the Indian customs, if the parents were willing for the children to be married, it always has been good, and George Barnett said to me that he was willing to let them get married."

He further testified: That he left it to Barnett to talk to these young people, and never knew any more about it until they were together. That he never saw either of them for a long time until Cita and Tom came up to his house. When they came to

his house they said nothing about being married, when they left—they stayed all night—and when they left they left together.

Daniel Pickett testified that he was a cousin to George Barnett; that George Barnett came up to his house and told him that he and George Brown had agreed that Tom and Cita should be married. He also testified that he saw them together after that; that they sometimes used to come up to his house; that they stayed all night there sometimes.

Legus Brown, a brother of Thomas', stated that he knew that Tom and Cita lived together over there southwest of Bristow at George Barnett's house.

"Q. Did Tom and Cita stay at your father's house a long time? A. Only when they came there and stayed overnight. Q. Do you know how your family regarded them, as to whether or not they were married? A. I don't know."

He did not state how often they were at his father's house, nor whether more than once, but stated that when they were there they occupied the same bed.

This is the substance of the relevant testimony offered by defendants in support of the marriage.

In support of plaintiffs' contention that no marriage relation existed, Billy Barnett testified that he was 52 years of age; that he was a brother to George Barnett and first cousin to George Brown; that he knew Tom Brown and Cita Barnett. He testified as though he had known them all their lives; that he lived there in that country; that he had never seen them together during the time it is claimed they were living together as man and wife. He said:

"I did see him come up there once or twice, but he went back the same day. He was staying at Johnson Barnett's at the time. Q. Did you ever have any conversation with George Barnett about Tom Brown and Cita and their relationship? A. Yes, sir; because we all knew they were close kin, were cousin's children. Q. Ask him if he ever had any conversation with George Barnett about Cita and Tom Brown marrying? A. No, sir; I never, because they was too close kin. Q. If two persons were nearer relation than third cousins, could they marry under the Creek custom? A. No, they could not marry either second and third. Q. Under the custom and understanding of the Euches, what relation would Tom Brown and Cita be? A. They would call each other brothers, under the Indian custom. Under the ways of the Indians they call their cousins sisters and brothers just the same as if they were own sisters. Q. Could sisters and brothers get married? A. No, sir; the old people during that time wouldn't allow such as that. Q. Is that one of the reasons why you know Tom Brown and Cita were not married? A. I never thought of them being married that way at all. Q. Did George Barnett ever say anything to you about Cita and Tom being intimate, and was apparently mad about it? (This question was objected to but finally admitted.) A. I don't know whether they were in that condition or not. They used to talk to each other, but I thought they talked to each other because they were acquainted."

Jesse Allen testified that he was an Euche Indian, 59 years old, and had lived in the Creek Nation all of his life; that he knew

George Brown and George Barnett; that they were first cousins, being children of two sisters; that he lived close to George Barnett; that he knew Tom and Cita; that he did not know anything about their being married; that he had never heard any of the family say anything about their being married. In answer to the question, "Did they live together?" he said:

"Why, Thomas, when he got out of jail, he went back up in there and was staying around George's place with the folks, and it wasn't long before he moved off down here at Haskell. Q. Did you hear any of the family or any of them say anything about Thomas and Cita being married? A. No, sir; I did not. Q. When was it that Tom came back from the penitentiary; how long before Cita's death? A. Why, I don't know just exactly, but it was, I don't think, very long—a short time."

In answer to the question whether or not the Euche Indians permitted the marriage of close relations, he said:

"Their custom was that they never married their close relation. If they were cousins they claimed brother and sister ship. Q. How about third cousins, could they marry? A. No, sir."

Melissa Johnson, sister of Cita Barnett, 19 years old, testified that she knew Tom Brown and had never heard her family say anything about Cita and Tom being married.

Jeannetta Johnson, another sister, 23 years of age, testified that when Cita died she was living with her auntie at Kellyville; that she was then in school; that when she left school Cita was at home with her father; that Tom Brown was not living there. In answer to the question, "Did you know Tom Brown at that time?" she said:

"Yes, sir; I have known him, but he never did marry her. Q. Well, did you ever hear anything said in the family about Tom and Cita being married? A. No, sir."

Jacob Roland, a Euche Indian, 26 years of age, stated that he had known the families of the parties all his life; lived in a quarter of a mile of his grandmother's house, where George Barnett most of the time made his home; that his family was with him and would move with him back and forth to and from his grandmother's; that Cita made her home with him; that he had known her intimately for the last year or two before her death; that he was well acquainted with Tom Brown; that he lived about with his father and the rest of his kin folks; that Tom Brown did not live with George Barnett and his family; that he never heard any of the family say anything about their being married; that he would have seen them together if they had been man and wife; that he saw Cita nearly every day; that he would see Tom every month or so; stayed at his cousin's house and would see him visiting around; that he was intimate with the family and visited them frequently and never heard any of the family say anything about them being married.

Thomas Way, one of the plaintiffs, 53 years old, testified that he had lived in that country

about 30 years and in that immediate country 26 years; was well acquainted with George Barnett's family; was about his place frequently; that he was well acquainted with Cita Barnett; that during the years 1898, 1899, 1900, she lived with her father, part of the time, however, with her aunt, Susana Barnett; that he knew Tom Brown. In answer to the question, "Did you see him about George Barnett's or where Cita was during these years?" he said:

"No, sir; I never saw him with the family at all. He stayed a while with his brother as he testified here, and at Jackson Barnett's, and at I think about the time Cita died, or just before Cita died, I can't recall just exactly."

He further testified that he had never heard any of the family say anything about Cita and Tom being married; that he had been leasing the land in question since about 1898, and had been in possession of same during the time; that he had leased Cita's land from her father, George Barnett, until after his death, and then from Billy Barnett, as guardian of the children; that he had been in possession of same through George Barnett, and then after his death through the guardian of George's children; that as the children had attained majority he had bought the interests of all the heirs, except two, one of whose interests Mr. Blanchard had bought, and the other one, Della S. Squires, had never sold her interest yet, during all of which time Tom Brown had made no claim to the allotment nor made any demand for any of the rents therefrom.

This is the substance of all the testimony offered in relation to the marriage.

It is contended by plaintiffs in error that the Arkansas statutes on marriage and divorce were in force in the Indian Territory at the time of this alleged marriage, and is contended by defendants in error that the Creek law was in force at the time, but it is unnecessary to decide these questions, as it is very clear under the evidence that, if there was a marriage contract at all, it was not made under either of the above laws. The question, then, is whether, under all the testimony, there was sufficient evidence to sustain the contention of a common-law marriage. We are unable to say what our views might have been, had we occupied the position of juror or trial judge, and it would probably be inappropriate to express our views of the weight of the testimony here, inasmuch as we did not see the witnesses nor hear them testify. It is true, as contended by plaintiffs in error, that the testimony in support of the marriage contract and of marriage relations between the parties was positive, while, on the other hand, the testimony of defendants in error was in a measure of a negative character. But an examination of the testimony shows that although Tom Brown testified positively that he and Cita Barnett were married, and that their marriage agreement be-

tween them was made out in the field at the time Cita came to the place where he was plowing, yet he is not corroborated on this point by any other witness. It is true also that George Brown, his father, testified that Tom and Cita were married, but an examination of his testimony discloses that he knew nothing about it, except from hearsay. The testimony shows that George Barnett, Cita's father, came to him and talked about Tom and Cita getting married, and expressed a willingness in that regard, but George Brown stated that he left the whole matter to George Barnett to arrange, and did not know anything about it until he afterwards heard that they had agreed to get married. This is all the testimony—the positive testimony—as to the fact that they did agree to get married. This testimony shows clearly that such contract or agreement, if made at all, was not made in accordance with either the Indian laws or the Arkansas laws on marriage, and under all the testimony submitted, viewed in the light of their subsequent conduct and relations towards each other, we do not feel justified in saying the court erred in holding that it was sufficient to constitute a common-law marriage. As to their conduct and relations towards each other subsequent to the alleged agreement to marry, Melissa Pence, a cousin of Tom Brown, stated that Tom and Cita came to her house and told her that they were married; that they stayed there two days and a night and occupied the same bed; that some three months after this she saw them together again at Susana Barnett's. George Brown, the father of Thomas Brown, testified that they lived together, but an examination of his testimony shows that their living together was a mere supposition or assumption on his part; that as a fact he did not personally know. Daniel Pickett testified that George Barnett told him that he and George Brown had agreed for Tom and Cita to get married; that he afterwards saw them together; that they sometimes came to his house and sometimes stayed all night. Legus Brown, a brother of Tom's, stated that Tom and Cita lived together over there southwest of Bristow at George Barnett's house, but several other witnesses, near neighbors and members of Barnett's family, testified that they did no such thing. Legus Brown also testified that he did not know whether the family considered them married or not.

On the other hand, Billy Barnett, a cousin of George Barnett, an Indian who had lived there most of his life and knew the families of both Tom and Cita, testified that he had never seen them together, except that he had seen Tom come up there once or twice, but he went back the same day, and said that he (Tom) stayed at Johnson Barnett's at the time. Jesse Allen, another Indian of the Euche Tribe, testified: That he knew the families well, and in answer



to the question, "Did they live together?" said:

"When Tom got out of jail he went back up there and stayed around awhile, but not long before he moved off down at Haskell."

That he had never heard any of the family say anything about them being married. Jacob Roland testified that he had lived within a quarter of a mile of his grandmother's during the time of the alleged marriage relation, and that George Barnett most of the time made his home with Roland's grandmother, and that Cita made her home with her father, and that Tom during the time made his home with his father and the rest of his kin folks and did not live with George Barnett and his family; that he had never heard any of the family say anything about their being married; that he saw Cita nearly every day. He saw Tom every month or so. Thomas Way testified practically to the same effect. He also testified that Melissa Pence told him that Tom and Cita were never married, but Melissa Pence denied making this statement. Two of Cita's sisters and one of her brothers testified that they had never known of Tom and Cita living together as man and wife, and never heard any of the family say anything about their being married, and one of the sisters, Jeannetta, testified that Tom never did marry her. George Barnett and his wife, Cita's father and mother, were dead at the time of this trial.

Now, while the testimony of plaintiffs in error on its face is positive in character, yet when viewed in the light of the admitted lack of opportunity of the witnesses to know what they were testifying to (that is, to have personal knowledge of the facts to which they were testifying), their testimony is not of that positive character as to render it absolutely conclusive. It is also true that the testimony of defendants in error's witnesses was in some measure of a negative character, but in many instances they testified to facts from which valid inferences might be drawn.

As to what constitutes a common-law marriage, Mr. Greenleaf, in section 107, vol. 1 (15th Ed.), says:

"It is frequently said that general reputation is admissible to prove the fact of the marriage of the parties alluded to, even in ordinary cases, where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient prima facie to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof. But the evidence produced in the other cases cited in support of this position cannot properly be called hearsay evidence, but was strictly and truly original evidence of facts from which the marriage might well be inferred, such as evidence of the parties being received into society as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public and addressing each other as persons actually married."

In 26 Cyc. 837, the essentials of a common-law marriage are defined as follows:

"All that is required is that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such a contract, consummated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations."

Now, in order to bring the relations between Tom Brown and Cita Barnett within the rule, *supra*, it is argued by plaintiffs in error that the testimony of Thomas Brown, Melissa Pence, George Brown, Daniel Pickett, and Legus Brown conclusively shows that Thomas Brown and Cita Barnett were received as man and wife and visited by respectable members of their Indian society, and that they appeared together publicly as man and wife; that Thomas Brown and Cita Barnett told their friends that they were married, occupied the same room and bed, appeared in public as man and wife; and that Thomas Brown worked all the time like a man to make a living for Cita. We cannot agree with plaintiffs in error that the testimony of the foregoing witnesses shows the facts which plaintiffs in error contend they show. It does not appear from the testimony of any witness in the record that Tom and Cita ever appeared together in public, at church, or at any other public gathering. The only testimony as to their being together at any time by witnesses who knew the facts was testimony of their being together one or two nights once in a great while. There is no testimony that he ever told any of his friends that Cita was his wife, except his cousin Melissa Pence. Even his father testified that at the time they stayed all night together at his house they said nothing about being married, but slept together that night, and went away together the next day. Neither is there any testimony that they ever any time claimed any one particular place as their common home, nor is there any testimony that they were ever visited by any of their friends or relatives, or ever invited any one to visit them, or had or claimed any common house to which friends could be invited. Nor is there any testimony that Tom ever contributed one penny's worth to Cita's support. Nor is there any testimony that Cita was ever known or recognized or referred to by her relatives and lifetime friends and acquaintances by any other name than Cita Barnett, while her other sisters and Melissa Pence were invariably referred to under the name their husbands bore. It is also a significant fact that not one of Cita's brothers or sisters, nor one of their disinterested neighbors who had known them all their lives, had ever heard of their being married, or even claiming to be married. Under this state of facts, we do not feel that we could soundly say, as a matter of law, that the trial court erred in



holding that the marriage relation had not been shown. These facts were all before him, and he had better opportunities for weighing them and for judging the credibility of the witnesses than we have, and we cannot feel justified in reversing the judgment.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

(45 Okl. 327)

SIMPKINS et al. v. WARE (No. 5453.)  
(Supreme Court of Oklahoma. Sept. 22, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. INDIANS (§ 18\*)—TRIBAL PROPERTY—INHERITABLE INTEREST.

Prior to the taking effect of the act of Congress of June 28, 1906 (34 Stat. 539, c. 3572), entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma territory, and for other purposes," a member of the Osage Tribe of Indians had no estate or interest in the lands and other property of the tribe to which her heirs would succeed at her death.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.\*]

2. INDIANS (§ 18\*) — HEIRSHIP — HUSBAND AND WIFE.

Upon the death of an Osage Indian woman, who had been married more than once, and whose estate consists of lands and other property allotted and set aside to her, under the provisions of the act of Congress of June 28, 1906, during coverture with a surviving husband, such husband succeeds to one-third of said estate.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.\*]

Error from District Court, Osage County; R. H. Hudson, Judge.

Proceedings instituted in county court between Mary L. Simpkins and others and David A. Ware, to have declared the rights of all persons in the matter of the estate of Victoria Ware, deceased. From a judgment of the district court on appeal that David A. Ware was entitled to one-third interest in such estate, the other parties bring error. Affirmed.

H. P. White and A. M. Widdows, both of Pawhuska, for plaintiffs in error. Leahy & McDonald, of Pawhuska, for defendant in error. Preston A. Shinn, of Pawhuska, amicus curiæ.

BLEAKMORE, J. This case presents error from the district court of Osage county. The proceeding was commenced in the county court of that county under the provisions of section 6488, Rev. Laws 1910, for the purpose of having ascertained and declared the rights of all persons in the matter of the estate of Victoria Ware, deceased. Upon determination of the cause there, appeal was had to the district court, and from the judgment of that court adjudging that the defendant in error, David A. Ware, the sur-

living husband, was entitled to an undivided one-third interest in said estate, plaintiffs in error bring the case here. The facts, as disclosed by the record, are that the deceased, then Victoria Del Orier, a member of the Osage Tribe of Indians, and a widow with six children by former marriage and a grandchild by a deceased son, was married to David A. Ware on the 10th day of December, 1904, and lived with him, as his wife, until her death on the 30th day of March, 1911. Her husband, David A. Ware, defendant in error, and said children and grandchild, plaintiffs in error, survived her. Her entire estate consisted of Osage lands allotted to her, moneys segregated and placed to her credit, and her interest in the moneys due or that might thereafter become due to be held in trust for the Osage Tribe of Indians by the United States.

Dealings with the Osages are evidenced by numerous treaties made by the United States with them, beginning in 1808 and culminating in the purchase from the Cherokee Nation of the lands now occupied by the members of the Osage Tribe and the division thereof under the terms of an act of Congress approved June 28, 1906, entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes." An examination of the various provisions of those treaties will be unprofitable.

By said act of June 28, 1906, it was provided:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe \* \* \* who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof."

It was also provided:

"That all lands belonging to the Osage Tribe of Indians in Oklahoma territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof."

Every such enrolled member was permitted to select three tracts of 160 acres each, and it was provided further by said act that all oil, gas, coal, and other minerals covered by the land, for the selection of which provision was made, was reserved to the Osage Tribe for a period of 25 years from the 8th day of April, 1906, and that all royalties from mineral leases and all moneys received from the sale of town lots and from the leasing of grazing lands should be placed in the treasury of the United States to the credit of the members of the tribe and distributed to those appearing up-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on the tribal rolls. The evident purpose of this act was, so far as practicable, to provide for a final disposition of the affairs of the tribe and a division of the property thereof to its members in severalty.

By section 6 of said act it is provided:

"That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

Section 8418, Rev. Laws 1910, provides *inter alia* that:

"If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation: \* \* \* Provided, that if the decedent shall have been married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. \* \* \*

It is contended by the plaintiffs in error that the estate of the deceased, Victoria Ware, as a member of the Osage Tribe of Indians, was acquired by reason of her Osage Indian blood, and was vested in her prior to her marriage with the defendant in error, while, on the other hand, it is urged by the defendant in error that all of said estate was acquired under and by virtue of the provisions of the allotment act of 1906, *supra*, and that prior to the passage of that act all of said estate was an undivided portion of the tribal property held by the United States in trust for the Osage Tribe of Indians and its members.

[1, 2] Various assignments of errors are made, but the sole question determinative of this case is: Was the deceased, Victoria Ware, the owner of her Indian estate prior to her marriage to defendant in error, or did she acquire all the right and title thereto descendable and distributable under the laws of Oklahoma by virtue of the provisions of the allotment act of 1906?

As to the title and ownership of Osage lands and other property, it was said by Judge Cottle in *United States v. Aaron* (C. C.) 183 Fed. 347:

"The Osage lands, which constituted their reservation in Oklahoma, were acquired from the Cherokee Nation, pursuant to the treaty between that nation and the federal government of July 19, 1866, which stipulated for the settlement of friendly Indians in the Cherokee country west of 96° and the conveyance of the lands in fee simple 'to each of the tribes to be held in common or by their members as the United States may decide.' 14 Stat. 804. Payment was made to the Cherokees out of the proceeds of the lands of the Osages in Kansas. Act March 3, 1873, c. 228, 17 Stat. 538. On the ground that the Cherokee title was owned in

fee simple, it is argued that the Osages acquired an equivalent title, and that, as title may be fully vested by treaty or law, they acquired 'an absolute and unqualified title to these lands' upon the selection of allotments under the act of Congress with the consent of the government. But such title as the Osages obtained was held in common, and was in no sense vested in the individual members of the tribe. Their lands were set apart and confirmed as their reservation by Act June 5, 1872, c. 310, 17 Stat. 228. As was held with respect to the Cherokee lands, the disposition thereof is an administrative subject, under the sole control of Congress. *Cherokee Nation v. Hitchcock*, 187 U. S. 295, 23 Sup. Ct. 115, 47 L. Ed. 183. The actual transfer of the Osage lands appears to have been made by deed of the Cherokee Nation to the United States in trust for the benefit of the Osage Indians. It was entirely competent for the government to determine upon and execute its own plan for the division of these lands among the members of the tribe. While it is doubtless true that the titles to the lands of Indians may be vested in tribes or their members by either law or treaty, such titles do not vest in the individual members without the sanction of the government, and certainly not in a manner contrary to restriction declared by Congress."

In *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, speaking with reference to the Creek Indians, the court said:

"During the last 20 years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee Tribe is one, among their respective members, and to the dissolution of the tribal governments. \* \* \* Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient, and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government."

In *McKee v. Henry*, 201 Fed. 74, 119 C. C. A. 412, the Circuit Court of Appeals for the Eighth Circuit, speaking of the power of Congress to provide for descent and distribution of Indian lands and property, said:

"But it (Congress) had full and ample authority to fix the laws of descent, with or without the consent of the Indians, both under its guardianship of the Indians and their property, and under its power to make all needful rules and regulations respecting the territory belonging to the United States. It had this right to make laws by agreement with the Indians, but it beclouds the issue if it be assumed that such agreement was necessary when it was not. These lands belonged to the Indians as a tribe so long as the tribe existed and they occupied the land, with reversion to the United States; but no part of these lands belonged to any specific Indian. The Muskogees or Creek Tribe

was in the nature of a dependent nation; and, as our national public buildings belong to the nation, the citizen, while he has an interest in them, has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever, severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress."

Thus it will be seen that the estate in question was acquired by and vested in the deceased, Victoria Ware, by virtue of the provisions of said act of 1906 and during the existence of the marriage relation between her and the defendant in error.

Prior to the taking effect of the allotment act of 1906, no law providing for or regulating the descent and distribution of the lands, moneys, or other interests of the Osages existed, and it is by virtue of the terms of this act alone that the parties to this proceeding succeeded to the estate in question or any part thereof.

It follows that the judgment of the trial court must be affirmed; and it is so ordered. All the Justices concur.

(45 Okl. 269)

ROGERS v. OKLAHOMA CITY. (No. 3421.)  
(Supreme Court of Oklahoma. Nov. 24, 1914.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS (§ 864\*)—CONTRACTS — "PRESENT INDEBTEDNESS" — CONSTITUTIONAL LIMITATIONS.

A contract to furnish meals for the prisoners confined in the city jail during the incumbency of the then city marshal at ten cents per meal, payable after the meals are furnished, according to the city ordinances, although the period covered by the contract extends beyond the fiscal year in which the contract is signed, does not constitute a present indebtedness, and is not repugnant to section 26, art. 10, Const., nor in violation of section 765, Comp. Laws 1909.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.\*

For other definitions, see *Words and Phrases*, Second Series, *Present Indebtedness*.]

2. DAMAGES (§ 124\*)—CONTRACTS—BREACH—MEASURE OF DAMAGES.

Where a party furnishes meals in accordance with the terms of his contract, and is prevented by the city from further performing his contract, the measure of damages is the difference between the cost of production and the contract price from the date of the breach to the expiration of the period covered by the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.\*]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by C. G. Rogers against the City of Oklahoma City. Judgment for less than the sum demanded, and plaintiff brings error. Reversed and remanded for new trial.

D. B. Welty, of Oklahoma City, and W. H. Caudill, of Muskogee, for plaintiff in error. J. W. Johnson and Verde V. Hardcastle, both of Oklahoma City, for defendant in error.

LOOFBOURROW, J. On May 11, 1909, C. G. Rogers, plaintiff in error, entered into a contract with John Hubatka, city marshal for the city of Oklahoma City, whereby Rogers agreed "to feed all of the city prisoners in the city jail of Oklahoma City at the stipulated price of ten cents per meal during the term of office of John Hubatka." The plaintiff furnished meals for the prisoners as per the contract during the remainder of the fiscal year ending June 30, 1909, and continued so to do until the 23d day of December, 1909, and was paid by the city for the meals furnished and received to that date, at which time the city refused to permit him to carry out his contract, and the mayor notified the plaintiff of such fact. The plaintiff by this action seeks to recover the benefit of his bargain under the contract. When the plaintiff rested his case the court sustained a demurrer of the defendant to the evidence of the plaintiff, and instructed the jury to return a verdict against the defendant in favor of the plaintiff in the sum of \$1. From this judgment plaintiff appeals.

Counsel for the city, in their brief, say:

"The contract sued on in this case was made with Hubatka, marshal of the city of Oklahoma City, and appears from the answer of the city and the evidence produced on the trial to have been accepted and ratified by the city."

Counsel for the city contend that the contract is void, for the reason that:

"The city had no power to contract beyond the fiscal year 1908-09, and that the contract is void for the reason that it is in contravention of section 765, Comp. Laws 1909, which declares to be unlawful the making of any contract for, or incurring any indebtedness against, the city in excess of 80 per cent. of the tax levied for city expenses during the current year," etc.

Section 26, art. 10, Constitution, provides:

"No county, city \* \* \* shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year. \* \* \*"

[1] The question presented is whether the contract created a present indebtedness or one in futuro. Under this contract the city must have in its jail prisoners to be fed, and the plaintiff must have furnished the meals before the city became indebted to him. If the city jail contained no prisoners, then there could be no indebtedness on the part of the city under the contract.

Counsel for the city rely upon *Haskins &*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

*Sells v. Oklahoma City*, 36 Okl. 57, 126 Pac. 204. Commissioner Harrison, in the opinion, very clearly distinguishes between a contract which creates a present indebtedness and one in futuro; that case being one wherein the city entered into a contract with an accountant for the auditing of the city's books and the installation of a new auditing system at a stipulated price per diem, etc., the work to begin at once (June 12, 1903), and continue until completed (running into the year 1904), and held that, where there is no provision in the contract as to when or how the services are to be paid for, such contract should be construed as an entirety, the rate per diem being a mere means of estimating the entire debt, and holding that "the indebtedness incurred thereunder is a present indebtedness, chargeable against the city's funds for the current year in which the contract is made." In that case the amount of work depended upon no contingency or no future act, wish, or want of the city. The service to be rendered involved an examination of the books in their then present condition. The exact service to be rendered was then definite and certain and the indebtedness incurred under the contract was a proper charge against the city for that year, if the revenues for that year had been sufficient to pay it. In the opinion the following language is quoted from *Burlington Water Co. v. Woodward*, 49 Iowa, 58, in determining whether a contract or ordinance creates a present indebtedness or one in futuro:

"The material and only question, therefore, is whether an indebtedness was thereby created within the constitutional inhibition. It is believed the Constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear such contingency is sure to take place, irrespective of any action taken or option exercised by the city in the future. That is, if a present indebtedness is incurred or obligation assumed which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the Constitution. But, if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future day, then no present indebtedness is incurred, and none will be until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness."

In *Territory of Oklahoma v. City of Oklahoma*, 2 Okl. 158, 37 Pac. 1094, it is held that:

"A contract entered into by a city, whereby such city contracts to pay the sum of \$4,400 per annum for a term of 20 years as rental for water hydrants, does not create a present indebtedness against said city in a sum equal to the aggregate amount of such rentals for the entire period of time for which the contract is to run."

In *City of Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993, it is held:

"A contract to furnish a city with light for ten years, which is to be paid for annually as

furnished, is not obnoxious to Constitution, art. 11, par. 8, limiting the extent of municipal indebtedness, where each annual payment is within the limit, though the aggregate amount that will become due for the entire period greatly exceeds the limit of indebtedness the municipality may incur."

In *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 359, 31 L. R. A. 794, 53 Am. St. Rep. 191, section 18, art. 11, of the California Constitution being almost identical with section 26, art. 10, of the Oklahoma Constitution, supra, a contract for the disposal of the sewage of the city for five years, for the sum of \$4,900 per annum, payable quarterly, was held valid, and not in violation of the constitutional provision. See, also, *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958.

In *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647, a contract between a city and a private corporation whereby the latter agrees to supply the city with light for a specified number of years at a certain price per year does not create a debt for the sum of all the annual payments within the meaning of the constitutional limitation on municipal indebtedness; since the payment for each year does not become obligatory until the services for that year have been rendered.

In *Swanson v. City of Ottumwa*, 118 Iowa, 172, 91 N. W. 1052, 59 L. R. A. 620, it is stated in the opinion:

"A city may enter into a valid contract covering a long term of years for water, lights, and other similar expenses, agreeing to pay therefor in installments as furnished, although the aggregate of payments thus to be made is largely in excess" of the constitutional limit; "the explanation assigned for this holding being that the debt for each year is not to be considered as accruing until the service for that year has been rendered"—citing numerous authorities.

In *Walla Walla v. Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, the city made a contract with the water company to furnish water for the city for a period of 25 years, agreeing to pay \$1,500 per annum therefor. Mr. Justice Brown, speaking for the court, said:

"But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

"In the case under consideration the annual rental did not become an indebtedness within the

meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental could not have been payable at all, and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation."

We are aware that this court, in *Campbell v. State*, 23 Okl. 109, 99 Pac. 778, held that section 2, art. 8, c. 32, Sess. Laws Okl. 1897, providing for the construction of courthouses and jails upon the rental plan, is repugnant to section 26, art. 10, of the Constitution, supra. In that case *C.* made a contract with the board of county commissioners to build a courthouse for \$139,252, payable in 20 installments; but that case is clearly distinguished from the case at bar, for the reason that that was a present indebtedness with deferred payments, and the expenditure was not authorized by a vote of the people.

[2] The contract in the case at bar was not void for the reasons assigned by counsel for the city in their briefs; the case was not defended upon this theory in the court below; neither the pleadings nor the evidence presented such issue. Counsel for plaintiff in error have, in their brief, presented their argument and authorities upon the issues joined in the trial of the case, and, as the case must be reversed, we deem it proper to say that the measure of damages in this case is the difference between the cost of production and the contract price.

The judgment of the trial court is reversed, and the cause remanded for a new trial.

RIDDLE and BLEAKMORE, JJ., concur. KANE, C. J., and TURNER, J., absent and not participating.

44 Okl. 468)

WALKER et al. v. McKEMIE. (No. 3525.)  
Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

INDIANS (§ 16\*)—ALLOTMENTS—LEASES—APPROVAL.

Act Cong. March 3, 1905, c. 1479, § 33 Stat. 1060, making appropriations for the expenses of the Indian Department, and for fulfilling treaty stipulations with the Indian Tribes, required the approval of all guardian's leases to allotted lands of minor members of the Five Civilized Tribes; such approval to be by the United States court having jurisdiction of the guardianship proceedings, and without which a guardian's lease should be valid or enforceable.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

INDIANS (§ 16\*)—ALLOTED LANDS—LEASE—RECORDING—"DATE."

That part of Act Cong. June 28, 1898, c. 17, § 29, 30 Stat. 507, providing that " \* \* \* every lease \* \* \* which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months after the date of its execution, shall be void \* \* \*" in the case of a lease to allotted lands made by guardian, should be construed to mean three months

from the date of approval by the court having jurisdiction of the proceedings.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Date.]

3. INDIANS (§ 16\*)—ALLOTED LANDS—LEASES—"EXECUTION."

The approval of a guardian's lease being necessary to its validity or enforceability, such lease was not fully executed within the meaning of the act of June 28, 1898, until its approval by the court as provided by the act of March 3, 1905.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

For other definitions, see *Words and Phrases*, First and Second Series, Execution.]

4. INDIANS (§ 16\*)—APPOINTMENT OF GUARDIAN—EVIDENCE—ADMISSIBILITY.

The recitals contained in an order approving a guardian's lease to allotted lands, made by the United States Court in the Indian Territory, together with the recitals in the lease, and the court's approval indorsed thereon, and which recitals appear to have been regularly made in a pending proceeding, and recite the fact of the guardianship, and direct the entering into of the lease, are, in the absence of the entire record, admissible as prima facie evidence that the lessor was the duly appointed guardian.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Marshall County; J. W. Falkner, Judge.

Two landlord attachment actions brought by Will McKemie in justice court; one against Joe Walker, the other against D. A. Woods. From judgment for defendants, plaintiff appealed to the county court, wherein S. G. Wood was made a party defendant and the actions consolidated. Judgment for plaintiff in the county court, and defendants bring error. Reversed and remanded.

James E. Humphrey, of Ardmore, and Richard M. Lester, of Savannah, Ga., for plaintiffs in error. H. A. Ledbetter, of Ardmore, for defendant in error.

SHARP, C. The real parties in interest in this controversy are the defendant in error McKemie, and plaintiff in error Wood. Both McKemie and Wood claimed the right to the lease on the allotment of John Hepson, a minor, through different leases, made by different guardians of said minor. The leases to McKemie were made by Joseph Fulsom, who was appointed guardian of said John Hepson, December 24, 1907, by the county court of Haskell county, and bear date during the month of October, 1909. The lease on the surplus allotment was for five years, that on the homestead for one year, each beginning January 1, 1910. These leases were each approved by the county judge of Haskell county on November 29, 1909. The lands included therein were cultivated during the year 1910 by Woods and Walker as tenants of Wood. Wood claimed title through a lease made by I. C. Cole, who also

claimed to be the guardian of John Hepson, to one John R. Edwards, and which lease was by Edwards assigned to Wood, on August 18, 1908. This lease was entered into in the month of August, 1905, for a period of five years beginning January 1, 1906.

As a part of their case, the defendants offered in evidence the lease made by the guardian, Cole, to Edwards, and the order of the United States Court for the Central District of the Indian Territory, approving the same. The court's action in excluding as evidence the documents and records mentioned is the principal error urged in this court. The questions involved are: (1) Whether a lease made by the guardian of a minor Choctaw allottee, otherwise valid, is rendered void because of a failure to record the same in the clerk's office of the United States court for the district in which the land was located, within three months after the date the lease was signed and acknowledged, where such lease was recorded within three months from the date of approval by the court. (2) Are the recitals in a lease executed by one claiming to be a guardian, and which lease purports to have been approved by the judge of the court having jurisdiction of the guardianship proceedings, both by indorsement on the lease itself, and by journal entry of order of approval made in open court, competent evidence that the lessor was in fact such guardian?

[1-3] Turning to the first question presented, we find that section 29 of the Act of Congress of June 28, 1898 (30 Stat. at L. 495), provides:

"No allottee shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder."  
\* \* \*

It is necessary therefore to determine what is meant by that part of the foregoing act providing that the lease shall be recorded "within three months after the date of its execution." By defendant in error it is insisted that the date of execution refers to the date of signing, or, at furthest, the date of acknowledgment of the lease. On the part of plaintiffs in error it is urged that the date of execution includes the date of approval by the court having jurisdiction of the proceedings. By the act of March 3, 1905 (33 Stat. at L. 1060), making appropriations for the expenses of the Indian Department, and for fulfilling treaty stipulations with the Indian Tribes, the Secretary of the Interior and the Attorney General were empowered to investigate leases of allotted lands in the Indian Territory, and to bring suits to cancel them for fraud. The act, however, expressly provided that:

"No lease made by any administrator, executor, guardian or curator, which has been investigated by and has received the approval of the United States court having jurisdiction of the proceedings shall be subject to suit or proceedings by the Secretary of the Interior or Attorney General."

And that:

"No lease made by any administrator, executor, guardian, or curator shall be valid or enforceable without the approval of the court having jurisdiction of the proceeding."

It will be remembered that the United States courts in the Indian Territory had the powers of probate. Act May 2, 1890, c. 182, par. 31, 26 Stat. at L. 94; Act April 28, 1904, c. 1824, par. 2, 33 Stat. at L. 573. It is unnecessary to here discuss the procedure in force in the United States courts in the Indian Territory, in the matter of the appointment of guardians or curators, except to note that the appointment of all guardians or curators was made either by the court, or, if by the clerk, subject to confirmation by the court. According to the plain letter of the statute, no lease of allotted lands, made by a guardian, had any force without the approval of the United States court having jurisdiction of the guardianship proceedings. *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391; *Indian Land & Trust Co. v. Shoenfelt*, 5 Ind. Ter. 41, 79 S. W. 134.

It being necessary, in order that the lease should be valid or enforceable, that it be approved by the court, the lease would not be executed, within the meaning of the act, until it received the court's approval. The approval was a necessary step in the execution of the lease. Until that was done the rights of the lessee were inchoate, since the court may not have approved the lease as originally prepared, or may have ordered changes made or imposed new conditions or additional consideration, which would have been assented to by the parties. In other words, the approval of the lease being indispensable to its validity, without such approval there was no valid or enforceable lease. The statutes must be read together and each given effect. Our position finds abundant support in the authorities. In *Smith v. Mayor, etc., of New York* (Super. N. Y.) 4 N. Y. Supp. 449, construing the Laws of 1880, c. 550, § 6, providing that, upon the filing of the certificate in a street assessment proceeding the amount fixed thereby, "with interest thereon from the date thereof, and no more," should be the extent of the lien, it was said by the court:

"In my opinion, the words in the last section, 'date thereof,' should be construed as meaning from the date of the filing of the certificate; for it is the filing of the certificate which gives to the decision of the commissioners its validity, authority, and force."

There the certificate was dated March 25, 1884, but was not filed until March 3, 1886. A well-considered case is that of *Houston, E. & W. T. R. Co. v. Keller*, 90 Tex. 214, 220, 37 S. W. 1062, 1065, where the "date of the

foreclosure sale" in an agreement between a judgment creditor and an insolvent railway for reorganization, in which the creditors assigned their judgment to the reorganizers in consideration of first mortgage bonds of the new company, it being provided that bonds should be delivered within six months after the date of the foreclosure sale, meant the date when the sale was completed, and not merely the date when the property was bid off, or the date of the confirmation. In *State ex rel. Stewart v. Henton*, 48 Neb. 448, 87 N. W. 443, the provision in relation to the forfeiture of school leases held by nonresidents of the state, found in section 16, c. 80, art. 1, Comp. Stats., that "the forfeiture may be entered by said board after 90 days from the date of such published notice," was held to have the same meaning as though it had read, "after 90 days from the completion of the publications required by the statute." In *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278, it was held that the word "date," in the statutes of 1874, c. 111, relating to the recording of mortgages of personal property, was not limited to the date stated in the in testimonium clause, but referred to the day of the delivery of the deed. Other cases bearing upon the question are: *De Florez v. Reynolds* (C. C.) 8 Fed. 434; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Bement et al. v. Trenton, L. & M. Mfg. Co.*, 32 N. J. Law (3 Vroom) 513.

The presumption that the lease was delivered on the day of its acknowledgment is overcome by the recitals in the order of approval, showing that the guardian at the time presented to the court the lease contract, and by the fact of the judge's indorsement of his approval upon the lease. To sustain the position of the defendant in error, the lease was void when approved, because the court's approval was made more than three months after the date on which the lease was signed as well as the date of the acknowledgment. The result, then, would be that if a lease was signed and acknowledged by the parties, and no opportunity was afforded for its presentation to the court for three months thereafter, a valid lease could not be made, and this without regard to the fact that court might not be in session at the court town where the guardianship proceedings were pending, during the three months' period. The position bears its own refutation.

The original lease, it appears, was filed for record at Tishomingo, February 22, 1906, in the office of the deputy United States clerk and ex officio register of deeds for district No. 22 of the Indian Territory, and recorded in Book 10 at page 255. Being recorded within three months from the date of its approval, or final execution, it was error in the trial court, for the reason assigned, to sustain the objection to its introduction as evidence on the part of the defendants.

[4] Referring to the second error mention-

ed, was there sufficient proof that I. C. Cole was ever the guardian of the minor John Hepson? The only evidence of his appointment is found in the recitals contained in the order approving the lease, and in the lease itself and the fact of the approval thereof. Had there been no guardianship proceedings pending, the court would have been without jurisdiction in the premises. The recitals in its orders were at least prima facie evidence that the lessor was the duly appointed and acting guardian, though it would have been proper to have introduced a duly authenticated copy of the original letters of guardianship, or the order of appointment. The failure, however, to do so did not render the record evidence offered incompetent, for it is a rule recognized by high authority that the absence of an entire record may be supplied by recitals in the judgment or decree of all the essential facts, jurisdictional or otherwise; that where the judgment or decree on which the party adducing it in a collateral action relies as a muniment of title or as a link in a chain of title recites all the essential facts, jurisdictional or otherwise, in regard to the proceedings in which it was rendered, the record of such judgment or decree, or a duly authenticated copy thereof, is admissible as prima facie evidence at least, without producing a complete record or transcript of the proceedings. *Wilson et ux. v. Spring*, 38 Ark. 191; *Monk v. Horne*, 38 Miss. 100, 75 Am. Dec. 94; *Verhine v. Ragsdale*, 96 Tenn. 532, 35 S. W. 556; *Truehart v. McMichael*, 46 Tex. 222; *Beck et al. v. Henderson*, 76 Ga. 360; *Blackburn v. Jackson et al.*, 26 Mo. 308; *Simmons v. Threshour*, 118 Cal. 100, 50 Pac. 312. It was therefore error for the court to refuse to admit in evidence the guardian's lease of August, 1905, approved in February, 1906, and the order of approval. The latter lease covered the same land included in the lease made by Fulson, as guardian, to defendant in error McKemie. Both leases included the year 1910. The importance therefore of the original lease as a muniment of title to defendant in error Wood is readily apparent. Whether said lease was in force when the cause of action arose, we are not advised. From the order of approval it appears that the former lease only included the surplus allotment. What part of the attached property was grown on the surplus, and what portion on the homestead, we are unable to here determine. These and other questions suggest themselves, and can only be determined upon a further hearing. The only question necessary for our consideration is the action of the court in excluding as evidence the writings and record herein referred to. As we have seen, in this the court erred.

The judgment should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.



(45 Okl. 363)

**BLACK et al. v. HAYNES.** (No. 4740.)

(Supreme Court of Oklahoma. July 14, 1914.)

Rehearing Denied Jan. 9, 1915.)

*(Syllabus by the Court.)***WILLS (§ 6\*) — OWNERSHIP OF PROPERTY — SURVIVING WIFE—JOINTLY ACQUIRED PROPERTY.**

Section 8985, Compiled Laws of Oklahoma 1909 (section 8418, Revised Laws of Oklahoma 1910), providing that, "when any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: \* \* \* Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares; provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation"—construed, and held not to preclude the surviving wife from disposing of by will such jointly acquired property, inherited by her from the deceased husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. § 6.\*]

Riddle and Bleakmore, JJ., dissenting.

Error from District Court, Love County; S. H. Russell, Judge.

Action by R. H. Haynes, administrator, against Sam Black and others. Judgment for plaintiff, and defendants bring error. Reversed and rendered.

Eddleman & Graham, of Marietta, and Davis & Davis, of Gainesville, Tex., for plaintiffs in error. Cruce & Potter, of Ardmore, for defendant in error.

**KANE, C. J.** This proceeding in error seeks to review the action of the trial court in an action wherein the defendant in error, as administrator of the estate of N. J. Decherd, who died in October, 1910, without issue, leaving a surviving wife, E. L. Decherd, who subsequently died, brought suit to recover one-half of the estate left by said deceased Decherd's wife; such estate having been acquired by her by inheritance from her deceased husband, it previously having been acquired during coverture by the joint industry of said husband and wife. The cause was tried on an agreed statement of facts. Paragraph 4 of said statement is as follows:

"Now it is agreed by the parties that, if the said E. L. Decherd could lawfully dispose of said property by will, then the plaintiff has no right to recover, and, if she could not lawfully dispose of said property by will, then the plaintiff is entitled to recover one-half of the same. It is further agreed that said E. L. Decherd

(the wife) during her lifetime did not dispose of any of said property or attempt to dispose of it, except by said will."

Section 8985, Compiled Laws of Oklahoma 1909 (section 8418, Revised Laws Oklahoma 1910), reads as follows:

"When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: \* \* \* Second. If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother to them in equal shares." But "if there be no father" or mother, then said remaining "one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares. Provided; that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate to go to the survivor, at whose death if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation."

If the estate had been acquired by the deceased husband prior to his marriage, if he died intestate and without issue, one-half of it would have descended without any limitations to the wife. Here the estate was acquired by the joint industry of the husband and wife during coverture. What reason for making a provision which gives the wife the right to dissipate the estate, dispose of it by conveyance, or spend all of it during her lifetime, yet if she be saving and frugal, economical and wise, thereby preventing the estate from decreasing, prohibits her from disposing of part of it by devise? This proviso, in case the husband died intestate, leaving a wife surviving, creates an estate in the manner of community property. It is the general rule that in the absence of an antenuptial agreement to the contrary in jurisdictions where the system of community property prevails, upon the death of either the husband or wife, one-half vests in the heirs of the deceased. 27 Cyc. 1703. It seems quite clear that the purpose of the section under consideration is to provide a general rule of descent, and that the first sentence thereof, "When any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner: \* \* \*"—relates to and qualifies the whole section. If the scope of the section and the persons to whom it applies, viz., any person having an estate who dies without disposing of it by will, is kept in mind, it will become quite apparent that it was not the intention of the Legislature that the alienation of property acquired by the joint industry of the husband and wife during coverture, which descends to a surviving spouse, should be hedged about by any other limitations than those

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



applicable to property otherwise inherited. If we read the proviso in connection with the sentence quoted above, a fair interpretation of it would be as follows:

"Provided that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor at whose death, if any of said property remain (undisposed of by will), one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to their right of representation."

This construction seems to harmonize with not only the letter, but also the spirit, of the act.

The plaintiffs in error are precluded from urging that the action would not lie in the name of the administrator under the stipulation hereinbefore set out, it being there agreed that:

"If the spouse could not lawfully dispose of said property by will, then the plaintiff is entitled to recover one-half of the same."

The judgment of the lower court is, accordingly, reversed, and judgment is here rendered in favor of the plaintiff in error as against the defendant in error. All the Justices concur, except RIDDLE and BLEAKMORE, JJ., who dissent.

(44 Okl. 526)

MASTERS et al. v. BOYES et al. (No. 3900.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

**GUARANTY (§ 45\*)—DEFENSE—NOTICE—INSOLVENCY.**

Under an absolute and unconditional guaranty, the duty is upon the guarantor to see that his contract of guaranty is fulfilled, and that the obligations of the principal are discharged at maturity; and in the absence of fraud which may be the proximate cause of damage to the guarantor, a lack of notice and demand, or the fact that the principal at maturity of his obligation was solvent and afterward became insolvent, does not constitute a defense that will discharge the guarantor from liability.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 55; Dec. Dig. § 45.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; Wm. M. Boles, Judge.

Action by H. L. Boyes and another against Geo. A. Masters and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John J. Jones, of Chanute, Kan., James W. Reid, of Parsons, Kan., and James A. Allen, of Chanute, Kan., for plaintiffs in error. Harris & Nowlin and W. H. Zwick, all of Oklahoma City, for defendants in error.

HARRISON, C. This was an action by H. L. Boyes and the Farmers' & Merchants' Bank of Perry, of which H. L. Boyes was president, against George A. Masters and S. A. Wickard, upon a promissory note for \$2,564.75, executed by S. A. Wickard and George A. Masters as collateral security for the payment of a note of like amount executed on the same day by the Stanley Basin Dredging

Company. From the judgment in favor of plaintiffs, defendants appeal. The question involved is presented in plaintiffs in error's brief in the following language:

"Does plaintiffs' neglect and failure to collect, or attempt to collect, from the Stanley Basin Dredging Company its note, while it was solvent, and the subsequent disbursement by the Stanley Basin Dredging Company of its assets and consequent insolvency resulting in complete loss to the defendants, when properly pleaded, constitute a defense?"

The material facts are: That the Stanley Basin Dredging Company became indebted to the Farmers' & Merchants' Bank to the amount of \$2,564.75 on overdrafts drawn by Geo. A. Masters, which, upon the written request of S. A. Wickard and his personal promise to see that same would be paid, the bank had honored. Not being able to pay the overdraft, the dredging company executed its note for the amount thereof, and, as a guaranty that such note would be paid at maturity, S. A. Wickard and George A. Masters executed their promissory note to the bank for a like amount. Wickard's and Masters' note was indorsed as follows:

"This note is given as collateral to a note given by the Stanley Basin Dredging Company, by Wickard, per Jarrett, Secy., for the same amount and same date, and to be void if said Stanley Basin Dredging Company note is paid when due."

S. A. Wickard was president of the Stanley Basin Dredging Company, and George A. Masters was the person who had drawn checks in the name of the dredging company on the Farmers' & Merchants' Bank. The dredging company's note was signed by S. A. Wickard as president, and J. H. Jarrett as secretary, thereof, under the corporate seal of said company. Upon the dredging company's failure to pay its note at maturity, the bank brought suit and obtained a judgment against it for the amount of the note. An execution was issued against the dredging company and returned unsatisfied. Thereafter an alias execution was issued, which was also returned unsatisfied. Whereupon H. L. Boyes and the bank brought suit against S. A. Wickard and George A. Masters as guarantors of the payment of the dredging company's note, with the result above stated.

It is claimed by plaintiffs in error that the dredging company was solvent at the maturity of its note, but was insolvent at the time this suit was instituted, and that, if the bank had exercised due diligence in the collection of the dredging company's note at maturity, or had given notice to Wickard and Masters of the dredging company's default, or made demand on them, they could have protected themselves from loss while the dredging company was solvent. Hence the pivotal point in the question presented here is whether the failure of the bank to give notice and make demand constituted a defense to plaintiffs' action. A number of authorities are cited by plaintiffs in error,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

among which is *Wood v. Farnham*, 1 Okl. 375, 38 Pac. 867, 20 Cyc. 1470, and authorities cited in note, in support of the contention that, where it can be affirmatively shown that a guarantor has sustained damage from want of notice, such damage will constitute a defense pro tanto. Not dissenting from the decisions cited by plaintiffs in error in cases where they are applicable to the conditions set forth in the contract of guaranty and the facts in the case, and aside from the plain language of our statutes, we cannot be constrained to believe that defendants herein sustained any damage from lack of notice. The facts are that Masters issued the overdrafts which created the indebtedness against the dredging company, and which were honored by the bank, upon the written request of Wickard, the president of the dredging company. Wickard and Jarrett, as president and secretary, respectively, of the company, signed the company's note, and on the same day, and as part of the same transaction, Wickard, the president of the company, and Masters, the man who had drawn the overdrafts, gave their personal note as a guaranty that the dredging company's note would be paid. It also appears from plaintiffs in error's testimony that subsequently to these transactions the dredging company declared a 10 per cent. dividend on a \$45,000 capital stock, which dividend of \$4,500 was disbursed among the stockholders of the company. Under this state of facts we cannot believe that the officers of the dredging company did not have actual knowledge of the maturity of the company's obligations, or that any damage they may have sustained was due to a lack of notice. But if the facts in the case at bar did not take it out of the rule contended for in the cases cited by plaintiffs in error, the plain provisions of our statutes would themselves do so. Section 3573, Comp. Laws 1909, defines a guaranty as follows:

"A guaranty is a promise to answer for the debt, default or miscarriage of another person."

Section 3583 reads:

"A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor."

Section 3584 reads:

"A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

In view of these statutes we are not persuaded to follow what appears to us as dictum in *Wood v. Farnham*, 1 Okl. 375, 33 Pac. 867, nor that in *Vinal v. Richardson*, 95 Mass. (13 Allen) 528. In *Wood v. Farnham*, supra, on page 377 of 1 Okl., on page 868 of 33 Pac., it is true that the court used the following language:

"In the case at bar, if the appellant suffered any loss or damages by the default, negligence, or laches of the appellee, it is a proper matter of defense."

But in this case the court also held:

"In a complaint against a guarantor of a promissory note, it is not necessary to allege

diligence on the part of the payee to make collection from the maker of the note; and a complaint failing to allege such diligence is not bad on demurrer."

Section 3 of the syllabus in this case is as follows:

"The guarantor of a promissory note is liable at once on the maturity of the note, if such note be not paid by the maker. The fact that the note is not paid at maturity fixes the liability of the guarantor."

In *Vinal v. Richardson*, supra, the Massachusetts court said:

"Practically it is almost invariably treated as a matter of defense, by way of discharge from the contract, and not merely as a defeat of the suit."

In *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302, the Massachusetts court not only held this language to be obiter, but also inconsistent with *Insurance Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, and in the same opinion, the court said:

"And we are of the opinion that, when the obligation of the guarantor is to pay a definite sum at a definite time, it is his duty to see that the sum guaranteed is paid, and that there is no duty on the creditor to give notice to the guarantor of a default in payment by the principal debtor, and that, if the guarantor, in violation of his duty, has slumbered because he supposed that, in the absence of a demand by the creditor the act guaranteed had been performed by the principal debtor, and has suffered damage from so doing, he has nothing of which he can complain but his own negligence, and is liable to pay the sum which he guaranteed should be paid."

In *Bank of Newbury v. Sinclair*, 60 N. H. 100, 49 Am. Rep. 307, the court said:

"The terms of a guaranty seem to impose on the guarantor the duty of seeing whether the principal pays. If the principal does not pay, and the guarantor sustains loss through ignorance of his default, the loss is owing to his own negligence, and it seems much more appropriate that it should be borne by him than by the person to whom he has agreed to be answerable upon the principal's default. \* \* \*"

This rule, which is supported by the weight of both English and American authorities, places the duty upon the guarantor to see that his contract of guaranty is fulfilled, and this doctrine is given voice by our Legislature in the above statute, which, in fixing the liability upon the guarantor immediately upon the default of the principal, logically imposes upon him the burden of seeing that his contract of guaranty is fulfilled at maturity. See *Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446; *Cobb v. Little*, 2 Greenl. (Me.) 261, 11 Am. Dec. 72. And it is equally well settled that proof that the principal was solvent at the time of the maturity of his note, and afterward became insolvent, constitutes no defense to an action against the guarantor. See *Brown v. Curtiss*, 2 N. Y. (Comst.) 225; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575; *Flenham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Huff v. Shife*, 25 Neb. 448, 41 N. W. 289, 13 Am. St. Rep. 497; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297.

Upon the general doctrine fixing the liability upon the guarantor upon default of the principal at maturity of his obligation, see *Bloom v. Warder-Mitchell Co.*, 13 Neb. 476, 14 N. W. 395; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Merritt v. Hass*, 106 Minn. 275, 118 N. W. 1023, 119 N. W. 247, 21 L. R. A. (N. S.) 153; *Miller v. Lewiston Nat. Bk.*, 18 Idaho, 124, 108 Pac. 901; *Wilkinson-Gadis Co. v. Van Riper*, 63 N. J. Law, 394, 43 Atl. 675; *Fuller et al. v. Tomlinson & Bros.*, 58 Iowa, 111, 12 N. W. 127; *Hoyt v. Quint*, 105 Iowa, 443, 75 N. W. 342; *Blanding v. Wiseley et al.*, 107 Iowa, 46, 77 N. W. 508; *Wright v. Dyer*, 48 Mo. 525; *Warder, Bushnell & Glessner Co. v. Johnson*, 114 Mo. App. 571, 90 S. W. 392; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Brown v. Curtiss*, 2 N. Y. 225; *Brandt on Surety*, § 170; *Donngerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *Jenkins v. Wilkinson*, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; *Fegley v. Jennings*, 44 Fla. 203, 32 South. 873, 103 Am. St. Rep. 142; *Penny v. Crane Bros. Mfg. Co.*, 80 Ill. 244; *Gage v. Mechanics' Nat. Bk. of Chicago*, 79 Ill. 62; *Roberts v. Riddle*, 79 Pa. 468; *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 259; *Klein v. Kern*, 94 Tenn. 34, 28 S. W. 295; 14 Am. & Eng. Enc. (2d Ed.) 1145-1149; 20 Cyc. 1450, and cases cited.

Many other equally well-reasoned opinions might be cited in support of the doctrine that, under an absolute and unconditional guaranty, the duty is upon the guarantor to see that his contract of guaranty is fulfilled, and that the obligations of the principal are discharged at maturity; and, in the absence of fraud which may be the proximate cause of damage to the guarantor, a lack of notice and demand, or the fact that the principal at maturity of his obligation was solvent, and afterward became insolvent, does not constitute a defense that will discharge the guarantor from liability.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 567)

ABBOTT et al. v. DINGUS. (No. 8940.)  
(Supreme Court of Oklahoma. Nov. 17, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. PLEADING (§ 428\*)—PETITION—OBJECTION.

Where the sufficiency of a petition is challenged solely by an objection to the introduction of evidence thereunder, such objection, not being favored by the courts, should generally be overruled, unless there is a total failure to allege some matter essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.\*]

2. MUNICIPAL CORPORATIONS (§ 706\*) — STREETS — DAMAGES — PETITION — SUFFICIENCY.

The petition in this case, measured by the above rule, is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

3. MUNICIPAL CORPORATIONS (§ 705\*) — STREETS—CARE REQUIRED.

The obligation which the law imposes upon a driver of a horse-drawn vehicle is to exercise reasonable care, to the end of keeping his horses and vehicle under such control as to be able to prevent a collision with other vehicles or pedestrians on the highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

4. MUNICIPAL CORPORATIONS (§ 705\*) — STREETS—CARE REQUIRED.

While the law does not make a driver upon a public street or highway an insurer against accidents which may happen because of his being there, yet it demands of him the exercise of reasonable or ordinary care; and, as in every other situation, this degree of care is one commensurate with the danger to others which attends the particular situation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

5. TRIAL (§ 169\*)—DIRECTION OF VERDICT—EVIDENCE.

It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff that the court is authorized to direct a verdict for defendants; and, unless the conclusion follows as a matter of law that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury, under proper instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.\*]

6. MUNICIPAL CORPORATIONS (§ 706\*) — STREETS — DAMAGES — SUFFICIENCY OF EVIDENCE.

The evidence is discussed in the opinion and held sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Cleveland County; R. McMillan, Judge.

Action by Rebecca Dingus against Charles E. Abbott and another. Judgment for plaintiff, and defendants bring error. Affirmed.

W. L. Eagleton, of Norman, for plaintiffs in error. J. B. Dudley, of Norman, for defendant in error.

BREWER, C. This is a suit brought by Rebecca Dingus, as plaintiff below, against plaintiffs in error, as defendants, to recover damages for personal injuries and the destruction of a carriage caused by a runaway team belonging to defendants. The cause was tried to a jury, and a verdict returned in plaintiff's favor for the sum of \$235. The defendants below, feeling aggrieved, have brought the case here for review, and argue

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

for a reversal, three propositions: First, the sufficiency of the petition; second, the sufficiency of the evidence; and third, the giving of certain instructions and the refusal of others. We shall discuss the points in the order named.

[1, 2] (1) Are the allegations of the petition sufficient? It was not attacked in the lower court by demurrer or motion to make more definite and certain. Its sufficiency was first challenged by an objection to the introduction of any evidence. As a premise it may be said, in the beginning, that this form of attack does not seem to be favored in this state. In *Johnston v. Chapman*, 38 Okl. 42, 131 Pac. 1078, it is said:

"Where the sufficiency of a petition is challenged solely by an objection to the introduction of evidence thereunder, such objection, not being favored by the courts, should generally be overruled, unless there is a total failure to allege some matters essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law."

See, also, *M. O. & G. Ry. Co. v. McClellan*, 35 Okl. 609, 130 Pac. 916; *Hogan v. Bailey*, 27 Okl. 15, 110 Pac. 890.

We shall view the petition in the light of the rule announced above, and will say, by way of further premise, that the elements entering into actionable negligence, where it is not claimed that the action was willful or intentional, are: First, the existence of a duty on the part of the defendant toward the plaintiff; second, the failure to perform that duty; third, injury to the plaintiff because of such failure. *C., R. I. & P. Ry. Co. v. Duran*, 38 Okl. 719, 134 Pac. 876; *St. L. & S. F. Ry. Co. v. Lee*, 37 Okl. 545, 132 Pac. 1072, 46 L. R. A. (N. S.) 357; *C., R. I. & P. Ry. Co. v. McIntire*, 29 Okl. 797, 119 Pac. 1008.

The petition states, in substance, that the plaintiff and her young daughter were riding in a carriage drawn by a horse on Main street in the city of Norman, en route home from church, and just as they reached a certain point (named) a large team of horses belonging to defendants, hitched to a dray-wagon, came running up behind the carriage and, without warning or knowledge upon the part of the plaintiff, struck and overturned the carriage, rendering it worthless, throwing the plaintiff and her child upon the ground, whereby she was injured, the particulars of her injuries being fully described. The negligence of defendants is set out in paragraph 2 of the petition, which follows:

"The plaintiff further states that a few minutes prior to said accident, the defendants' servant, Ivy Brown, under the direction of the defendants, was using and driving said team, hitched to a wagon, on said street in said city, and that said team was wild and unruly, and the bridle, bridle bits, lines, and harness in general, which were then being used on said team by the servant of said defendants, were of an inferior grade, and on account of the negligence and carelessness of the defendants in this respect, and the negligence and carelessness of the defendants' servant in the use and management

of said team, said team ran away, and in so doing struck plaintiff's carriage at the time and place, and in the manner aforesaid, on account of which plaintiff sustained and received the injuries aforesaid, without any fault or negligence upon her part; that the carriage in which plaintiff was riding at the time of said accident had a top on it, and the back curtain thereof was fastened down, and the plaintiff was unable to see or hear said team, and the accident occurred and the injuries resulted without any fault or negligence on the part of plaintiff."

[3] Considering the petition, it will not be disputed that a traveler on a city street is under a duty at all times to other travelers. He is under the duty to use reasonable care to not collide with or injure other travelers. This duty is very well stated by Judge Thompson in his work on Negligence, vol. 1, § 1284:

"The obligation which the law imposes upon a driver is to exercise reasonable care, to the end of keeping his horses and vehicles under such control as to be able to prevent a collision with another driver or a foot passenger on the highway."

[4] And in section 1283 the same author says:

"While the law does not make a traveler upon the public street or highway an insurer against accidents which may happen in consequence of his being there, yet it demands of him the exercise of what is described, in books of the law, to be reasonable or ordinary care. As in every other situation, this degree of care is a care and foresight commensurate with the danger to others which attends the particular situation."

And in 37 Cyc. at page 275, it is announced in the text:

"Drivers of vehicles in a public highway must not drive recklessly, but must use due care to prevent injury to others in the highway, to avoid collisions, and to avoid pedestrians, children, or persons working in the highway. A driver is in general negligent if he fails to have a proper equipment."

To sustain which the author cites numerous illustrative cases which may be read with profit.

The defendants being under the duty to plaintiff of reasonable care, does the petition sufficiently allege a failure to perform that duty? The plaintiff alleges that she was driving along the city street with care; that defendants through their servant were also driving along the street with a wagon drawn by two horses; that the horses were "*wild and unruly*," and that the "*bridle, bridle bits, lines, and harness in general*" being used at the time, were of "*an inferior grade*," and that "on account of the negligence and carelessness of the defendants in this respect, and the negligence and carelessness of the defendants' servant in the use and management of said team," it ran away, etc., and collided with plaintiff's carriage, causing the damage complained of, etc. Now this petition is open to the criticism that it is not as definite and specific as it ought to be and doubtless would have been made under a proper and timely motion; but it certainly, taking its facts together with the conclusions added, shows a failure of duty. This is the

test it is put to under the doctrine stated in *Johnson v. Chapman*, supra.

[5] (2) We are also of the opinion that the point made as to the sufficiency of the evidence, which was raised by a demurrer thereto at the trial, cannot be sustained.

"It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff that the court is authorized to direct a verdict for defendants; and, unless the conclusion follows as a matter of law that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury, under proper instructions. *Booker Tobacco Co. v. Waller*, 38 Okl. 47, 131 Pac. 537; *Chickasha Street Ry. Co. v. Wund*, 37 Okl. 582, 132 Pac. 1078; *M. & T. Ry. Co. v. Walker*, 27 Okl. 849 [113 Pac. 907]; *Fidelity Mt. Life Ins. Co. v. Stegall*, 27 Okl. 151, 111 Pac. 380; *Moore v. First Nat'l Bank of Iowa City*, 30 Okl. 623 [121 Pac. 626]."

[6] We have read the entire evidence introduced, and it is conflicting, and we cannot say that there is a total want of evidence on the part of plaintiff. There was evidence that after the injury one of the defendants made statements tending to show negligence. There is other evidence tending to show that the young man driving the team abandoned the same unnecessarily, and left them to run wild without restraint. It is true the evidence of defendants contradict this, and may even be more convincing to us than that of plaintiff, but still, the jury saw the witnesses and heard them, and evidently believed those supporting the idea of negligence. We reproduce on this point a portion of the testimony:

"Q. Do you know who he was? A. I don't know his name; he was a young man. Q. Where did you see the team again? A. Yes; they went on east; they crossed up here, and still were going east, and I was up there at the upper end of this second block, and he got in about where the middle butcher shop is now, and this young man's hat blew off to the south, and he fell off of the wagon—I don't know—he made a leap to get off of the wagon and pick up his hat, and the team broke this trot and struck a lope, and myself and two or three others there thought the team was going to head into the barn, and after they missed the barn they went on east. Q. Now, what speed was this team going at the time you saw this boy's hat fall off? A. They just about quit trotting and struck up a lope about the time he quit the wagon. Q. A fast trot up to that time. A. Yes, sir; a fast trot. Q. You saw the speed was faster after he got off? A. Oh, yes; certainly faster. Q. Now, at the time you saw this team going down there before the boy jumped off, what do you say the facts are, whether the team was running away at that time? A. Why, I don't think they was; no, sir. They was just in a good stiff trot. Q. What do you say as to whether or not the team appeared to be frightened at that time? A. I wouldn't call them a frightened team; they just wanted to go."

It certainly would not be contended that the driver of a team of large young spirited horses would not be negligent if he jumped from the wagon to get his hat and let them run on, under no restraint, down the street. This evidence certainly tends to show that

he did so. Of course, upon the other hand, it is claimed that the driver only abandoned the team out of dire necessity and to protect his own life; but, as we have said, the jury passed on this evidence, and, taken in its aspects most favorable to plaintiff in its contention, we think that it is clear that it is sufficient to support the verdict of the jury.

(3) Some argument is made as to a number of the instructions, but we have examined all of those given and those offered and refused, and have become fully convinced that no reversible error appears. Of the 10 prepared instructions requested by the defendants, we find that 5 were given by the court as requested, that 4 were given with slight modifications, and 1 was refused outright. And taking the instructions throughout, it seems to us that they follow the defendants' view on all the material phases of the case as to the law involved. There are some verbal inaccuracies, the language is slightly twisted in a few sentences, but when considered as a whole, the law applicable is very clearly charged. We do not believe that we would be justified in taking up the numerous instructions and setting them out and analyzing them, because it is very clear to us that no substantial error was committed.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

(45 Okl. 173)

MISSOURI, O. & G. RY. CO. v. MILLER.  
(No. 4348.)

(Supreme Court of Oklahoma. Jan. 5, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Plaintiff was employed by defendant as storekeeper in the city of Muskogee. The storeroom was three-quarters of a mile from the Union depot. The trains in reaching the depot were required to enter over a Y, passing by the storeroom. Plaintiff testified he was ordered by his superior officer to board passenger train No. 1, for the purpose of going to the depot after some rubber hose; that, in attempting to board the train as it was passing his office at the rate of from 6 to 8 miles per hour, his left foot came in contact with a pile of coal which defendant had piled within six inches of the track, and he was thrown under the train and injured; that he did not know the coal was there until he stumbled over it and fell; that had the surface of the ground been smooth there would have been no danger in boarding said train. Defendant moved for a directed verdict. *Held*, there was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 236.\*]

2. MASTER AND SERVANT (§ 113\*)—INJURY TO SERVANT—NEGLIGENCE.

Defendant was charged with a specific act of negligence in placing a pile of coal in such proximity to the track where plaintiff might reasonably be expected to board defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant's train as to make the place dangerous in boarding its train. *Held*, that the rule giving defendant a reasonable time in which to remedy the defect or to remove the obstruction has no application.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224–227; Dec. Dig. § 113.\*]

**3. MASTER AND SERVANT (§§ 240, 289\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Plaintiff's principal duties as storekeeper were to receive and look after all supplies used by defendant on its trains; to keep an account of same. His duty in looking after the grounds in front of the storeroom and adjacent to the track was incidental to his principal duties. *Held*, that the facts do not bring the case within the exception to the rule, where a servant is engaged in making a reasonably safe place dangerous, or in making an obviously dangerous place safe. *Held*, further, that the question of plaintiff's contributory negligence, under all the facts and circumstances, was a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751–756, 1089, 1090, 1092–1132; Dec. Dig. §§ 240, 289.\*]

**4. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT — PROXIMATE CAUSE — QUESTION FOR JURY.**

Plaintiff alleged and testified that he was ordered by his superior to board the train at the time, place, and in the manner in which he attempted to board same. Defendant admitted piling the coal near the track a short time before the accident. Plaintiff claimed to have had no knowledge of said coal until he was injured. *Held*, the question of approximate cause of the injury was an issue of fact to be determined by the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.\*]

**5. APPEAL AND ERROR (§ 1050\*)—EVIDENCE (§ 514\*)—HARMLESS ERROR—EXPERT TESTIMONY—SUBJECT-MATTER.**

A question was propounded to the witness Kiersey, who qualified as an expert, as follows: "Suppose the surface was smooth along the track and the passenger coach should be coming along, an ordinary passenger coach, going at the rate of six to eight miles an hour, to an experienced man in catching moving trains, would there be any danger incident to the catching of the same?" Answer: "No danger to an experienced man. I mean by that, if a man is experienced in catching trains under those circumstances, necessarily he should not be in danger in catching trains at that rate per hour, because he would necessarily use precaution." To this question defendant objected, upon the ground that it was not a proper subject for expert testimony. *Held*, not error. *Held*, further, if error, it was harmless, in that plaintiff testified to the same effect, without objection, which testimony is not controverted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050; \* Evidence, Cent. Dig. §§ 2319–2323; Dec. Dig. § 514.\*]

**6. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—INSTRUCTIONS.**

Complaint is made to paragraphs 4, 5, and 8 of the court's instructions to the jury. *Held*, upon an examination of said instructions in connection with the whole charge of the court, we find that the law applicable to the facts was fairly given to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.\*]

**7 TRIAL (§§ 191, 194, 200\*)—INJURY TO SERVANT—INSTRUCTIONS—REPETITION — WEIGHT OF EVIDENCE.**

Defendant complained of the action of the court in refusing to submit to the jury special requested instructions Nos. 8, 7, and 9. *Held*, that the court fairly gave to the jury the law applicable to the issues made by the pleadings and the evidence, and substantially included in its charge requested instructions Nos. 3 and 9; and that requested instruction No. 7 is not a correct statement of the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 420–431, 435, 436, 439–441, 446–454, 456–466, 651–659; Dec. Dig. §§ 191, 194, 200.\*]

(Additional Syllabus by Editorial Staff.)

**8. NEGLIGENCE (§ 58\*)—"PROXIMATE CAUSE."**

Strictly defined, an act is the "proximate cause" of an event, when in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event; but the practical construction of "proximate cause" by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. § 58.\*]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by W. E. Miller against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Wilhoit, both of Muskogee (Arthur Miller, of Kansas City, Mo., of counsel), for plaintiff in error. W. N. Maben, of Shawnee, and C. A. Galbraith, of Oklahoma City, for defendant in error.

**RIDDLE, J.** The parties will be referred to here as they were in the trial court. Plaintiff alleges substantially that he was employed by defendant as storekeeper in the city of Muskogee; that it was his duty to collect, take charge of, and distribute the supplies used by defendant on its train, and to go from the storeroom to the depot and receipt for all supplies; that, as part of his contract of employment, defendant was to furnish plaintiff with transportation for himself and supplies from the storeroom to the depot, a distance of about three-quarters of a mile; that defendant operated a passenger train which it would back over a Y, passing the storeroom; that plaintiff was directed to board said train by defendant's superior officer, who had authority to give such instructions, to use said passenger train as a means of transportation of himself and supplies; that the employes in charge of said train were in the habit of slowing up the speed at the rate of about 6 miles per hour, for the purpose of permitting plaintiff and the other employes to board same; that on the date of the accident one H. P. Abbey, purchasing agent for defendant, and who was plaintiff's

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

foreman and superior, having authority, directed plaintiff to catch said train as the same passed the storeroom about the hour of 10:30 a. m. for the purpose of going to the passenger depot after a steam hose, and to bring the same back when the train returned; that said agents and servants aforesaid caused a large pile of coal to be placed near said storeroom, but that in so doing its said servants and employes negligently and carelessly placed the same within about 6 inches of the railway track where said passenger train had to pass; that all said acts of defendant, its agents and servants, were known to said defendant, but were unknown to plaintiff; that the placing of said coal in such close proximity to said track rendered said place unsafe for plaintiff and said employes; that the ground was smooth along near said storeroom where said passenger train passed, and when said train approached said storeroom, going in the direction of the passenger depot, plaintiff stepped out near by to catch said train, upon the order of his said superior, and used due care and caution for his own personal safety; that there was no danger in attempting to board said train at said time, but for the negligence of said defendant, its agents and servants, in causing said pile of coal to be placed at said point, of all of which acts of negligence plaintiff was ignorant, and could not by the exercise of ordinary care and diligence have discovered same; that plaintiff, before catching said train and before placing his foot on the step, and while in the act of placing his right foot on the step on said passenger coach, his left foot and leg came in contact with said pile of coal, causing his foot to slip and be caught by the wheels of said train and run over, the injury causing the amputation of his foot, as aforesaid. He prayed for judgment for the sum of \$20,000. Defendant filed its answer, consisting of a general denial and pleading contributory negligence; specially alleging that plaintiff's duty did not require him to board moving trains for the purpose of reaching the depot, and that it did not owe plaintiff the duty of keeping said right of way free from obstructions, and was not required to anticipate that the place where the coal was put would be used by defendant in error, or any other person, as a place to board moving passenger trains. To this answer, plaintiff filed a reply. A trial was had to a jury, resulting in a verdict and judgment in favor of plaintiff for the sum of \$5,000, from which judgment defendant prosecutes this appeal.

Defendant presents and argues the following assignments:

"(1) The trial court erred in refusing to give a peremptory instruction requested by the plaintiff in error at the conclusion of all the testimony in the case. (2) The trial court erred in admitting incompetent evidence offered by the defendant in error. (3) Because of errors of law occurring at the trial. (4) The trial court erred in giving to the jury its instructions Nos.

4, 5, 7, and 8. (5) The trial court erred in refusing to give to the jury instructions requested by the plaintiff in error Nos. 3, 7, 9, and 15. (6) The trial court erred in overruling the motion of plaintiff in error for a new trial."

[1, 3] The testimony of plaintiff tends to support all the material allegations of his petition; while the testimony on the part of defendant contradicts that of plaintiff and tends to support the theory of defendant. Defendant insists that the court erred in refusing to give a peremptory instruction. Counsel assign and argue four reasons why the action of the court is error. The first reason assigned is that where a servant is furnished in the first instance with a reasonably safe place to work, and it is made the duty of the servant to maintain the place in a reasonably safe condition, he cannot complain if that place, which he was charged with maintaining in such condition, becomes unsafe. The question as to whether or not it was plaintiff's duty to keep the place in a safe condition was controverted. While one of defendant's witnesses testified that it was the duty of plaintiff to superintend the storeroom and the grounds between it and defendant's track and keep them clear of obstructions, yet the reasonable deduction to be drawn from plaintiff's testimony is to the contrary. On both direct and cross examination, plaintiff testified relative to his duty under his contract of employment, and clearly negated the idea that he was to keep the premises free from obstructions. If true, as contended by defendant, yet looking after and superintending the premises was merely incidental to plaintiff's principal duties, and would not bring the case within the rule contended for. If the act of the defendant in placing the coal too near the track was negligence, and if the act of the servant must be regarded the act of the master, then we have an affirmative act of the defendant, constituting primary negligence, of which plaintiff says he had no knowledge, before or at the time of the injury. This was one of the controverted points in the case, and plaintiff could not be deprived of going to the jury on this issue, because he had failed to remove an obstruction of which he knew nothing, and the existence of which, under the circumstances, he was not required to know. This case does not fall within the exception, which is where the servant is employed to make a reasonably safe place dangerous, or an obviously dangerous place safe, the master is not liable for an injury resulting on account of such place becoming dangerous by reason of failure of the servant's nonperformance of his duty. *Sulsberger v. Castleberry*, 40 Okl. 613, 139 Pac. 837; *C. & R. I. & P. Ry. Co. v. Townes*, 143 Pac. 680 (recently decided, but not yet officially reported); 26 Cyc. 1119. The authorities relied upon by defendant to sustain its contention under this proposition are not in point.

It is next urged that, under the undisputed



evidence in this case, the place defendant provided for employes to board its trains was not the place where the coal was situate, nor where the injury occurred. We agree with counsel that it was the theory of the defense—and all the witnesses who testified for defendant seem to agree—that employes, including plaintiff, were only authorized to board defendant's trains on the opposite side of the track from where plaintiff was injured; but plaintiff's theory and his testimony was to the contrary. The undisputed facts show that, coming into Muskogee from the main line, defendant maintains a Y; that the storehouse and the master mechanic's office are situate about three-quarters of a mile from the Union depot, where defendant stops for passengers to alight and board its trains; that the storehouse in which plaintiff was required to work was situate inside of this Y, and just north of the south track of the Y; that the master mechanic's office was situate just on the south side of the south track of the Y. In other words, the south track of the Y is between the master mechanic's office and the storehouse. Upon this issue, plaintiff testified substantially as follows:

I had a conversation with Mr. Abbey with reference to those supplies. I told him Mr. Greeley was complaining of the lack of steam hose, and he told me they were at the depot at that time, and, if they were needed so badly, for me to take the train down and go to the depot and get sufficient number and bring them back with me. A few minutes after Mr. Abbey left, I was sitting in my office and saw the rear end of the train through the office door coming towards the storeroom, and I got up and went out through the door, and it was not but a very few feet to the track. The rear end of the train had then passed me, and I jumped to catch the second coach, and in doing so I had lifted my right foot from the ground, preparatory to mounting the steps, and had hold of the grabirons on the coach, and my feet came in contact with a pile of coal, and I was thrown under. Mr. Abbey came there in a buggy and told me to go about ten minutes before this train came by. I had been boarding that train ever since my employment going to Muskogee on No. 1. It did not stop at the storeroom to let me on. I jumped on while it was in motion. I knew the train did not stop there and passengers were not supposed to get on there. They had been stopped there by me by flagging on different occasions. I was on my side when I did this flagging. The side I was on the engineer rode on, and to get the best results, would be to give the flag there. I have had practically a lifetime of experience in catching trains; have been in the railroad service 12 years. There was no danger whatever in attempting to catch the train there, if the surface of the ground had been smooth and no obstruction. The left side of my left foot came in contact with the coal at or below the ankle, and knocked my feet out from under me, toward the train, and the weight of my body pulled my hands loose from the grabirons. They would let me use other trains, but told me to catch No. 1, because it ran at the time when it was convenient in going to the depot, and in going back it always stopped to take off supplies.

After testifying Brown had instructed him to use train No. 1, he continued:

I followed out those instructions on a number of occasions. I had a conversation with the

general superintendent of the M. O. & G. relative to boarding passenger trains. I think his name was Fisher. He was at the shops. I told him Mr. Brown said in any case where the goods were of such a small quantity I could bring them down on this train, and could catch this train and go to the depot at Muskogee and get them and return on same train. I asked him if this was O. K., and he said it was. He was preparing to catch the train, and caught it on numerous occasions, and I caught it with him at that time.

It is the theory and contention of defendant that its employes could flag the train only from the south side of the track, next to the master mechanic's office; while the testimony of plaintiff shows that he had been flagging it from the other side of the track, and had caused it to stop on other occasions. Besides, plaintiff testifies positively that he and other employes had been boarding moving trains at this place for quite awhile; that he was directed to take this train to go after the hose. The evidence shows that he was an experienced railroad man; that the train coming from Wagoner, Okl., to reach the depot at Muskogee, was required to back in on this Y, and back down by the master mechanic's office and the storeroom; that, a few minutes after Mr. Abbey had directed him to go after the hose, he was sitting in his office, and noticed the rear end of the train as it was backing in about even with the storeroom; and he ran out, and the rear end of the coach had just passed the door when he ran and jumped for the second coach at the time of the injury. Under the circumstances as detailed by him, it would, perhaps, have been impossible, and if not impossible, extremely dangerous, to have run in behind the train and crossed the track while the train was backing. Plaintiff further testified that he and the general superintendent, a short while before the accident, boarded the moving train at the same place where he attempted to board it on this occasion; that the superintendent ratified Brown's instructions. Under the theory and evidence of plaintiff, it was permissible to board the train from either side. In view of the specific instruction, under which plaintiff claims to have been acting at the time of the injury, and under the facts and circumstances, we hold that plaintiff was not acting outside the scope of his employment at the time of the injury; neither did the testimony so conclusively sustain defendant's theory as to make it the duty of the court to direct a verdict in favor of defendant.

[2] The third reason assigned and argued is that the coal over which plaintiff stumbled was deposited near the track not more than one hour before the accident; that this was not an unreasonable length of time to leave it there, and negligence could not be imputed from the fact that it was left there for that time. We do not understand that plaintiff sought to recover of defendant by reason of not removing the obstruction within a reasonable time after it had been placed near



the track. Plaintiff charges defendant with primary and a positive act of negligence in placing the coal at such proximity to the track as to make dangerous the place where plaintiff was instructed to board said train. If defendant was negligent in this respect, then it naturally and logically follows that no notice was necessary, and defendant would not be entitled to any certain length of time to remove the obstruction. It was defendant's act in placing the coal too near the track, and not its failure to remove same, to which complaint is made. This state of facts is governed by an entirely different rule of law from that relied upon by defendant. It is not a case where, in the ordinary use of machinery or other appliances a defect occurs, or an obstruction accidentally is placed near or about such machinery as to render it unsafe. In such case the master is generally entitled to a reasonable time within which to remedy such defect or remove the obstruction; and, in the absence of actual notice, knowledge will be imputed after the expiration of a reasonable time. This is the holding of the authorities relied upon by defendant. But defendant is charged here with primary negligence—a specific act of negligence in placing an obstruction so near the track, making the place where plaintiff was required to work unsafe, and as a result thereof plaintiff was injured. If defendant were guilty of negligence in placing the coal too near to the track as to make it unsafe for plaintiff, and if plaintiff was injured as a result of said act of negligence within three minutes thereafter, defendant would be liable. Plaintiff does not make any charge against the defendant for unloading or piling coal on its premises to be used in the stove in the storeroom, but in unloading the coal and piling it too near the track, so as to make the place dangerous in boarding the train. Had the coal been piled a reasonable distance from the track, no doubt there would have been no occasion for any complaint.

[4, 5] Approaching the fourth reason, it is contended that the act of the defendant in piling the coal and permitting it to remain near the track was not the proximate cause of the injury, but that it was the act of plaintiff in rushing out and attempting to board a moving train. This contention is untenable. It is true, had plaintiff remained in the storeroom and not attempted to board the train, he would not have been injured at this time and by this particular train. It is also reasonably certain that, had the coal not been piled near this track, plaintiff could and would have boarded the train safely; but, according to plaintiff's theory, under his employment and under instructions of his superior, he was required to board this train. If his testimony is true, after he first noticed the train, it would have been most impossible for him to have run around the train and

flagged it from the opposite side, for the end of the rear coach had already passed his door when he ran out. The question is: When an experienced railroad man, who has been accustomed to boarding moving trains, was presented with a condition of this kind, what action is he authorized to take? What would have been reasonable to have been expected of a man of his experience in performing the duty which he was called upon to perform? If he performed this duty as a reasonable man, engaged in such work with his experience under conditions and circumstances would have performed it, and in obedience to orders of a superior, who was authorized to give such orders, then it cannot be said that his acts were the approximate cause of the injury. Strictly defined, an act is the "proximate cause" of an event, when in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event; but the practical construction of "proximate cause" by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *Enochs v. Pittsburgh, C., C. & St. L. Ry. Co.*, 145 Ind. 635, 44 N. E. 658. Or, as stated by some of the courts, where the question is whether a cause proximated to the accident, the test is whether it was such that a person of ordinary intelligence and prudence should have foreseen that the accident was liable to be produced by that cause. *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Davis v. Chicago, M. & St. P. Ry. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935. Where different forces and conditions concur in producing a result, it is often difficult to determine which is proper to be considered the cause. The law will not go further back than to find the active, efficient, and procuring cause, of which the event under consideration is a natural consequence. *Freeman v. Mer. Mut. Acc. Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. See, also, *City Council of Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Shear, & R. Neg.* § 10; *Williams v. So. Pac. Ry. Co. (Cal.)* 9 Pac. 152; *Texas & P. Ry. Co. v. Woods*, 8 Tex. Civ. App. 462, 28 S. W. 416; *American Exp. Co. v. Risley*, 179 Ill. 295, 53 N. E. 558; *Missouri, K. & T. Ry. Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402.

Applying this definition to the facts in the instant case and accepting plaintiff's theory of the case as true, defendant might expect him under the circumstances to board the train at the time and in the manner in which he undertook to board it; and, with this in mind, it seems to us the approximate cause of the injury was the act of defendant piling the coal so near the track that it would be probable that plaintiff, in attempting to

board this train, would likely come in contact with such coal, resulting in the accident or injury complained of. In any event, the facts of this case made an issue to be submitted to the jury; and having been submitted to the jury, and it having found a general verdict in favor of plaintiff, its finding is conclusive upon this court. C., R. I. & P. Ry. Co. v. Brazzell, 40 Okl. 460, 138 Pac. 794.

[5] Under the second assignment of error, it is contended that the trial court erred in admitting incompetent evidence. The particular complaint is to the action of the court in permitting one Klersey to testify, after being qualified as an expert, that under similar circumstances under which plaintiff undertook to board the train in question it was not necessarily dangerous. The following question was propounded to the witness:

"Suppose the surface was smooth along the track and the passenger coach would be coming along, an ordinary passenger coach, going at the rate of six to eight miles an hour, to an experienced man in catching moving trains, would there be any danger incident to the catching of the same?"

Witness answered:

"Not dangerous to an experienced man.  
\* \* \* I mean by that, if a man is experienced in catching trains under those circumstances, necessarily he should not be in danger in catching trains at that rate per hour, because he would necessarily use precaution."

The main objection urged to this testimony is that the facts are not such that call for expert testimony; that the expression of opinion by this witness was an invasion of the right of the jury. If by this question it was sought to develop information about which the ordinary mind would be expected to possess as much knowledge as the witness, the objection would have been good; but we cannot agree with defendant in the application of the rule. While it would, perhaps, appear to the ordinary mind that there is more or less danger for any one to attempt to board a moving train, yet it is common knowledge to all that experienced railroad men hourly and daily board trains while running from a mile to several miles per hour, and no more accidents occur on account thereof than occur in the discharge of duties in other departments which do not require boarding moving trains. What would appear to be dangerous to the ordinary mind in boarding a moving train might be considered by an experienced man, who is accustomed to boarding trains under such conditions and circumstances, practically free from danger; and the jury, while possessing the same knowledge as would be expected to be possessed by the ordinary man, yet it is not presumed that the jury was possessed of that peculiar knowledge that comes to railroad men from long experience. Without the testimony of an expert, the jury would not be expected to know whether or not under the existing conditions it was negligent per se for plaintiff to undertake to board the moving train in question. We are of the

opinion that the court committed no error in admitting this testimony. And this, too, for another reason, to wit: Plaintiff testified to practically the same facts, without any objection; and his testimony is not controverted. Besides, this matter was largely in the sound discretion of the trial court. 17 Cyc. 28, 62, 65. Had plaintiff sought to prove by this witness whether plaintiff was negligent or was free from negligence, in an attempt to board the train in question, under the circumstances, then it would have been objectionable as an invasion of the province of the jury.

Defendant's counsel have abandoned the third assignment of error.

[8] Under the fourth assignment, defendant complains of the action of the court in submitting paragraphs 4, 5, 7, and 8 of its charge to the jury. Paragraph 4 reads:

"The jury are instructed that if you find and believe from the evidence that the plaintiff was employed by the defendant in the capacity of storekeeper, and further find and believe from the evidence that it was a part of his duties to go from the storeroom to the union depot for the purpose of receiving and transporting supplies from the union depot to the storeroom, and if you find and believe from a fair preponderance of the evidence that the defendant permitted or invited the plaintiff and other employees to board its passenger train in front of the storeroom in which the plaintiff was employed, then it would be the duty of the defendant company to use ordinary care in keeping said place reasonably safe, as would protect the plaintiff in the performance of his duty in boarding the passenger train of the defendant."

It is contended that this charge is erroneous, because it does not clearly define the place where the employees were to board the train of defendant. In considering whether or not this was prejudicial error, we must presume that the jury received it in the light of the facts and circumstances before them and as applied to plaintiff's theory of the case. The only theory plaintiff had in regard to this branch of his case was that he had authority generally to board the train while moving, on the side next to the storeroom, and that in this particular instance he was ordered by his superior to so board the train; and that he and the superintendent at a previous date had boarded the train at the same place and in the same manner. This charge was given to meet plaintiff's theory, and could only have been understood by the jury as applying to the evidence bearing upon the point where plaintiff actually boarded the train, and we are clearly of the opinion that the jury was not in any way misled in this respect. When the court used the words, "in front of the storeroom," the jury could not reasonably be expected to have understood the court to mean "on the opposite side of the track, in front of the master mechanic's office." There was no testimony of plaintiff directed to the opposite side of the track.

What we have said in response to the first reason assigned by counsel why this charge

is misleading will apply to the second reason. It is argued that the following language is prejudicial, to wit:

"To use ordinary care in keeping said place reasonably safe, as would protect the plaintiff in the performance of his duty in boarding the passenger train of the defendant."

It is claimed that this language is equivalent to the court telling the jury that the master was an insurer of the safety of the servant. This language, standing alone, might be subject to the criticism offered; but in connection with the full section of the charge, considered with the whole charge, we are unable to agree with this contention. Taking the whole charge, the court made it clear to the jury that defendant in this case was not an insurer of the plaintiff against injury. This holding is in harmony with the rule laid down by Mr. Labatt in his work on Master and Servant. The latter part of section 920 reads:

"Hence it is error to use the epithets, 'safe,' 'secure,' 'safe and sound,' or the like for the purpose of describing the instrumentalities which the master is bound to furnish, unless it is also made quite clear to the jury that he is only required to use ordinary care in furnishing instrumentalities answering the description."

The language used by the court was that:

"It would be the duty of defendant company to use ordinary care in keeping said place reasonably safe as would protect the plaintiff in the performance of his duty in boarding the passenger train of defendant."

The jury would understand by this that if defendant used ordinary care in keeping said place reasonably safe and plaintiff was injured, then defendant would not be liable for such injury. The jury would not be warranted in finding, and we think was not led to believe, that defendant was required to keep this property in such condition as would protect plaintiff against any injury.

Section 5, to which complaint is made, reads:

"The jury are instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff, while in the employment of the defendant, was directed by a superior officer to board a passenger train and go to the union depot for the purpose of getting some steam hose, and bringing the same back to the storeroom, and that the plaintiff, in obedience to the command of his superior officer, attempted to board the moving passenger train of the defendant at a point where the defendant permitted or invited the plaintiff or its other employes to board the said passenger train, and that it was not dangerous or hazardous and that it was not obvious to him at the time, and that the plaintiff used at the time such care and discretion as an ordinarily prudent person would have used at the time, and that in attempting to board the train he was tripped by a pile of coal placed at this point; and if you further find and believe from a fair preponderance of the evidence that the said coal had been placed there by the servants or employes of the defendant in the course of their duties, and that the same was negligently placed there, or was negligently permitted to remain at the place and to render the place unsafe for the plaintiff and other employes to board said passenger train, and that the plaintiff, by reason of tripping, fell and his foot

was crushed and injured; and you further find that the negligence, if any, of the servants in placing the coal at that place or permitting the same to remain at that point was the direct and proximate cause of plaintiff's injury, if any; and you further find that the plaintiff could not, by the use of ordinary care, have discovered the coal in time to have avoided the accident—then your verdict should be for the plaintiff."

The exact language to which the objection is urged in referring to the coal which was beside the track, "or was negligently permitted to remain at the place and to render the place unsafe for the plaintiff and other employes to board said passenger train," it is urged that this deprived defendant of its right to be relieved of any liability in the event the testimony showed that it had used reasonable care to keep its premises in a reasonably safe condition. As said in answer to defendant's contention and its criticism to instruction 4, we are not permitted to carve out a sentence in any certain paragraph of the court's charge and consider it standing alone, when passing upon the question as to whether or not the court committed prejudicial error. The court cannot include its charge applicable to the issues in one sentence, or any one paragraph; and the jury in this case was directed and required by the court to consider the charge as a whole. This instruction, fairly considered and construed, is not subject to this criticism. Counsel, in discussing the alleged defect in this instruction, state:

"The master, under the settled law of the land, is relieved from liability, unless his knowledge, actual or constructive, of a defective appliance or premises, was obtained sufficiently long before the injury was received to have enabled him to adopt remedial measures."

They cite quite a number of cases to sustain this proposition. This, no doubt, is the law, applied to a state of facts which would make it applicable; but, as we have said, it has no application here. If defendant was guilty of primary negligence, as charged, in piling this coal too near the track, making the place dangerous as alleged, certainly the master would not be entitled to a reasonable time within which to relieve it of the negligence. In any event, after the plaintiff had been injured as a result of defendant's negligence it could not set up as a defense that, while it was guilty of primary negligence in placing the obstruction upon its premises, yet it could not be held liable, for the reason it was entitled to a reasonable time within which to become acquainted with the situation and remove the obstruction. To state the contention is a sufficient argument against it.

Instruction 8, to which complaint is made, we find, from an examination and application to the facts, is not defective in the manner claimed. Considering this paragraph of the instruction as a whole, it is not subject to the construction placed thereon by counsel for defendant.

[7] Under assignment No. 4, it is urged that

the court committed error in refusing to give to the jury certain instructions, requested by defendant, to wit, Nos. 3, 7, 9, and 15. Instruction No. 3 is as follows:

"The court instructs the jury that contributory negligence on the part of plaintiff defeats his right of action, and, if you believe from the evidence that the plaintiff failed to exercise ordinary care to avoid injury to himself, then you should find for the defendant."

The court gave, at the request of defendant, instruction No. 2, which is as follows:

"The court instructs the jury that, although an injury may be inflicted upon this plaintiff by this defendant, nevertheless if this injury was contributed to naturally and proximately by the situation of peril into which the plaintiff, by his own neglect or carelessness or lack of discretion, had placed himself, the plaintiff must be considered as the party solely at fault, and as the author of his own misfortune, and the jury will find a verdict for the defendant."

It will be seen that the propositions included in requested instruction No. 3 are substantially included in instruction No. 2, which the court gave; but they are couched in different language, and are more favorable to defendant. They both are intended to submit defendant's theory of the case upon the question of contributory negligence. The court committed no prejudicial error in refusing to give this requested instruction.

Complaint is made to the action of the court in refusing to give instruction No. 7, requested by defendant, which is as follows:

"The court instructs the jury that if they believe from the evidence that the coal over which the plaintiff is alleged to have stumbled was placed along the track and was in the yards of this defendant and not at a public crossing or a thoroughfare, or at a station ground or at a place where this train regularly stops, then the defendant had the right to place said coal there, and it was not negligence on the part of the defendant in any particular so to do, and if you believe that by reason of the coal being there the plaintiff was injured, and that the said coal was the cause of his injury, you will find for the defendant."

The court did not commit error in refusing to give this instruction, for the reason that it is a charge directly upon the weight of the evidence, and is not a correct statement of the law as applied to the issue and evidence on this point. It was not the act of defendant in unloading the coal that plaintiff alleges caused the injury, but it was the negligence of defendant, placing the coal too near the track. Although defendant had a right to unload the coal on its premises, yet if it did so in such a negligent manner or piled it at a place where it would render its premises unsafe for its servants to perform the duties required of them, it might be liable for an injury, although it had a perfect right to unload the coal on the premises. Hence the court did not err in refusing to give this instruction.

It is next contended that the court committed error in refusing to give requested instruction No. 9, which is as follows:

"The court instructs the jury that ordinarily an employé is required to obey the proper order of his superior officer; but you are further instructed that, if this order would require the servant to place himself in a position that was obviously dangerous, it is then the servant's duty to decline to obey such order, and if he does not decline to obey, but, on the contrary, does obey, and his injury is occasioned thereby, he is then held to contribute to his own injury. And in the case at bar, if the jury believe that the defendant's officer superior to the plaintiff herein ordered the plaintiff to board a passenger train, and if it was obviously dangerous for him so to do, and he was hurt thereby, you will find for the defendant."

This same proposition was couched in instruction No. 10, given to the jury by the court. Hence no error in failing to submit this one. It is admitted, in effect, by counsel that the general charge covers the same proposition; but they claim to have a right to have the jury specifically called to this state of facts, included in this instruction. Not true, however.

We have carefully examined the charge of the court and find that all the issues were fairly and fully submitted to the jury; that there were sufficient facts and circumstances, warranting the court in submitting the issue to the jury, and its finding in favor of plaintiff is conclusive upon this court.

Finding no prejudicial error, the judgment of the trial court is affirmed. All the Justices concur.

(44 Okl. 475)

DUNLAP v. O. T. HERRING LUMBER CO.  
et al. (No. 3540.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR (§ 564\*)—NEW TRIAL (§ 2\*)—CASE-MADE—TIME FOR MAKING AND SERVING.

Where a case is tried upon an agreed statement which eliminates all questions of fact, a motion for a new trial is unauthorized by statute; and the time for making and serving a case-made for this court runs from the date of the rendition of judgment, unaffected by such motion or the order overruling the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564;\* New Trial, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.\*]

2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—TIME FOR SERVICE.

According to the law in force at the time, a party desiring to appeal had three days by statute in which to serve a case after a judgment or order was entered, and, unless such case was served within that time, or within an extension of time allowed by the court or judge within such time, the case will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action by the O. T. Herring Lumber Company, a corporation, against the Blanchard Construction Company and others, for fore-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

closure of materialman's lien. Judgment for plaintiff, and defendant E. F. Dunlap brings error. Appeal dismissed.

L. M. Keys, of Hobart, and O. B. Riegel, of Snyder, for plaintiff in error. Hays & Hughes, of Hobart, for defendant in error.

THACKER, C. [1, 2] This case was tried in the district court upon an agreed statement of facts upon which judgment was entered for plaintiff on the 5th day of August, 1911; and on the same date the defendant E. F. Dunlap filed motion for new trial, which was, on the 30th day of August, 1911, overruled, and time then granted in which to serve a case-made. As has been repeatedly held by this court, a motion for a new trial is unauthorized where a case is tried upon an agreed statement of facts alone; and such motion does not operate to extend the period of three days allowed by statute in force at the date of the entry of judgment in this case, and therefore the order entered on the 30th day of August, 1911, extending such time, was a nullity, and does not confer upon this court jurisdiction to consider this case on appeal. See School District No. 38, Hughes County, ex. rel. F. M. Hale, Director, v. B. W. Mackey, Co. Treasurer (No. 3689) 144 Pac. 1032, not yet officially reported, and cases there cited.

For the reasons stated, the appeal should be dismissed.

PER CURIAM. Adopted in whole.

(45 Okl. 228)

LANKFORD, State Bank Com'r, v. MENEFEER. (No. 3330.)

(Supreme Court of Oklahoma. Dec. 22, 1914. Rehearing Denied Jan. 9, 1914.)

*(Syllabus by the Court.)*

1. BANKS AND BANKING (§ 313\*)—LIABILITY OF STOCKHOLDER—EXTENT—"CORPORATION"—BANKING BUSINESS—TRUST COMPANY.

Where a company is organized under act approved March 8, 1901 (article 5, c. 11, Laws 1901), relating to trust companies, as amended by act approved March 15, 1905 (article 3, c. 10, Laws 1905), and thereafter does a banking business, within the contemplation of act approved March 10, 1899 (Laws 1899, c. 4, § 37), and fails, in a suit by the bank commissioner against a stockholder of said trust company, held, that the extent of defendant's liability is measured by section 16 of the Trust Company Act, and is to the extent only of double the amount that is unpaid upon the stock held by him. Held, further, as the term "corporation" does not include stockholders, although defendant be such in a trust company doing also a banking business, he cannot, as such stockholder, be said to be doing a banking business, within the contemplation of act approved March 10, 1899 (chapter 4, Laws 1899, § 37), so as to be chargeable as a stockholder of a bank organized under the general banking law (act approved March 10, 1899 [chapter 4, Laws 1899]), as revised by act approved March 26, 1908 (chapter 6, Laws 1907-08), and by section 11 of the

original and section 9 of the revising act, made liable to the amount of his stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 469-495; Dec. Dig. § 313.\*]

For other definitions, see Words and Phrases, First and Second Series, Corporation.]

*(Additional Syllabus by Editorial Staff.)*

2. BANKS AND BANKING (§ 47\*)—LIABILITY OF STOCKHOLDER—"INDIVIDUAL"—"FIRM."

As used in the act approved March 10, 1899 (Laws 1899, c. 4, § 37), providing that any individual or firm receiving money on deposit shall be amenable to all the provisions of this act, the words "individual" and "firm" have no reference to stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 62, 64-68, 341; Dec. Dig. § 47.\*]

For other definitions, see Words and Phrases, First and Second Series, Firm; Individual.]

Riddle, Justice, dissenting.

Error from District Court, Caddo County; J. T. Johnson, Judge.

Action by J. D. Lankford, State Bank Commissioner, against J. A. Menefee. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles West, Atty. Gen., and Stuart, Cruce & Gilbert, of Oklahoma City, for plaintiff in error. A. J. Morris, of Anadarko, for defendant in error.

LOOFBOURROW, J. On August 9, 1911, J. D. Lankford, as bank commissioner, commenced this action in the district court of Caddo county. His amended petition substantially states: That on October 17, 1905, the Columbia Bank & Trust Company filed its articles of incorporation with the secretary of the territory of Oklahoma, and soon thereafter commenced to do business in the city of Oklahoma. A copy of said articles of incorporation is thereto attached and marked Exhibit A. That said Columbia Bank & Trust Company was incorporated both under the laws of the territory of Oklahoma, relating to trust companies, and under the laws of the said territory relating to banks, and that said Columbia Bank & Trust Company was incorporated for the purpose both of doing a trust company business and doing a banking business. That, from and after the date on which said company commenced to do business in the territory of Oklahoma and up to the time of its failure in September, 1909, said company engaged in the banking business, both before and after statehood, and, at all times after the date of its organization and up to the time of its failure, received money on both general and special deposit, and conducted a general banking business, subject to the laws of the territory of Oklahoma relating to banks, and subject to the laws of the state of Oklahoma relating to banks.

Plaintiff further states: That there was never any reorganization of said Columbia

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bank & Trust Company, but that said bank and trust company continued to do a banking business up to and after statehood, under and subject to the banking laws of the state of Oklahoma, until September 7, 1909, when said Columbia Bank & Trust Company failed, and is now unable to meet, with its assets and credits, its debts and obligations. That said bank commissioner, acting under authority of law, has possession of said Columbia Bank & Trust Company, and the same is now under his control as such for the purpose of liquidation and settlement of the claims of its creditors. That the liabilities and obligations of said Columbia Bank & Trust Company amount to a very large sum of money, and that, when all the assets and credits of said bank have been subtracted from its total liabilities, a sum of money is left as liabilities, in an amount far greater than the amount of all the stock subscribed and paid in by the stockholders of said bank; the amount of stock so paid in by the stockholders being \$200,000. That it is necessary for him, as bank commissioner, to enforce the personal liability of the stockholders of said bank to make good the foregoing deficit. That, at the time said bank was taken over as aforesaid, one J. A. Menefee was the owner of 250 shares of stock of \$100 each in said bank, fully paid up, and said Menefee is still the owner of said stock. That, by reason thereof, the said Menefee is still liable to this plaintiff, as bank commissioner, in the sum of \$25,000, same being the amount of stock subscribed and paid up by said defendant, and prays judgment for \$25,000.

The material part of the charter of the Columbia Bank & Trust Company, filed as Exhibit A, reads:

**"Articles of Agreement.**

"We, the subscribers, hereby associate ourselves together by the following articles of agreement, for the purposes herein set forth:

"Article 1. The name of this corporation shall be 'the Columbia Bank and Trust Company.'

"Article 2. This corporation shall be located in the city of Oklahoma City, Oklahoma county, territory of Oklahoma.

"Article 3. The amount of capital stock of this corporation shall be two hundred thousand (\$200,000) dollars, divided into two thousand (2,000) shares, of the par value of one hundred (\$100) dollars each, which said shares are now actually paid up in lawful money of the United States of America, and the money is in the custody of the persons named as the board of directors and its officers.

"Article 4. \* \* \*

"Article 5. \* \* \*

"Article 6. \* \* \*

"Article 7. The purposes for which this corporation is formed are: First. To receive money in trust or on general deposit with or without interest as may be agreed upon, and to accept and receive saving accounts and the payment to them or their order of deposits made by minors shall be binding on them; to receive upon deposit for safe keeping personal property of every description; to guarantee special deposits and to own and control safety vaults and rent boxes therein. Second. \* \* \*

To this amended petition defendant filed a general demurrer, and the same was, by the court, sustained. Plaintiff elected to stand upon the amended petition, and judgment was thereupon entered in favor of the defendant, from which judgment the plaintiff appeals.

[1] The petition alleges that the Columbia Bank & Trust Company was incorporated both under the laws of the territory of Oklahoma, relating to trust companies, and under the laws of the said territory, relating to banks. This statement of a legal conclusion is not binding upon the court as against a demurrer, unless the law and the petition sustain such allegation. As appears from the face of its charter, said company was, in fact, organized under the laws of the territory of Oklahoma (article 5, c. 11, Sess. Laws 1901), relating to trust companies, as amended by article 3, c. 10, Laws 1905, and the charter recites verbatim section 4 thereof, as amended by article 3, c. 10, Laws 1905. As section 16, Trust Company Act, provides:

"Each stockholder of a company organized under this act shall be individually and personally liable for the debts of the corporation to the extent only of double the amount that is unpaid upon the stock held by him \* \* \*"

—and this failed bank was organized under this act, this section would seem to be conclusive of defendant's liability as a stockholder therein, but section 37, c. 4, Sess. Laws 1899 (General Banking Act), provides as follows:

"Any individual, firm or corporation, who shall receive money on deposit, whether on certificates or subject to check, shall be considered as doing a banking business and shall be amenable, to all the provisions of this act: Provided, that promissory notes issued for money received on deposit shall be held to be certificates of deposit for the purpose of this act."

And plaintiff in error contends that said section 37 remained a part of the banking law, although the same is not incorporated in the revising statute (Sess. Laws 1907-08). That a revising statute takes the place of all the former laws existing upon the subject with which it deals seems settled beyond controversy. 88 Cyc. 1079, lays down the general rule as to revision as follows:

"It is a familiar and well-settled rule that a subsequent statute revising the subject-matter of the former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former \* \* \* [citing numerous decisions from a great many states, United States, and England]. This rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the Legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions mentioned in the latter act as the only ones on that subject which shall be obligatory." *Mack v. Jastro*, 126 Cal.

130, 58 Pac. 372; *State v. Conklin*, 19 Cal. 501; *People v. Thornton*, 186 Ill. 162, 57 N. E. 341; *Roche v. Jersey City*, 40 N. J. Law, 257; *Bracken v. Smith*, 39 N. J. Eq. 169.

Same volume, p. 1080:

"Where a statute is revised, some parts of the original act being omitted, the parts which are omitted cannot be revived by construction, but are to be considered as annulled, provided it clearly appears to have been the intention of the Legislature to cover the whole subject by the revision."

See numerous authorities cited in note 52, same page.

"When a statute is revised, and a provision, contained in it, is omitted in the new statute, the inference is that a change in the law was intended to be made. If the omission was by accident, it belongs to the Legislature to supply it." *Buck v. Spofford*, 31 Me. 34.

These acts are discussed in *Smock v. Farmers' Union State Bank*, 22 Okl. 825, 98 Pac. 945, an opinion by Justice Hayes, wherein it is said:

"The question in this case, then, is not one of legislative power, but of legislative intent, and we must determine the nature of House Bill No. 615 and its effect upon the former laws pertaining to the incorporation of banks and the control and regulation thereof. There is nothing in the title of this act to indicate that it is a revising statute, nor is there any expression in the act declaring it to be such a statute; but a careful comparison of this act and its contents with chapter 8, *Wilson's Rev. & Ann. St. 1903* (chapter 4, *Sess. Laws 1899*), and the acts of the Legislature subsequently enacted, discloses that this act is principally a restatement in a correct and improved form of the laws contained in that chapter and in the subsequent acts of the Legislature. There are, it is true, some material changes, but this does not destroy the nature of the act as a revising act, and it clearly appears from the subject-matter of the act that it was intended to take the place of all the former laws existing upon the subject with which it deals. *Hudson v. Ely*, 36 Okl. 576 [129 Pac. 11]. In *Bartlett et al. v. King*, 12 Mass. 545, 7 Am. Dec. 99, the court said: 'A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former.' This language is quoted in *Lewis' Sutherland on Statutory Construction*, vol. 1, p. 515, as stating the rule to be that the effect of a statute of revision, without express words repealing previous statutes, when it is apparent that the Legislature intended that the new act should cover the entire subject embraced in all the former statutes, is to repeal said statutes, both as to those parts that are repugnant and those parts that are not repugnant to the new act. The act under consideration, however, contains the following repealing clause: 'All acts and parts of acts in conflict herewith are hereby repealed.' This clause, inserted in acts other than revising acts, neither adds to nor lessens the repealing force of the act. *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656. But, when it is inserted in a revising act, the courts are not uniform in their holding as to its effect. The text on *Statutory Construction*, above quoted, states the rule, however, as follows: 'If the new act is intended as a revision and substitute for the former act or acts, the general rule applies, and the former act or acts are repealed in toto, though they may contain parts or provisions which are not embraced in the new act and are not repugnant to its provision.' *Lewis' Sutherland on Statutory Construction*,

vol. 1, p. 522, citing *Attorney General v. Parrell*, 100 Mich. 170, 58 N. W. 839; *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320; *State v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728. House Bill No. 615 covers the entire grounds of said chapter 8, *Wilson's Rev. & Ann. St. 1903* (chapter 4, *Sess. Laws 1899*) and of the four subsequent acts of the Legislature above referred to. It pertains to the same general subject-matter, and seeks to accomplish the same general purpose, and in the main is a re-enactment of those statutes in the same language, and we are therefore of the opinion that said act was intended by the Legislature as a substitute for all the laws then existing upon the subject-matter dealt with in that act, and that said former laws were repealed by it."

But, assuming that this section was not repealed by said revision, there is no merit in the contention that, as the corporation in which defendant was a stockholder was doing a general banking business, defendant's liability as such is fixed by section 11 of the *Banking Act* (*Laws 1899*, c. 4) and section 9 of the *Revising Act* (*Laws 1907-08*, c. 6), both of which read:

"The shareholders of every bank organized under this act shall be additionally liable for the amount of stock owned, and no more."

[2] In other words, the contention is that, although this failed bank was organized under the *Trust Company Act*, which provides that stockholders of a company organized thereunder shall be personally liable for the debts of the bank to the extent only of double the amount unpaid upon this stock, yet, by reason of the fact that this company was doing a banking business in addition to a trust company business, his liability as a stockholder was changed or rather fixed by the terms, not of the *Trust Company Act*, but of the *Banking Act*, sections 11 and 9, supra, so as to be to the extent of the amount of his stock. And this, too, in virtue of section 37, supra, of the original banking act. As stated, there is no merit in this for the obvious reason that the defendant, as a stockholder in the failed bank, was neither "an individual, firm or corporation" doing a banking business within the contemplation of that section. To hold otherwise would be to say, not that the corporation was doing a banking business as a corporation, but that the stockholders were doing the business as individuals. The term "individual" and "firm" doing a banking business have no reference to stockholders, and the term "corporation" does not include them; and this statute, declaring, as it does, that "corporation," whether incorporated under that act or not, doing a banking business, shall be amenable to all the provisions of that act, is not broad enough to cover stockholders, so as to fasten the liability upon this stockholder imposed by sections 11 and 16, supra. That such was not the intent of the Legislature is clear for the reason that, when the entire *Banking Act* was revised by chapter 6, *Sess. Laws 1907-08*, the Legislature recognized the fact that corporations organized



under the Trust Company Act were doing a banking business, and specific mention is made in many of the various sections of the said Banking Act of trust companies, and the language of the act was broadened so as to permit trust companies to continue in the banking business—now if the Legislature had intended that stockholders in a trust company, doing a banking business, should be liable the same as stockholders of a corporation organized under the Banking Act, they could easily have so provided by, for example, carrying section 37, *supra*, into the revision and amending it so as to read:

"Any individual, firm or corporation, and the stockholders thereof, who shall receive money on deposit \* \* \* shall be amenable to all the provisions of this act, including the liability of stockholders: Provided. \* \* \*"

But the Legislature made no such provision, and the word "corporation," as used in section 37, *supra*, is not broad enough to include stockholders. In *Park Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008 a certain warehouse company was a corporation of the state of New York, incorporated under a certain act of the Legislature of that state. Section 9 of a certain chapter of the act (Laws 1872, c. 701) provided:

"The corporation hereby created shall possess all the general powers and privileges, and be subject to all the liabilities, conferred and imposed upon corporations organized under and in pursuance of" another act.

The corporation never made and published a report as required by section 12 of that act (Laws 1848, c. 40) which report was to be signed by the president and a majority of the trustees and verified by the oath of the president or secretary. One Squires was president, and one Remsen was a director and trustee of the company. A certain firm doing business in New York made two promissory notes to the order of themselves and indorsed them in blank, which were thereafter indorsed by the warehouse company; the same being made by the president of the company without the knowledge of Remsen or the other directors. Section 12, referred to, provided that, for failure to file the report, the trustees "shall be jointly and severally liable for all the debts of the company, then existing, and for all that shall be contracted before such report shall be made." In a suit against the warehouse company as indorser of the notes, the court held that it did not become indebted to the plaintiff by reason of its indorsement. In seeking to charge Remsen, as trustee, with the debt of which the promissory notes were the basis, speaking to section 12, *supra*, the court said that, before any party should be held bound by such provisions, it must appear that the Legislature of the state had rendered him subject thereto. In passing, the court said:

"The contention is that section 9 of the charter of the warehouse company in effect incorporates said section 12 into such charter, but the

provision of section 9 is that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the act of 1848. It is the corporation which is given the powers and privileges and made subject to the liabilities. Does this carry with it an imposition of liability upon the trustee or other officer of the corporation? The officer is not the corporation; his liability is personal, and not that of the corporation, nor can it be counted among the powers and privileges of the corporation. How, then, can it be contended that a provision in a charter that the corporation thus chartered shall assume all the liabilities imposed by a general statute upon corporations carries with it a further provision of such general statute that the officers of corporations also assume, under certain conditions, the liabilities of the corporation? Does one, by becoming an officer of a corporation, assume all the liabilities resting upon the corporation? Is not his liability of a distinct and independent character and dependent upon other principles? \* \* \* The term 'corporation' does not include stockholders, and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders"—and affirmed the judgment of the circuit court holding the defendant not liable.

A careful examination of the trust company laws and of the banking laws discloses the fact that both may do a general banking business and are subject to the control and supervision of the bank commissioner. The principal differences are: First. That the trust company has authority to accept and execute trusts, as set forth in the second to ninth paragraphs, inclusive, of section 4, art. 5, Laws 1901, while a bank is limited to a general banking business. Second. The capital stock of a bank in a city of more than 10,000 inhabitants cannot be less than \$25,000, all of which must be fully paid up, while the capital stock of a trust company cannot be less than \$200,000, at least one-half of which must be actually paid up. Third. A shareholder of any bank organized under the Banking Act is additionally liable for the amount of stock owned, and no more, while a stockholder of any trust company, organized under the Trust Company Act, is personally liable to the extent only of double the amount that is unpaid upon the stock held by him.

Banks and trust companies are corporations, and each are regarded as legal entities. They have a separate existence from the persons who control them. There is said to be no identity between the owners and the holders of the stock and the corporation itself. The corporation is the real, though artificial, person substituted for the natural persons who may procure its creation and be financially interested therein. Every such corporation must be organized or incorporated for a particular purpose. Such purpose is usually expressly stated in the act of the statute giving life to the corporation. The Constitution or the statute fixes the liability of the stockholders of a corporation, and in this case the liability prescribed by the statute is, in its nature, contractual. The Legislature prescribed that the liability of a stock-



holder in a trust company should be double the amount that is unpaid upon the stock by him held. When the defendant purchased this stock he became the equitable owner of that much corporate property, but the power to transact business under the charter could be exercised only by the corporation. The defendant assumed all of the liabilities imposed by the statute upon him as a stockholder in a trust company. His contract was that he would pay the par value of the stock by him owned. He had therefore complied with every condition of his contract, and the petition does not state a cause of action against him.

The judgment of the trial court is affirmed.

KANE, C. J., and TURNER and BLEAKMORE, JJ., concur.

RIDDLE, Justice (dissenting). I am unable to agree with the reasoning and conclusion in the opinion upon rehearing of the majority of the court. Owing to the importance of the question involved, as affecting both the state and the defendant, as well as marking the beginning of what I deem a new policy affecting corporations generally, especially the basic principles of the bank guaranty law, I deem it my duty to set forth my views in detail.

In preparing the original opinion I examined the authorities cited by both parties, and made an independent investigation of many others, and reached a conclusion which I believed was unquestionably the law. The opinion was submitted to the full court, and after due consideration was concurred in by all of the members thereof, with the exception of Justice Dunn, and his dissent was not sufficiently strong to induce him to write a dissenting opinion. Whatever doubt existed in my mind as to the soundness of the conclusion reached was removed when the older members of this court heartily concurred therein. The original opinion remained the law of this case for more than three months; and as no new ideas were advanced, and but little additional authority cited, I see no reason to change my views. If the conclusions reached and concurred in by the other justices were sound, and correct principles of law enunciated, they are still sound, and the law announced should remain the law of the case.

I am sure it is the desire of every member of this court to reach a proper conclusion and decide the law as it actually is, regardless of the consequences. We should follow the law as our sovereign guide; the law as announced upon the highest authority; the law as it is written, interpreted, and construed according to its plain letter and true spirit; the law as construed by broad common sense, as applied to the subject-matter under consideration.

The opinion on the petition for rehearing

rests almost solely as a basis upon section 16 of the act of the Legislature of 1901, which we designate as the Trust Company Act, and which reads:

"Each stockholder of a company organized under this act shall be individually and personally liable for the debts of the corporation to the extent only of double the amount that is unpaid upon the stock held by him."

While section 37 of chapter 4 of the Session Laws of 1899 of the General Banking Act was considered, yet this whole chapter, regulating the banking business, was dismissed by the court by holding that said section was not broad enough to include stockholders. So far as material here the section reads:

"Any individual, firm, or corporation who shall receive money on deposit, whether on certificates or subject to check, shall be considered as doing a banking business and shall be amenable, to all of the provisions of this act," etc.

In my judgment it is immaterial, so far as the rights of the parties in this litigation are concerned, whether this section ever existed; to reach a proper and just conclusion the issues must be determined upon much broader grounds.

In addition to the fact that the opinion on rehearing is based almost exclusively on section 16 of the Trust Company Act, *supra*, the conclusion reached shows that the liability sought to be recovered in this case is considered as a penalty fixed by the statute and not one growing out of a contract. Although the writer of the opinion states that the liability is "contractual," yet the conclusion and reasoning show it was considered a penalty. The main authority relied upon is the case of *National Park Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008. In preparing the original opinion of the court my conclusion was that this case was inapplicable for two reasons: First, as set forth therein, that the highest court of New York had held that the liability sought to be recovered against the trustee was not a debt of the corporation, and therefore there could be no recovery against the trustee, as the corporation did not owe the debt. The second reason is that the case proceeded wholly on the theory that the liability sought to be recovered was a penalty, which the record in the case shows was correct. Mr. Justice Brewer, in concluding the opinion, uses the following language:

"And, in the absence of any controlling decisions, we are unwilling to hold that a provision of a general statute imposing a personal liability on trustees or other officers is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under such general act. Something more specific and direct is necessary to burden an officer of the corporation with a penalty for omission of duty."

It will be seen that this was clearly a penalty imposed for the omission of duty by an officer. But suppose the liability sought to

be recovered in that case grew out of a contract, in which event it must be held that the defendant assented to the same, then it is clear that the decision and language of Justice Brewer would have been different. The court further proceeds upon the theory that the general laws applicable to the subject did not enter into and become a part of the charter or articles of incorporation under which the Columbia Bank & Trust Company transacted its business; and, proceeding under a false promise, necessarily an erroneous conclusion was reached.

It is admitted both by the demurrer and in the brief of counsel for the defendant that the Columbia Bank & Trust Company was a banking corporation and was at all times during its existence engaged in the general banking business, and we must assume that it enjoyed all the privileges, rights, and had all the protection of other state banking institutions. On page 47 of the brief of counsel for the defendant, we find this admission:

"I admit that the Columbia Bank & Trust Company was a corporation doing a banking business, and in the ordinary sense of the term was a banking corporation."

The first point that naturally challenges the attention of the court, in view of this clear admission, is: Why should the Legislature make such an unwarranted and inequitable discrimination between banking corporations organized under the Trust Company Act and those organized under the General Banking Act? What was the controlling influence that brought about this legislation that the Legislature should make such an unreasonable discrimination, if in fact it was the intent of that body to relieve stockholders doing a general banking business, and who were members of a banking corporation organized under the Trust Company Act, from a liability imposed upon stockholders of other banking institutions doing exactly the same kind of banking business, organized under the general banking law and receiving no more benefits or protection? What were the evils sought to be remedied—the blessings intended to be bestowed.

The only reason which has been suggested is that a trust company was required to have a much larger capital than a bank; yet, if the contention of the defendant be true, trust companies were permitted to transact all the business usually transacted by trust companies, and in addition thereto engage in a general banking business without any additional capital from other trust companies, and receive all the benefits and protection of the general banking law as well as the trust company law, without assuming any of the burdens or assenting to any of the liabilities imposed under the general banking law. This, in my opinion, is too narrow and technical a construction of the statute, and such an intent should not be attributed to the Legislature, if it can be avoided.

The opinion of the court overlooks and

ignores certain well-established principles of law, which, if adhered to, greatly simplify the questions involved.

Section 47, art. 9, of the Constitution provides:

"The Legislature shall have the power to alter, amend, annul, revoke, or repeal any charter of any corporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the incorporators."

Section 1255 of Comp. Laws 1909, of the laws enacted by the Legislature of 1893, reads:

"Every grant of corporate power is subject to alteration, suspension or repeal, in the direction of the Legislature."

It is undebatable that under this reservation the Legislature could at will make any reasonable amendment to a charter or franchise of any corporation without the consent of the incorporators. It is also a well-settled principle of law that the provisions of every general law applicable to the business or subject-matter of any corporation enters into and becomes a part of the franchise or charter, and that the corporation and stockholders are controlled by and subject thereto. The liability sought to be recovered of the defendant in this case being contractual and not a penalty, section 37 of the General Banking Law of 1899 was broad enough to include both the corporation and the stockholders; or, in other words, I think it was the intent of the Legislature expressed in this section, considered in connection with other provisions, that, before a corporation or the incorporators should receive the benefits and protection of the General Banking Act, it was necessary that they should comply with all of the provisions of that act and, by accepting the benefits and protection thereof, should necessarily assent to the liabilities imposed. But waiving this point, and discussing the proposition as though this provision had never been a part of the general banking law. Prior to 1905 corporations organized under the Trust Company Act were not authorized to receive money on general deposit, but in the latter year this law was amended permitting same.

There are many authorities holding that a corporation receiving money on general deposit is, in the ordinary acceptance of the term, doing a banking business; however, it is unnecessary to waste any time in defining a bank or the banking business, in view of the admission in this case that the Columbia Bank & Trust Company was at all times engaged in the banking business, and in the usual meaning of the term was a banking corporation.

The amendment to the trust company law extended the charter of the Columbia Bank & Trust Company, authorizing it to receive

money on general deposit, which also had the effect of permitting a general banking business, upon condition, however, that it comply with and be subject to the provisions of the general banking law. Section 11 of the Banking Act of 1899 (section 252 of Wilson's Statutes) provides:

"Stockholders of every bank organized under this act shall be additionally liable for the amount of stock held, and no more."

Section 17 of the Banking Act of 1899, (section 258 of Wilson's Statutes) provides:

"It shall be unlawful for any individual, firm or corporation to transact a banking business, or to receive deposits except by this act authorized any person violating any provision of this section, either individually or as an interested party in any association or corporation, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined in a sum not less than three hundred or more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment."

It will be seen under this section that not a dollar could the Columbia Bank & Trust Company receive on general deposit without first complying with all of the provisions of the Banking Act, and it cannot be said that this section only applies to the corporation, and that it does not include the officers and stockholders.

Reading section 37 in connection with section 17, it is clear to my mind that it was never intended that a trust company should engage in the general banking business without it and its officers and stockholders being subject to the general banking law. But, waiving this point, still under the general law and the well-recognized principle of construction, when the Columbia Bank & Trust Company, through its officers, filed its articles of incorporation and voluntarily engaged in the general banking business, every provision of the General Banking Act regulating the banking business was applicable to the Columbia Bank & Trust Company and became a part of and must be read into its charter. There is but little diversity of opinion upon this proposition.

Quoting from volume 1 of Beach on Corporations, § 146, p. 271:

"So all existing statutes or charter provisions imposing additional liabilities upon stockholders for the corporate debts enter into and become a part of contracts between the company and its creditors, and the obligations thereby imposed are not to be impaired by a repeal of the statute or an amendment to the charter; such legislation operating only upon subsequently contracted debts. But when the liability imposed is in the nature of a penalty it may be abolished even in respect to claims arising prior to the enactment of the statute, for there can be no vested right to the enforcement of a penalty."

See Cook on Corporations, vol. 1, § 2; *Breltung v. Lindauer*, 37 Mich. 217; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 148; *Id.*, 86 Mo. 466.

Quoting from the case of *Corry v. Baltimore*, 196 U. S. 466, at page 477, 25 Sup. Ct. 297, at page 300, 49 L. Ed. 566, at page 562, it is said:

"Whilst it is true that the liability of the non-resident stockholders in the case before us, as enforced by the laws of Maryland, was not directly expressed in the charter of the corporation, it nevertheless existed in the general laws of the state at the time the corporation was created, and, be this as it may, certainly existed at the time of the extension of the charter. This is particularly the case since the Constitution of Maryland for many years prior to the extension of the charter of the transportation company contained the reserved right to alter, amend, and repeal. From all the foregoing, it resulted that the provisions of the general laws and of the Constitution of Maryland were as much a part of the charter as if expressly embodied therein."

Quoting from the case of *Sherman v. Smith*, 1 Black, 587, at page 593, 17 L. Ed. 163, at page 167:

"According to the fifteenth section, the association was authorized to establish a bank of discount, deposit, and circulation, 'upon the terms and conditions, and subject to the liabilities, prescribed in this act.' It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities, than those prescribed in the general charter. Now, the thirty-second section, which reserved to the Legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions or rules of liability prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system."

In the case of *Maine Central Rd. Co. v. State of Maine*, 96 U. S. 499, 24 L. Ed. 836, Mr. Justice Field, delivering the opinion, stated:

"It follows that the limitation of the taxing power of the state to a portion of their net income prescribed in the charters of the old companies ceased upon their consolidation into the Maine Central. When this new company came into existence, it became subject to the provisions of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter 'be liable to be amended, altered, or repealed,' etc."

From the statutes and the authorities quoted it is clear that every provision of the General Banking Act of 1899 applicable to the banking business became a part of and entered into the charter of the Columbia Bank & Trust Company.

On May 26, 1908, there was passed by the Legislature a general law which is properly termed a revising act or a substitution for all the laws governing the banking business in Oklahoma. A quotation from a few of these provisions applicable to this case will show that the defendant is equally liable under this law after it took effect. We must not lose sight of the fact that on the date this law took effect the Columbia Bank & Trust Company under the admitted facts was engaged in the general banking business and was, in the usual acceptance of that term, a

banking corporation, and so continued to do a general banking business. This law, so far as applicable to the business carried on by the Columbia Bank & Trust Company, must be regarded as an amendment to its charter.

Some of the provisions of the Banking Act of May 26, 1908, applicable here, are as follows:

"And provided, further, that all banking institutions now organized as corporations doing business in this state are hereby permitted to continue said business as at present incorporated; but in all other respects their business, and the manner of conducting the same, and the operation of said bank, shall be carried on subject to the laws of this state, and in accordance therewith: And provided, further, that no bank, except those that have complied with or that may be organized under the laws of this state relating to trust companies, shall engage in any business other than as authorized by this act. And whenever it shall appear from the reports made for the preceding year by such banking corporation that the total deposits are more than ten times the amount of its paid up capital and surplus, deposits of other banks not included, the bank commissioner shall have power, and it shall be his duty, to require such bank within thirty days to increase its capital or surplus to conform to the provisions of this chapter, or shall cease to receive deposits."

This provision authorized banks organized under the Trust Company Act and those organized under the general banking law of Oklahoma to continue business on the same basis and subject to all the provisions of the banking law.

Section 320, Comp. Laws 1909, reads:

"There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this state for the purpose of creating a depositors' guaranty fund equal to five per centum of its average daily deposits, during its continuance in business as a banking corporation."

This section also recognizes the right of banks organized under the trust company law to continue in business with the same rights and authority and be governed by the same laws as other banks organized thereunder.

Section 323 provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is insufficient to discharge its obligations to the depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 2 (320 of Comp. Laws 1909), the amount necessary to make up the deficiency, and the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company and all liabilities against the stockholders, officers, and directors of said bank or trust company and against all other persons, corporations, or firms such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

Part of section 326 reads:

"After the bank commissioner shall" take charge or "possession of any bank or trust company which is subject to the provisions of this act," etc.

Section 327 provides:

"Any bank or trust company which has complied with the provisions of this act shall be eligible to act as a depository of state funds, of any fund under the control of the state or any officer thereof, upon compliance with the laws of this state relating to the deposit of public funds."

Section 286 provides:

"Shareholders of every bank organized under this act shall be additionally liable for the amount of stock owned, and no more."

All of these provisions were enacted by the Legislature and became amendments to and a part of the charter of the Columbia Bank & Trust Company as fully and to the same extent as if they had been incorporated into the charter itself, and the bank, through its officers and stockholders, by accepting the profits and benefits and operating thereunder, necessarily accepted all of the burdens and assumed all the obligations imposed by said law.

Section 285, Comp. Laws 1909, provides:

A "violation of any of the provisions of this act by the officers or directors of any bank organized or existing subject to the laws of this state shall be sufficient cause to subject the said bank to be closed and liquidated by the bank commissioner and for the annulment of its charter."

Section 293, Comp. Laws 1909, of the provisions of the act of 1908, reads:

"It shall be unlawful for any individual, firm or corporation to receive money upon deposit or transact a banking business except as authorized by this act, or by the laws relating to trust companies. Any person violating any provisions of this section, either individually or as an interested party, in any association or corporation, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or both such fine and imprisonment."

It will be noted that the last section is practically the same as section 17 of the General Banking Act of 1899, supra, but amended by adding the following words: "Or by the laws relating to trust companies."

Under section 17 of the 1899 Banking Act, supra, a trust company could not then receive money upon deposit without complying with all the provisions of the general banking law. By this amendment a trust company bank, under its charter and under the provisions of the law relating to trust companies, could receive money on deposit without complying with the provisions of the banking law, but could not engage in the banking business without complying with the provisions of this law; otherwise there would be no law governing the banking business carried on by a bank organized under the trust company law.

The following authorities sustain the proposition that the statutes quoted became a part of the charter of the Columbia Bank & Trust Company without any formal action on the part of its officers:

Volume 2, Cook on Corporations, § 497, reads:

"A statute passed subsequent to the granting of a charter and increasing the liability of the stockholders on the stock for the debts already incurred is unconstitutional and void, unless the Legislature has reserved the right to alter or amend the charter. Under such a reservation the statute is legal and binding, although there are limits even to this reserved power, as will be shown hereafter"—citing *Ochiltree v. Railroad Co.*, 21 Wall. 249, 22 L. Ed. 546; *Smathers v. Western Bank*, 135 N. C. 410, 47 S. E. 893; *Stieffel v. Tolhurst*, 67 App. Div. 521, 73 N. Y. Supp. 1034; *McKee v. Chautauqua Assembly*, 130 Fed. 536, 65 C. C. A. 8.

Section 497, same volume:

"A statutory liability may be applied to existing corporations if they continue to do business"—citing *Gamewell v. Fire Ins. Co.*, 116 Ky. 759, 76 S. W. 862; *Bay State Gas Co. v. State*, 4 Pennewill (Del.) 497, 56 Atl. 1120; *Germer v. Triple state Co.*, 60 W. Va. 143, 54 S. E. 509.

Section 501:

"Under this reserved power, however, the Legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated and have gone into business under a charter which does not impose such liability. The exercise of this power by the Legislature in such a case is held to be only a repeal of part of the corporate franchise"—citing *Williams v. Hall*, 108 Ky. 21, 55 S. W. 706; *McGown v. McDonald*, 111 Cal. 57, 42 Pac. 418, 52 Am. St. Rep. 149; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *South Bay Co. v. Gray*, 30 Me. 547; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

In the case of *New York & New England R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, the court, speaking through Mr. Justice Fuller, states:

Where a statute provides that any corporation accepting its benefits thereby waives its exemptions from the power of the Legislature to amend its charter, the acceptance of the benefits of such a statute thereby works that change without any formal action on the part of the board of directors or stockholders.

In the case of *L. & N. R. Co. v. State*, 154 Ala. 156, 45 South. 296, it is stated:

A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit. Acquiescence may sometime grow out of his silence or delay under circumstances that called on him to dissent if he so intended. 2 Cook on Corporations, §§ 503, 504, and a long list of cases cited.

Quoting from 10 Cyc. p. 215:

"The acceptance of an amendment to a charter need not be proved by formal corporate action, but may be established by evidence of user thereunder (that is to say, by action by the corporation which could not be taken properly but for the amendment); and it may be inferred from such acts or omissions as would raise a presumption of acceptance in the case of a natural person. A presumption of acceptance arises where the grant is beneficial to the corporation or to the shareholders. \* \* \* Such an acceptance may be shown by showing the exercise by the corporation of the powers conferred by the amendment, by showing that the corporation has done particular corporate acts authorized by the amendment, but without which said acts would not have been authorized, by the fact that the officers of the corporation have exercised the powers conferred by it, or in general by any acts or omissions done or had by the corporation which are inconsistent with any

hypothesis save that of an acceptance of the amendment." A long list of cases cited.

And again:

"Where the new grant is beneficial in its aspect, it is thought very little is required to find a presumption of acceptance.

"And this rule applies when the powers are conferred by a general law which is declared applicable to any one of a class of corporations that may accept its provisions." *Goodin v. Evans*, 18 Ohio St. 150; *Kenton Co. v. Bank Lick Turnp. Co.*, 10 Bush. (Ky.) 529; *U. S. Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *People v. Law*, 34 Barb. (N. Y.) 494; *Beals v. Benjamin*, 29 How. Prac. (N. Y.) 101.

Quoting from the case of *St. John v. Iowa Bldg. & Loan Ass'n*, 136 Iowa, 455, 113 N. W. 866, 15 L. R. A. (N. S.) 508, the court states:

"Defendant had two courses open to it: One to quit business and settle up its affairs, and the other to comply with the law, amend its articles, and give to its members the benefit of the new law. It chose the latter course, and, having done so, it is in no position to say that the act under which we did these things is unconstitutional and void. *Durfee v. Old Colony & F. Co.*, 5 Allen [Mass.] 230; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 25 L. Ed. 961; *Union P. R. Co. v. U. S.*, 99 U. S. 700, 25 L. Ed. 496. \* \* \* Plaintiff expressed no dissent, but allowed the association to go ahead under the amended articles, incurring additional liabilities, paying their premiums, interest, and dues, and taking no steps to enforce their original contract. Under such circumstances, there was either an implied acceptance, or plaintiffs are estopped from denying an acceptance of the provisions of the new or amended articles. *Chubb v. Upton*, 95 U. S. 765, 24 L. Ed. 525; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Sparrow v. Evansville & O. R. R.*, 7 Ind. 369; Moreover, as the amendment in this case was beneficial to the members, assent will be presumed. *Commonwealth ex rel. v. Cullen*, 13 Pa. 133, 53 Am. Dec. 450; *Bangor O. & M. Co. v. Smith*, 47 Me. 34. \* \* \* Further claim is made that, as defendant's amended articles do not refer to existing contract, they were in no manner changed, and the new law does not apply. This position is also unsound, for it was the Legislature which made the change by the act in question, and, as defendant chose to accept the provisions of that act and to conduct its business thereunder, it cannot be heard to say that existing members may not take advantage of the law."

If, when the General Banking Law of 1908 took effect, the Columbia Bank & Trust Company had surrendered its former charter and secured formal articles of incorporation under this law, no one would question the liability of the defendant in view of the admitted facts. The question arises: Under the law, was this formal act necessary? The officers and stockholders of this bank at the time this law went into effect were engaged in the general banking business as fully and to the same extent as other banking corporations in the state, which they could continue only by conforming to all of the provisions of this law, or could cease the banking business and confine its business solely to that permissible and governed by the Trust Company Law. Under the law, every provision of the General Banking Act applicable to banking entered into and became a part of the charter under which this bank was

operating. In fact, the defendant's counsel in his oral argument conceded that the charter of the corporation must be read and construed in connection with the general laws upon the subject. This doctrine is clearly upheld in the case of *Memphis Bank v. State of Tennessee*, 161 U. S. 186, 16 Sup. Ct. 468, 40 L. Ed. 664, for the court stated:

"The effect of a state law giving to a company, having in its charter the right to receive money in trust or otherwise, the right to do a banking business is to grant a new charter to the extent of granting banking powers, and the company, if it avails itself of the privileges mentioned in such law, takes them subject to the constitution and laws then in force."

The Columbia Bank & Trust Company received all of the privileges, the protection, and the benefits under this law as fully as if it had secured and filed formal articles of incorporation thereunder, and why should it and its stockholders and officers not be held to have assumed the burdens and assented to the liabilities imposed therein? The difference is a mere matter of form; the substance is the same.

One of the reasons insisted upon by counsel for the defendant upon the petition for rehearing why section 37 of the General Banking Laws of 1899 did not apply to the stockholders is that this section only provides that the "corporation" shall be considered as doing a banking business and shall be amenable to all of the provisions of this act, and hence it was not broad enough to include stockholders; that the corporation is a legal entity, distinct and separate from the stockholders. And this contention is upheld and adopted in the opinion of the court. While, as a general rule, and for many purposes, the corporation is regarded as a separate legal entity from that of the stockholders, yet in recent years, since corporations have so multiplied and grown into every avenue and fiber of our commercial life, and often the incorporators who are the life and strength, and through whom the corporation only can and must act, have sought to take shelter behind the corporation and use it as a means of protection and a shield to perpetrate many wrongs and to hinder and defeat justice, courts have had a tendency to disregard this distinction and denominate it a mere legal fiction; and there is much reason for this position.

Speaking on this subject, Mr. Coon on Corporations, § 6, states:

"But there are occasions where the courts will ignore the corporate existence and will hold that its acts are the acts of its stockholders, and vice versa, the same as in a partnership. The New York Court of Appeals said: 'We have of late refused to be always and utterly trammelled by the logic derived from the corporate existence where it only serves to distort or hide the truth.' *Anthony v. American Glucose Co.*, 146 N. Y. 407 [41 N. E. 23]."

Mr. Thompson in his work on Corporations, vol. 1, § 10, speaking of the separate entity of corporations from stockholders, states:

"This separate existence is to a certain extent a legal fiction. Whenever necessary for the interest of the public or the protection or enforcement of the rights of the membership, courts will disregard this legal fiction and operate both upon the corporation and the persons composing it." See Morawats on Private Corporations, § 227.

The Supreme Court of Ohio, in the case of *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, recognized this distinction when it stated:

"So long as the proper use is made of the fiction that a corporation is an entity apart from its stockholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders (that is to say, by the persons united in one body), was done simply as individuals and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and effect the transaction of its business in the same manner as if the act had been clothed with all the formalities of a corporate act."

And again the court continued:

Other courts have recognized this doctrine that the so-called legal entity of a corporation is artificial and that the corporation is a fictitious person, and will be so recognized and treated when necessary to the ends of justice. *State v. Milwaukee R. R. Co.*, 45 Wis. 579. The New York Court of Appeals recognized this doctrine and said of it: "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech"—citing *People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23; *Des Moines Gas Co. v. West*, 50 Iowa, 16; *Kellogg v. Bank*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596; *C. R. R. Co. v. Miller*, 11 Mich. 166, 51 N. W. 981; *Terhune v. Bank*, 45 N. J. Eq. 344, 19 Atl. 377; *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; *First Nat. Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834; *Web Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663.

This court cannot afford to go on record announcing an unconditional rule to be applied under all circumstances, to the effect that a corporation is a legal entity, separate and distinct from its stockholders and officers, as the language in the opinion would import.

In this case it makes but little difference whether that rule is adhered to or not, so far as the rights of the parties are concerned, as they could and should be disposed of upon other grounds; yet it may well be considered a step towards putting in force a policy in this state which, if followed up, might in years to come result in much harm.

There is yet another well-recognized principle of law, somewhat related to those already referred to, which if adhered to must render the contention of the defendant untenable. It is settled beyond controversy

that where there is a law authorizing a corporation to engage in the banking business, and parties organize themselves together, assume the status of a corporation, and hold themselves out to the world as such, those who contract and deal with them as such corporation, when sued on such contract, will be estopped from defendant on the ground that they were not incorporated, or that it was irregularly organized; and likewise those holding themselves out as an organized corporation are estopped from defending or asserting that, as a matter of fact, they are not incorporated. It has been asserted that there is no contention of this kind in the case at bar, and therefore this argument and authority is inapplicable. It is contended, however, that notwithstanding the officers and stockholders of the Columbia Bank & Trust Company engaged in the banking business the same as other state banks, and conformed to all of the provisions of the banking law during the time it was in existence, yet, inasmuch as it was organized under the Trust Company Act, its stockholders cannot be held liable under the provisions relating to the double liability of stockholders, under the general banking law. In principle there is no reason why the law of estoppel should not apply to the stockholders in the latter instance as in the first.

It is clear from the statute that, notwithstanding the Columbia Bank & Trust Company was organized under the Trust Company Act, yet it is equally clear that, under the law relating to banking, it was authorized to engage in the general banking business the same as other state banks. The officers and stockholders did actually conduct a general banking business during its existence, in conformity to the general banking law. It and its officers and stockholders received the protection of this law and contributed to the support of the guaranty fund; they permitted the bank commissioner to pay its debts from the guaranty fund, which had been contributed by all the state banks, to the amount of at least \$200,000 and how much more the record does not disclose. Having received the protection, the fruits, and benefits of this law, and having operated under same, when the state seeks to collect the liability provided for thereunder they should be estopped from asserting that they were not organized under the banking law, but were only liable as provided for in the Trust Company Act. The principle of estoppel has been enforced in every court against individuals assuming similar positions towards each other, and has been enforced by this court against individuals under the same state of facts, and why it should not be applied in the present case I am unable to discover. This doctrine is sound, just, and equitable and supported by both reason and authority.

In the case of *Casey v. Galli*, 94 U. S. 680, 145 P.—25

24 L. Ed. 170, the Supreme Court of the United States laid down the rule as follows:

"There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made \* \* \* and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it"—citing *Eaton v. Aspinwall*, 19 N. Y. 119; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151; *Camp v. Byrne*, 41 Mo. 525; *Railroad v. Wilson*, 22 Conn. 435; *Ellis v. Schmock*, 5 Bing. 521; *McFarlan v. Ins. Co.*, 4 Denio (N. Y.) 392; *Rector v. Lovett*, 1 Hall (N. Y.) 213; *Wolcott v. Dooley*, 4 Allen (Mass.) 402; *Eppes v. Railroad*, 35 Ala. 33; *Hantramck v. Bank*, 2 Mo. 169; *Jones v. Type Foundry*, 14 Ind. 89; *Med. Int. Co. v. Harding*, 11 Cush. (Mass.) 285; *Hughes v. Bank*, 5 Litt. (Ky.) 47; *Nav. Co. v. Neal*, 3 Hawks (N. C.) 520.

Quoting from the case of *Aultman v. Waddle*, 40 Kan. 201, 19 Pac. 734:

"Further than that, these stockholders are not in a position to impeach the irregularity of the organization of the corporation, or to deny their liability as stockholders herein. Having organized themselves as a corporation, transacted business, and held themselves out to the world as such corporation, they cannot, when proceeded against, \* \* \* set up as a defense that the preliminary steps in the organization were irregular"—citing *Thompson on Liability of Stockholders*, § 887.

1 Thompson on the Liability of Stockholders, § —:

"Where the corporation whose existence is to be proved operates so as to derive its franchise from the general law, proof of its existence for the ordinary purposes of litigation is sufficiently made by showing a general law under which it might exist, and by showing the exercise on its part of a franchise which it might properly have acquired by an organization under the general law."

Many more authorities might be cited, but it is unnecessary.

In principle, there is no reason why the rule of estoppel should not be applied to the officers and stockholders of the Columbia Bank & Trust Company and the defendant estopped from defeating the liability sought to be recovered by reason of the acts of the officers and stockholders in this banking institution having conducted its banking business under the general law, of which this provision is a part.

The opinion of the court upon the petition for rehearing proceeds upon a wrong theory, overlooks the basic principles underlying the points involved, and the conclusion reached is erroneous.

The judgment of the trial court should be reversed.



(45 Okl. 376)

**McALPIN v. HIXON et al.** (No. 3816.)  
(Supreme Court of Oklahoma. Nov. 10, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 1071\*)—GROUND FOR REVERSAL—FINDINGS.**

Section 5017, Rev. Laws 1910, provides: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing, the conclusions of fact found, separately from the conclusions of law." *Held*, said statute is mandatory; and failure of the court to substantially comply with same, when requested, and judgment is rendered against the party making such request, constitutes reversible error, unless upon an examination of the entire record this court is of the opinion that substantial justice has been done.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

**2. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR—FINDINGS.**

Plaintiffs sued defendant upon two promissory notes. Defendant alleged failure of consideration; that the notes were obtained by misrepresentation, etc. Defendant's alleged defense was not supported by the evidence. The cause was tried before the court without a jury. Before the decision was announced, defendant requested the court to state in writing the conclusions of fact separate from the conclusions of law, which request was refused. *Held*, upon examination of the entire record, it appears that no substantial right of defendant has been affected. *Held*, further, that construing section 5017, Rev. Laws 1910, in connection with sections 4791 and 6006, *Id.*, no error affecting any substantial right of defendant was committed; and it is the duty of this court to affirm the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4036, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

Error from County Court, Beckham County; John C. Hendrix, Judge.

Action by H. O. Hixon and others against T. J. McAlpin. Judgment for plaintiffs, and defendant brings error. Affirmed.

Wilson & Tomerlin and E. E. Buckholts, all of Oklahoma City, for plaintiff in error. W. F. Mayer, of Elk City, and J. E. McMurtry, of Hammon, for defendants in error.

**RIDDLE, J.** The parties will be denominated here as they were in the trial court. Plaintiffs sued defendant upon two promissory notes in the sum of \$200 each. It appears that the notes were executed for the purpose of raising a bonus for paying for a right of way and an inducement to the Wichita Falls & Northwestern Railroad Company to build into Elk City. Defendant, in substance, alleged as a defense that plaintiffs, comprising a committee of citizens, conspired and confederated with the railway company to procure defendant and other citizens to contribute to a bonus for the purpose of the

location of the line of railroad, which location had already been made, determined, and ascertained; that the notes sued on were given as part of a contribution to said bonus, and were void and without consideration; that plaintiffs had collected large sums of money, including a note from plaintiff, in sufficient amount to discharge all obligations, if said obligations should be found to exist in favor of said committee. The balance sought to be recovered from defendant was for the sole and secret benefit of plaintiffs. It is alleged that, at the time the notes were executed, defendant was in a weakened condition of mind and body, on account of excessive use of intoxicating liquors; that he did not know and understand the effect, meaning, and consequence of his act, and while in such condition, which was known to plaintiffs, the notes were procured to be executed, said plaintiffs taking advantage of defendant's mental condition to procure the execution of said notes. These allegations were denied by plaintiffs. A jury was waived, and the cause was tried to the court. Judgment was rendered in favor of plaintiffs for the amount sued for, from which judgment defendant prosecutes this appeal.

The only question argued here is error of the court in refusing to make separate findings of fact and conclusions of law in writing. We have carefully examined the testimony in the record, and are of the opinion that defendant failed to make his alleged defense good; and had the cause been tried to a jury, upon motion for a directed verdict, it would have been the duty of the court to have sustained the same. The record discloses that, as the court was about to announce its opinion, counsel requested separate findings of fact and conclusions of law to be made in writing. The court stated, in response thereto, he would announce his decision and then would file findings of fact and conclusions of law. Counsel presented four questions, and requested the court to find thereon, as follows:

"(1) Does the court find that the contract sued on herein or any part thereof was procured through misrepresentation on the part of plaintiffs or either of them? (2) Does the court find that there were any changes made by the plaintiffs and permitted to be made by the railroad company in the bonus contract between the plaintiffs and the railroad company to enable the plaintiffs to perform which said contract the defendant is alleged to have executed the notes sued on in this case? (3) If the court finds that any changes were so made, does the court find that the same were consented to or made known to the defendant? (4) Does the court find that at the time of the execution of the notes sued on the defendant was drunk to such an extent that he did not know the nature and consequences of his act?"

To each of these questions, the court answered: "Not required to answer; covered by journal entry."

[1, 2] For a reversal of this cause, defendant relies upon section 5017, Rev. Laws 1910,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



as construed in the cases of *Smith v. Harrod*, 29 Okl. 3, 115 Pac. 1013, and *Insurance Co. of North America v. Taylor*, 34 Okl. 186, 124 Pac. 974, following the rule laid down in the case of *Briggs v. Eggan*, 17 Kan. 589. In construing this statute, the court in the cases cited seems to have stated the broad rule, to the effect that the statute is mandatory, and if a timely request is made of the court, which request is refused, and the decision and judgment of the court is against the party making such request, that such party would be entitled to a reversal of the cause on the grounds of substantial error having been committed. We are of the opinion that this is stating the rule too broad, and that the decisions of this court should be modified to the extent that if it appears affirmatively from an examination of the entire record, under sections 6005 and 4791, Rev. Laws 1910, that substantial justice has been done, then the error of the court should be held to be harmless. Or, to state it in another way, if the record and the evidence are such that it was the duty of the court to render judgment for the party in whose favor the same was rendered, then the party complaining could not be prejudiced by reason of the court's failing to make separate findings of fact and conclusions of law; and the cause should be affirmed under sections 6005 and 4791, Rev. Laws 1910, *supra*. This, in effect, as applied to this case, is equivalent to holding that the record presents no question, other than a question of law. The Supreme Court of Kansas seems to have followed the rule laid down by the Supreme Courts of Ohio, California, and Michigan. Under the statute in California, as shown from the decisions, the court was required to make separate findings of fact and conclusions of law, without the request of either counsel; and that statute was held to be mandatory; and, upon the failure of the court to substantially comply with same, there was no substantial foundation for a judgment. This, in effect, was the holding of the Supreme Court of Ohio in the case of *C. & T. Ry. Co. v. Johnson*, 10 Ohio St. 591. It was held subsequently, however, in the case of *Oxford Township v. Columbia*, 38 Ohio St. 87, as follows:

"In disposing of this case, it is necessary to determine two questions: (1) The plaintiffs requested the court to state separately, in writing, the conclusions of law and fact. That request was made under the statute, which provided: 'Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.' Civil Code, § 280; Rev. Stats. § 5205, note. This provision is one of much importance, and it is in no sense directory. That there was no proper compliance with the request is admitted; and it is clear to us that the action of the court in that respect

affords ground of reversal, unless it be shown that the plaintiffs were not prejudiced thereby. But we are of opinion that it is shown that there was no such prejudice as to call for a reversal on that ground. The record contains all the testimony offered on the trial, and objection is made that the judgment below is opposed to the weight of the evidence. In deciding the case, therefore, we necessarily ascertain the facts."

38 Cyc. p. 1954, after referring to the rule construing different statutes, states:

"Although the want of findings renders a judgment subject to vacation or reversal on proper proceedings being taken therefor, it does not make the judgment void, or subject to collateral attack; and in some cases the courts have refused to reverse where no prejudicial error was shown, as where the facts otherwise appeared of record"—citing the following cases: *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791; *Miller v. McCaleb*, 208 Mo. 562, 106 S. W. 655; *Umscheid v. Scholz*, 84 Tex. 265, 16 S. W. 1065; *Crocker v. Crocker*, 19 Tex. Civ. App. 396, 46 S. W. 870; *Settegast v. Blount* (Tex. Civ. App.) 46 S. W. 268; *In re Callahan*, 102 Wis. 557, 78 N. W. 750; *Schmits v. Schmitz*, 19 Wis. 207, 88 Am. Dec. 681; *In re Taylor*, 5 Ind. Terr. 219, 82 S. W. 727, 5 Ann. Cas. 226.

Again, 38 Cyc. p. 1962, states:

"The statutes and codes of civil procedure of the different states require that, in trials by the court without a jury, the findings of fact and conclusions of law shall be separately stated, upon the condition in most states that such separate statement be requested by one of the parties, and a failure to comply with this requirement is error, calling for reversal, unless it is not prejudicial to the parties, or unless the jurisdiction is one in which the requirement is treated as being merely directory."

In the former opinions of this court, it was correctly held that the statute under consideration is mandatory; but we are of the opinion that it should be construed in connection with sections 6005 and 4791, Rev. Laws 1910, and in any case where it appears from an examination of the entire record that the judgment is correct, and no error has been committed affecting the substantial rights of the party complaining, the case should not be reversed. This should be the rule in any case where the issue was submitted to the court without a jury, and the record is such, either from want of facts or that the evidence shows such a conclusive state of facts sustaining the judgment which would have warranted the court in directing a verdict in favor of such party, had the cause been tried to a jury. Or, to state the rule in another way, where the record discloses such state of facts that no practical benefit would result to either party, had the court made separate findings of fact and conclusions of law, then this court should not reverse the case. This is a reasonable and sensible construction of the statute, and is in harmony with the more liberal rules of procedure, which have been adopted, to the end of obtaining substantial justice.

Finding no prejudicial error, the judgment of the trial court is affirmed. All the Justices concur.

(45 Okl. 51)

SCHOCK, Okmulgee County Treasurer, et al.  
v. SWEET et al. (No. 6410.)

(Supreme Court of Oklahoma. Dec. 15, 1914.)

(Syllabus by the Court.)

1. TAXATION (§ 181\*)—PROPERTY SUBJECT—ALLOTMENT—PURCHASE.

The town lots involved were a part of the homestead allotment of a Creek freedman, which allotment, under section 16 of the Allotment Act (32 Stat. L. 503, c. 1323), was to be inalienable and nontaxable for a period of 21 years from date of issuance of patent. The act of Congress of March 3, 1903 (32 Stat. L. p. 996, c. 992), provides: "And provided further, that nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior." Under this law, the allottee made application to the Secretary of the Interior and caused the restrictions upon alienation of said land to be removed. At the date of the removal of said restrictions, section 19 of the act of Congress of April 26, 1906 (34 Stat. 144, c. 1876), was in force, which section provides: "That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the allottee." The land was platted into lots and blocks, and plaintiffs thereafter purchased said lots. Defendants placed same on the tax rolls, and assessed said property for taxation against plaintiffs. Plaintiffs filed their petition with the county commissioners, demanding that said lots be stricken from the tax rolls. Said petition was denied. Upon appeal to the district court, judgment was rendered for plaintiffs, restraining the collection of taxes on said property. *Held*, error, for the reason said property was not exempt from taxation after title passed from the allottee to plaintiffs.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 45; Dec. Dig. § 181.\*]

2. TAXATION (§ 181\*) — EXEMPTION — ALLOTMENTS.

Plaintiffs obtained title to the property involved through and by virtue of the provisions of the act of Congress of March 3, 1903, *supra*. They now seek to have exempted from taxation said property. *Held*, that except by virtue of the provision of the act of Congress of March 3, 1903, *supra*, plaintiffs could not have secured title to said property; that said act nowhere attempts to exempt said property from taxation; that the use to which said property has been appropriated is inconsistent with continuing the exemption from taxation. Therefore said property is subject to taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 45; Dec. Dig. § 181.\*]

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by Cornelia Sweet and others against Elmer E. Schock, Treasurer of Okmulgee County, and the board of County Commissioners of Okmulgee County. Judgment for plaintiffs, and defendants bring error. Reversed, with directions to render judgment for defendants.

Orlando Swain and J. W. Childers, both of Okmulgee, for plaintiffs in error. Merwine, Newhouse & Albertson, of Okmulgee, for defendants in error.

RIDDLE, J. Defendants in error will be denominated the plaintiffs, and the plaintiffs in error the defendants. Plaintiffs are owners of certain lots in what is known as the Capital Heights addition, Nos. 1 and 2, in the city of Okmulgee, being the same lots referred to in the agreed statement. These lots were part of the homestead allotment of Sarah Smith, a Creek freedwoman. The lots were assessed and placed on the tax rolls by the authorities of Okmulgee county for the year 1912. Plaintiffs filed their petition with the board of county commissioners in November, 1912, praying that said property be stricken from the tax list. Upon hearing said petition, the prayer was denied, and plaintiffs appealed to the district court. In the district court the cause was heard upon an agreed statement of facts. That part of said agreed statement material here is as follows:

"(1) That on the 23d day of April, 1904, the Creek Nation of Indians, by P. Porter, its principal chief, by deed of conveyance or patent, conveyed unto one Sarah Smith, a freedman citizen of said nation, who had been placed on the final rolls of the citizens and freedmen of said nation, the following described real estate, situated in the city of Okmulgee, Okmulgee county, state of Oklahoma, to wit: Lot three (3) of section seven (7), township thirteen (13) north, range thirteen (13) east, containing 41.82 acres, more or less. \* \* \*

"(2) That said real estate was conveyed to the said Sarah Smith as and for her homestead, and was so designated in said conveyance, and said conveyance, at the time of its execution and delivery, contained the express provision that said real estate described in said deed should be nontaxable for 21 years from the date of said deed.

"(3) That thereafter, on the 28th day of February, 1907, the restrictions on the alienation of said real estate having been removed by the Secretary of the Interior, upon the application and petition of Sarah Smith (as alleged in the defendant's answer, and set forth in the second cause of defense, contained in the amended answer of the defendant), the said Sarah Smith, by deed of general warranty, conveyed fee-simple title to one Nathan Boyd of the following of the above-described real estate: \* \* \*

And that said deed was filed for record with the register of deeds of Okmulgee county, Okl., and was by him duly recorded in the proper records of his office. It is further agreed that, at the time of said conveyance to the said Nathan D. Boyd of the lands above described, there were no improvements thereon, and that said deed contained no stipulation, reservation, or agreement that said land should be exempt from taxation.

"(4) That on the 1st day of May, 1907, the said Nathan Boyd, being the owner of said real estate last described, caused said lands to be surveyed, platted, and laid out into lots, blocks, streets, and alleys, all according to law, and filed said plat for record, designating the same as the Capital Heights addition to the city of Okmulgee, Okl., which said plat was duly accepted by the proper authorities for said city of Okmulgee, Okl., and said addition is now a part of and within the incorporated boundaries of said city of Okmulgee, Okl., and the same lies entirely within the lands so conveyed by the Creek Nation to the said Sarah Smith, as and for her homestead.

"(5) That the said Sarah Smith, after July 26, 1908, having conveyed a portion of her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

homestead to the said Nathan Boyd, as above set out, caused the remaining portions of said real estate in her said homestead, as aforesaid, to be surveyed, platted, and laid out into lots, blocks, streets, and alleys, all according to law, and the same was duly filed for record with the register of deeds of Okmulgee county, Okl., and said addition was designated as Capital Heights addition to the city of Okmulgee, Okl., and said Capital Heights second addition to said city of Okmulgee, Okl., is now a part of said city, and lies entirely within the incorporated limits of said city.

"(6) That each of the lots in each of said additions, numbered, designated, and tabulated below in this paragraph set out, have been placed by the assessor for said Okmulgee county, Okl., upon the tax duplicate of said Okmulgee county, Okl., and upon the tax duplicates of said city of Okmulgee, Okl., for taxation for the year 1912, for the valuations hereafter set forth, and a tax levied on each of said lots, as is set forth below, with the names of the owners, the valuation for taxation, the amount of the taxes charged for the year 1912, in Capital Heights addition No. 2 to said city. \* \* \*

The court, on the 2d day of February, 1914, rendered judgment reversing the order of the county commissioners and directing that the property be stricken from the tax rolls, and enjoined defendant Schock, treasurer of said county, his successors in office, from taking any steps toward the collection of any taxes, and from selling any of said property described in said proceeding. From this judgment, defendants prosecute this appeal by filing their petition in error with original case-made attached.

The assignments of error necessary to be considered are: (1) The court erred in not rendering judgment for plaintiffs in error upon the agreed statement of facts submitted to the court as the evidence in the case. (2) The judgment and decree is not sustained by the evidence and is contrary to the evidence. (3) Said judgment and decree is contrary to law.

[1] This record presents but one question for our determination, which is: Were the lots belonging to plaintiffs, which were originally parts of the homestead allotment of Sarah Smith, a Creek freedman, exempt from taxation in the hands of plaintiffs? This question involves the consideration of section 16 of the Supplemental Creek Agreement (32 Stat. L. 503), commonly known as the Allotment Act, under which said lands were allotted to Sarah Smith, together with the provision of the Indian Appropriation Act, herein referred to, and the act of April 26, 1906. Section 16 of the Creek Supplemental Agreement reads:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued

to each allottee for his homestead, in which this condition shall appear."

It is the contention of plaintiffs that, under this provision of the treaty, the exemption attaches to and runs with the lands in the hands of plaintiffs, who purchased from the original allottee. On the other hand, defendants contend that said exemption was intended only for the benefit of and as a personal protection to the allottees, and did not attach to and become appurtenant to the land; hence did not pass to plaintiffs. Defendants claim the authority and right to tax said property under section 19 of act of Congress of April 26, 1906, which in part provides:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

It is well to keep in mind the manner in which the restrictions upon alienation of this land were removed, and the authority of said Sarah Smith to place this land upon the market, and the source of plaintiffs' title. The Indian Appropriation Bill of March 3, 1903 (32 Stat. L. p. 996, c. 992) contains the following provision:

"And provided further, that nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Sarah Smith made application to the Secretary of the Interior under this provision of the law, and she was specifically authorized to convey the land for town-site purposes, as was done in this case. It is well to remember that the state of Oklahoma, as a sovereign, has plenary power to subject all property within her domain to taxation, except such property as may have been exempted by the Enabling Act, or unless restrained by the federal Constitution. If this property is not subject to the taxing power of the state, it must be by reason of some specific provision exempting it from taxation by a federal law or treaty with the Indian tribes, which provision the state has agreed to keep inviolate, or else is exempt by some provision in the Constitution. Section 1 of the Enabling Act provides:

"Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

Section 22 of said act provides:

"That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act."

Article 10, § 6, of the Constitution, after naming certain property exempt from taxation, provides:

"And such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws."

The Enabling Act requires the state, through its constitutional convention, to adopt the Constitution of the United States, which was done by article 25, § 44, of said document; and it also provided that the people, through said convention, should irrevocably adopt the Enabling Act, which was done by article 25, § 45, Const.

Plaintiffs rely, principally, to sustain their contention upon the cases of *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949, and *State v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303. The case of *English v. Richardson*, supra, involves the exemption under the Creek treaty. The court, in substance, in *Choate v. Trapp*, supra, announced that the exemption from taxation provided for in the Chickasaw and Choctaw agreement was a property right, which Congress could not abrogate. The court, in the opinion, said:

"The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma."

In considering the purpose and effect of the agreements between the government and these different tribes of Indians, and their effect upon the state, we must not lose sight of the fact that the state is bound only by such agreements wherein it specifically consented to be bound; and, except where it expressly agreed to exempt Indian property from taxation, the right to tax remains unimpaired. The Supreme Court, in *Choate v. Trapp*, supra, held that the exemption from taxation for a certain period constituted a property right, which the federal government could not withdraw or abrogate; and it necessarily follows that the state was bound by such exemption by virtue of accepting the Enabling Act, and by virtue of the provision contained in section 6, art. 10, of the Constitution, wherein it specifically agreed to exempt such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States government, or by federal laws while such provisions are in force and effect. We find in the agreement involved in the case of *Choate v. Trapp*, supra, a provision exempting from taxation lands granted by the federal government, which exemption the federal Supreme Court holds was a property right, and a right that Congress could not destroy. Certainly, under this construction of the federal law, this pro-

vision was in force and effect, and the state, by its Constitution, expressly agreed to exempt such property from taxation, so long as that provision remained in force and effect.

So it will be seen that the decision in *Choate v. Trapp*, supra, could not have reasonably been otherwise. But here we have an entirely different question; we are dealing with a different class of citizens, and one that is entitled to no protection, save and except that protection which every other citizen of the United States is entitled to receive. The provision as applied to these citizens must be strictly construed against granting the tax exemption; and, if we fail to find it granted in specific terms and expressed in language about which there can be no doubt, the exemption does not exist. In other words, an exemption from taxation is never presumed; but in all cases of doubt as to the legislative intent, except where the rights of Indians are involved, the presumption is in favor of the taxing power. *Allen v. Trimmer*, 144 Pac. 795 (recently decided, but not yet officially reported); *Wells v. Savannah*, 181 U. S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Delaware Railroad Tax Case*, 18 Wall. 206, 21 L. Ed. 888; *Hoge v. Railway Co.*, 99 U. S. 348, 25 L. Ed. 303; *Vicksburg R. R. Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; *Pickard v. East Tennessee R. Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051; *Wilmington, etc., R. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972.

On the other hand, from the foundation of our government, acts of Congress and agreements between the various Indian tribes have always been construed liberally in favor of the Indians. This rule applies to laws relating to taxes. It was said in the case of *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738:

"We must remember, in considering this subject, that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such. *Cherokee Nation v. Georgia*, 5 Peters, 1, 17 [8 L. Ed. 25]; *Elk v. Wilkins*, 112 U. S. 94, 99 [5 Sup. Ct. 41, 28 L. Ed. 643]; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484 [19 Sup. Ct. 722, 43 L. Ed. 1041]."

The general rule, as stated in 37 Cyc. 897, is as follows:

"Exemption from taxation granted by the Legislature to an individual or a corporation is not a franchise, nor is it an estate or interest inherent in or running with the particular property exempted; but it is a mere privilege personal to the grantee; and, unless there is express statutory authority therefor, the exemption will not pass to a successor of the corporation or to a person taking the property by sale, assignment, or by other transfer. So, in construing grants of exemption, they will be construed as personal and limited to the grantee, unless a contrary intention clearly appears."

Cases sustaining this text are cited from many of the states, and also from the Unit-

ed States Supreme Court, as follows: *Rochester R. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784; *Home Ins. Co. v. Tennessee*, 161 U. S. 200, 16 Sup. Ct. 476, 40 L. Ed. 670; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 16 Sup. Ct. 461, 40 L. Ed. 656; *Pickard v. East Tennessee R. Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051; *Chicago, etc., R. Co. v. Missouri*, 122 U. S. 561, 7 Sup. Ct. 1300, 30 L. Ed. 1135; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121; *Memphis, etc., R. Co. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Armstrong v. Athens County*, 16 Pet. 281, 10 L. Ed. 965.

There is no doubt that the primary purpose of the provision of the treaty exempting the homesteads of the members of the Creek Tribe of Indians from taxation for 21 years was for the sole benefit and protection of those Indians. Out of the 160 acres of land conveyed to each member of said tribe, it was thought wise by the government that each allottee should retain at least 40 acres as a homestead for a period of at least 21 years, or during such part of said period as such allottee might live; and the government in carrying out this policy, undertook to throw such restrictions and safeguards around each allottee as would protect him in the possession and title of his homestead for that period of time. Thus, in addition to prohibiting the alienation of the homestead for a period of 21 years, exemption from taxation was likewise granted for the same period and for the same purpose. This is made clear by Mr. Justice Brewer in the case of *Goudy v. Meath*, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130, where it was said:

"That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. \* \* \* But, while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation."

Congress recognized the fact that the power in the state to tax necessarily carried with it the power to destroy, and to enforce a payment of such tax by sale of the property, should it become necessary; and no doubt this was one reason for granting the tax exemption. This reason is not in conflict with the holding of the Supreme Court in the case of *Choate v. Trapp*, supra. The fact that Congress has placed this additional safeguard around the members of the Creek Tribe of Indians is not inconsistent

with holding that this exemption constituted a property right in the Indian. On the other hand Congress could have had no purpose in protecting this property from taxation in the hands of speculators or other noncitizens of the tribes. It would have been an unjust, unnatural, and unwarranted discrimination, which the federal government has always studiously refrained from making. Congress required the state to provide that the property of nonresidents should not be taxed at a higher rate than the property of residents of the state, and certainly Congress did not intend that the state should exempt the property of part of its citizens from taxation, when property of the same class of citizens similarly situated is taxed. In the case of *Commissioners of Miami County v. Brackenridge*, 12 Kan. 114, Mr. Justice Brewer stated:

"The object of the treaty, say the United States Supreme Court, 'was to hedge the lands around with guards and restrictions so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture, from a levy and sale for taxes, as well as the ordinary judicial levy and sale.' \* \* \* That purpose was effectually accomplished by the two provisions which stand side by side, one restricting leases and alienations, and the other exempting from seizure and sale. Neither should be carried further than is necessary to accomplish the purpose of the parties. When they stipulated that patents for the land might issue, 'subject to such restrictions respecting leases and alienations as the President or Congress of the United States may provide,' they contemplated restrictions simply on the Indian owners, and not on subsequent white purchasers. It was not thought that, after the title had passed from the Indians to the whites, there should be any restriction or limit to the latter's power of sale or lease. And, if the restriction was not to be carried beyond the period of Indian ownership, why 'should the exemption be?' The two provisions are parallel; they stand side by side, and are each general in their terms. They should be construed similarly, and with reference to the obvious intent of contracting parties."

Under the Constitution, the state would be unauthorized to exempt this land from taxation, should it undertake to do so. Section 5 of article 10 of the Constitution provides:

"The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects."

The Constitution of Minnesota contains a similar provision, and it is said by the Supreme Court of the United States, in the case of *Great Northern R. Co. v. Minnesota*, 216 U. S. 206, 30 Sup. Ct. 344, 54 L. Ed. 446:

"Now, when that purchase was made, the Territory had become a state, with a constitution expressly requiring the equal and uniform taxation of all real and personal property in the state upon a cash basis, and authorized the exemption from taxation of certain specified kinds of property, devoted to public and charitable uses; but, as we have seen, railroad property was not included among the properties that could be so exempted. It is therefore to be taken that the Constitution of the

state, after it went into operation in 1858, required all railroads to be taxed by an equal and uniform rule and on a cash basis. The state, having, by its purchase, become reinvested in 1860 with all the rights, franchises, and privileges granted to the Minnesota & Pacific Railroad in 1857, could, speaking generally, have disposed of such interests at will, but clearly it could not have disposed of the interests, acquired by its purchase, in any manner that was inconsistent with, or which would have rendered nugatory, the requirements or injunctions of the state Constitution. \* \* \* The Legislature of the state could not, after the state Constitution went into operation, have reinvested the old railroad company with such property, rights, immunities, or franchises, or have transferred them to a new corporation or to a consolidated railroad corporation created by the union of prior corporations, accompanied by an exemption from taxation that was inconsistent with the Constitution. \* \* \* It was not competent for the Legislature, after the state Constitution went into operation, to agree, for the state, that the payment of any given per cent. of the gross earnings of the railroad corporation should be in lieu of all other taxation."

See *Trask v. Maguire*, 18 Wall. 409, 21 L. Ed. 938; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Louisiana & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Keokuk & Western R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450.

Thus it will be seen there is no provision in the federal laws or any agreement made with the Indian tribes requiring the state to exempt this property from taxation in its present condition. Neither has the state anywhere agreed to exempt it from taxation. On the other hand, the Constitution requires that this property be taxed uniformly with all other property of its citizens subject to taxation. The purpose for which the exemption was made has ceased to exist, and the exemption itself must fail. In construing all laws, it is the cardinal rule to ascertain the intent of the lawmakers. There is nothing in this provision of the agreement, or in any prior or subsequent act of Congress dealing with these Indian tribes, that evidences a purpose in Congress to grant an exemption from taxation of the property in question in the hands of third parties, who are not members of said Indian tribes. On the contrary, the provision of the act of April 26, 1906, expressly provides that the homesteads shall be nontaxable so long as the title remains in the allottee, which is equivalent to saying that, when the title passes out of such allottee, the land shall be subject to taxation. Conclusive evidence that it was not the intention of Congress to exempt this class of property from taxation when title and possession had passed from the allottee is found in section 30, subd. 24, of act of Congress of June 28, 1898 (30 Stat. 517, c. 517), commonly known as the Curtis Bill, which section provides:

"No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot

sold as herein provided shall constitute a lien on same till the purchase price thereof has been fully paid" to the nation.

The case of *State v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303, is relied upon as authority for sustaining the contention of plaintiffs. We are of the opinion, however, that this case has no application to the facts in the instant case. In that case the state was a party to the agreement and granted the exemption, and, as was held, for a valuable consideration, and in every respect constituted a valid contract which could not be abrogated on the part of the state, in that it was protected by the federal Constitution. Unlike the case at bar, the state of Oklahoma was a party to the agreement between the Creek Nation and the United States only to the extent that it agreed to exempt from taxation such property that was exempt by the federal laws, so long as such exemption remained in force; but when such exemption ceased to exist, for any reason, the state was under no further obligation to exempt this property from taxation.

[2] There is another reason why we are of the opinion that the contention of plaintiffs cannot be sustained, and that is: That the source of their title is in the appropriation bill of March 3, 1903, supra, permitting the allottee, Sarah Smith, to convert a part of her allotment into town-site property, with the approval of the Secretary of the Interior. It was upon her application that the restrictions upon her alienation of said land were removed. At the time this application was made, the act of Congress of April 26, 1906, was in full force and effect. Except under the act of Congress of March 3, 1903, supra, the allottee could not have alienated the lands in question; neither could plaintiffs have obtained any title to the land. Hence it may well be said that it is by virtue of and through this act of Congress that plaintiffs obtained their title. There is no exemption from taxation contained in this law; neither is any contained in the conveyances made to plaintiffs. The law is well settled that, where land is granted by a particular act, a tax exemption asserted under a prior act will not be upheld. *Armstrong v. Treasurer of Athens County*, 16 Pet. 281, 10 L. Ed. 965; *Lord v. Town of Litchfield*, 36 Conn. 117, 4 Am. Rep. 41; *Southwestern R. R. Co. v. Wright*, 116 U. S. 231, 6 Sup. Ct. 375, 29 L. Ed. 626; *Wilmington & Weldon R. R. Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Ford v. Delta & Pine Land Co.*, 164 U. S. 862, 17 Sup. Ct. 230, 41 L. Ed. 590; *Platt v. Rice*, 10 Watts (Pa.) 352. When the allottee made application to have the restrictions removed, with a view of disposing of said land for town-site purposes, she did so with knowledge of the fact that it would become taxable under the act of Congress of April 26, 1906, and may well be held to have impliedly, at least, consented to sub-

ject said land to such burdens. Congress never required the state to exempt this land from state taxation in its present condition; neither did the state agree to so exempt it. All parties dealing with this land dealt with full knowledge of the law. The purpose for which they secured its release from federal control, and the very use to which they expected to put it was wholly inconsistent with continuing the same free from taxation, and plaintiffs must be held to have consented to subject said property to state taxes. This is a reasonable and just construction, in harmony with equity and sound principles. It is likewise in harmony with the views of Justice Brewer, in the case of Commissioners of Miami County v. Brackenridge, *supra*, wherein it is said:

"No government can exist without revenue. There can be no revenue without taxation, and there can be no taxation without property. We claim, then, that the federal government, under the Constitution of the United States, has no power to dispose of the public lands, or to assent to the disposal of them to individuals in fee simple in such a way as to deprive the state of the exercise of its sovereign right to tax them. So long as the lands remain Indian lands, or so long as the government retains an interest in or control over them the state, by compact in the act of admission, is prohibited from exercising the taxing power in relation to them. But the moment the title passes out of the government and is vested in individuals, the lands become subject to all the laws of the jurisdiction where they are located."

We therefore hold that the property involved is not exempt from taxation; that the judgment of the trial court is contrary to law and erroneous, and must be reversed, with directions to set aside the judgment and render judgment for defendants.

It is so ordered. All the Justices concur, except KANE, C. J., absent and not participating.

(44 OKL. 459)

TODD et al. v. ORR. (No. 3463.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

1. NEW TRIAL (§ 1\*)—POWER TO GRANT—STATUTE.

Courts of general common-law jurisdiction have the inherent power of their own motion to set aside a verdict and grant a new trial on account of prejudicial error, when done at the same term of court at which the verdict was returned or judgment rendered; and the power will not be deemed to have been taken away by statute, unless intent to do so is clear.

(a) Long v. Board of County Commissioners, 5 Okl. 128, 47 Pac. 1063, announcing a contrary rule, overruled.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

2. JUDGMENT (§§ 298, 399\*)—PROCEDURE—VACATION DURING TERM.

A court of general jurisdiction has control over orders or judgments during the term at which made, and for sufficient cause may modify or set them aside at that term, and, when so set aside, the parties are remitted back to such rights and remedies as they formerly had, the

same as though the order or judgment vacated had not been made in the first instance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 582, 733, 759, 760; Dec. Dig. §§ 298, 399.\*]

3. TRIAL (§ 409\*)—JURISDICTION—CORRECTION OF ERRORS.

The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed, not alone by their solicitude for the rights of litigants, but also by the considerations of justice to themselves as instruments provided for the impartial administration of the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 970; Dec. Dig. § 409.\*]

4. JUDGMENT (§ 399\*)—SETTING ASIDE—VACATION OF ORDER—JURISDICTION.

Where a court, possessing the power to set aside a judgment, does so, for whatever cause, and no objection thereto is made or appeal prosecuted, the court's action becomes final, and cannot be attacked by motion filed more than three years thereafter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 733, 759, 760; Dec. Dig. § 399.\*]

5. JUDGMENT (§ 399\*)—VACATION—WAIVER OF ERROR.

Error of the trial court in setting aside and vacating a judgment, where the court has jurisdiction so to do, unless appealed from or otherwise reviewed according to the forms of law, cannot be availed of by the litigant prejudicially affected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 733, 759, 760; Dec. Dig. § 399.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by James W. Orr against Samuel K. Todd and another. Judgment for defendants, which was vacated on motion of plaintiff. From an order overruling defendants' motion to vacate all proceedings had therein since the rendition of the original judgment, defendants bring error. Affirmed.

S. M. Rutherford, of Muskogee, and O. S. Booth, Benj. F. Rice, and Thos. D. Lyons, all of Tulsa, for plaintiffs in error. Biddison & Campbell and Chas. B. Rogers, all of Tulsa, for defendant in error.

SHARP, C. On August 7, 1907, plaintiff instituted an action in ejectment against the defendants in the United States Court for the Western District of the Indian Territory. September 21st, thereafter, defendants filed their answer, and on the same day plaintiff filed his reply. Thereafter and on the 17th day of January, 1908, the case came on for trial before the district court within and for the county of Tulsa; said court being the legal successor of the United States Court for the Western District of the Indian Territory. The trial resulted in a verdict for defendants (which verdict was signed by but 9 of the 12 jurors trying the case). Thereupon and on the same day, judgment for the defendants was duly entered upon the verdict of the jury. On the day following, plaintiff

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



filed his demand in writing for a second trial, claiming the right thereto under authority of section 4792, Wilson's Rev. & Ann. Stat. 1903. On the 22d day of July, and at the same term of court, the court vacated and set aside the judgment theretofore rendered in said action, and directed that the case stand for trial at the next term of the court. No objection was made by counsel to the order vacating the judgment, and at the October, 1908, term the case was again heard upon its merits, and resulted in a verdict for the plaintiff. Motion for new trial was thereafter filed, and the hearing thereon continued until September 13, 1909, when said motion was sustained. No further proceedings of consequence were had in said action until the 27th of November, 1911, when defendants filed their motion to dismiss the cause for want of jurisdiction, alleging that the original order of July 22, 1908, vacating the judgment theretofore rendered, was void; the court being without jurisdiction in the premises. On the same day the motion was overruled, and, exceptions being saved, the case is brought here for review.

[1-4] In overruling the defendants' motion to vacate the proceedings had in said case since January 17, 1908, the court made the following order:

"The court further holds, in addition to vacating the judgment upon the grounds stated in the demand, that the court should, at this time, upon its own motion, enter an order setting aside and vacating the judgment theretofore rendered in the original case, for the reason that it appears from the face of the record that there was no sufficient verdict returned into court by the jury sitting upon said cause upon which a judgment could be predicated, and that the judgment so rendered at said term was wholly void and without any force or effect whatever, which is accordingly so ordered, considered, and adjudged."

This order, made more than three years after the order of July 22, 1908, by the court of its own motion, was coram non judge. The order vacating the judgment must stand or fall independent of the latter order assigning a new reason for the court's action. The latter added nothing to the original order except to furnish an additional ground for what had already been done. What we have said of the unauthorized act of the court in its final judgment is of minor importance, however, in view of the fact that our conclusion must rest upon the power of the court to vacate the judgment in the first instance.

Plaintiff's action, as we have seen, was one in ejectment, and was pending in the United States Court for the Western District of the Indian Territory upon the admission of Oklahoma into the Union as a state. The plaintiff, being the losing party in said action, was not entitled to a second trial as a matter of right. *Runyan v. Fisher*, 28 Okl. 450, 114 Pac. 717; *Iowa Land & Trust Co. v. Indian Land & Trust Co.*, 29 Okl. 308, 116 Pac. 769; *Campbell-Ratchiff L. Co. v. Klaus*, 31 Okl. 120, 120 Pac. 561. It was the contrary belief of the

court and doubtless of counsel both for plaintiff and defendants as the point was urged by the former, sustained by the court, and no objection thereto made by counsel for defendants. The effect, however, of the court's action, even though erroneous, was to vacate the original judgment and to open up the whole case for further proceedings. *Boynton et al. v. Crockett et al.*, 12 Okl. 57, 69 Pac. 869; *Langhorst v. Rogers*, 88 Ark. 318, 114 S. W. 915; 29 Cyc. 1028.

It has uniformly been held by this court that a cause of action pending and undetermined at the time of the erection of the state is to be tried or continued, as if no change in the form of government had taken place. *Freeman v. Eldridge*, 26 Okl. 601, 110 Pac. 1057; *Pac. Mut. Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026; *Missouri, K. & T. Ry. Co. v. Walker*, 27 Okl. 849, 113 Pac. 907; *St. Louis & S. F. R. Co. v. Cundieff*, 171 Fed. 319, 96 C. C. A. 211. Under the laws in force in the Indian Territory prior to statehood, courts of record had the power to set aside, vacate, and annul judgments and orders, during the term at which rendered. The existence of this right and its propriety were not questioned. Referring to this prerogative, it is said in *Ashley v. Hyde et al.*, 6 Ark. 92, 42 Am. Dec. 685:

"It is based upon the substantial principles of right and wrong, to be exercised \* \* \* for the furtherance of justice."

In *Underwood v. Sledge*, 27 Ark. 295, it is announced to be the settled law in that state that a court has control over its orders and judgments during the term at which they are made, and for sufficient cause may modify or set them aside; that, when an order or judgment of a court is set aside at the same term of the court at which it was rendered, the whole suit or matter stands precisely as if no such consideration had been had or entered of record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated. In 17 Am. & Eng. Enc. Law, 813, the rule is declared to be that every court has absolute control over its own judgments and decrees during the term at which they are rendered, and may therefore at any time before the expiration of the term, in the exercise of its discretion, open, amend, correct, revise, vacate, or supplement any judgment or decree rendered during such term. Many authorities supporting the text are cited in the footnotes. In 14 Enc. Pl. & Pr. 932, the text is to the effect that courts have the inherent power to correct errors in cases tried before them, and in the exercise of such power may grant new trials on their own motion, or for grounds not specified in the motion of one of the parties. The right was one recognized at common law. In *Rex v. Gough*, 2 Doug. 791, the court suggested that a new trial would be proper, and on counsel saying they would have moved for it, but thought it too late, Lord Mansfield de-



clared that the court, if enough appeared, could grant a new trial. In *Rex v. Holt*, 5 Term R. 437, Lord Kenyon said he well remembered *Rex v. Gough*, "where the objection to the verdict was taken by the court themselves." And Buller, J., observed in concurring, that:

"After four days the party could not be heard on motion for new trial, but only in arrest of judgment; but if, in the course of that address, it incidentally appear that justice has not been done, the court will interfere of themselves."

See, also, *Rex v. Atkinson*, 5 T. R. 437.

In *Hensley v. Davidson Bros. Co.*, 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62, it is said that there is no provision of the Code relating to orders of this kind on the court's own motion. That such right exists, however, is indisputable. It is one of the inherent powers of the court essential to the administration of justice.

In *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35, the following language is used in stating the court's conclusion:

"We do not doubt the power of the trial court to examine its record and to set aside a verdict on account of prejudicial error on its own motion in the absence of a request by either party. \* \* \* The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is inherent."

The same conclusion in effect was reached in *Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868, by use of the following language:

"Appellant contends that as our statute provides that the notice of motion for a new trial shall be in writing, and shall state the grounds of the motion, the court below had no authority to grant a new trial on its own motion. Under the common-law practice, it was well settled that the trial court could grant a new trial on its own motion. Our Code of Civil Procedure does not expressly cut off this power of the court, and, in our opinion, does not do so by implication, although the Code may to some extent limit or modify that power. \* \* \* The provisions of such a statute regulating motions for a new trial do not prevent the court, in a proper case, from granting a new trial on its own motion."

In *State ex rel. v. Adams*, 84 Mo. 310, in sustaining the right of the court of its own motion to grant a new trial, the court observed:

"That this power may be abused by the court is no argument against its existence. The appellate courts will find a way to correct any abuse of the power by the lower courts. It is conceded by the Court of Appeals, in the opinion delivered in this cause, that at common law this power could be exercised by the courts, independent of any application by a party for its exercise. \* \* \* And that our statute, prescribing the time within which a party may file a motion to set aside a verdict, does not confer upon the court any power which did not previously exist, or abridge the recognized power of the court, but simply regulated the privilege of the parties to the suit."

Other opinions supporting our position are: *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800; *Commonwealth v. Gabor*, 209 Pa. St.

201, 58 Atl. 279; *Ft. Wayne & B. I. R. Co. v. Donovan*, 110 Mich. 173, 68 N. W. 115; *Eggen v. Fox*, 124 Wis. 534, 102 N. W. 1054; *De Vall v. De Vall*, 60 Cr. 493, 118 Pac. 843, 120 Pac. 13, 40 L. R. A. (N. S.) 291, Ann. Cas. 1914A, 409; *Ex parte Henry*, 24 Ala. 638; *Gould & Co. v. Tatum*, 21 Ark. 329; *Ivanhoe Furnace Corporation v. Crowder's Adm'r*, 110 Va. 387, 66 S. E. 63; *Gallegos v. Sandoval*, 15 N. M. 216, 106 Pac. 373; *Schmidt v. Brown*, 80 Hun. 183, 30 N. Y. Supp. 68; *Hawkins v. New Orleans Printing Co.*, 29 La. Ann. 134; *Dicken v. Smith*, 1 Litt. (Ky.) 209; *Duff v. Fisher*, 15 Cal. 380.

In reaching our conclusion, we have not overlooked the case of the territorial court, in *Long v. Board of County Commissioners*, 5 Okl. 128, 47 Pac. 1063. The opinion in that case was by a divided court. No brief was filed defending the trial court's action, and it is stated in the opinion that no cases were cited or known to the court which sustained the practice. While it does not appear that the opinion has ever been expressly overruled, a conclusion in consonance with that herein stated appears to have been reached by this court in *McAdams v. Latham*, 21 Okl. 511, 96 Pac. 584, where it was said that a trial court had a wide and extended discretion in modifying, vacating, or setting aside an order, judgment, or decree entered and rendered in its own court, when it did so at the same term at which said order, decree, or motion was had. The same right was recognized in the following additional cases: *Brown et al. v. Capital Townsite Co.*, 21 Okl. 586, 96 Pac. 587; *Badger Lbr. Co. v. Rhoades*, 26 Okl. 261, 109 Pac. 302; *Riely v. Robertson*, 29 Okl. 181, 115 Pac. 877. Nor does the opinion in *Anderson v. Chrisman*, 37 Okl. 73, 130 Pac. 539, announce a contrary rule; the facts in that case being considered. After referring to the opinion in *Long v. County Commissioners*, supra, the Criminal Court of Appeals of this state, in *Johnson v. State*, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300, after reviewing *McAdams v. Latham*, supra, concluded:

"If it appears to the trial court, after overruling a motion for a new trial or a motion in arrest of judgment, that there was irregularity in obtaining the judgment, it may, of its own motion, modify or set aside its order overruling the motion for a new trial or the motion in arrest of judgment. This may be done at the term of the court at which the order was made; but, after final judgment has been rendered and the term has expired, there must be a substantial compliance with the statute, to give the court further jurisdiction."

The power of a court of record, during the term at which rendered, to control its orders, judgments, and decrees, made during the term, is of far-reaching importance. That such authority should be possessed by trial courts of general jurisdiction must be conceded. Any other view would so fetter and paralyze the power of the courts that they must frequently do wrong, from mere inabil-

ity to do right. We do not believe it was the intention of the Legislature either to destroy or impair the exercise of such authority, nor does the language of the statute so indicate. As we have seen, from the early days of the common law, the right has been recognized. It is a necessary and inherent power pertaining to the courts in the administration of justice that the very end and object of their institution may not be defeated. The rule laid down by the court in *Long v. Board of County Commissioners*, being against both sound reason and the great weight of authority, should be and is expressly overruled. The extraordinary power thus recognized to exist should be exercised sparingly, and, we may add, upon due notice to the parties, or at the time when the verdict is rendered. This, that the losing litigant may have timely opportunity to except, and, if desirous, appeal from the court's action.

The court having the inherent right to vacate the judgment (though its action was subject to review on appeal), and its order having been acquiesced in without form of objection, is final, for it is a principle needing no citation of authorities in its support that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding. If, however, it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.

[5] The verdict of the jury, it appears, was signed by but nine jurors. The action being one pending in the United States Court for the Indian Territory, upon the incoming of statehood, plaintiff was entitled to a unanimous verdict; that was a right preserved to him by the schedule to the Constitution, which remained unaffected by section 19, art. 2, of the state Constitution, authorizing in civil cases three-fourths of the whole number of jurors concurring to render a verdict. *Pac. Mut. Life Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026; *Choctaw Electric Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; *Swift v. Coulter*, 28 Okl. 768, 115 Pac. 871. Whether such a verdict rendered the judgment void or voidable only, it is unnecessary to decide. It is the question of the jurisdiction possessed by the trial court, and not its exercise, with which we are concerned. That the court erred, or gave an erroneous reason for its conclusion, is immaterial. Having exercised its power, however prompted, the effect was to vacate and set aside the judgment. No appeal having been prosecuted from this order, it has become final. There is absolutely no warrant of law for attacking the judgment of the trial court in the manner attempted by the motion of November 17, 1911.

The judgment of the trial court, in overruling said motion, should therefore be sustained.

PER CURIAM. Adopted in whole.

(44 Okl. 807)

UNITED STATES FIDELITY & GUARANTY CO. v. BALLARD. (No. 3925.)†  
(Supreme Court of Oklahoma. Nov. 24, 1914.  
On Rehearing, Jan. 9, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 323\*)—NECESSARY PARTIES—DISMISSAL.

All parties against whom a joint judgment has been rendered must be made parties to a proceeding in error to review such judgment, and a failure to join any one of them, either as plaintiffs or defendants, is ground for dismissal of the cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.\*]

2. APPEAL AND ERROR (§ 223\*)—PRESENTATION BELOW—NECESSITY—JUDGMENT.

Section 5179, Rev. Laws 1910, authorizes the trial court, upon evidence, either record or parol, to find the true relation existing between the defendants to the action, and to direct the clerk to enter judgment against one as principal and the other as surety, as provided in this statute, but this question cannot be raised for the first time in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1338-1342, 1344, 1346-1350; Dec. Dig. § 223.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Craig County; Preston C. Davis, Judge.

Action by Marian Ballard, as administratrix of Randolph Ballard, deceased, against George W. May and the United States Fidelity & Guaranty Company. Judgment for plaintiff, and the defendant company brings error. Appeal dismissed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Jas. S. Davenport, of Vinita, for defendant in error.

GALBRAITH, C. The judgment attempted to be appealed from in this case reads in part as follows:

"Whereupon the court rendered judgment on the verdict for the plaintiff for the amount found to be due plaintiff from the defendant by the jury.

"It is therefore considered, ordered, and adjudged by the court that Marian Ballard, as the administratrix of the estate of Randolph Ballard, deceased, have and recover of and from Geo. W. May and the United States Fidelity Company, a corporation, the sum of \$454.60, and all of her costs in this suit laid out and expended."

It will be observed that this is a joint judgment against George W. May and the United States Fidelity & Guaranty Company. George W. May did not join in the appeal to this court, nor was he made a party thereto.

[1, 2] The defendant in error has presented a motion to dismiss the appeal for the want of necessary parties, on the ground that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Second petition for rehearing denied March 9, 1915.

the judgment complained of was a joint judgment against George W. May and the United States Fidelity & Guaranty Company, and the United States Fidelity & Guaranty Company alone appeals, and has not made George W. May a party, either as plaintiff or defendant, and did not serve him with case-made or summons in error, and that therefore this court has no jurisdiction of the appeal, and the same should be dismissed. The plaintiff in error, in response to this motion, has presented an ingenious argument in its brief to the effect that George W. May was not a necessary party to the appeal, inasmuch as his rights would not be injuriously affected by the judgment rendered in this court, for the reason that he is the principal and primarily liable for the payment of the judgment. It is contended that it appears from the record that George W. May was the principal and the United States Fidelity & Guaranty Company was surety, and that under section 5179, Comp. L. 1910, it was the duty of the clerk in such cases, in entering the judgment, to certify to these facts, and that this court should consider the record as though the clerk had certified to the true relation of the parties. We cannot agree with counsel as to the effect and operation of this statute upon the judgment. It is true that the statute gave the trial court the right to find the relations of the defendants upon evidence, either record or parol, and to declare that one was principal and the other surety, and to direct the clerk to enter the judgment accordingly. *Kupfer v. Sponhorst et al.*, 1 Kan. 77; *Bank of Stockham v. Weins*, 12 Okl. 502, 71 Pac. 1073. However, in the absence of a finding by the trial court and the direction to the clerk and the entering of judgment accordingly, the statute does not authorize or empower the appellate court to find the relationship existing between the parties to the judgment. This question cannot be raised for the first time in this court.

In *Bank of Stockham v. Weins*, supra, 12 Okl. at page 505, 71 Pac. at page 1074, the court says:

"The record discloses that the judgment was a joint one against the plaintiff in error and defendant in error. The law seems to be well settled that where a judgment is joint, against two or more defendants, both are regarded as principals, unless by proof aliunde one is shown to be a surety, and where one of them pays the whole amount of the judgment, he is not therefore entitled to an execution, for use against his codefendant, unless he himself has been judicially determined to be only a surety. 2 Black on Judgments, § 996.

"The mode of rendering a judgment in order to make it appear upon the record who was the principal debtor, and who was surety, is controlled by the statute in Oklahoma as well as in Nebraska; the provisions of the Code being the same in both jurisdictions. Oklahoma Code of Civil Procedure, § 485; Nebraska Code of Civil Procedure, § 511.

"In this case there was no question of suretyship raised in the court in which the judgment was rendered, and which is made the basis of this action, and hence it cannot be considered for the first time in this court."

In *Vaught v. Miners' Bank of Joplin*, 27 Okl. 100, 111 Pac. 214, the judgment was against three defendants, one of them appealed, and in dismissing the case the court said:

"Vaught alone instituted proceedings in error in this court without making the receiver a party.

"In *Strange et al. v. Crismon*, 22 Okl. 841, 98 Pac. 937, it was held that: 'A petition in error by two of three defendants, against whom judgment was entered jointly for the recovery of a specified sum, to which the other defendant is neither made a party plaintiff nor defendant in error, must be dismissed for want of necessary parties.'

"In that case a great many authorities are cited to support the decision of the court, both from the Supreme Court of Oklahoma Territory and the Supreme Court of Kansas. In one of the Kansas cases cited (*Great Western Manufacturing Co. v. True Richardson*, 57 Kan. 661, 47 Pac. 537), it is said that: 'The rule is well settled, and has often been enforced by this court, that all persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and that a failure to join any of them either as plaintiffs or defendants is ground for the dismissal of the case.'

"The latest expression by this court on the question may be found in *Seibert v. First National Bank of Okeene*, 25 Okl. 778, 108 Pac. 628. In that case, after citing with approval *Strange et al. v. Crismon*, supra, and other Oklahoma cases, it was said: 'The rule requiring parties having an interest that may be materially affected by the judgment when brought before the appellate tribunal is in no sense a technical one; on the contrary, it is a rule of great importance and is required in order to secure to a litigant his day in court.'

In the case of *Southwestern Surety Co. v. Hall*, 40 Okl. 447, 139 Pac. 305, judgments were rendered against the principals and the surety company, and the surety company alone prosecuted the appeal, without making the principals parties thereto, and the court, in sustaining the motion to dismiss, said:

"The rule is well settled in this state that all parties to a joint judgment must be joined in the proceedings in error either as plaintiffs or defendants" (citing a number of cases).

In the *National Surety Co. v. Oklahoma Presbyterian College for Girls*, 38 Okl. 429, 132 Pac. 652, there was a judgment against M. J. Gill, principal, and the surety company. The surety company alone appealed, and in sustaining the motion to dismiss the appeal because Gill had not been made a party, the court said:

"All parties to a joint judgment must be joined in a proceeding in error in this court, either as plaintiffs or as defendants in error, before such judgment can be reviewed; and, where the review is sought by means of petition in error and case-made, service of the case-made within the time prescribed by the statute must be had upon all parties against whom the joint judgment is rendered who do not join in the appeal as plaintiffs in error, and who are made parties thereto as defendants in error; and failure to serve the case-made upon such parties will operate to prevent the same from being considered in this court."

To the same effect are *Crow v. Hardridge*, 143 Pac. 183, and *Foreman v. Fish et al.*, 148 Pac. 661.

The record clearly shows that the judgment

attempted to be brought up for review in this case was a joint judgment against George W. May and the United States Fidelity & Guaranty Company, and that the United States Fidelity & Guaranty Company alone appeals, and that George W. May is not made a party to the appeal. Under the foregoing authorities he was a necessary party, and the failure to make him a party is fatal to the jurisdiction of this court to review the case upon its merits, and the motion should therefore be sustained and the appeal dismissed.

#### On Rehearing.

In the case of *Southwestern Surety & Insurance Co. v. Hall*, 40 Okl. 447, 139 Pac. 305, wherein it is said that "we look to the substance rather than the form," the record discloses two judgments entered upon different days, one against Appleton and Brazil, and the other against the surety company on their official bonds, and the court held that these judgments, although several in form, were in fact a joint judgment, and, the surety company alone having appealed, dismissed the appeal for want of necessary parties. This case is an authority supporting the original opinion in the instant case. If the contention of plaintiff in error is correct, the motion to dismiss in that case should have been overruled, since the principals were not necessary parties to the appeal and a failure to join them was not ground for dismissal, but the court "looked to the substance rather than the form," and found that the judgments, although several in form and reheard on different days, were in fact joint, and, the principals being necessary parties to the appeal, and not having been made parties thereto, sustained the motion to dismiss. It was not necessary to look beyond the form of the judgment in the instant case. This alone showed that the judgment was joint, and that all of the parties to the joint judgment had not been made parties to the appeal. In passing upon a similar motion in *Jameson v. Goodwin*, 141 Pac. 767, the court said that the rule by which to determine the motion is, were the parties omitted from the appeal necessary parties to the proceedings in the trial court? and if found to be necessary parties in the trial court, they were necessary parties on appeal, and, if omitted, the motion to dismiss on that ground should be sustained. This rule also supports the original opinion filed herein.

To hold, as contended by the plaintiff in error, that the principal is not a necessary party to an appeal from a judgment rendered in an action against the principal and surety on a bond, it would be necessary to overrule a number of the former decisions of this court. See *Southwestern Surety & Ins. Co. v. Hall*, supra, and cases there cited, and those cited in the original opinion herein. With due respect to the counsel urging the

proposition, we are constrained to decline to so hold. One of the questions of practice that might be regarded as settled in this jurisdiction is that the principal is a necessary party to such appeal.

The petition for rehearing is denied, and the original opinion filed herein is adhered to in all respects.

PER CURIAM. Adopted in whole.

(45 Okl. 382)

MISSOURI, K. & T. RY. CO. v. CITY OF  
TULSA et al. (No. 4758.)

(Supreme Court of Oklahoma. Sept. 22, 1914.  
Rehearing Denied Jan. 9, 1915.)

#### (Syllabus by the Court.)

#### 1. MUNICIPAL CORPORATIONS (§ 408\*)—POWERS—SPECIAL ASSESSMENTS.

Where a reasonable doubt as to the power of a city to impose a special assessment arises from the terms of its charter, the doubt must be resolved against the power of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1005, 1006, 1183; Dec. Dig. § 408.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 429\*)—POWERS—SPECIAL ASSESSMENTS—"OWNERS OF THE PROPERTY ABUTTING UPON THE STREET."

Section 6 of the charter of the city of Tulsa provides: "After excluding the cost of making any improvement between and two feet on each side of the track and rails of railroads, \* \* \* and the entire cost of any improvements crossing the right of way of any railroad, which costs are to be \* \* \* paid by the owners of such railroads, \* \* \* the City \* \* \* shall have the power to assess the whole cost of construction, \* \* \* against the owners of the property abutting upon the street \* \* \* upon which such improvements are to be constructed, and who are specially benefited thereby. \* \* \*" Assuming that certain lots owned by the railroad company and within its right of way are within the taxing district and are benefited by the improvement, *held*, that the company are the "owners of the property abutting upon the street" improved within the meaning of the charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1039; Dec. Dig. § 429.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 450\*)—SPECIAL ASSESSMENTS—TAXING DISTRICT—PROPERTY INCLUDED.

Where the charter provides that the board of commissioners shall have the power to assess the whole cost of construction against the owners of the property abutting upon the street improved, who are benefited thereby, and in apportioning the cost of such improvement each quarter block shall be charged with its due proportion of paving, both the front and side streets on such block, together with the areas formed by street intersections, which costs shall be apportioned among the lots or subdivisions of such quarter blocks according to the benefit to each lot or parcel, *held*, that the charter means, for the purpose of taxing for improvement of streets, the taxing district shall include all the property between lines drawn parallel with the street improved and back from it one-half block on each side.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**4. MUNICIPAL CORPORATIONS (§ 450\*)—SPECIAL ASSESSMENTS — TAXING DISTRICTS — PROPERTY INCLUDED.**

Where the charter so provides and the commissioners, in fixing the taxing districts to pay for the improvement of a street running east and west, went back on the north side of the street one whole block, *held*, that the north half of the block so included was without the taxing district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**5. MUNICIPAL CORPORATIONS (§ 450\*)—SPECIAL ASSESSMENTS—TAXING DISTRICT.**

Where, to pay for the improvement of a street running east and west in the city of Tulsa, it appears that blocks from 15 to 21, inclusive, abutting said street on the north, were abutted on the north by Fourth street, that said street was abutted on the north by corresponding blocks, also separately numbered on the city plat, and that said street, theretofore one of the city's system of streets, had been vacated and occupied by a railroad right of way, *held*, that said blocks and corresponding blocks did not thereby become one block; that said street, for assessment purposes, should have been treated as extended, and that the commissioners in fixing the taxing district to improve said street should have run the line north thereof parallel with said street and back from it one-half block, and not parallel with said street between blocks from 15 to 21, inclusive.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

**6. MUNICIPAL CORPORATIONS (§ 484\*)—SPECIAL ASSESSMENTS—PROPERTY BENEFITED—DETERMINATION—CONCLUSIVENESS.**

Whether lots abutting on a street improvement and included in a railroad right of way are in fact benefited by the street improvement is a legislative question, and, having been settled by the legislative power of the city, is conclusive on us.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1137-1139; Dec. Dig. § 484.\*]

**7. MUNICIPAL CORPORATIONS (§§ 429, 450\*)—SPECIAL ASSESSMENTS—TAXING DISTRICT—BOUNDARIES.**

Where certain parcels of ground appear upon the official plat of a city, approved by the Secretary of the Interior, and are shown as lots and blocks, the platted boundary lines thereof must control in fixing the taxing district to improve a street upon which said blocks abut. The assessment must be limited to the blocks which actually abut on the street, and cannot be extended to corresponding blocks by reason of the fact that the street intervening between them has been vacated and included in the right of way of a railroad company.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1039, 1073, 1074; Dec. Dig. §§ 429, 450.\*]

*(Additional Syllabus by Editorial Staff.)*

**8. MUNICIPAL CORPORATIONS (§ 450\*) — ASSESSMENT DISTRICT—"BLOCK"—"SQUARE."**

A "block" or "square" is a portion of a city bounded on all sides by streets or avenues, but two blocks each, bounded by a street, do not necessarily, when thrown together by the vacation of a street, constitute a single block to be included as such within an assessment district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.\*]

For other definitions, see Words and Phrases, First and Second Series, Block; Square.]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by the Missouri, Kansas & Texas Railway Company against the City of Tulsa and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. John R. Ramsey, City Atty., of Tulsa, and Bledsoe & Treadwell, of Oklahoma City, for defendants in error.

**TURNER, J.** On December 14, 1912, the Missouri, Kansas & Texas Railway Company, plaintiff in error, sued the city of Tulsa and the Shelby-Downard Asphalt Company, defendants in error, in the district court of Tulsa county. The object of the suit was to enjoin the city from collecting an alleged illegal assessment sought to be imposed by the city on certain parcels of ground known as lots upon the official plat of said city, approved by the Secretary of the Interior on April 11, 1902, but which, at the time of the assessment sought to be restrained, were owned by plaintiff and included in its right of way, for the cost of paving Cameron street, and the intersection of Cincinnati avenue therewith. There was trial to the court, and judgment refusing to grant the temporary injunction prayed, and plaintiff brings the case here. According to said plat these lots (except as hereinafter mentioned) are within the north half of block 15 to 21, both inclusive, which abut north on Fourth street and south on Cameron street, both of which run east and west. Said blocks are separated by streets which intersect Fourth and Cameron streets at right angles, Cincinnati avenue intersecting said streets between block 20 and 21. Plaintiff's right of way not only runs east and west over the north half of these blocks and covers said lots, as stated, but includes Fourth street, vacated by the city for right of way purposes, and, curving southward, crosses Cincinnati avenue. It is the contention of the city that, by the vacation of said street, each of the blocks from 15 to 21, both inclusive, and corresponding block north of said vacated street, became one block for assessment purposes and, as plaintiff's lots, although a part of its right of way, are within the south half of the blocks thus formed, they are liable to the special assessment taxed to pay the costs of improving said street. The city further contends that Cincinnati avenue, being a side street between blocks 20 and 21, the lots in those blocks covered by plaintiff's right of way, and within the quarter block abutting on Cameron street, are further liable to the assessment sought to be imposed for paving that avenue where it intersects Cameron street. The cost of improving said avenue over and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

across the plaintiff's right of way, having been paid, is not in this case.

[1] Plaintiff, conceding the facts to be as assumed by the city, contends that it is not liable for any of the assessments sought to be imposed upon said lots, for the reason that the charter of the city does not authorize it. If there is any reasonable doubt as to the power of the city to impose this tax, the doubt must be resolved against the power of the city. It seems to the writer of this opinion that such doubt so arises. In the first paragraph of the syllabus, in the case of *In re Unger*, 22 Okl. 755, 98 Pac. 999, 132 Am. St. Rep. 670, we laid down the rule thus:

"A grant by the Legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation, and the power is denied. All acts beyond the scope of the power granted are void."

1 Page & Jones, *Taxation by Assessment*, § 229, reads:

"Furthermore, assessment proceedings are proceedings in invitum, and have for their ultimate object the taking of property from the individual owner without his consent. As is the case in all proceedings of a similar character, such as taxation, the statutes conferring the power to impose local assessments must be construed strictly. The intention of the Legislature to confer upon public corporations the power to levy local assessments must appear affirmatively. In case of fair and reasonable doubt as to the existence of such power, the presumption in construing the statute must be against its existence."

[2] Turning to the charter, we find, after article 9, § 1, provides for the declaratory ordinance and other preliminary steps for the letting of a contract for the purpose of grading, paving, etc., that section 4 provides:

"The cost of grading, paving, curbing and guttering any street, avenue or alley may be paid in part by the city or in part by the owners of property benefited by such improvement upon the property; \* \* \* Provided, that when any person, firm or corporation owns any railroad or street railroad or railroad switch of any kind on such street or alley or portion thereof ordered to be improved, such person, firm or corporation shall pay the whole costs of such improvement between the rails and tracks, and for two feet on either side of the rails of such railroad or street railroad, and the city and abutting property owners shall be relieved of the part of the costs to be paid by such road. [Note here that the railroad, the city, and the abutting property owners are carefully distinguished. Which means that when the charter speaks of the property owners, it does not mean the railroad.] The pro rata share of the cost of such improvement payable under the terms hereof by any railroad or street railroad or the owners thereof, together with all costs of collecting the same, shall be a special tax against, and secured by a lien upon the roadbed, ties, rails, fixtures, rights and franchises of such railroad or street railroad and the owners thereof, and whenever a contract shall be let for any such improvement, the board of commissioners shall levy a special tax upon the railroad, ties, rails, fixtures, right and franchises of such railroad or street railroad, for the pro rata share due from such road, for improvement between their tracks and rails and two feet on each side thereof. \* \* \* The lien provided for shall be a first and prior lien paramount to all incumbrances except taxes, upon the road-

bed, ties, rails, fixtures, rights and franchises of the person, firm or corporation or company owning the railroad or street railroads aforesaid.

"Provided further, that when any street, avenue or alley is ordered graded, paved, curbed or guttered as herein provided, any person, firm or corporation having right of way or operating a railroad intersecting or crossing such street, avenue or alley so ordered improved, shall bear the entire expense of grading, paving, curbing and guttering and laying sidewalks over and across their tracks and right of way for the full width of such right of way."

Pertinent to this inquiry, section 6 provides:

"After excluding the costs of making any improvements between and two feet on each side of the track and rails of railroads or street railroads, and the entire cost of any improvement crossing the right of way of any railroad, which costs shall be assessed against, and wholly paid by the owners of such railroads, as herein provided, and subject to the terms hereof [that is, by imposing a lien, not upon the lots within its right of way but upon all the property of the railroad including its "right and franchises"] the city of Tulsa, acting by its board of commissioners, shall have the power to assess the whole cost of construction, reconstructions and repairing any sidewalks, curbing, guttering and paving any street, avenue or alley or making any other improvements ordered under the terms hereof, against the owners of property abutting upon the street, avenue or alley or part or section thereof upon which such improvements are to be constructed, and who are specially benefited thereby, and shall have the power to fix a lien against such property to secure the payment of the portion of such costs assessed against the owners of such property and in apportioning the costs of such improvements against the abutting property owners, each quarter block shall be charged with its due proportion of paving, both the front and side streets on such block, and the alley or alleys therein, together with the area formed by street intersection and alley crossing, which costs shall be apportioned among the lots or subdivisions of such quarter blocks, according to the benefit to each lot or parcel."

When section 6 of the charter says, as it does:

"After excluding the costs of making any improvements between and two feet on each side of the track or rails of railroads \* \* \* and the entire cost of any improvements crossing the right of way \* \* \* which costs are to be \* \* \* paid by the owners of such railroads, \* \* \* the city \* \* \* shall have power to assess the whole cost of construction \* \* \* against the owners of property abutting upon the street upon which such improvements are constructed, and who are to be benefited thereby, and shall have the power to fix a lien against such property \* \* \*"

—as plaintiff is the owner of the lots covered by its right of way and sought to be assessed, assuming them to be within the quarter blocks abutting on Cameron street and that such lots would be benefited thereby, it would seem that so much of plaintiff's right of way would be subject to this assessment, as contended by the city. But such is a doubtful implication. I say doubtful for the reason that, having expressly provided that plaintiff should pay the cost of the improvement when its road is on or crosses a street, I am uncertain whether the charter meant to include plaintiff in the word "owners," and thereby required of it further payments un-

der different conditions, when it says that, after said payments are made, \* \* \* the city \* \* \* shall have power to assess the whole cost of construction \* \* \* against the owners of property upon \* \* \* any street \* \* \* who are benefited thereby." And this doubt is intensified when the charter is careful to distinguish between the parties in interest, that is, the city, the railroad, and abutting property owners, as we have seen. On the other hand, plaintiff, invoking the rule of strict construction, contends that when the charter expressly says that the city may impose the whole cost of an improvement and enforce a lien to a sale of its entire property when two conditions exist, i. e., when the railroad is on or crosses a street (neither of which it does here), such grant of power is a limitation on the power of the city to impose a lien and sell a part of the property under any other conditions. Or, in other words, that the power thus expressly granted to the city impliedly excludes a grant of power to the city to assess the property and impose a lien thereon under other and different conditions. In my judgment this contention is sound. 2 Lewis' Sutherland, Stat. Con. § 491, says

"What is expressed is exclusive only when it is creative. \* \* \* The maxim is applicable to a statutory provision which grants originally a power or right."

As here, for instance, where this charter expressly grants to the city, when those two conditions exist, the power to assess and impose a lien upon the entire property of the railroad including its right of way. The author continues:

"In such cases the power or right originates with the statute and exists only to the extent plainly granted."

Applying this rule, I am of opinion that, when the charter expressly created a right in the city to assess the entire cost of a public improvement on plaintiff's entire property, including its right of way, when its railroad is on or crosses a street, and says nothing about making plaintiff pay any part of those costs where its property abuts on a street to be improved, as here, the intent of the framers of the charter was to exclude any such idea, together with the idea that those costs, or any part thereof, could be assessed upon any part of the right of way and the same sold in satisfaction thereof. But, as no other member of the court agrees with me, in view of the fact that plaintiff in error is the "owner" in fee of these lots (Gilbert et al. v. M., K. & T. Ry. Co. et al., 185 Fed. 102, 107 O. C. A. 320), I will, for the purposes of this case, concur in the view of the majority of the court that when the charter says:

"\* \* \* After excluding the costs of making any improvements between and two feet on each side of the track or rails of railroads \* \* \* and the entire cost of any improvements crossing the right of way \* \* \* which costs are to be \* \* \* paid by the owners of such railroads, \* \* \* the city \* \* \* shall have power to assess the whole costs of con-

struction \* \* \* against the owners of property abutting upon any street \* \* \* who are to be benefited thereby and shall have the power to fix a lien against such property"

—it means to include this company as the owner of the property in question, and hence plaintiff is liable to respond to this special assessment; that is, if the lots in controversy are within the quarter block abutting on Cameron street and are benefited by the improvement.

[3, 4, 5] The charter provides that the board of commissioners shall have the power to assess the whole cost of this construction against the owners of the property abutting upon the street improved who are specially benefited thereby, and in apportioning the cost of such improvement each quarter block shall be charged with its proportion of the paving both of the front and side streets of each block, together with the area formed by street intersections, etc., which cost shall be apportioned among the lots or subdivisions of such quarter blocks according to the benefit of each lot or parcel. In other words, the charter means that, for the purpose of taxing for improving Cameron street, the taxing district shall include all the property between lines drawn parallel with that street and back from it one-half block on each side. No complaint is made as to the south line of this district but, in fixing the north line, the commissioners went back on the north side of that street one whole block and ran the line parallel with Cameron street between blocks 15 and 21, both inclusive, and their corresponding blocks north, and now contend that, by the vacation of Fourth street, which separated them, the two blocks became one, although they still remained separately numbered on the city plat. When we remember the definition of a "block" or "square" to be a portion of a city bounded on all sides by streets or avenues, it would seem, when two blocks, each bounded by a street, are thrown together in this manner, as both would then be bounded by streets, that both would be a single block. But the courts have held not so. The vacation and occupation of Fourth street by plaintiff's right of way had nothing to do with making any one of these blocks, and its corresponding block north, one block. In fact had Fourth street never been opened at all between these blocks, being in line with the city's system of streets, as it is, for the purpose of assessment the assessing power of the city should have considered it as extended, and formed the taxing district accordingly. 1 Page & Jones on Taxation by Assessment in section 628, under the head "Assessment District Consisting of Blocks or Parts of Blocks," it is said:

"In doubtful cases the court has some discretion in determining what a square is. A tract of land which was the size of two ordinary city squares, which was surrounded by streets and opposite the middle of which on either side a street had been opened, but did not extend



through the large tract in question, was treated as consisting of two squares by regarding such street as opened so as to extend through such tract."

In support of the text the learned author cites *Dumesnil v. Shanks*, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864. Turning to that case, the facts were that an alley began in Park street, 200 feet east of Fourth street, and ran, parallel with that street, north 260 feet. The distance from Park avenue to Ormsby avenue was about 460 feet and from Fourth street to Sixth street 900 feet. The length of this territory from east to west was about double that of the squares on the north side of Ormsby avenue, arising from the fact that Fifth street, which ran halfway between and parallel with Fourth and Sixth streets up to the north side of Ormsby avenue, stops there. On this state of facts it was held that the cost of improving the alley should be apportioned over the property lying east of a line corresponding with the center of Fifth street, if extended. In other words, that the territory the size of two blocks should be cut in two by an extension of Fifth street. Precisely this was held again in *Specht v. Barber Asphalt Paving Co.* (Ky.) 80 S. W. 1106. By ordinance approved the carriageway of Frankfort avenue was ordered improved 40 feet in width by grading, paving, etc., between two certain avenues, at the cost of the owners of the adjoining ground extending back from the street 195 feet. The council proceeded upon the assumption that the land was not divided into squares by principal streets. After the contract had been let and the work performed and accepted and warrants duly issued, some of the property owners failing to pay, suit was brought on the ground that the ordinance was void because it fixed the taxing district at 195 feet instead of going back halfway to the next street. The next streets referred to were streets running parallel with Frankfort avenue. In holding that this should be done the court said:

"While the cross-streets on the north side of Frankfort avenue were not extended so as to intersect the cross-streets on the south side of Frankfort avenue because of the right of way of the Louisville & Nashville Railroad Company which intervened, for the purpose of assessment under the statute these cross-streets must be treated as extended. 'This was so held in *Cooper v. Nevin*, 90 Ky. 90, 13 S. W. 841.'"

In the case referred to the syllabus reads:

"Where the territory on one side of the improved street has been defined into ordinary squares, the territory on the other side, although it has, in fact, not been thus subdivided, will, if bounded by principal streets, be treated as if the cross-streets at right angles to the improved street had been extended through the territory on that side; and, although the distance to the next parallel street may be greater than the depth of an ordinary square, yet if it is apparent that the distance is not great enough to admit of the territory being subdivided by another parallel street, the divisions made by the imaginary extensions of the cross-streets will be treated as squares within the meaning of the charter, and the taxing district extended

halfway to the parallel street; and property within one of these squares cannot be taxed to pay the cost of improving the streets in another square, the cost of the improvement being greater in the one square than in the other. The district to be taxed in such a case is defined by the charter.

"In this case the distance to the next parallel street on that side of the improved street which has not been subdivided is 630 feet. Two cross-streets which divide the territory on the other side of the street have not been extended through this territory. Held, that this area should be treated as if divided into squares corresponding to the squares on the opposite side of the street, except as to depth, and the lots taxed to the depth of 315 feet, that being halfway back to the next street; and the property in one of these squares should not be required to contribute to pay the cost of the improvement in the other."

[5-7] But in addition to what we have said there is another reason for holding that this method of forming the taxing district was error. Blocks 15 to 21, both inclusive, appear upon the official plat as blocks, and as blocks they should have been considered by the taxing power of the city in fixing the taxing district. In other words, in so doing the official plat of the city should have governed, and the north line of the taxing district drawn so as to divide blocks from 15 to 21, both inclusive, equally north and south. *Smith et al. v. City of Des Moines et al.*, 106 Iowa, 590, 76 N. W. 836, was a suit in equity to enjoin the collection of special assessment for improving Pennsylvania avenue. The widening of the avenue took 40 feet off lot 21 on the corner where it intersects Walker street and added it to the avenue, leaving a strip only 10 feet lengthwise remaining of that lot. At the time the assessment was levied said 10 feet and lot 20 next to it were both assessed for the improvement. The governing statute provided that an assessment for a street improvement "shall be a lien upon the property abutting on such street" on which the improvement is made, and that it "shall be limited to the lot or lands bounding or abutting on such street." In passing, the court held that the assessment was confined to said strip of 10 feet, and could not be extended to cover lot 20, and hence that the assessment attempting so to do was void. The court further held that:

"Where a tract had been platted into lots the platted boundary lines must control, and the assessment must be limited to the lot or parcel of ground which actually abuts on the street, and cannot be extended to a contiguous point, though the latter, with the abutting lot, constitute a single tract, and is used jointly for a single purpose, \* \* \* and fronts on the street to be improved."

And so we say that, as the platted boundary lines of the lot controlled in that case, so the platted boundary lines of block 15 to 21, both inclusive, must control in this case in determining what is meant by a "block," and that the lots in controversy, lying within the north half of the platted blocks, as they do, were without the taxing district, and



hence the assessment sought to be imposed thereon is void. To the same effect see *Gardner et al. v. Eberhart et al.*, 82 Ill. 316, where it is held that the court will take judicial notice of government surveys of land and also blocks and lots in towns and cities. Also, see, *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 528.

Of course we do not hold that the assessment imposed for improving Cameron street on the north half of lot 7 in block 18, and the south half of lot 2 in block 20, and on lots 2, 3, 4, and 5 in block 21, is void. This for the reason that they are within the south half of those blocks, and are hence within the proper taxing district indicated, and, although included within plaintiff's right of way, are presumed to be benefited by the improvement. Whether they are in fact so benefited we cannot say, for the reason that the same is a legislative question which, having been settled by the legislative power of the city, is conclusive on us. This precise question arose in *L. & N. Ry. Co. v. Barber Asphalt Co. et al.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819. The case was on error from the Court of Appeals of Kentucky to review a judgment of the Jefferson circuit court of that state enforcing an assessment for street improvement. The defense made by plaintiff in error was that its only interest in the lots was a right of way for its main roadbed, and that neither the right of way nor the lots would get any benefit from the improvement, and hence any special assessment would deny it the equal protection of the law and was contrary to the fourteenth amendment to the Constitution of the United States. The law under which the assessment was made provided that it should be made at the exclusive cost to adjoining owners to be apportioned according to the number of feet owned by them. The court in passing said:

"There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to arise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar mode of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed, whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law"

—and held in effect, as expressed by the syllabus, that:

"The fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, under Const. U. S. Amend. 14, for lack of benefits, an assessment thereon for the grading, curbing, and paving, made under the area rule, prescribed by Ky. St. §§ 2833, 2834."

And this is in keeping with the weight of authority. Turning to the case affirmed (*L. & N. Ry. Co. v. Barber Asphalt Paving Co.*,

116 Ky. 856, 76 S. W. 1097) we find this language:

"It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, that is, its right of way. The railroad company has been in possession of the strip of land in question for 50 years. \* \* \* It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way, it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement. \* \* \* Under the statute governing street improvement, a lot is any piece of land within the territory defined by the statute or the general council, where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use, to which the parcel of land is put does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot in the meaning of the statute, and to thus appropriate it cannot change its character."

This is in keeping with the holding of our own court in *Kerker et al. v. Bocher et al.*, 20 Okl. at page 763, 95 Pac. at page, 995. The court said:

"Also it is within the power of the Legislature to conclusively determine in advance what improvements shall be taxed against certain districts, and it is presumed that the Legislature has determined in advance what property shall be benefited to the extent of the cost of such improvements. *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Paulsen v. City of Portland*, 149 U. S. 80, 13 Sup. Ct. 750, 37 L. Ed. 637; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955; *Cooley on Taxation* (3d Ed.) vol. 2, p. 1257; *Horton v. Town of Avondale*, 147 Ala. 458, 41 South. 935."

It follows, Cincinnati avenue being a side street between blocks 20 and 21, that the lots within the south half of those blocks, although within plaintiff's right of way, were properly assessed to pay their share of the cost of paving the intersection of that avenue with Cameron street. It also follows that, for the reason the taxing power of the city erroneously fixed the taxing district, as stated, the court erred in refusing to grant the injunction prayed. The cause is therefore reversed and remanded, with directions to proceed in accordance with this opinion. All the Justices concur.

(45 Okl. 219)

OBERT v. ZAHN. (No. 2970.)

(Supreme Court of Oklahoma. Nov. 4, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

FORCIBLE ENTRY AND DETAINER (§ 47\*)—TAXATION OF COSTS—JURISDICTION.

Where, pending the trial of an action of unlawful detainer, damages were waived, and, by consent of counsel, it was made to appear to the court after issue joined that defendant had left the country and yielded possession of the premises in controversy to plaintiff, held, construing Rev. Laws 1910, § 5229, that the cause of action was extinguished, and the court was without ju-

isdiction to render judgment for plaintiff and tax defendant with the costs.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 188, 189; Dec. Dig. § 47.\*]

Error from District Court, Caddo County; Frank M. Bailey, Judge.

Action by Abe Zahn against M. Obert. Judgment for plaintiff, and defendant brings error. Reversed.

Ballinger & Maxwell, of Anadarko, for plaintiff in error. Blake & Boys, of Oklahoma City, and C. H. Carswell, of Anadarko, for defendant in error.

TURNER, J. After the mandate had gone down and been spread of record in the district court of Caddo county, Zahn v. Obert, 24 Okl. 159, 103 Pac. 702, an action of unlawful detainer, came on for trial upon the merits. During the trial it developed, pending the cause and after issues joined, that Obert had left the country and yielded possession of the property in controversy to Zahn without any agreement as to costs. Thereupon it was contended by counsel for defendant that the court had lost jurisdiction of the subject-matter, and was without power to render judgment in favor of plaintiff for possession and tax defendant with the costs. But the court held not so, and did both (damages being waived), to which defendant excepted, and, after motion for a new trial filed and overruled, brings the case here. This was error.

In *Thompson v. Union Elevator Co.*, 77 Mo. 520, the court, on the question of costs under similar circumstances, said:

"At common law, plaintiff was in no case entitled to recover costs. *Steele v. Wear*, 54 Mo. 532. In this state the matter of costs is regulated by statute, which is to be strictly construed. *Shed v. K. C.*, St. J. & C. B. R. R. Co., 67 Mo. 687; *Gordons v. Maupin*, 10 Mo. 352 [47 Am. Dec. 118]."

This sends us to the statute. Our statute governing costs (Rev. Laws 1910, § 5229) reads:

"Where it is not otherwise provided by this or other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific, real or personal property."

Which means that costs shall follow the judgment for plaintiff as of course. When possession was yielded the cause of action was, by that act, settled out of court and extinguished. After that the court was without jurisdiction to enter judgment for plaintiff, and hence could not allow him costs. There is conflict on the authorities upon this proposition, however, 11 Cyc. 83, says:

"In some jurisdictions the rule is that, where a cause of action is extinguished by agreement of the parties, whether by payment, compromise, release, or otherwise, the plaintiff will be entitled to costs, in the absence of some agreement in relation to the disposition of costs. \* \* \* In other jurisdictions it is held that, where a cause of

action is extinguished by agreement between the parties, whether by payment, settlement, release, or otherwise, no agreement being made as to costs the plaintiff cannot recover costs. This rule has been held to apply as well in equity as in law although the question of costs be reserved for the decision of the chancellor. \* \* \*

*Two River Mfg. Co. v. Beyer et al.*, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131, supports the latter view, and states the reason for the rule. It is, we think, in line with the weight of authority. That was an action to set aside, as clouds on plaintiff's title to certain lands, a certain judgment, a sheriff's deed, and a conveyance by the grantee in that deed. The facts were that one Pfau was the original owner of the lands in controversy. They were sold for taxes and bid in by the county, which held the certificates, and which went by several assignments into the hands of one Webster, who brought a suit to foreclose the same against Pfau, who answered. Pending the suit Pfau sold the lands to plaintiff after Pfau had redeemed the lands and obtained a certificate of redemption therefor and notified Webster thereof, who received and accepted the redemption money for his own use as holder of the certificates without demanding the costs of the suit, which remained unpaid. Thereafter Webster, treating the case as still pending, without knowledge of Pfau or plaintiff, pursued the same to judgment and sale for "costs and disbursements," at which time the land was bought in by one Cook, and the sale confirmed. Cook conveyed to defendant, and plaintiff sued to clear his title. The court said:

"The tax certificates were the cause of action, and the sole cause of action, of that suit of foreclosure. They are to be foreclosed in the same manner as mortgages (section 1181, R. S.), and are the cause of action, the same as mortgages are the cause of action in suits of foreclosure. The redemption of the lands from the certificates, pending the suit of foreclosure, must have the same effect upon the suit as the payment of the mortgages, or redemption of the lands from the mortgages, pending the suits for their foreclosure. In both cases, respectively, the tax certificates and the mortgages are the subject matter of the suits. The sole object of the suits is to foreclose them, and the sole result is the judgment of foreclosure. The suit is brought upon them, and on account of them alone. They are the principal of the suit, and the lis pendens as notice is of them alone, and of the lands upon which they are liens and the title of which is involved in, and will be affected by, the action and the judgment therein. In all possible respects they are the same as any other causes of action, such as a promissory note, or a bond for the payment of money, a trespass, or damage feasant, or any other which may be satisfied or discharged by the payment of money and for which a judgment may be rendered. There could be no action without such a cause or some cause of action. When such a cause no longer exists, there is no longer any cause of action, and the action is at an end. An action could not continue as an action when the cause has been removed, any more than an action could be commenced without a cause of action. The costs are merely incidental to an action based on a sufficient cause of action, and are not part of it, but the creature of the statute, which can only

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

follow a judgment or final determination of an action in which the cause of action is merged. An action cannot be brought merely for the costs thereof, nor can an action be maintained, after the cause of action has been removed, merely for the costs thereof; for then they would be no longer incidental, but the principal of the suit. Can an action be commenced to foreclose a mortgage or tax certificate, or on a note or bond, or for trespass, after the mortgage or tax certificate had been redeemed, or the note or bond had been paid, or the trespass satisfied, and the money had been accepted by the plaintiff? No more can such actions subsist and continue to judgment after such redemption, payment, or satisfaction had been acknowledged by the acceptance of the money. The action is ended when the cause of action is taken out of it. The reason of the rule is apparent. It is inherent."

*Geiser Threshing Machine Co. v. Smith et al.*, 36 Wis. 295, 17 Am. Rep. 494, was an action upon a promissory note. The facts were that on March 17, 1873, summons and complaint in the action were delivered to the sheriff with intent to have the same served upon the defendants; that before service defendants paid plaintiff's attorney the principal and interest on the note in full, who accepted the money, but claimed \$17 costs; whereupon, defendants refusing to pay, a surrender of the note was refused upon that ground. Service was thereafter had. The note contained an agreement to pay plaintiff 5 per cent. for attorney's fees if suit was brought thereon. On this state of facts there was judgment for plaintiff for costs, from which defendants appealed. In reversing the case the court said it was not necessary to decide when the suit was commenced:

"Because, whether it was commenced or not, the acceptance by the plaintiffs of full payment of the amount due on the note extinguished their right to prosecute it. It may be that the plaintiffs might have refused the payment, and prosecuted the suit to judgment for damages and costs. But they could not receive the damages and reserve the right to prosecute the suit for costs. *Canfield v. School District*, 19 Conn. 529; *Ayer v. Ashmead*, 31 Conn. 447 [83 Am. Dec. 154]; *Buell v. Flower*, 39 Conn. 462 [12 Am. Rep. 414]."

And in the syllabus:

"Where, after commencing an action upon a note, plaintiff accepted payment of the amount due on the note, this extinguished his right of action; and it was error to render judgment in his favor for the costs of the suit."

*Buell v. Flower*, supra, was assumpsit on a promissory note, brought in the superior court of New Haven county. After suit brought, defendant proved without objection that upon the first day of the term his attorney had paid plaintiff's attorney a sum certain in full of principal and interest due on the note, and that payment of the costs of the suit was requested and refused, that thereupon plaintiff's attorney retained, and still retains, possession of the note, and claimed he was entitled to judgment for damages and costs. In passing upon the reserved question as to what judgment should be rendered, the court said:

"It is not pretended that the costs in controversy in this case are an independent claim against the defendant, but it is conceded that it is necessary for the plaintiff to recover judgment of some amount as debt or damage before there can be a recovery of the costs that have been made. But the debt has been paid, and the payment has been voluntarily accepted in full satisfaction of all that is due the plaintiff as a debt, and on what principle can he be entitled to recover something more as debt or damages? The voluntary acceptance of money as full payment of the debt operates as a discharge of the debt, and consequently as a discharge of the costs incident to the debt, which otherwise he would have been entitled to recover. The tender of the debt by the defendant without a tender of the costs that had been made would not have had this effect. It is the voluntary acceptance of the money as a full payment of the debt that operates to discharge the costs, which until judgment are only an incident of the debt. A majority of the court are of the opinion that the plaintiff himself has put it out of his power to recover the costs in controversy, and therefore advise the superior court to render judgment for the defendant."

*Poppers v. Meager*, 33 Ill. App. 20, was a suit in which a distress warrant was levied on the property of defendant for the rent of the landlord. After issue joined on a plea of nil debet, the rent for which the warrant issued was paid; nevertheless the cause proceeded to trial after the goods had been released on bond. At the trial the expense of the custody of the goods levied upon was proven to be \$15, and from a judgment for that amount rendered and entered against him defendant appealed. Of this amount the court said:

"But, such allowances being costs, the party is not entitled to recover them unless he is, by statute, entitled to costs. No final costs were recoverable by the plaintiff or defendant at common law." 2 Tidd's Pr. 945. Without a judgment in his favor for the thing sued for, debt, damages, chattels or land, the various statutes do not provide for any final costs to the plaintiff. If his cause of action is extinguished pendente lite, his right to a recovery, and with it his title to costs, is gone. *Sweetland v. Tut-hill*, 54 Ill. 215. The judgment must be reversed, but, as no further proceedings can be had in the cause, it is useless to remand it."

And in the syllabus:

"Without a judgment in his favor the plaintiff is not entitled to costs; if a cause of action is extinguished pendente lite, a right to a recovery, and with it the title to costs, is gone."

In *Skinner v. Jones*, 4 Scam. (Ill.) 193, a part of the syllabus reads:

"Before a plaintiff is entitled to recover costs from a party he summons into court, he must show that he had a cause of action against him at the time of the institution of the suit, and that it still subsists. If, between the commencement of the suit and the trial, he voluntarily releases his cause of action, his right to recover costs is gone."

See, also, *McCoy et al. v. Loughery*, 11 Phila. (Pa.) 302; *Keeler, Agt., v. Van Wie*, 49 How. Prac. (N. Y.) 97; *Warfield v. Watkins*, 30 Barb. (N. Y.) 395; *Christie v. Corbett*, 34 How. Prac. (N. Y.) 19; *Bendit, Agt., v. Annesley*, 27 How. Prac. (N. Y.) 184; *Hayes County v. Wileman*, 82 Neb. 660, 118 N. W. 478; *Montgomery v. Har-*

son, 1 Brev. (S. C.) 480; Johnson v. Brannan, 5 Johns. (N. Y.) 268; Watson v. De Peyster, 1 Caines (N. Y.) 66; Morgan v. Griffin, 1 Gilman (6 Ill.) 565; Bates v. Norris, 13 Civ. Proc. R. (N. Y.) 395; Pulver v. Harris, 62 Barb. (N. Y.) 500; Weeks v. Starr (Sup.) 132 N. Y. Supp. 393.

We are therefore of opinion, when pendente lite defendant yielded possession of the property in controversy, as he did, that there was left remaining no issue to try; that the court lost jurisdiction of the subject-matter, and hence could render no judgment affecting the same, and, there being no agreement as to the costs, erred in taxing the same against defendant. Precisely what defendant did, in effect, when on the trial it was made known to the court by agreement of counsel that possession had been yielded and accepted, as stated, was to interpose what was known at common law to a plea *puls darrein continuance* or, under the statute (Rev. Laws 1910, § 4795), a supplemental answer, alleging the same as a material fact occurring after the former answer. When a plea *puls darrein continuance* was interposed and established, under 8 & 9 W. c. 11, § 2, defendant was entitled to costs incurred subsequent to putting in the plea. *Lyttleton v. Cross et al.*, 4 B. & C. 115. But, to take the place of this practice, said section 4795 provides:

"Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply."

Pursuant to which the court had the right to require defendant to reduce such fact to writing and file it as a supplemental answer, and, in the court's discretion, tax him with part or all the costs of the suit. But the court did not so require, but accepted and considered the fact thus interposed as well pleaded. It is clear that, when that fact was considered, as it was, the court lost jurisdiction to render judgment on the merits, erred in so doing, and, having no jurisdiction upon which to predicate a judgment for costs, also erred in taxing defendant therewith. In *Bronner Brick Co. v. M. M. Canda Co.*, 18 Misc. Rep. 681, 42 N. Y. Supp. 14, the court said:

"In an action of a legal nature, the rights of the parties must be determined as they existed at the commencement of the action, except so far as the situation has since been changed unfavorably to the plaintiff's claim, either by his own act or by operation of law (*Abb. Trial Brief on Pleadings*, 414, § 502; *Styles v. Fuller*, 101 N. Y. 622 [4 N. E. 348]; *Ferris v. Tannebaum* [Com. Pl.] 15 N. Y. Supp. 295); the reason being that in such actions the statute gives costs, and, as they ought not to be charged on a plaintiff, who had good reason to sue, the defendant ought to get leave, and then the court can impose terms (*Abb. Trial Brief on Pleadings*, supra; *Ferris v. Tannebaum*, supra). Hence (with these exceptions) an answer which sets up as a defense any essential fact that did

not occur until after suit brought is bad in an action of a legal nature, even in those jurisdictions where equitable defenses can be pleaded. But if plaintiff's own voluntary act, pending the action, has impaired or discharged his cause of action as by compromise or release, \* \* \* the defendant may set up the fact in his answer, unless it occurred after issue joined, in which case it can only be set up by supplemental answer. *Abb. Trial Brief on Pleadings*, above. The ground for this distinction is, I think, substantial."

And in the syllabus:

"Costs are but an incident to the debt, and, if the latter is extinguished by tender and acceptance, no costs can be recovered unless expressly reserved by agreement between the parties."

There is no conflict in what we hold here and what we held in *Interstate Crude Oil Co. v. Young*, 29 Okl. 465, 118 Pac. 257. Here was an executed settlement of the action brought about by the change of possession of the property in controversy and a consequent extinguishment of the subject-matter of the action out of court with no agreement as to costs. There, by stipulation, an executory contract of settlement, signed by the parties, was brought into court containing an agreement which was not intended to, and did not, extinguish the subject-matter of the action until the court, on motion, rendered judgment pursuant thereto, and, in so doing, correctly carried into that judgment the part of the stipulation as to the costs. While the record is not as fully stated in the opinion as it might be, this was all the court did in that case, for in the syllabus we say:

"Where the parties stipulate for the settlement of an action, providing that each shall pay his own costs, the court does not thereby lose jurisdiction thereof, but may retain the same, award and tax costs, and render judgment therefor in accordance with the terms of the stipulation."

The judgment of the trial court is reversed and rendered. All the Justices concur.

(16 Ariz. 422)

CHENOWETH et al. v. BUDGE. (No. 1440.) (Supreme Court of Arizona. March 1, 1915.)

1. APPEAL AND ERROR (§ 722\*)—REVIEW—FUNDAMENTAL ERROR.

Without some attempt by counsel to observe the rules of practice of the Supreme Court, it is not called upon to consider the record filed on appeal, further than to look for fundamental error appearing upon the face thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—SCHOOL BUILDINGS—ELECTION—STATUTES.

Under Civ. Code 1913, par. 2780, providing that high school districts may vote bonds the same as common school districts, paragraph 2736, requiring the board of trustees of any district in their judgment or upon petition of school electors to call an election to determine whether bonds of the district shall be issued for purchasing or leasing school lots, paragraphs 2737, 2738, providing the election procedure and notice, and paragraph 2740, providing for a canvass of the returns and that after a ma-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

majority vote the supervisors may issue bonds, no election for the purposes of locating a high school prior to issuance and sale of bonds is necessary.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

**8. EVIDENCE (§ 83\*)—PRESUMPTION—PERFORMANCE OF OFFICIAL DUTY.**

Where the official acts of public officers are not questioned, it will be presumed that they performed their duty.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**4. APPEAL AND ERROR (§ 719\*)—FUNDAMENTAL ERROR—REVERSAL.**

Where judgment on a record embodying no cause of action was rendered for plaintiff, there was fundamental error requiring reversal, though no error was assigned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Action for injunction by W. G. Budge against W. F. Chenoweth and others, constituting the Board of Trustees of School District No. 1, Santa Cruz County, Ariz., and A. S. Henderson and others, constituting the Board of Supervisors of Santa Cruz County. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The parties to this cause have stipulated that the findings of the court are the facts of this case. The findings are as follows:

"1. That heretofore, to wit, on or about the 11th day of May, 1912, at an election in Nogales school district No. 1, Santa Cruz county, Ariz., regularly called for that purpose, the majority of the qualified school electors voted in favor of establishing a high school in the said district.

"2. That at the call of the county superintendent of schools a mass meeting of the school electors of said district was held within 15 days thereafter, to wit, on the 24th day of May, 1912, which selected the grammar school building as a temporary place in which to carry on the high school.

"3. That neither within 15 days of the election of May 11, 1912, nor at any time prior to the hearing of this action, was there held any election of the school electors of the said district, either at the call of the county superintendent of schools or otherwise, for the purpose of locating the said high school.

"4. That it is admitted by the parties hereto that on the 2d day of May, 1914, a majority of the qualified electors of the said district voted at an election duly and regularly called and conducted in accordance with the provisions of sections 44, 45 and 46, chapter 77, of the Acts of the Regular Session, First Legislature of the State of Arizona (paragraphs 2736, 2737, 2738, and 2780, Revised Statutes of Arizona of 1913), to issue bonds of the said school district to the amount of \$60,000, and sell them for the purpose of raising money with which to purchase a high school site or lots, in the town of Nogales, or within the said district, to erect a high school building thereon, supply the same with necessary furniture and apparatus, and improve the grounds thereof; and that all subsequent steps have been duly and regularly taken by the proper authorities of the said district and county to issue and sell the said

bonds, and that they are now ready for delivery to the purchasers thereof."

The action was commenced by a resident taxpayer and qualified school district elector against the board of education and the board of supervisors of the county, seeking to have the bonds declared invalid and to restrain the said officers from delivering the said bonds to the purchasers of the bonds, and to restrain the officers from holding an election for the purpose of changing the location of the high school and to relocate the same, because—

"no election of the qualified school electors of the said district for the purpose of locating the high school was called by the county superintendent of schools within 15 days after the majority of the qualified school electors of said district voted to establish and maintain a high school in the said district, or at any time prior to the issuance of the said bond issue; \* \* \* that such an election was necessary, and a condition precedent to the lawful issuance of any bonds of the said district. \* \* \*"

The defendants admit the facts pleaded, but deny the legal effect of the facts admitted. Upon a trial had the court made the foregoing findings of fact, and thereon rendered judgment for plaintiff, declaring the bonds invalid, and entered an order restraining the defendants from proceeding in any manner from completing the sale and delivery of the bonds. From this judgment the defendants have appealed.

Other facts appear in the opinion of the court.

S. F. Noon, Co. Atty., of Nogales, for appellants. E. R. Purdum, of Nogales, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The parties have stipulated that the record consists of the complaint, answer, judgment, motion for new trial, notice of appeal, and the stipulation signed by the attorneys for the respective parties and approved by the trial judge. The stipulation contains this provision:

"It is further stipulated and agreed that the only question or issue submitted for the consideration and decision of the Supreme Court in this appeal is whether or not the mass meeting held by the electors of Nogales school district No. 1, Santa Cruz county, Ariz., on the 25th day of May, 1912, was or was not a compliance with law; and, if not a compliance with law, did the subsequent acts of the board of trustees of Nogales school district cure such omission or defect, and render the bond issue valid?"

[1] Counsel have filed no briefs in the case, nor formally assigned errors, and the court has received no assistance from that source. The above stipulation seems to have been treated by the parties as embodying the whole question, and as a sufficient assignment of errors. Without some attempt on the part of counsel to observe the rules of practice established in this court, we are not called upon to consider the record filed on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appeal, further than to look into it for fundamental error appearing upon the face of the record presented. For this purpose we will examine the complaint, in order to determine whether a cause of action is stated thereby, and, if so, whether the judgment is responsive to the complaint.

[2] The complaint sets forth as grounds for action that no election of the qualified school electors of the district had been held for the purpose of locating the high school in the district prior to the time when the bonds were ordered issued and sold. The complaint admits that a majority of the qualified school electors of the district had voted to establish and maintain a high school in the district but contends that the election to locate the high school in the district prior to the issuance of the bonds was necessary and a condition precedent to the lawful issuance of any bonds of the district, "and that on account of the failure to hold the said election for the purpose of locating the high school the said \$60,000 bond issue is unauthorized by law, illegal, and void." The judgment is that the bonds are unauthorized and void, following a finding "that an election to select a location for the high school, was necessary, and a condition precedent to the lawful issue of any bonds of said district."

The statutes in force authorizing the issuance of bonds of a high school district are paragraphs 2780, 2736, 2737, and 2738, Civil Code 1913. Paragraph 2780 provides that high school districts may vote bonds "for the same purpose and in the same manner as common school districts." Paragraph 2736 provides that:

"The board of trustees of any school district may, whenever in their judgment it is advisable, and must, upon petition of fifteen per cent. of the school electors, as shown by the poll list at the last preceding annual school election, residing in the district, call an election for the following purposes: \* \* \* (4) To decide whether the bonds of the district shall be issued and sold for the purpose of raising money for purchasing or leasing school lots, for building school houses, and supplying same with furniture and apparatus, and improving grounds, or for the purpose of liquidating any indebtedness already incurred for such purposes. \* \* \*"

Paragraph 2737 provides the procedure required to be followed in calling the election by giving notice of the holding of the election and the time notice must be given. Paragraph 2738 prescribes the contents of the notice. Paragraph 2740 provides:

"On the seventh day after said election, at 1:00 o'clock p. m., the returns having been made to the board of trustees, the board must meet and canvass said returns; if it appear that a majority of the votes cast at said election were in favor of issuing such bonds, then the board shall cause an entry of that fact to be made upon its minutes and shall certify to the board of supervisors of the county all the proceedings had in the premises, and thereupon said board of supervisors shall be and they are hereby authorized and directed to issue the bonds

of such district, to the number and amount provided in such proceedings, payable out of the building fund of such district, naming the same, and the money shall be raised by taxation upon the taxable property in said district for the redemption of said bonds and the payment of the interest thereon: Provided, that no school district shall issue bonds for the purposes herein specified to an amount in the aggregate, including the existing indebtedness, exceeding six per cent. on the value of the taxable property within such school district, to be ascertained by the last assessment of state and county taxes previous to the issuing of such bonds."

We find no provision of the law requiring as a condition precedent to the issuance of the bonds of a school district for the purpose of raising money with which to purchase a high school site or lots and to erect a school building thereon, and supply the same with necessary furniture and apparatus, and improve the grounds, the holding of an election to locate the school building. No such requirement exists. Such election is unnecessary to the authorization of the issue of bonds of the district for the purposes mentioned.

[3] Appellee in his complaint makes no contention of other omission to follow the law, and as the officers are public officers we must presume for the purposes of this case that they performed their duty. They are not required to call or hold an election for the purpose of locating the high school within 15 days after a majority of the qualified school electors of the district voted to establish and maintain a high school, before bonds of the district could be lawfully issued for the purposes stated above. If the officers failed to substantially follow the requirements of the statutes, supra, such failure is not the subject of plaintiff's complaint.

[4] As the record stands, the judgment of the court is based upon an erroneous proposition of law, embodying no cause of action, and discloses fundamental error. The judgment is reversed, and the cause remanded, with instructions to permit the plaintiff to amend his complaint, if desired, so as to set forth a cause of action, and take such further proceeding as the law requires.

Reversed and remanded.

ROSS, C. J., and FRANKLIN, J., concur.

(45 Okl. 75)

OKLAHOMA CITY et al. v. DUHME  
(No. 3814.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 950\*)—BONDS—PAYMENT—FUNDS AVAILABLE—"SEPARATE SPECIAL FUND."

Act approved April 17, 1908 (Laws 1907-08, c. 10), providing for the payment of bonds issued pursuant thereto, provides that assessments to pay said bonds shall bear 7 per cent. interest per annum if paid at maturity and 18 per cent. thereafter as a penalty. It further

provides that said bonds before maturity shall bear interest at the rate of 6 per cent. per annum until paid. *Held*, that the 1 per cent. interest collected pursuant thereto in excess of the 6 per cent. interest provided for in the bonds constitutes a part of the separate special fund provided for in the statute, and as such is properly applicable to the payment of said bonds when due and payable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902-910; Dec. Dig. § 950.\*]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Herman Duhme, Jr., against the City of Oklahoma City, a municipal corporation, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Johnson, of Oklahoma City, for plaintiffs in error. G. A. Paul, of Oklahoma City, for defendant in error. M. D. Libby, of El Reno, amicus curiæ.

TURNER, J. This is a proceeding commenced in the trial court upon an agreed statement of facts pursuant to Rev. Laws 1910, § 5303, providing for the submission of a controversy. The facts submitted are that defendant in error is the owner of paying bond No. 71 of series No. 75, issued by the municipality of Oklahoma City for the improvement of Classen Boulevard; that said bond is past due and remains unpaid, although duly presented to the city treasurer for payment; that at the time the city treasurer had collected and had within the treasury a fund sufficient in amount to pay said bond derived by setting aside 1 per cent. of the 7 per cent. interest collected as assessments, the same being in excess of the 6 per cent. provided by law to be paid upon this and other street improvement bonds. The question for us to determine is—

“whether said 1 per cent. so collected by said city and placed in said special fund shall be paid to the persons holding matured bonds and interest coupons upon presentation thereof to the city treasurer.”

We think so, for the reason that the statute says so. The statute, among other things, provides that one-tenth of the principal of these bonds shall become due and payable on September 15th of each year, together with interest on the amount of the bonds unpaid. The bonds before maturity are required to bear not exceeding 6 per cent. interest per annum and after maturity until paid, 10 per cent. per annum. Assessments to meet the bonds are payable in 10 equal annual installments, and bear interest at the rate of 7 per cent. per annum if paid at maturity and 18 per cent. after maturity as a penalty, and “are payable in each year at such time as the several installments of the assessments are made payable each year.” These amounts, including interest, when collected are denominated by statute “assessments,” and should be covered in to the treasury as one fund. With ref-

erence to the same the statute (Act April 17, 1908; Laws 1907-08, c. 10) provides:

“It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily the amounts of such assessments collected by him, and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purposes.”

It will be noted that the statute provides that all such assessments “shall constitute a separate special fund,” not funds. As one fund is contemplated, the confusion arose in this case by segregating the 1 per cent. collected over and above the interest provided for in the face of the bonds and withholding it from being applied in payment thereof. This was unwarranted under the law. The statute is plain, and as this 1 per cent. is a part of the separate special fund collected for the purpose of paying these bonds, it must be so applied pursuant to the statute.

There is nothing in *Spitzer v. City of El Reno*, 41 Okl. 430, 138 Pac. 797, in conflict with this opinion.

The judgment of the trial court is affirmed. All the Justices concur, except KANE, O. J., absent and not participating.

(45 Okl. 77)

BRADLEY et al. v. GODDARD. (No. 3822.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. INDIANS (§ 15\*) — ALLOTMENTS — REMOVAL OF RESTRICTIONS — OPERATION OF STATUTE.

As to a certain portion of the lands of the Creek Nation, namely, those held by a certain class of citizens, to wit, allottees not of Indian blood, and (in the event of their death) their heirs, Congress by the Act of April 21, 1904 (chapter 1402, 33 Stat. 204), removed all restrictions upon alienation, thereby granting to such allottees or to such heirs power to convey all lands allotted to or inherited by them, except the portion designated as a homestead while the allottee lived, and the lands of minors during their minority.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

(Additional Syllabus by Editorial Staff.)

2. INDIANS (§ 15\*) — ALIENATION OF ALLOTMENT — REMOVAL OF RESTRICTIONS — “ALLOTTEES.”

The word “allottees,” as used in Act April 21, 1904, c. 1402, 33 Stat. 204, removing the restraint on alienations by persons not of Indian blood, except minors, refers to the persons to whom allotments are made, and not to their heirs.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

For other definitions, see *Words and Phrases*, Second Series, Allottee.]

Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by George N. Goddard against Thomas F. Bradley and others. Judgment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for plaintiff, and defendants bring error. Affirmed.

Powell & Wilson, of Muskogee, and E. L. Kirby, of Wagoner, for plaintiffs in error. Robert F. Blair and Henry M. Brown, both of Wagoner, for defendant in error.

**BLEAKMORE, J.** This is an action begun in the district court of Wagoner county by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants, to cancel and set aside a deed and mortgage executed to the plaintiffs in error Bradley and Malone, respectively. The cause was tried to the court without a jury, and resulted in a decree canceling said deed and mortgage, and enjoining plaintiffs in error from clouding the title, or interfering with the possession, of defendant in error. The parties will be hereafter referred to as they appeared in the trial court.

The facts are: That the land involved was allotted to one Lucy Lewis, a duly enrolled freedman of the Creek Nation, not of Indian blood, who was born prior to April 1, 1899, and who died in the year 1901, an infant, unmarried and without issue, leaving surviving her father, John Lewis, a freedman citizen of the Creek Nation, and her mother, Docie Lewis, a noncitizen of said nation. In February, 1905, John Lewis and Docie Lewis executed and delivered a warranty deed conveying to plaintiff a portion of the allotment of said Lucy Lewis, and in February, 1906, executed a warranty deed conveying to plaintiff the remainder of said allotment. That on the 15th of March, 1909, the mother of the deceased allottee, Docie Lewis, executed and delivered a deed to the defendant Thomas Bradley, purporting to convey to him the entire allotment. That afterwards, on March 28, 1911, the father of the deceased allottee, John Lewis, executed a mortgage upon the entire allotment to the defendant Lewis B. Malone. The plaintiff was in possession of the lands under the conveyance made to him.

[1, 2] The allotment was made under the provisions of the Act of March 1, 1901 (31 Stat. at L. 888, c. 676), as modified by the Act of June 30, 1902 (32 Stat. at L. 500, c. 1323). By the terms of the Act of March 1, 1901, it was provided:

"Lands allotted to citizens hereunder shall not \* \* \* be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

By section 16 of the Act of Congress of June 30, 1902, it is provided:

"Lands allotted to citizens shall not in any manner whatever, or at any time be incumbered, take, or sold to secure to satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall

select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Under these provisions the restraint upon alienation was a limitation attaching to and running with the land, in no wise dependent upon the life or death of the allottee. *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525; *In re Lands of Civilized Tribes (D. C.)* 199 Fed. 811.

"The inalienability of the allotted lands was not due to the quality of the interests of the allottee, but to the expressed restrictions imposed." *Goat v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 58 L. Ed. 841.

By the Act of Congress of April 21, 1904 (33 Stat. at L. 204, c. 1402), it was provided:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood except minors, are, except as to homesteads, hereby removed."

Neither the allottee nor her heirs were of Indian blood. The sole question decisive of this case is: Were the restrictions upon the alienation of said lands removed by the Act of April 21, 1904?

What were the restraints upon the alienation of the lands in question at the time of the passage of the Act of April 21, 1904, which could have been removed thereby? Manifestly such restraints were: (1) That during the periods prescribed by the allotment act no citizen to whom lands had been allotted could alienate the same (except a portion with the approval of the Secretary of the Interior); and (2) if such allottee died, his heirs during said periods could not convey such lands. The allottee was restrained from alienating during his lifetime—and after his death his heirs. These restrictions were impressed upon all lands allotted to Creek citizens during their lifetime, regardless of Indian blood.

As to a portion of these lands, namely, those held by a certain class of citizens, to wit, allottees not of Indian blood, and (in the event of their death) their heirs, Con-



gress, by the Act of April 21, 1904, removed all restrictions upon alienation, thereby granting to such allottees or to such heirs power to convey all lands allotted to or inherited by them, except the portion designated as a homestead while the allottee lived, and the lands of minors during their minority.

Restrictions upon the alienation of these lands applied solely to allottees and to the heirs of deceased allottees thereof, and could be removed only as affecting conveyances made by such allottees or such heirs. Protection of the rights of the living was alone contemplated by the legislation imposing restrictions, and the act removing such restrictions could have had regard only for the lands and rights of living owners.

The restraint upon alienation provided by the Act of June 30, 1902, *supra*, being a limitation, running with the land, upon the power of the allottee during his lifetime and of his heirs after his death to convey the same, the obvious purpose of Congress in removing such restriction upon the lands of a certain class of persons was to permit those persons, having title to such lands either by allotment or by inheritance, to convey, and therefore must necessarily have referred to and removed restrictions upon the power of heirs of deceased allottees to convey such lands. Deceased allottees could not have been contemplated, and as to the lands which had been allotted to them only the rights of their heirs who took title under the provisions of the allotment act could have been affected.

In *Parkinson v. Skelton*, 33 Okl. 813, 128 Pac. 131, it is said in the syllabus:

"The word 'allottees,' as used in Act April 21, 1904, c. 1402, 33 St. at L. 204, refers to the parties to whom an allotment is made, and not to their heirs; and where the allottee under the said act would have been authorized to alienate his land, had he lived, the same, on his death, was alienable by his heirs, without reference to their blood."

In *United States v. Jacobs*, 195 Fed. 707, 115 C. C. A. 507, a case in which a member of the Creek tribe had died prior to allotment, and the lands to which he would have been entitled if living had been allotted to his heirs, it was said by the United States Circuit Court of Appeals for the Eighth Circuit:

"The Act of April 21, 1904, above quoted, says, 'And all restrictions upon the alienation of lands of all allottees, except minors, are removed.' This was not a removal of the restriction upon alienation by the allottee only, but was general and applied to allottees or heirs of allottees, except in cases only of minors, and no claim is made that any of the heirs of Pearlie Jacobs were minors. Hence it is clear that there was no restriction upon the alienation by them."

In construing section 16 of the Act of Congress of June 30, 1902, *supra*, Judge Campbell of the United States District Court for the Eastern District of Oklahoma said:

"I therefore conclude, in view of the entire section, studied in the light of contemporaneous legislation regarding the other tribes, and the purpose sought to be accomplished, that the only reasonable construction is that the parties to the agreement intended that upon the death of the Creek allottee, in the absence of the children mentioned, whether before or after the expiration of the five years' restriction period affecting his surplus his homestead allotment should become immediately alienable by his devisees in case of will, and by his heirs in the absence of a will." In *re Lands of Civilized Tribes*, *supra*.

Plaintiff having deeds from both the father and mother of the deceased allottee, it is unnecessary here to determine the question as to whether the noncitizen parent inherited any part of said allotment. However, the Supreme Court of the United States in the recent case of *Skelton v. Dill*, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. —, in which the same question was raised, said:

"Both parties are claiming under deeds from the father and mother, so we pass the question of who were the true heirs of the deceased child, observing only that under section 6 of the supplemental act, in the circumstances before stated, the mother was and the father was not a lawful heir."

In that case the mother was a member of the Creek tribe of Indians, but the father was not. In the instant case the mother was a noncitizen and the father a citizen.

It follows from the foregoing that the judgment of the trial court should be affirmed, and it is so ordered. All the Justices concur.

(44 Okl. 520)

WELKER v. ANNETT et al., Board of Com'r's of Pawnee County. (No. 3853.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. COUNTIES (§ 131\*)—DAMAGES—LIABILITY—STATUTE—"COUNTY."

A county is purely an auxiliary of the state, and is not subject to a liability which is neither expressly nor impliedly imposed by statute.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 199; Dec. Dig. § 131.\*

For other definitions, see *Words and Phrases*, First and Second Series, *County*.]

2. COUNTIES (§ 146\*)—EMINENT DOMAIN (§ 2\*)—CONSTITUTIONAL LAW—LIABILITY—DIPPING CATTLE.

A county is not liable for purely consequential damages resulting from a tort committed by its board of county commissioners in neglecting to provide a dripping pen and to retain in such pen until dry cattle (including plaintiff's own) dipped by it for the eradication of ticks (*Morgaropus annulatus*), as required by Sess. Laws 1910-11, pp. 255, 256, c. 115 (sections 29-32, Rev. Laws 1910), in a vat provided by it, with plaintiff's consent, upon his premises, before allowing such cattle to go thence onto plaintiff's grass and into his field of fodder, upon which they deposited "dip," from which seven head of plaintiff's cattle, upon eating, were poisoned and died.

(a) This does not show a taking or damaging of private property for public use without just compensation within the inhibition of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

section 24, art. 2 (Williams', § 32), of the Constitution.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 212; Dec. Dig. § 146;\* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

Commissioner's Opinion, Division No. 1. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by James A. Welker against Walter Annett and others, the Board of County Commissioners of Pawnee County. Judgment for defendants, and plaintiff brings error. Affirmed.

Orton & McNeill, of Pawnee, for plaintiff in error. Redmond S. Cole, Co. Atty., of Pawnee, for defendants in error.

THACKER, C. Plaintiff in error was plaintiff and defendant in error was defendant in the trial court, and this is an appeal by plaintiff from a judgment upon a sustention of defendant's demurrer to his petition, alleging damages sustained in the death of seven head of cattle caused by their eating fodder and grass upon which a "dip" employed by the defendant county through its commissioners to eradicate ticks (*Morgaropus annulatus*) had been deposited by cattle "dipped" in a vat erected with plaintiff's permission upon his premises and allowed to go thence into the plaintiff's field of such fodder and grass without first "dripping" until dry in a pen which should have been, but was not, provided therefor by the defendant.

Under Sess. Laws 1910-11, pp. 255, 256 (sections 28-32, Rev. Laws 1910) and the rules and regulations of the state board of agriculture authorized by these statutes, it was the duty of the defendant county to erect said vat and to have erected said omitted pen, to "dip" the said cattle, and allow them to "drip" and "dry" in a pen before discharging them to run at large, so as to prevent the poisoning of other animals or themselves from such "dip."

[1, 2] The only question in this case is as to whether the defendant county is liable in an action for damages on account of the negligent and tortious act of its officers in the discharge of their ministerial duty in this regard.

The rule announced and the reasoning as to the dual character of such political or civil divisions of a state in the case of *Liberity Township v. Rock Island Township*, 144 Pac. 1025, decided at this time, is applicable here.

As stated in 1 Dillon, *Municipal Corporations* (5th Ed.) § 37 (25), as to counties:

"They are involuntary political or civil divisions of the state, created by general laws to aid in the administration of government. \* \* \* They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all the liabilities to which they are subject."

See 11 Cyc. 497-500; *Board of County Commissioners of Greer County v. Watson*, 7 Okl. 174, 54 Pac. 441; *Howard v. Rose Twp. of Payne County et al.*, 37 Okl. 153, 131 Pac. 683.

This action is upon a tort, and the foregoing authorities show that the county is not liable thereon.

It is contended, however, that the petition shows a taking or damaging of private property for public use without just compensation within the inhibition of section 24, art. 2 (Williams', § 32) of the Constitution; but, as the damages are purely consequential, and not the direct and immediate result of the tortious act of the defendant, we cannot give our assent to this proposition. 4 Dillon, *Municipal Corporations* (5th Ed.) § 1680 (992).

For the reasons stated, the judgment in this case should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 586)

BAILEY, Sheriff, v. WILLIAMSON-HALSELL-FRAZIER CO. (No. 3700.)

(Supreme Court of Oklahoma. Nov. 10, 1914. Rehearing Denied, Jan. 12, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1008\*)—FINDING—CONCLUSIVENESS.

Where a cause is tried to the court without the intervention of a jury, a general finding of the court is upon appeal to be given the same weight and effect as the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

2. TAXATION (§ 611\*)—COLLECTION—INJUNCTION—BURDEN OF PROOF.

Under section 7553, Comp. Laws 1909, the burden of proof is upon the person claiming the lien to show that the Altus Wholesale Grocery Company sold all of its personal property to the Williamson-Halsell-Frazier Company after its personal property was assessed, before the taxes thereon were paid, and did not retain sufficient property to pay such taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Jackson County; Frank Matthews, Judge.

Action by the Williamson-Halsell-Frazier Company, a corporation, against John D. Bailey, sheriff of Jackson county, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Williams and M. L. Hankins, both of Altus, for plaintiff in error. Everett Petry, of Altus, for defendant in error.

RITTENHOUSE, C. This action was brought to enjoin J. D. Bailey, sheriff of Jackson county, Okl., from levying a tax warrant for \$710.32 upon the property of the Williamson-Halsell-Frazier Company, which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property had been assessed for taxation for the year 1911 as the property of the Altus Wholesale Grocery Company, such assessment being made prior to the sale thereof. The defendant, as sheriff of said county, filed answer, admitting the acts complained of by the plaintiff, but sought to justify his levy upon the theory that the tax in question had been assessed against the Altus Wholesale Grocery Company, and that the property sought to be seized was liable for the payment of such taxes under section 7553, Comp. Laws 1909, which provides:

"If any person in this state, after his personal property is assessed and before the tax thereon is paid, shall sell all of the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall be a lien thereon, or if such property is about to be sold at auction, or about to be sold at cost, then in either of such events the tax thereon shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereof, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any tax he owes thereon, but the property so purchased shall be liable in the hands of the purchaser for such tax: Provided, however, if the property be sold in the ordinary course of retail trade, it shall not be so liable in the hands of the purchaser."

At the time of the trial the plaintiff proved that it was the owner and in possession of the property in controversy, that the tax warrant was issued against the Altus Wholesale Grocery Company, and that the defendant was threatening to and would levy such warrant against such property, unless restrained by order of the court. This established a prima facie case on behalf of the plaintiff; in addition thereto the plaintiff proved by E. F. Nesbit, who was formerly manager of the Altus Wholesale Grocery Company, that such company sold to the Williamson-Halsell-Frazier Company property of the value of \$13,676.13; that the assets of said company retained at the time of the sale amounted to \$14,835.40, which consisted of notes and accounts aggregating \$13,447.02, merchandise, \$338.38, and real estate, \$1,000. On cross-examination it was brought out that at the time of the trial the notes and accounts which remained undisposed of were of questionable value, but might have been collected had they been pressed at an earlier date. On this theory, the plaintiff in error insists that, the notes and accounts being of questionable value, this court should hold that the Altus Wholesale Grocery Company did not retain sufficient property to pay the taxes on its entire stock. The court below found in favor of the plaintiff.

[1] It has been held repeatedly in this state that where a cause is tried to the court without the intervention of a jury, a general finding of the court is, upon appeal, to be given the same weight and effect as the verdict of a jury. *Miller v. Severs*, 141 Pac. 965; *Roberts v. Markham*, 26 Okl. 387, 109 Pac.

127; *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694; *Lookabaugh v. Bowmaker*, 21 Okl. 489, 96 Pac. 651; *J. I. Case Threshing Machine Co. v. Oates*, 27 Okl. 412, 112 Pac. 980.

[2] Independent of whether we are bound by the finding of the court, the burden of proof was upon the defendants to show that the Altus Wholesale Grocery Company sold all of its personal property to the Williamson-Halsell-Frazier Company, after its personal property had been assessed, before the taxes thereon were paid, and did not retain sufficient property to pay such taxes. This the defendant failed to show, therefore, not bringing his case within section 7553, supra. It is true that the plaintiff offered evidence which tends to show that the Altus Wholesale Grocery Company had complied with said section, and in doing so the defendant, on cross-examination, brought out the fact that the property retained by the Altus Wholesale Grocery Company was, at the time of trial, of questionable value, but this did not establish the fact that the Altus Wholesale Grocery Company did not retain sufficient property with which to pay the taxes assessed against its stock. The notes and accounts aggregated \$13,447.02, and while they may have been of questionable value, yet in the absence of evidence to show their actual value, we would not be justified in holding that they were not of sufficient value to discharge the tax. The court was justified, under the evidence in this case, in holding that the defendant had failed to prove that the Altus Wholesale Grocery Company had not retained sufficient property with which to pay the taxes against its stock. The injunction was properly granted.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

(45 Okl. 121.)

BOARD OF COM'RS OF MUSKOGEE  
COUNTY et al. v. FINK et al.  
(No. 5481.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

1. DISTRICT AND PROSECUTING ATTORNEYS  
(§ 9\*)—PARTIES—PRESUMPTION OF AUTHORITY.

Where an appeal is lodged in this court in which a board of county commissioners are plaintiffs in error, the county attorney appearing as their counsel, such attorney, being the county attorney and an officer of the court, will be presumed to have authority to perfect and prosecute the appeal in the absence of an affirmative showing to the contrary by the board of county commissioners.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 36, 37; Dec. Dig. § 9.\*]

2. DISTRICT AND PROSECUTING ATTORNEYS  
(§ 9\*)—PARTIES—PRESUMPTION OF AUTHORITY.

It is not essential that the board of county commissioners enter upon their records or min-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

utes an order directing or approving an appeal by their county attorney, and the fact that the records of the board are silent on the proposition does not raise the presumption that such appeal was not authorized or consented to by them.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 36, 37; Dec. Dig. § 9.\*]

*(Additional Syllabus by Editorial Staff.)*

**3. DISTRICT AND PROSECUTING ATTORNEYS (§ 9\*)—PARTIES—PRESUMPTION OF AUTHORITY—"AFFIRMATIVE SHOWING."**

An "affirmative showing," within the rule that a county attorney appealing on behalf of the board of county commissioners will be presumed to have authority to do so in the absence of an affirmative showing, means an affirmative showing by the party whom the attorney represents, and does not mean that the adverse party may challenge the attorney's right except when the records of the appellants or the appellants themselves indicate affirmatively that they do not desire to appeal.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 36, 37; Dec. Dig. § 9.\*]

Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action between the Board of County Commissioners of Muskogee County and others and D. N. Fink and others. From the judgment, the parties first mentioned bring error, and the adverse parties move to dismiss. Motion overruled.

Charles West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and W. E. Disney, Co. Atty. of Muskogee, for plaintiffs in error. W. O. Cromwell, of Enid, and Franklin & Carey, of Muskogee, for defendants in error.

**LOOFBOURROW, J.** Defendant in error moves to dismiss this appeal; one of the grounds being that the case-made does not affirmatively show that the county attorney of Muskogee county had no authority to prosecute the appeal. Attached to the motion is a certificate of the county clerk to the effect that the minutes and records of the board of county commissioners do not show that they authorized the appeal.

[1-3] Counsel cite *Kingfisher Co. v. Graham*, 40 Okl. 571, 139 Pac. 1149, and *Sequoyah Co. v. Helms*, 40 Okl. 565, 139 Pac. 958, in support of the proposition. In each of the above cases the board of county commissioners specifically directed a dismissal of the appeal, and this court held that under such circumstances the county attorney was without authority to maintain and prosecute the appeal. But in the case at bar the record does not disclose the attitude of the board of county commissioners. The county attorney, under the law, must appear for them, and is presumed to be acting within the scope of his authority. It is not necessary, in any case

where the county appeals, that the board of county commissioners enter upon their minutes an order directing the county attorney to perfect and prosecute the appeal, and the absence of such an order does not give rise to the presumption that the board are opposed to or have not consented to such appeal; but the presumption is that the county attorney is acting within the scope of his authority. See *Leedy v. Brown*, Judge, 27 Okl. 494, 113 Pac. 177, wherein it is held:

"When an action is commenced in the district court in the name of the state by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been requested by the Governor or one of the branches of the Legislature."

The "affirmative showing" referred to means "an affirmative showing by the party whom the attorney represents." As in the *Graham and Helms Cases*, supra, it does not mean that the adverse party may challenge the right of the attorney appealing except when the records of the appellants or appellants themselves indicate affirmatively that they do not desire to appeal.

In *San Luis Obispo v. Hendricks*, 71 Cal. 246, 11 Pac. 682, an ordinance provided that "the tax collector may direct suit," etc. The suit being instituted by the district attorney of the county, it was contended that the complaint should have averred that the tax collector had directed that the suit be brought, and, not having done so, the demurrer should have been sustained. The court said:

"The objection goes, not to the absence of any fact constituting the cause of action, but rather to the authority to bring the suit for want of an authorization from the tax collector. The action is instituted by the district attorney of the county—an attorney at law and an officer of the court. It was not necessary to state in the complaint that he was directed to bring the action. An attorney at law is presumed to be authorized by the proper party to institute the actions he brings, until the contrary is made to appear."

In *State v. Welbes*, 11 S. D. 86, 75 N. W. 821, the Attorney General, on behalf of the state, brought an action on the official bond of the county treasurer to recover taxes collected by him. It was held that it would be presumed that the Attorney General was requested to prosecute the action.

It is unusual for this court to write an opinion where a motion to dismiss an appeal is overruled; but, in view of the fact that the county commissioners and other officers so frequently appeal, we deem it advisable to settle this question so that there could be no misunderstanding among the profession and litigants as to the law on the proposition involved.

The motion to dismiss the appeal is overruled. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(11 Okl. Cr. 418)

HORINE v. STATE. (No. A-2248.)

(Criminal Court of Appeals of Oklahoma.  
March 6, 1915.)*(Syllabus by the Court.)*

CRIMINAL LAW (§ 1087\*)—APPEAL—JURISDICTION—DISMISSAL.

The record on appeal to this court must show the issuance and service of summons in error, or the waiver thereof by the Attorney General, or the service of notices of appeal. Unless one of these three acts is affirmatively shown, this court acquires no jurisdiction to determine the issues raised upon the record, and only has jurisdiction to dismiss the pretended appeal and direct the enforcement of the judgment of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770-2781, 2794; Dec. Dig. § 1087.\*]

Appeal from County Court, Adair County; John H. Pitchford, Judge.

Earl R. Horine was convicted of embezzlement, and appeals. Affirmed.

W. J. Crump, of Muskogee, and E. B. Arnold and W. L. Chase, both of Stilwell, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Earl R. Horine, was convicted at the October, 1913, term of the district court of Adair county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a term of five years. Judgment was pronounced on the 4th day of October, 1913. The appeal was filed in this court on the 13th day of April, 1914. No summons in error was ever issued, and no praecipe therefore was ever filed by counsel for plaintiff in error. No waiver of summons in error by the Attorney General was ever filed. No notices of appeal were served as provided by law.

The Attorney General has filed a motion to dismiss the appeal on the ground that no summons in error had been issued, that the same had not been waived by the Attorney General, and that no notices of appeal were served as provided by law. The response filed on behalf of plaintiff in error admits the correctness of the statements contained in the motion of the Attorney General, but contends that these omissions were not fatal. We have held in many cases, and to the contrary in none, that the failure to file proof of the service of notice of appeal, or waiver of summons in error, or the issuance and service of same, is fatal to the jurisdiction of this court. Unless one of these acts is done as provided by law, this court acquires no jurisdiction over the subject-matter and has jurisdiction only to dismiss the appeal. Neither of these acts having been done in this case, the court has no alternative except to sustain the motion of the Attorney General to dismiss the appeal.

The motion is sustained, and the appeal is

dismissed. The trial court is directed to enforce the judgment and sentence imposed.

DOYLE, P. J., concurs. FURMAN, J., absent.

(44 Okl. 658)

HUSTED v. LOCHE. (No. 4090.)

(Supreme Court of Oklahoma. Jan. 26, 1915.)

Commissioners' Opinion, Division No. 2. Error from County Court, Garvin County; W. B. M. Mitchell, Judge.

Action by Joe Loche against Theo. Husted. Judgment for plaintiff, and defendant brings error. Dismissed.

Blanton & Andrews, of Pauls Valley, for plaintiff in error. Thompson & Patterson, of Pauls Valley, for defendant in error.

BREWER, C. The petition in error and case-made in this action were filed in this court on June 17, 1912. The plaintiff has failed to file any brief, and, no reason being given therefor, the cause is dismissed in accordance with rule 7 of this court (137 Pac. ix).

PER CURIAM. Adopted in whole.

(45 Okl. 118)

CITY OF MUSKOGEE et al. v. IRVIN et al. (No. 5467.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS (§ 456\*)—ASSESSMENT FOR PUBLIC IMPROVEMENTS—VALIDITY.

Assessment held to be void upon the authority of *Sharum v. City of Muskogee*, 43 Okl. —, 141 Pac. 22.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1094-1099; Dec. Dig. § 456.\*]

2. APPEAL AND ERROR (§ 294\*)—PRESENTATION BELOW—MOTION FOR NEW TRIAL—FINDINGS OF FACT.

To secure a review of the evidence upon which the special findings of fact of a court are predicated, a motion for a new trial must be filed in the trial court, and, except for the cause of newly discovered evidence, must be at the term the findings are filed, and, unless unavoidably prevented, within three days thereafter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1724, 1725, 1727-1735; Dec. Dig. § 294.\*]

Error from Superior Court, Muskogee County; Alvin F. Molony, Judge.

Suit by William S. Irvin and others against the City of Muskogee and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

S. V. O'Hare, James O. Davis, and Clark J. Tisdell, all of Muskogee, for plaintiffs in error. William Neff and L. E. Neff, both of Muskogee, for defendants in error.

KANE, C. J. This was a suit in equity, commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, pursuant to section 644, Rev. Laws 1910, to enjoin the enforcement of a special assessment levied against their property in payment for paving certain streets situated in street improvement district No.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

122 in the city of Muskogee. The cause was tried before Alvin F. Molony, Esq., who was appointed special judge for the trial thereof, who, after making very full special findings of fact and conclusions of law, entered a decree granting the plaintiffs the full relief prayed for. To reverse this decree this proceeding in error was commenced.

[1] An examination of the record discloses that the assessment herein involved is the same assessment involved in the case of *Sharum v. City of Muskogee et al.*, 141 Pac. 22, recently decided by this court. In that case the assessment was held to be void, and it was further held that:

"A property owner is entitled to relief in a court of equity against an assessment for public improvements, void for the reason that the assessment sought to be enforced is made up of different items or elements all blended together, some of which are illegal and other legal, when such suit is commenced not more than 60 days after the passage of the ordinance making such assessment, as provided by section 644, Rev. Laws 1910."

[2] It is true that the facts relied upon to constitute an estoppel in pais in the case at bar and the *Sharum* Case are somewhat dissimilar. However, we may concede that the case is distinguishable from *Morrow v. Asphalt Paving Co.*, 27 Okl. 247, 111 Pac. 198, and yet, as the court found that "this suit was brought within 60 days after the passage of the void assessing ordinance, and that practically no work was done by said contractors under the contract made pursuant to said ordinance and the date of the commencement of this suit," the question of estoppel is not available to the defendants, for the reason that no motion for a new trial was filed until the time required by law for filing such motion had expired.

That a motion for a new trial is required in a court case, the same as in a jury case, before a review of the facts may be had seems to be well settled. *Johnson Abstract & Loan Co. v. Swarts*, 31 Okl. 284, 121 Pac. 1077; *Campbell v. Lane*, 31 Okl. 757, 123 Pac. 1061; *Ortman v. Giles*, 9 Kan. 324.

Section 5033, Rev. Laws Okl. 1910, provides that:

"A new trial is a re-examination in the same court, of an issue of fact, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. \* \* \*

And section 5035 provides:

"The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, or impossibility of making a case-made, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

In *First Nat. Bank of Shawnee v. Oklahoma Nat. Bank*, 29 Okl. 411, 118 Pac. 574, this court held that the word "decision," as used in the foregoing statutes, does not mean the judgment rendered, but the conclusion

on the facts which must precede the judgment, and further held that:

"To secure a review of the evidence taken on a trial before a referee, a motion for a new trial must be filed in the trial court, and, except for the cause of newly discovered evidence, must be at the term the report is filed, and, unless unavoidably prevented, within three days thereafter. \* \* \*

And further that:

"The findings of fact of a referee, where not challenged within a proper time and manner, become final, and exceptions to a judgment rendered thereon are of law, and not fact, and cannot be raised on a motion for a new trial."

If the findings of a referee on a question of fact constitute the "decision," within the meaning of the foregoing statute, it seems to us that it inevitably follows that the special findings of fact of a court must also be held to be its "decision" on the question of fact involved, and that, if such findings are not challenged within the time prescribed by statute, they become final.

For the reason stated, the judgment of the court below must be affirmed. All the Justices concur.

(45 Okl. 69)

**INTERSTATE NAT. BANK v. PUMROY,**  
Sheriff. (No. 3425.)

(Supreme Court of Oklahoma. Dec. 22, 1914.)

(Syllabus by the Court.)

**TAXATION (§ 510\*)—TAX LIEN—PRIORITIES—CHattel MORTGAGES.**

A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 946; Dec. Dig. § 510.\*]

Error from County Court, Pawnee County; G. T. Graves, Judge.

Action by the Interstate National Bank, a corporation, against C. I. Pumroy, as sheriff of Pawnee county. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

H. B. Martin, of Tulsa, Chas. E. Bush, of Lindsay, Cal., and Jno. Y. Murry, Jr., of Tulsa, for plaintiff in error. Redmond S. Cole, County Atty., of Pawnee, for defendant in error.

**KANE, C. J.** The only question of any substance involved herein has been recently decided by this court favorable to the contention of plaintiff in error in *Fidelity Trust Co. v. C. I. Pumroy*, as sheriff of Pawnee county (144 Pac. 1052), recently decided by this court, but not yet officially reported, wherein it was held:

"A lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches."

Upon the authority of that case the judgment of the court below must be reversed and rendered. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(83 Wash. 394)

**JOHNSTON et al. v. NICHOLS.**  
(No. 12083.)

(Supreme Court of Washington. Jan. 8, 1915.)

**1. LANDLORD AND TENANT (§ 164\*)—INJURIES TO TENANT—NEGLIGENCE—DUTY OF LANDLORD.**

Where a lease contained no covenant binding the landlord to repair, he was not liable for injuries resulting in the death of the tenant caused by a defective porch railing insecurely fastened to the building.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-637, 639, 641; Dec. Dig. § 164.\*]

**2. LANDLORD AND TENANT (§ 162\*)—INJURY TO TENANT—DEFECTS AND DANGERS OF PREMISES.**

The only exception, in the absence of a contract, to the rule of caveat emptor with reference to defective rented premises, is where there are obscure or latent defects or dangers known to the landlord, and unknown to the tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 629; Dec. Dig. § 162.\*]

**3. JUDGMENT (§ 199\*)—JUDGMENT NON OBSTANTE.**

Where it was not possible, under the facts, for plaintiff to state a cause of action or recover, the court, on setting aside a verdict for plaintiff, was properly authorized to grant judgment non obstante verdicto, instead of granting a new trial.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Hazel Helen and Blanche Kathryn Johnston, by James T. Lawler, their guardian, against George Nichols. From a judgment for defendant, plaintiffs appeal. Affirmed.

C. C. Dalton, of Kent, and Herbert W. Meyers, of Seattle, for appellants. Revelle, Revelle & Revelle, of Seattle, for respondent.

CHADWICK, J. For nearly five years prior to October 7, 1911, Ella Jennie Johnston had been a tenant of the defendant, occupying premises in the city of Seattle. In the summer of 1911 the street in front of the property was improved by regrading, and the building was adjusted to the new grade by putting a brick story under the frame structure that had been the subject of the tenancy. Mrs. Johnston had remained in the building during the period of repair or reconstruction. On November 15, 1911, Mrs. Johnston, with another, was in the act of passing a bed spring over the railing of a porch extending across the top or third story of the house as reconstructed. It was their intention to lower it or let it fall to the ground some 22 feet below, when the railing gave way, and Mrs. Johnston was precipitated to the ground, sustaining injuries of which she died. This suit is brought by the children of Mrs. Johnston, by their guardian ad litem, to recover damages. There is proof that the railing was structurally weak; that its weakness might

have been known to any one by a slight examination, although not patent without some examination. The case went to a jury, and a verdict was returned in favor of plaintiffs, whereupon the court, on motion of counsel for the defendant, entered a judgment notwithstanding the verdict. From this judgment plaintiffs have appealed.

[1] The case resolves itself into a pure question of law, and we shall not go further into the facts. The contract of lease, which was in writing, contained the following stipulations:

"Said lessee hereby agrees that said owner or his agent shall not be liable for any damages to property or personal injuries caused by any defects in said premises, or hereafter occurring. \* \* \* Said lessee accepts said premises in their present condition and agrees to leave said premises in as good order and condition as they are now in, excepting the necessary wear and tear thereof and damage by the elements or fire."

The relation between a landlord and his tenant and the duty of the landlord to answer for negligence has been considered by this court in two recent cases. *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 Pac. 927; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917.

In speaking of the liability of the landlord for negligence, we said in the *Mesher* Case:

"The liability as for negligence must arise either from a breach of some general duty arising as a legal incident to the relation of landlord and tenant created by the contract, or from the negligent \* \* \* failure to perform some general duty imposed upon the landlord by the contract. A mere breach of contract, in the absence of some general duty, gives no basis for an action in tort."

The only question for us to consider, then, is whether the landlord has failed to perform some duty imposed by law or by contract. It is held in those cases that a tenant takes the property leased caveat emptor. In the *Howard* Case it is said that the rule caveat emptor rests in contract. There is an implied assumption on the tenant's part of all risks arising out of obvious defects or conditions affecting the safety or fitness of the premises. In the absence of a warranty or covenant to repair, there is no greater duty of inspection upon the landlord than there is upon the tenant. The law imposes no burden of diligence or active duty upon the landlord to find and disclose obscure defects or dangers.

[2] The only exception, in the absence of a contract to the rule caveat emptor, is where there are obscure or latent defects or dangers known to the landlord, and not known to the tenant. This exception is grounded in reason and in the fundamental principles of justice. It rests upon, and is sustained by, the moral obligation of every man knowing a danger to warn the innocent or the ignorant against that which may beset or befall him in the use of property which is put into his hands for a present or prospective consideration moving to the donor, vendor, or lessor.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—27

In the case at bar the railing had been made fast to the outer wall of the house with small nails or brads, toe-nailed into the wood. Either on account of the small number of nails used by the carpenter, or by reason of the accumulation of rust, the railing was, or had become, structurally weak, but it is not contended that the defect was obvious, or that it could have been more readily seen and appreciated by the landlord than by Mrs. Johnston, who had occupied the premises, as we have said, for a term of years. We are not disposed to re-examine the authorities or discuss the principles pertaining to the cases cited. It is enough to say that we find no facts that would take this case out of the rule there laid down; that is, in the absence of an agreement to repair, the landlord is under no legal duty to search for defects of which he has no knowledge.

Counsel contend in this case, as was contended in the Howard Case, that there is a higher duty put upon the landlord; that he should be held liable not only for a failure to disclose obscure defects actually known to him at the time of the lease, but that he should exercise reasonable care to discover such obscure defects and to divulge them. That phase of the case was passed upon, and we there pointed out that but one court in this country held to the rule invoked, whereas the greater weight of authority, as well as of reason, is to the contrary.

Believing that all of the contentions of appellants' counsel have been met in the Howard and the Mesher Cases, we shall adopt them as controlling authority, as did the trial judge.

We have not gone into the suggestion of counsel that an agreement on the part of a tenant to assume the risk of structural defects is void as a matter of public policy, nor shall we review the authority cited on either side. As shown in the cases hereinbefore referred to, there was no common-law liability on the part of respondent to answer for damages in the absence of a contract to repair, unless the defect was known and not divulged. The parties did not contract with reference to any public right, nor did they undertake to contract away any common-law right. Adverting, then, to the ancient principle that there is no higher or better public policy than to encourage the right of private contract, where there is no restraining statute, we pass this phase of the case.

[3] Finally, it is contended that the court erred in entering a judgment non obstante veredicto; that under the rule announced in Forsyth v. Dow, 142 Pac. 490, the state of the record is such that the court could make no order other than to grant a new trial.

If it were possible, under the facts of this case, for the plaintiff to state a cause of action in law, the rule there announced might apply, but where the court can say, as a mat-

ter of law, that there are neither facts nor reasonable inference from facts to support a verdict, and there is neither fact nor reason upon which a verdict could stand, the order of the court will be sustained under the authority of Paich v. Northern Pacific Ry. Co., 144 Pac. 919.

Other questions are raised in the briefs, but, having decided that there was no primary liability to answer for damages, it is unnecessary to discuss them.

Affirmed.

CROW, C. J., GOSE, PARKER, and MORRIS, JJ., concur.

(83 Wash. 412)

GLADEN v. CITY OF SEATTLE.  
(No. 12164.)

(Supreme Court of Washington. Jan. 8, 1915.)  
MUNICIPAL CORPORATIONS (§ 802\*)—USE OF STREET—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Even though the plaintiff, starting to cross a street, was negligent in attempting to cross a wire which city employes were removing from poles and winding on a reel, the employes, knowing of his presence, were required to use a degree of care commensurate with the danger in which plaintiff had placed himself, and if by such care they could have avoided injury from the snapping of the wire, and failed to do so, their negligence was the proximate cause of the injury, rendering the city liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1672-1683; Dec. Dig. § 802.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by I. M. Gladen against the City of Seattle. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. E. Bradford, Frank M. Egan, and Wm. B. Allison, all of Seattle, for appellant. Reynolds, Ballinger & Hutson, of Seattle, for respondent.

CHADWICK, J. A crew of city employes were engaged in removing a line of wire on Alki avenue near its intersection with East street, in the city of Seattle. The method employed was to loosen the wire from the top of one pole, pass it through a pulley or snatch block about four feet from the base of the next pole, then carry it across the street car tracks to a plank roadway on Alki avenue, where it was passed around and held taut by a peavy stuck in the planking, and held by one of the workmen. The wire was then conveyed down Alki avenue some distance to a reel placed on a wagon. After the wire was released from the poles it was wound up on the reel. At the time plaintiff was injured the peavy was nearly opposite the place or platform which had been erected for the convenience of persons boarding street cars. Plaintiff's home was on the opposite side of the street from where the work was being

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



done. He came out of his house and started across the street with the intention of boarding a street car. He was about to cross the wire when one of the workmen warned him not to do so. Plaintiff went back to the sidewalk and waited a short time, and again proceeded on his way. He had crossed the wire and was near the platform when the peavy gave way, releasing the wire. He was caught by the snap of the wire and thrown down. There is testimony tending to show that the one who held the peavy knew of plaintiff's presence. At the time the injury seemed trivial. At the trial plaintiff, who was advanced in years, was in a bad mental and physical condition. The jury found that he had been injured by the negligence of the employees of the city, and a verdict was returned in his favor. The city has appealed.

Although several questions are raised in the briefs, all were waived at the time of argument, except the one of contributory negligence on the part of defendant.

In determining the question of contributory negligence, the first duty of the court is to ascertain the proximate cause of the injury; to disassociate the proximate from the supervening and intervening causes and ascertain from the whole mass of the testimony that circumstance or set of circumstances but for which the accident would not have happened. Having this duty in mind, it seems to us that the case is controlled by two very recent decisions of this court, *Pearson v. Willapa Const. Co.*, 72 Wash. 487, 130 Pac. 903, and *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941. In the first of these cases it is said:

"When a plaintiff by his own negligence has placed himself in a dangerous position where injury is likely to result, the defendant, with knowledge of the plaintiff's danger, is bound to use reasonable care to avoid injuring plaintiff; and where, by the exercise of such care, defendant could avoid the injury, but fails to do so, the defendant's negligence becomes the proximate cause of the injury and renders him liable."

In the latter case:

"This court has held, in accordance with many courts, and with what we conceive to be the more logical, as well as the more humane, rule, that where the peril of a traveler on the highway is actually discovered and should be appreciated by the operator of a street car, or other agency of danger, there arises a new duty to exercise all reasonable care to avoid injury, and the failure to exercise such care, if it results in injury, will render a defendant liable notwithstanding the continuance of the plaintiff's negligence up to the instant of the injury."

Granting that plaintiff was negligent in passing over the wire at the time and at the place he did, it is clear that the employees of the city, knowing of his presence, were put to a higher duty than first imposed, and it was incumbent upon them to use a degree of care commensurate with the added danger in which plaintiff had placed himself. Whether the employees of the city used such reasonable care, knowing plaintiff's peril,

was for the jury. The question has been decided in his favor and against the city.

Affirmed.

CROW, C. J., and GOSE, PARKER, and MORRIS, JJ., concur.

(83 Wash. 376)

COLVIN et al. v. CLARK. (No. 12038.)

(Supreme Court of Washington. Jan. 8, 1915.)

1. ACTION (§ 25\*)—LEGAL OR EQUITABLE—TIMBER CONTRACT.

Where a contract for the sale and cutting of timber entitled the seller to payment each month for that removed during the preceding month, his action claiming only that he had not been paid all that was due, asking an accounting and a cancellation of the contract, without alleging the necessity of an accounting to prevent a multiplicity of suits or that a jury could not arrive at the true state of the accounts, and not showing any fiduciary relation between the parties, was an action at law for the amount due on the contract, and not a suit in equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-145, 147-149, 153, 156-159, 313; Dec. Dig. § 25.\*]

2. APPEAL AND ERROR (§ 1071\*)—PREJUDICIAL ERROR—REFUSAL OF FINDINGS.

Under Rem. & Bal. Code, § 368, declaring that findings, except as qualified as to their weight by section 1736, stand as the verdict of the jury, and section 367, providing that upon the decision of an issue of fact by the court the facts found and the conclusions of law shall be separately stated in writing and judgment on the decision entered accordingly, the court's failure to make findings of fact and conclusions of law and its refusal to accept those proposed by the defendant in an action at law was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

3. APPEAL AND ERROR (§ 1177\*)—REVERSAL—NECESSITY OF NEW TRIAL.

Under Rem. & Bal. Code, § 307, providing that the court shall disregard any error not affecting the substantial rights of the adverse party, and that no judgment shall be reversed for such error, the refusal of the trial judge to make findings did not require a new trial; but the case would be remanded with instructions to prepare findings and enter judgment thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.\*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by Ambrose Fred Colvin and wife, and Tom Ismay, as guardian of their minor children, against Delbert Clark. Judgment for plaintiffs, and defendant appeals. Reversed, with instructions to prepare findings and enter judgment thereon, from which either party appeal.

Troy & Sturdevant, of Olympia, for appellant. Thomas M. Vance and Harry L. Parr, both of Olympia, for respondents.

CHADWICK, J. On the 25th day of April, 1912, plaintiffs and defendant entered into

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a written contract for the sale of the merchantable fir timber on certain lands belonging to the plaintiffs, in consideration of the payment of \$2 per 1,000 feet. The material parts of the contract follow:

"It is agreed that the amount of timber upon the said land is 10,825,000 feet; said timber shall be paid for by the party of the second part as the same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet as aforesaid. All timber logged each month shall be settled and paid for by the party of the second part on the 15th of the following month until said timber is fully paid for. The party of the second part, his successors and assigns agree to take and remove said timber and pay for the same as above set forth within five years from the date of this contract. \* \* \* The sum of two thousand dollars shall be deposited by the party of the second part in the Capital National Bank of Olympia, to the credit of the guardian of the minor children of Ambrose Fred Colvin and Anna Colvin upon the execution of this contract, and said two thousand dollars cash shall be credited to the party of the second part on the last one million feet of timber cut."

The land is divided by a road and by other physical conditions and is referred to by the parties, and will be by us, as the north and the south side. Prior to the time the contract was entered into, the parties had negotiated between themselves concerning the sale of the timber on the south side. There is no controversy between them as to the amount of timber on that tract. All agree, for the purposes of this suit, that it was 5,825,000 feet. A memorandum showing this amount had been reduced to writing. Cruises of the north side timber had been theretofore made; the quantity of the timber as shown by the cruises varying. The cruises were: Valentine, 5,530,000 feet; Champlin, 4,902,000 feet; and Manning, 4,800,000 feet. The parties met in the office of Mr. Otis in Olympia to reduce their contract to final form, and it was there agreed that the north side timber should be included in the sale, and a contract was written so as to include a description of the land upon which it was growing. Defendant built a logging road into the north side and proceeded to log the land, and has removed all but 390,000 feet, as estimated by witness Moore, a cruiser who was put upon the stand by plaintiffs. Defendant had cut some cedar and ties and spars that were not scaled at the mill and had removed his active logging operations from the north side. Plaintiffs then brought this action praying for an accounting and a cancellation of the contract. They have endeavored to maintain their action as a suit in equity. The court denied a cancellation of the contract, and no appeal has been taken from the order.

[1] Whatever may have been the original theory of the plaintiffs, it seems to us that this is not a suit in equity, but a simple action at law for the amount due on contract. There is neither allegation of fact nor proof

of fact to sustain the action as an equitable suit. It is true that plaintiffs in demanding that which they conceived to be their due have said that an accounting is necessary and have prayed for an accounting. Under the contract plaintiffs were entitled to payment for all of the timber removed during the previous month. Payments were made from month to month. Plaintiffs brought this action at a time when they believed that the defendant was abandoning the north side with part of the timber uncut. They claim no more than this: That they have not been paid all that is due. This fact would not change the controlling principles of law. The action remains as one upon contract, and it cannot be made an equitable suit by a demand for an accounting unless that demand is based upon some reasonable ground justifying equitable interference. There is no allegation that an accounting is necessary to prevent a multiplicity of suits. There is no fiduciary relation between the parties, nor is it alleged, nor does the proof show, that mutual accounts have been kept by the parties, and that they are so involved that a jury would not be likely to arrive at the true state of the account. The fact that the proof is difficult, or that the proof is largely in the keeping of the opposite side, is not enough in itself to justify equitable interference. In fact, the proof in this case upon either side is quite simple. It is purely a question of the amount of timber cut by defendant. The payment is a mere matter of calculation. It seems to us that counsel have confused the words "accounting" and "payment." If every difference between parties to a contract as to the amount due thereon would justify an accounting, there would be no such thing as an action at law for breach of contract. Nor can the character of the action be fixed by the fact that plaintiffs have used phrases and demands peculiar to equity. A court will look to the substance of the pleadings and to the character of the proof in determining the character of the proceeding.

In *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572, an action was brought as a law action. After trial "the action was purely equitable." So in this case there was no pretense of reliance upon equitable principles in the trial of the case. The court determined a simple issue of fact and entered a money judgment for the amount he found due.

[2] Defendant has been quick to appreciate the legal situation of the plaintiffs, and in the court below and in this court has insisted that the trial judge should have made findings of fact and conclusions of law. To save the point, findings and conclusions were proposed and were refused. Counsel for defendant has brought his case squarely within the following decisions of this court: *Barb v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273;

Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. 865; Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95.

We would be glad to hold, if it were possible to do so, in the light of our previous decisions and Rem. & Bal. Code, § 367, that the refusal of the court to make findings was error without prejudice; but the statute and the duty that is upon us to follow rules of practice and procedure arising out of the construction of statutes compels a holding that the error was prejudicial to the right of the defendant. Findings, under Rem. & Bal. Code, § 368, except as qualified as to their weight by section 1736, stand as the verdict of the jury. In one of our earlier cases it is said:

"Judgments of law are founded upon general or special verdicts of juries, or findings of the court which take the place thereof. Without such verdict or findings there is nothing to support the judgment." Kilroy v. Mitchell, *supra*.

The purpose of section 367 is to permit, if not to encourage, appeals without bringing up a statement of facts, for, as is said in the Kilroy Case just cited:

"A judgment at law will usually stand or fall upon the verdict or findings, without any reference to the evidence as a whole."

The first ruling upon the question before us is found in Barb v. Kleebe, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273. Our court reviewed the California cases and noted the confusion that had arisen in that state by reason of the courts' attempts to find a way around a similar statute when occasion seemed to require it. It is there said:

"We have the opportunity to shape the practice in this state so that our successors may not have to repeat the helpless plaint of the California Supreme Court."

And it was accordingly held that a recital in a judgment that "the court finds that the matters and things set forth in the complaint are true" was not a compliance with the statute. In a later case (Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95), the statute was held to be mandatory. So far as we are informed, there has been no departure from the rule of these cases in law actions.

[3] The point raised by counsel for defendant is well taken. But it does not follow that the action will be reversed and remanded for a new trial. While the statute (Rem. & Bal. Code, § 307) has never been invoked, so far as we know, in a case like this, it seems to us to be peculiarly applicable. It is provided:

"The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

In the case at bar the testimony has been taken. No right of either party will be conserved by a new trial. The case fails here because the refusal of the trial judge to make findings "affect(s) the substantial rights of the adverse party." This can be corrected

if the case is remanded with instructions to the lower court to make findings and enter a judgment thereon. There is no reason in law or sound sense for a retrial. The judge had and will have the whole testimony before him, and he can find, presumptively at least, the same facts and draw the same conclusions as he would if the testimony were taken over again. We have therefore determined that this case shall be remanded to the court from whence it came, with instructions to the trial judge to cause findings to be prepared and to enter a judgment thereon from which either party may appeal. Defendant will recover his costs in this court. The taxation of the costs of the trial in the court below will be reserved until the final disposition of this case.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 445)

STATE ex rel. CLEAR LAKE LOGGING R. CO. v. SUPERIOR COURT OF THURSTON COUNTY et al. (No. 12366.)

(Supreme Court of Washington. Jan. 8, 1915.)

1. EMINENT DOMAIN (§ 20\*)—"PUBLIC USE"—WHEAT CONSTITUTES.

To bring timber to the mill or market is a public use, authorizing condemnation of land for a logging railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, First and Second Series, Public Use.]

2. EMINENT DOMAIN (§ 20\*)—PUBLIC USE—HOW DETERMINED.

The amount of service rendered to members of the public generally by a logging road is not material in determining whether it is a public utility.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.\*]

3. EMINENT DOMAIN (§ 20\*)—PUBLIC USE.

The fact that a logging road was largely controlled by a timber company does not deprive it of its public character and prevent the exercise of powers of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.\*]

4. EMINENT DOMAIN (§ 56\*)—CONDEMNATION—RIGHT TO.

Whether a logging road is entitled to condemn land depends upon the necessity of the land for a public use and the feasibility of the route.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.\*]

5. EMINENT DOMAIN (§ 55\*)—CONDEMNATION—POWER OF CONDEMNATING CORPORATION.

Public service corporations having powers of eminent domain may determine the location of their works for which land is sought to be condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 97, 135; Dec. Dig. § 55.\*]

6. EMINENT DOMAIN (§ 45\*)—CONDEMNATION—PROCEEDING.

A logging road will not be denied condemnation because its proposed route will cross a portion of a tract of land which might in the future be used for a mill site; the availability

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the land for that purpose only affecting the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 94–100, 102, 106; Dec. Dig. § 45.\*]

Department 1. Certiorari to Superior Court, Thurston County; C. E. Claypool, Judge.

Certiorari by the State, on the relation of the Clear Lake Logging Railroad Company, against the Superior Court of Thurston County and others. Writ issued, and cause reversed and remanded.

Dipart & Ellsbury, of Centralia, and F. D. Oakley, of Tacoma, for relator. T. F. Mentzer, of Tenino, Troy & Sturdevant, of Olympia, Kerr & McCord, of Seattle, and Thomas O'Leary, of Olympia, for respondents.

MORRIS, J. This writ was sued out to review an order of the court below denying relator an order of public use and necessity. Relator, as indicated by its name, was organized as a toll logging road, and is seeking to condemn a 30-foot right of way to extend its road a distance of about 3,500 feet across lands of the respondent Mentzer Bros. Lumber Company. The chief objections urged to the entry of the order of public use are: (1) No showing of any public use; (2) the contemplated use is the private use of the A. P. Perry Lumber Company; (3) other and more feasible locations not interfering with the respondent's contemplated use of its property.

[1, 2] Relator offered evidence to the effect that there was from 150,000,000 to 250,000,000 feet of timber tributary to the first 4 miles of the proposed route, and beyond that the supply was unlimited. Respondent's estimate of the amount of timber accessible was much less. It is evident, however, that there is a large supply of timber tributary to the proposed road. Bringing this timber to mill or market is certainly a public use. It is also shown that, since the relator began operating the road as at present constructed, it has been used to some extent for the shipment of timber products. The amount of service that has been rendered other parties is not so material in determining the question of the public use so long as the relator receives without discrimination all that is offered, and has in no respect failed to discharge its duty in this regard. It is the nature, and not the extent, of the use that determines its public character. *State ex rel. United, etc., T. Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017.

[3] The second objection is based upon respondent's contention that relator is but another name for the A. P. Perry Lumber Company, and that its purpose is to serve the logging plant of the lumber company. The fact that a large part of relator's business would be the transportation of timber for the Perry Lumber Company, and that the timber company would exercise a controlling inter-

est in the logging railroad, does not destroy the character of the relator as a public service corporation, nor change its contemplated use from a public to a private use. A like contention was urged against the right of condemnation in the United, etc., T. Co. Case, supra. It was there met by saying that public service corporations are amendable to public regulation, and can be made to discharge their public duties in a satisfactory manner. Overruling a similar contention in *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637, we said:

"The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe to its capital stock does not deprive the road of its public character. The road, when constructed, will be a public service corporation, and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged."

[4, 5] In support of the third contention, respondent sought to show that the route selected by relator was not the most feasible or practicable route across the lands in question; that other available routes existed that could be made use of without serious damage to respondents; and that more especially the route selected would destroy a contemplated mill site. It may be said generally that in determining questions of this character it is not a question whether or not there is other land to be had that is equally available for the intended use, but the real question is whether the land sought to be taken is required for a public use (*Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670), and whether upon all of the facts shown in the record the route adopted by the relator is the most feasible, and a reasonable necessity exists for its appropriation (*State ex rel. Milwaukee Terminal Ry. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175). Except as specially restricted by statute, public service corporations invested with the power of eminent domain for a public use can make their own location according to their own views of what is best or expedient, and this discretion will not be controlled by the courts (*State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; 2 Lewis, Eminent Domain, § 604) until it is convincingly shown that the land sought is not reasonably necessary, and that a slight change of location will equally meet the necessity of the taker and be of much less damage to the owner (*State ex rel. Postal Telegraph Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855). The showing here made is not sufficient to invoke this last rule. Reviewing it as a question of fact, there is no question in our mind but that the route selected is both the most feasible and practicable.

[6] Nor can relator's right to this route be denied because it will cross a portion of respondent's land that respondent says is available for a mill site and upon which, at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

some future time when conditions warrant, it intends to construct a mill. The availability for any special purpose of property taken or damaged in eminent domain proceedings is only one of the questions to be considered in estimating the damages to be paid. The courts cannot say to corporations exercising this right: You should select another route because it is cheaper or because you will destroy a valuable building site. The only thing we have to determine is the right to take the property, which, when it exists, applies equally to all property irrespective of its value or contemplated use.

The order under review is reversed, and the cause remanded, with instructions to enter an order of public use and proceed with the condemnation proceedings.

CROW, C. J., and GOSE and PARKER, JJ., concur.

(83 Wash. 334)

EMERY v. LITTLEJOHN et al. (No. 11975.) (Supreme Court of Washington. Jan. 8, 1915.)

1. ASYLUMS (§ 7\*)—OFFICERS—DISCHARGE FROM ASYLUM—LIABILITY FOR INJURIES.

Rem. & Bal. Code, § 5967, provides that any patient may be discharged from a state hospital for the insane when, in the judgment of the superintendent, it may be expedient. The superintendent of state hospital, to which one P. had been committed, after two weeks released him in charge of his mother, who signed the usual writing certifying that she had taken P. on parole, knowing that he was not fully recovered, and assumed all responsibility for his actions, that she agreed to care for him, and return him to the hospital, if necessary, and she took him home, and, after complaint of his letters alarming a girl in a show, gave him money to go East to relatives, instead of which he followed the girl, called at plaintiff's theater to see her, and, while plaintiff was listening to his request to see her, shot him. *Held* that, as the statute gave the superintendent an official discretion to release a patient, he was not liable to plaintiff in damages.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 5; Dec. Dig. § 7.\*]

2. INSANE PERSONS (§ 80\*)—PERSONAL INJURY BY—LIABILITY OF CUSTODIAN.

The stepfather of such insane person, who was not instrumental in getting him out of the hospital, and who had no knowledge of his release from the hospital until he was brought to his house by his wife, the mother of such insane person, was not liable to plaintiff in damages.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 142; Dec. Dig. § 80.\*]

3. INSANE PERSONS (§ 80\*)—TORTS OF INSANE PERSON—LIABILITY OF CUSTODIAN.

In an action for damages from alleged negligence in restraining an insane person, it appeared that defendant was the mother of one committed to a state hospital for the insane; that after a few weeks she obtained his release upon signing the usual writing certifying that she had taken him on parole knowing that he was not fully recovered, assuming all responsibility for his actions, agreeing to care for him, and return him to the hospital, if necessary; that she brought him to her home; that, after complaint from the police that he was sending letters to, and alarming, a girl in a show, she gave him money to go East to relatives; that, instead, he pursued the girl to Portland, and,

while demanding of plaintiff, the manager of a theater, permission to see her, shot plaintiff. *Held*, that a verdict and judgment for plaintiff would not be reversed on the ground that defendant was not liable.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 142; Dec. Dig. § 80.\*]

Crow, C. J., and Gose and Ellis, JJ., dissenting in part. Fullerton, Chadwick, and Main, JJ., dissenting.

En Banc. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by H. P. Emery against Andrew J. Littlejohn and wife and A. P. Calhoun. Judgment for plaintiff, and defendants appeal. Reversed as to defendants Andrew J. Littlejohn and A. P. Calhoun, and affirmed as to defendant Mrs. Andrew J. Littlejohn.

E. R. York, of Tacoma, W. V. Tanner, of Olympia, Stephen V. Carey, of Seattle, and J. T. S. Lyle, of Olympia, for appellants. Bates, Peer & Peterson, of Tacoma, for respondent.

PARKER, J. The plaintiff seeks recovery of damages from the defendants for personal injuries which he claims resulted to him from the negligence of the defendants in failing to properly restrain and care for one O. W. Pence, an insane person. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

On June 7, 1912, O. W. Pence was adjudged insane by the superior court for Pierce county, and committed to the Western Washington Hospital for the Insane. The appellant Dr. A. P. Calhoun was then the superintendent of the hospital. Dr. F. P. Wilt was assistant physician of the hospital, and directly in charge of Pence while he was in the hospital as a patient. Pence was then 30 years old. He first showed signs of insanity about 10 days previous to his commitment to the hospital. He never had suicidal or homicidal tendencies. He imagined that people—especially detectives—were after him, to do him injury. Physically, he is in a normal state of health. One of the examining physicians in the insanity proceedings, testifying upon the trial of this case, described Pence's condition as follows:

"Am physician and surgeon. Was one of the physicians appointed to act as a commission to examine O. W. Pence. Recall the examination tolerably well. Remember his condition at that time. Pence to all appearances was normal, in a normal condition; that is, without getting his hobby, he could not have been convicted before any jury of insanity. There was no history of filth, dirt, as to his clothing—in fact, he was careful about his clothing; no suicidal mania; no tendency to injure others; and no history at all that would lead to a conviction of insanity. What I convicted him on was delusion, and the delusion was of a religious nature. My recollection now is that he was religious altogether and that he had hallucinations I think, hallucinations of hearing, he heard imaginary voices; I think it was on that point alone almost that I found him insane. I did not con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sider him dangerous; if he was given a rest of a few days he would rapidly recover." "He had delusions that detectives were after him; that people were trying to get at him to do him harm. We sent him to the asylum for rest. If we had a place of detention outside of the asylum, I should not have sent him to the asylum."

Pence is a son of appellant Mrs. Littlejohn, who lives in Tacoma with her husband, A. J. Littlejohn. After Pence was committed to the hospital for the insane, his mother visited him several times. His condition while in the hospital was one of apparent rapid improvement, and, after remaining there a little over two weeks, on June 24th Dr. Wilt, acting for the superintendent of the hospital, permitted Mrs. Littlejohn to take Pence home, though he was not discharged as cured. At that time, she signed the usual writing required of those taking patients from the hospital, reading as follows:

"June 24th, 1912.

"This is to certify that I have taken O. W. Pence on parole from Western Hospital for Insane. Knowing that he is not fully recovered, I assume all responsibility for his actions while in my charge, and agree to care for him and return him to the hospital at my own expense if it becomes necessary. I further agree to write the superintendent, informing him of the condition of the patient at intervals designated by him during the life of the parole.

"[Signed] Mrs. A. J. Littlejohn.

"Address: 3704 6th Ave., Tacoma, Wash."

Nothing further occurred coming to the notice of Mr. or Mrs. Littlejohn indicating that Pence's condition was other than one of continuous improvement until the evening of July 4th or 5th, some ten days after he was brought home, when two police officers of the city of Tacoma, Recob and Brown, visited the Littlejohn home and talked to Mr. and Mrs. Littlejohn about Pence. All the information then conveyed to either Mr. or Mrs. Littlejohn relative to the actions of Pence then complained of by the policemen is such as may be gathered from the testimony of Recob, as follows:

"I have lived in the city of Tacoma eight years. Have been a member of the Tacoma Police Department seven years. My attention was called to the conduct of one Pence about the 4th of July, 1912. Mr. Timmins, manager of the Pantages Theater, in Tacoma, called at the police station. He was accompanied by the manager of a play on that week at the theater. They had some letters that had been written to a girl in one of the acts at the theater. We looked the letters over. They were written by Pence, and gave his name and address as Sixth avenue. We looked up the address and found it was the Littlejohn residence. We (Mr. Brown and myself) went to the Pantages Theater that night. Pence was supposed to be in the front row, and we went to observe his actions. He did not come that night, and we went to the Littlejohn house to see him. At that time I did not know that Pence had been an inmate of the asylum. We went to the Littlejohn house to investigate—to see why he was writing such letters. We had talked with the manager and the girl. She was greatly excited. Mr. Brown went with me. It was about 9:30 in the evening. Brown knocked at the door, and Mrs. Littlejohn answered from the window upstairs. Brown said he would like to talk with Pence. She asked: 'What about?' Brown said:

'I would like to talk with him.' She came to the door and talked for a minute, and then said she would call Mr. Littlejohn. She went back upstairs, and Littlejohn came down. We stood in the reception hall and talked with Mr. Littlejohn. I told him there had been letters received at the Pantages Theater addressed from his number, and we came out to have a talk with Pence. Littlejohn said: 'Now, Pence has just been in from the asylum. I don't like to have you talk with him; it might make him worse.' He would not let us talk with him, and we told him there would have to be something done.

" \* \* \* After Littlejohn refused to let us have a talk with Pence, we told him something would have to be done and he said: 'Well now I have got everything arranged for him to leave to-morrow. \* \* \* I will send him East.' \* \* \* I don't remember the place he said, somewhere in the East, to his relatives, or would send him back to the asylum. We told him he must not let him go to Portland on account of the girl. She went over there. The girl was awful excited over the letters, and I told Littlejohn to buy a ticket himself and send him East, rather than give him money. I said he was liable to go down there (to Portland) and kill some one. He said he was going to send him East. At that time I talked to Littlejohn about the letters and what Pence had been doing. There was no sense to the letters. A right-minded person would not write such letters. He wanted the girl to marry him. Wanted her to meet him over in the Firemen's Park. It was just a lot of foolishness. I had known Mr. Littlejohn by sight for the last eight years. I told Littlejohn if he would do as he said I would leave Pence with him, with the understanding that he would be sent away the next day. I told him to buy the ticket himself and start him East. If he gave him the money he would go to Portland. We didn't insist on seeing Pence that night, because we relied on Littlejohn doing as he said. The next I heard of Pence Mr. Timmins told me he had gone to Portland and shot Mr. Emery. This was four or five nights after we were out at Littlejohn's. \* \* \* I saw part of the letters written by Pence to the girl, but did not see any letters written by the girl to Pence. \* \* \* The letters did not contain any threats or vile language. They were merely the letters of a person having some admiration or pretense of love for the girl, asking her to marry him, and expressing affection for her. I had never seen Pence up to that time. \* \* \* So far as I know the police department never communicated with the asylum authorities concerning Pence."

Brown's testimony relative to the visit to Littlejohn's home is in harmony with that of Recob above quoted, though it does not go so much into details. Neither Mr. or Mrs. Littlejohn ever saw any of the letters claimed by the policemen to have been written by Pence to the actress, and they had no knowledge of the contents or nature of those letters, except as communicated to them by the policemen. No other acts of Pence were complained of or reported to them. On the evening of the visit of the policemen to the Littlejohn home Pence had been home during the whole evening, and was not at the theater where the policemen went, expecting to find him. Mrs. Littlejohn, on the following day reported by telephone to the hospital, talking to Dr. Wilt, the incident of the policemen coming to their home, and complaining of Pence's action in writing the letters. Just what Mrs. Littlejohn told Dr. Wilt of the hospital over the telephone concerning the

visit of the policemen is not very clear. Dr. Wilt testified as to what she then told him as follows:

"I talked with Mrs. Littlejohn over the telephone. If I remember right, she called me. She mentioned that the police had been to the house the evening before. She did not say why they had been there any more than for the purpose of stopping Mr. Pence's actions. At the time of the conversation Dr. Calhoun happened to be in the office where the telephone is located. I asked him what we should do, and he thought it advisable to send in a guard if he (Pence) was causing any trouble. She (Mrs. Littlejohn) said she would send him East the next morning. That was satisfactory to us. If I remember rightly, I told her we would send a guard. The reason we did not send a guard for him was that she promised to send Pence East. As to imposing conditions as to the manner in which he should be sent East, I do not know of any special arrangements by which he was to be sent East. There was nothing said about that at the time that I remember. Dr. Calhoun was in the office at the time and I talked to him as to what should be done. This was not the first time Mrs. Littlejohn had talked to me about Pence after his release. As I remember, she telephoned to me several times, and told me how well he was getting along."

A day or two later, on July 7th, Pence went away, as Mr. and Mrs. Littlejohn supposed, to his relatives in Missouri, as they had planned, and had furnished him money for so doing. They evidently honestly believed that he went to Seattle, with a view of going East over the Great Northern, and not to the South through Portland. However, that was the last seen or heard of him by Mr. or Mrs. Littlejohn until after his shooting respondent in Portland on July 9th, resulting in the injuries of which respondent here complains, and for which he seeks recovery from appellants. What occurred at the time of that shooting may be related in the language of respondent's testimony, as follows:

"On the evening of the 9th of July, Tuesday evening, I believe it was, during the latter part of the second performance, one of the stage hands came to me and reported a gentleman in the hall to see one of the lady performers, and almost the same time I think Miss Callie Lowe made the exclamation, 'There is the man that I am afraid of.' I walked out to the hall, which is on the same level with the stage and the entrance from the alley to the stage, and standing in the hall was a man. I walked right close up to him, possibly a foot and a half, as I would speak to anybody, and I asked who he wished to see, and he said, 'I am O. W. Pence, and I am engaged to be married to Callie Lowe, I would like to speak to her.' While he was speaking, I noticed on the lower part of his vest he had a badge, an officer's badge, deputy sheriff, and it was turned upside down so I couldn't read it, and, as he finished speaking, I reached over and turned over the badge so I could read the letters, I says, 'What kind of a badge is that?' He said, 'What have you got to say about it?' and he pulled his gun out and commenced firing and struck me."

In view of the conclusions we have reached, especially upon the question of the negligence of Littlejohn and wife here complained of, we have related the facts in the most favorable light possible in aid of respondent's contentions, though the facts, as testified to

by the policemen, are, in some details, contradicted by the testimony of Mr. and Mrs. Littlejohn. Otherwise the facts as related above are undisputed. Nor does the record contain any other facts, as we view it, lending additional aid to the respondent in the contention made by his counsel.

[1] Counsel for appellant Dr. Calhoun contend that the trial court erred in declining to decide the cause in his favor as a matter of law, upon their motions for a directed verdict, made at the close of the plaintiff's evidence and also at the close of all of the evidence. The principal ground upon which this contention is rested is that appellant Dr. Calhoun, being the superintendent in charge of the hospital, performing an official act involving the exercise of his discretion as such, in allowing Pence to leave the hospital with his mother, and in allowing him to remain away, no liability by an action for damages can be imposed upon Dr. Calhoun. We shall, for the purpose of argument, treat all actions of Dr. Wilt, the assistant physician, as those of Dr. Calhoun. The only provision of our statute relating to the discharge or parole of patients by the superintendent of the hospital of his own motion is that found in section 5967, Rem. & Bal. Code, reading as follows:

"Any patient may be discharged from the hospital when, in the judgment of the superintendent, it may be expedient."

This, in fact, is the only provision of our statutes relating to the subject of the discharge or parole of patients by the superintendent, at the instance of any one, except as provided by section 5962, Rem. & Bal. Code, reading as follows:

"The relatives or friends of an inmate of the hospital for the insane may receive such inmate therefrom on their giving a bond or other satisfactory evidence to the superior judge issuing the commitment, that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person. If such satisfactory evidence appear to the judge, he may issue an order, directed to the superintendent of the hospital for the insane, for the removal of such person. If, after such removal, it is brought to the knowledge of the judge, by verified statement, that the person thus removed is not cared for properly, or is dangerous to persons or property by reason of such want of care, he may order such person returned to the hospital."

It is manifest that the discharge of a patient from the hospital by the superintendent of his own motion involves the exercise of discretion upon his part. It is insisted, however, by counsel for respondent, that such discretion of the superintendent pertains only to the question of absolute discharge of a patient, and that he has no other discretionary power, especially none as to the parole or conditional discharge of a patient. It is argued that the provisions of section 5962, above quoted, negative the idea of the superintendent exercising discretion other than in relation to the absolute dis-



charge of a patient. We are unable to agree with this view. It is manifest that the method of relatives or friends acquiring possession of a patient provided for in section 5962 is only a procedure which may be instituted at the instance of such friends or relatives, and has nothing whatever to do with the discretion of the superintendent in discharging patients conditionally or otherwise. Whatever is done under that section may be done even against the judgment or will of the superintendent, and has nothing to do with the performance of any duty upon his part other than to obey the order of court which may be made in pursuance of proceeding under that section. The diligence of learned counsel for respondent has not brought to our attention any direct authority throwing any light upon this contention, nor has any such authority come to our notice, except the law relating to the pardoning power, which, by way of analogy, furnishes some aid to the solution of this problem.

"The power to pardon is generally held to include the power to mitigate or commute sentences, the theory being that the greater power includes the less." 24 Am. & Eng. Ency. Law (2d Ed.) p. 567; 29 Cyc. 1570; Fuller v. State, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1.

We are of the opinion that the power of absolute discharge of patients from the hospital includes the power to parole or conditionally discharge patients therefrom, and that all acts of the superintendent under this power involve the exercise of discretion on his part of a quasi judicial character.

The acts of Dr. Calhoun, here complained of, being official, and calling for the exercise of his discretion, the law seems to be settled beyond controversy that he cannot be called to account for any consequences flowing therefrom, in a civil action for damages instituted by a person claiming to be injured as the result of such discretionary action in the absence of malicious or corrupt action. It is not claimed that Dr. Calhoun acted either maliciously or corruptly. Indeed, it could not be with any show of reason under the evidence. The most that can be said is that he acted mistakenly, or, for argument's sake, we may concede that he acted negligently; but, under all the authorities, such action would not render him liable in this action, since his acts were official and involved his discretion. In the text of 29 Cyc. p. 1444, after noticing the law touching the immunity of judicial and legislative officers from liability in an action for damages flowing from their official acts, it is said:

"In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for a mistaken exercise of such discretion. In many of the cases on the liability of inferior judicial officers and officers discharging quasi judicial or

administrative functions, the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability. But in most cases what is said in the opinion is merely dictum, inasmuch as the actual decision did not recognize the liability. There are, however, a few cases which actually decide that, if the act complained of has been done with corrupt motives or malice, there is a liability to the person injured. On the other hand, it has been distinctly held that, if the officer whose acts are complained of keeps within his powers, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts."

In *Kendall v. Stokes et al.*, 3 How. 87, 98, 11 L. Ed. 506, 512, Chief Justice Taney, speaking for the Supreme Court of the United States, said:

"A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs."

In *Spalding v. Villas*, 161 U. S. 483, 498, 16 Sup. Ct. 631, 637, 40 L. Ed. 780, 786, Justice Harlan, speaking for the United States Supreme Court, in a case where damages were sought in an action against the Postmaster General, claimed to have resulted from his official action, said:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law."

In *Daniels v. Hathaway*, 65 Vt. 247, 255, 26 Atl. 970, 973, 21 L. R. A. 377, 380, it is said:

"Discretionary power is, in its nature, independent, and to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. Discretion, to a certain extent, implies judicial functions; and, when officers act in such a capacity, they are not liable to any private person for a neglect to exercise these powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and they keep within the scope of their official duties and authority." *Porter v. Haight*, 45 Cal. 631; *Fath v. Koeppel*, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867; *Garff v. Smith*, 81 Utah, 102, 88 Pac. 772, 120



Am. St. Rep. 924; *Rohn v. Osmun*, 143 Mich. 68, 106 N. W. 697, 5 L. R. A. (N. S.) 635; *Valentine v. Englewood*, 76 N. J. Law, 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262, 16 Ann. Cas. 731; *Mechem on Public Officers*, § 638; *Cooley on Torts* (2d Ed.) p. 447; 23 Am. & Eng. Ency. Law (2d Ed.) p. 375.

We are clearly of the opinion that it must be held, as a matter of law, that Dr. Calhoun is not liable for the damages complained of in this case, upon the ground that he acted in an official capacity in a matter involving his discretion, and did not act maliciously or corruptly. Whether he would have been liable to respondent had he acted maliciously or corruptly we do not now decide. Clearly, his acts were not attended by any such motives on his part.

[2] Is there any sound legal basis upon which appellants Littlejohn and wife may be held liable in damages to respondent because of the unfortunate injuries resulting to him from the apparent insane act of Pence? We are constrained to hold, as a matter of law, that there is not. One is not liable for his every act that may ultimately result in wrong to another. He is only responsible for that which, in the light of experience of mankind, he should reasonably anticipate as liable to happen; not that which might barely possibly happen as the result of his act. In the text of Webb's *Pollock on Torts* (Enlarged Am. Ed.) on page 42, the learned author observes:

"The doctrine of 'natural and probable consequence' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight. It has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that, if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

Similar observations are made in the text of *Negligence of Imposed Duties (Personal)* by the learned author, Justice Ray, as follows:

"Mischiefs which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what his reason and experience

will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things. The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident."

This doctrine has been applied by us in *White v. Spokane & Inland Empire R. Co.*, 54 Wash. 670, 103 Pac. 1119, *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364, and other master and servant personal injury cases where there was involved a duty of the master to the servant resting upon the contract of service existing between them. In so far as the master's liability for injury to the servant is concerned, a duty, to whatever extent it exists, is owing directly to the servant. The duty here involved, if any, was that of Littlejohn and wife to respondent simply as a member of the public. Assuming, however, that that duty was of such a nature that Littlejohn and wife might become liable to some person injured by Pence, in view of the control they had over him, we are quite unable to see that Pence's homicidal act resulting in the injury to respondent was within the realm of probability, as Littlejohn and wife had a right to view his probable future actions in the light of the knowledge they possessed as to his mental condition. The above-quoted observations from the works of Pollock and Ray are, of course, very general, but we cannot escape the conclusion that they nevertheless fully answer the problem here involved, as a matter of law, in favor of Littlejohn and wife. The facts they had before them pointing to the probable future actions of Pence were: That he had no homicidal tendencies; that he had developed no signs of insanity until about two weeks before he was committed to the asylum, and about four weeks before he committed this act; that his insanity was of a mild form; that he was improving mentally up until the time they were informed of his infatuation with the actress; that he was regarded by the assistant physician of the hospital, Dr. Wilt, as being harmless; that the letters written by him to the actress, as the contents of those letters were made known by the policemen to Littlejohn and wife, "did not contain any threats or vile language," but "were merely the letters of a person having some admiration or pretense of love for the girl, asking her to marry him, and expressing his affection for her." It seems clear to us this would not indicate to

the ordinary mind anything more than that Pence was making himself somewhat of a nuisance to the actress, and might possibly continue to do so. It does not contain the suggestion that he might attempt to do any one physical harm, in view of the fact that he had never developed any tendencies to do any one physical harm up to the time of shooting respondent. It is true one of the policemen says in his testimony that he told Littlejohn that Pence was liable to go to Portland "and kill some one," but this was only an opinion expressed on the part of the policeman, and not warranted by the facts then communicated by him to Littlejohn, except as an opinion of a bare possibility. What Littlejohn and wife then learned as to what Pence was actually doing was the thing to guide them in their actions. We are of the opinion that it must be decided, as a matter of law, from the undisputed facts here shown, that Littlejohn and wife were, as reasonable persons, not bound to anticipate the unfortunate occurrence upon which it is now sought to render them liable in damages. The diligence of learned counsel for respondent has not brought to light a single decision of any court holding a person liable for negligence growing out of his want of care and restraint over an insane person. A remark made by the United States Court of Appeals of the Eighth Circuit, in their syllabus to *Western Union Telegraph Co. v. Schriver*, 141 Fed. 539, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678, seems quite appropriate here, where they say:

"The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists."

We are not prepared to say that a private person having the legal custody and control of a violently insane person with homicidal tendencies could not, under any circumstances, be rendered liable for damages caused by such a person, resulting from want of proper restraint on the part of the person having him so in charge; yet no decision of a court involving even such an extreme case has been brought to our notice.

We conclude that the judgment of the learned trial court should be reversed, and the cause dismissed, upon the ground that there is no legal liability to answer to respondent in damages, resting upon either Dr. Calhoun or the Littlejohns.

MOUNT and MORRIS, JJ., concur.

GOSE, J. I concur in the view that neither Dr. Calhoun nor Andrew J. Littlejohn is liable in damages to respondent. I think the statute clothed Dr. Calhoun with discretionary powers. The husband appellant was not instrumental in getting Pence out of the hospital. He had no knowledge of his removal from the hospital until he found him in his home.

[3] I think the case stands upon a different footing as to Mrs. Littlejohn. In order to get Pence released from the hospital, she signed an agreement to "assume all responsibility for his actions" while in her charge, "knowing that he is not fully recovered." She agreed "to care for him." She knew that Pence had been adjudged insane a short time before she secured his release. She was told that he was writing letters to a young lady with such frequency as to cause her great anxiety. She was dealing with an insane man who had only partially recovered his reason. I think, upon the facts stated, it was for the jury to determine whether, in the exercise of reasonable care, she should have anticipated that Pence might become dangerous at any moment. She had voluntarily assumed a duty. Did she exercise reasonable care in performing that duty? The jury and the trial court have said no. I do not think that we should hold that the verdict is without sufficient evidentiary basis. To this extent I dissent.

CROW, C. J., and ELLIS, J., concur with GOSE, J.

FULLERTON, J. (dissenting). I am unable to concur in the conclusion reached by the majority. In my opinion, the evidence justified submitting the question of liability as against all of the defendants. As to the superintendent of the asylum, it may be that he acted within his authority when he granted the parole to Pence in the first instance. But I think he was grossly negligent in not immediately ordering Pence to be brought back to his place of confinement when he learned that he had become infatuated with the young woman, and had pursued his attentions towards her with such vehemence as to put the woman in fear, and to cause those surrounding her to believe that it was a proper matter to be brought to the notice of the police. It is common knowledge that when a man of weak or unsound mind conceives an infatuation for a woman he commonly at once becomes, particularly if his attentions are shunned and avoided, highly dangerous not only to the object of his infatuation, but to those whom he believes stand in the way of his approach to her. Dr. Calhoun must be held to have known of this general propensity. He was the person selected by the state to control the custody and actions of Pence, and the person on whom the state looked to see that he did not become a menace to the public. When, therefore, he was informed of this new form of dementia in his patient, and failed to take adequate action to prevent harm therefrom, it was, in my opinion, for the jury to say whether he performed his duty with that degree of care and prudence the circumstances imposed upon him. I concede that he has a large measure of discretion in the

care and control of the unfortunate committed to his care, but this does not absolve him from all prudence. Carried to its utmost limit, the doctrine of the majority would justify him in turning the entire in-macy of the asylum loose upon the unsuspecting public. But it is said there are no precedents for such a liability. I think there are analogous cases. The parents of a child are not, at common law, usually liable for the torts of their minor children, but they are so if they know of their propensity for mischief, and do not use a reasonable degree of prudence to restrain them. The keeper of a vicious animal is not commonly liable for injuries caused by it, but is so if he knows of its vicious nature and neglects to use reasonable care to prevent its doing mischief. A poor unfortunate with mind destroyed is less responsible than even these, and I cannot conceive of any principle of law which would hold the keeper of one responsible and exempt the keeper of the other. Again, it is said that the rule I conceive should prevail would tend to the injury of the person confined, as the keeper of the asylum would hesitate to discharge a person committed to his charge even after he felt that a cure had been effected, because of his liability to answer in case of a mistake. But it is a sufficient answer to this to say that our statute provides for a judicial inquiry in cases of doubt, and immunity from liability for a wrongful discharge of a patient can be had by pursuing that method.

As to Andrew J. Littlejohn, I think him liable on the principle that it was negligence on his part to turn Pence loose with means in his pocket to pursue the girl to a neighboring city, particularly after warning had been given him of the young man's infatuation and of his liability to pursue such a course. Common prudence requires that persons of unsound and defective minds be guarded. The most optimistic must recognize this fact if they do no more than but glance at the great public institutions the state supports and maintains for their control. Ordinary prudence, it seems to me, would have dictated that Mr. Littlejohn, since he had assumed to assist in protecting the public from this unfortunate person, should have placed him in the charge of some person to look out for him on his journey to his intended destination, or, at least, should have himself purchased his ticket and saw that he was safely on his way before leaving him free to exercise the bent of his disordered mind.

Mrs. Littlejohn, in my opinion, is the least blamable of any of the appellants. Pence was her son. For him she had the instinctive, primal love; the love that causes a mother to make sacrifices for her offspring when its return is ingratitude, contumely, and hate; the love that survives and gives

rise to hope when all the world condemns. But I think it was for the jury to say whether even she in this instance exercised that degree of care which was incumbent upon a mother. She could but know that her son was irresponsible, that his dementia had taken a dangerous turn, and that he was liable because thereof if left unrestrained to inflict injury on some individual unaware of his infirmity.

I conclude, therefore, that the question of the defendant's negligence was for the jury, and that, since they found negligence, the judgment should be affirmed.

CHADWICK and MAIN, JJ. We think Mr. and Mrs. Littlejohn are liable to answer in damages. We agree that Dr. Calhoun is not liable.

(83 Wash. 364)

JOHNSON v. MARTIN et al. (No. 11997.)  
(Supreme Court of Washington. Jan. 8, 1915.)

PRINCIPAL AND SURETY (§ 147\*) — BOND TO SURETY—RIGHT TO SUBROGATION.

The obligee of a bond given to secure a building contract is subrogated to a mortgage given by the contractor to secure the surety, though the surety, by reason of insolvency, did not satisfy the bond, the contractor having defaulted, and this right is not defeated because the obligee did not know of the existence of the mortgage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402-412; Dec. Dig. § 147.\*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge. Action by Conrad Johnson against H. S. Martin and another and J. S. Elliott and others. From the judgment, the last-named defendants appeal. Reversed, with directions.

Jas. B. Murphy and Wm. A. Greene, both of Seattle, for appellants. Robt. C. Saunders, of Seattle, for respondents.

CHADWICK, J. This case comes to us upon an agreed statement of facts which we shall epitomize. Respondent H. S. Martin was a contractor engaged in building houses. He and his wife, Ellen Martin, were the owners of property described as lots 1, 2, and 3, block 57, Salmon Bay Park addition to the city of Seattle. The property had been mortgaged to respondent Conrad Johnson. Thereafter Martin entered into a contract to build a dwelling house for the appellant J. S. Elliott in consideration of the sum of \$7,800, and agreed to pay for the labor and material and to deliver the premises free and clear of all liens and claims of whatsoever nature arising or growing out of his contract. Martin gave Elliott a bond in the penal sum of \$4,000, "conditioned that the said H. S. Martin would erect the said building for the said J. S. Elliott according to the plans and specifications, and fully perform his contract in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all respects." This bond was signed by the appellant the United Surety Company, as surety. To secure the surety company against any loss or damage it might suffer on account of the Elliott bond or on account of any other bond that it might thereafter enter into as surety, Martin and his wife executed a trust deed, the recitals and conditions of the deed being as follows:

"To have and to hold the same unto said grantee as joint tenants, with the right of survivorship, their successors and assigns in trust to secure the United Surety Company, a Maryland corporation, against any and all damages or loss (including a reasonable attorney's fee) which the said United Surety Company may sustain by reason of having executed or executing in the future at the request or for the benefit of Hans S. Martin any undertaking or contracts of suretyship. \* \* \* Any and all loss or damage which the United Surety Company may suffer by reason of the undertakings or contracts of suretyship executed by it for the benefit or at the request of Hans S. Martin shall immediately become due and payable to the said company without demand, and the amount of such loss or damage shall become fixed as the amount secured by these presents, together with a reasonable sum as attorney's fees. But if all indebtedness due to United Surety Company on account of loss or damage suffered by it on account of such undertakings or contracts of suretyship shall be paid by the parties primarily responsible therefor, without demand, and said trustees or the survivor of them, their successors and assigns, shall reconvey all the premises and estate derived hereunder unto the said grantors, their heirs and assigns, at their request and cost. But if default be made in the payment of any of said indebtedness when due and payable or in the performance of any of the covenants herein, then, upon request of said United Surety Company or its assigns, said trustee or the survivor of them, their successors and assigns, are hereby empowered to sell for United States gold coin the granted premises and estate or such part or parts or part at one time and part at another, and so on as in his or their discretion shall be deemed best in the manner following."

Martin entered into the performance of his contract, but defaulted, and Elliott was compelled to pay lien claims aggregating \$2,034.34. Elliott also obtained a judgment against Martin for \$403.63, for failure to complete the building according to the plans and specifications. In defending the lien claims in the superior and in the Supreme Court Elliott expended by way of court costs the sum of \$245.65, and paid attorney's fees aggregating \$750. Johnson, the mortgagee, thereafter began suit to foreclose his mortgage. The Elliotts and the receiver of the surety company, which had become insolvent, were brought in as parties, and the present controversy is waged between them and the Martins.

It is the contention of the appellants that Elliott and wife are entitled to a substitution and to be subrogated to the security held by the surety company and to the benefits of its contract as evidenced by the deed of trust.

The contention of respondent may be briefly stated. It is: That the contract between Martin and the surety company is personal to the parties; that the condition of their contract, as evidenced by the trust deed, is that

the property should stand in satisfaction only of "any loss or damage" suffered by the surety company on account of its undertaking; that it has suffered no "loss or damage," as distinguished from a liability; that it is now insolvent and unable to meet the penalty of the bond, and therefore no cause of action has been stated or can be stated by the Elliotts, under the rule announced in *Puget Sound Imp. Co. v. Frankfort, etc., Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Sheard v. U. S. F. & G. Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; *Ford v. Aetna Life Ins. Co.*, 70 Wash. 29, 126 Pac. 69. These cases were all actions at law brought against an indemnitor, and were correctly decided upon the theory that there was no privity, and hence could be no recovery under a strict interpretation of the obligation assumed. The indemnitor was the party defendant. No loss or damage had been suffered, or the company had terminated its contract. The suit was on the bond alone. Here the surety or its receiver is not contesting. It could not raise that issue. Its bond is conditioned for the "faithful performance of the building contract." It is not an indemnity bond. It says nothing about "loss or damage." This suit is not primarily a suit upon the trust deed. It is against Martin and the surety upon his bond, which is an undertaking on the part of Martin and the surety company to pay in any event. The question, then, is whether a contract collateral to a direct promise to pay will inure to the benefit of the principal creditor; he having suffered a loss growing out of a breach of the original contract—a contract to build a house free of lien and according to plans and specifications. The question whether the surety company might successfully defend an action on the ground that it was insolvent and could not suffer a "loss or damage" is not involved. We are to inquire whether equity will permit Martin to defeat his contract by resorting to a technical defense reserved by his surety, not against the Elliotts, but against him, for its own benefit, or whether it will take the parties as they were at the outset and do what they intended to do. Martin intended to build a house according to the plans and specifications and free of lien. If he did not he expected and intended that his trustee should pay the loss out of his own property. The only thing standing in the way of the due execution of the contract is a competent trustee. It is a primary rule that equity will not permit a trust to fail for the want of a trustee.

The features which distinguish the cases cited from the case at bar may be illustrated by reference to the Ford Case. It is typical of the three cases and of the authorities cited in the several opinions. A recovery was denied upon the theory that there was no privity between the indemnitor and the party plaintiff. The contract did not extend either

in law or in equity to a tort or contract creditor of the insured party. The indemnifying company was a stranger to the plaintiff in each and every case, while here there is a tie of privity between the surety company and the principal creditors, the Elliotts, in virtue of the bond and the trust deed which was given to sustain the liability assumed by the company, and but for which, we may assume, it would not have signed the bond to answer for the default of Martin. We may further assume that the Elliotts would not have entered into a contract with the Martins if Martin had not executed the bond, and we may assume that the surety would not have engaged as a bondsman if it had not been secured. With these assumptions before us, equity will not allow the Martins to say their obligation is not good when resort to the substance of the whole transaction is necessary to keep it whole. There is nothing in the cases demanding it, nor would we, in the absence of controlling principles of law or equity, extend the doctrine of the cases relied on to the extent of destroying a security given by the Martins to secure their unqualified promise.

Under well-settled authority a principal creditor may subject any security held by a surety upon the principal obligation to the payment of his debt. The earliest expression of the rule which we have noted is found in *Maure v. Harrison*, cited in 1 Eq. Ca. Abr. 93:

"A bond creditor shall, in this court, have the benefit of all counterbonds or collateral security given by the principal to the surety; as, if A. owes B. money, and he and C. are bound for it, A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt."

The more modern doctrine is well stated by the Court of Errors and Appeals of New Jersey in the case of *Demott v. Stockton Paper Ware Mfg. Co.*, 32 N. J. Eq. 124, where it is said:

"As a general rule, where a surety or a person standing in the situation of a surety for the payment of a debt, receives security for his indemnity and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance. And the right of the creditor is the same when the security is a mortgage, or other lien given to the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given; and, to entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law or have reduced his debt to judgment."

See, also, *Brandt on Suretyship* (3d Ed.) § 1419; *Vail v. Foster*, 4 N. Y. 312.

In *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719, the court found a state of facts which fell within an exception to the rule, which it states as follows:

"Many sufficient maxims of the law conspire to justify the rule. To avoid circuitry and mul-

tiplicity of actions, to prevent the exercise of one's right from interfering with the rights of others, to treat that as done which ought to be done, to require that the burden shall be borne by him for whose advantage it has been assumed, and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and, though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied is the property of the debtor primarily liable for the payment of the debt; and it is because it is so that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

The same doctrine is announced in the case of *Swift & Co. v. Kortrecht*, 112 Fed. 709, 50 C. C. A. 429. In the case of *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539, the same defense was made as here, that a mortgage executed in favor of a surety was given to indemnify the surety personally, and, until he had suffered some loss or damage, no right of action could accrue, and in no event could the creditors of defendant maintain an action when no payment had been made or loss suffered by the surety to whom the mortgage had been given as an indemnity. Both the principal and the surety had become insolvent. The court said:

"Under well settled and recognized principles of equity it seems quite clear that the lien of the mortgage on this property is ultimately for the benefit of the holders of the original indebtedness, who, in a proper case, should be adjudged entitled to subrogation to the rights of the surety. When the surety is insolvent, as in this case, or for failure otherwise to discharge the legal obligation he had assumed, it would seem the equitable principle of subrogation could be invoked. The object and purpose of the chattel mortgage to be finally accomplished was to secure payment of the principal indebtedness by the mortgagor, who was primarily liable therefor. It was his obligation, and to secure its satisfaction out of his own means as the one on whom the obligation first rested, he entered into the contract with his surety whereby the mortgage was executed so that, in case he did not satisfy the debt and the surety was compelled to, recourse could be had to the collateral security. The payment by the surety of the debt would not cancel it as to the principal debtor, who yet would remain liable for its satisfaction out of his own property. Had the principal creditors possessed collateral security, and the personal surety had paid the indebtedness, it would hardly be doubted that he would be entitled to be subrogated to the rights of the creditors to such collateral security; and on a par-

ity of reasoning we can see no difference in principle as to the right of the principal creditors to be subrogated to the rights of the surety upon his inability or failure to respond to his obligation."

This case was followed in *Harlan County v. Whitney*, 65 Neb. 105, 90 N. W. 993, 101 Am. St. Rep. 610, where the court said:

"Ezra S. Whitney, as treasurer of the county of Harlan, had given the required bond, with several sureties, for due performance of the duties of his office. Toward the end of his term a suspicion arose that he was short in his accounts. Thereupon, in order to indemnify said sureties, he and his wife executed a deed conveying the lands in controversy to one Roberts as trustee, reciting expressly that he was trustee for the sureties on said Whitney's official bond. A shortage having occurred as anticipated, the successor of the trustee conveyed said property to the county, which brought this suit, alleging that the deed was intended as a mortgage to secure said sureties and the county against loss, and praying foreclosure. A decree was rendered accordingly, from which this appeal has been taken. It is argued that there is no evidence to sustain the decree, because the proof shows clearly that said conveyance was intended to secure the sureties only, and that there is no evidence in support of the allegation that it was intended for security of the county as well, nor is it shown that the sureties have paid the amount due on the bond. But it is elementary that a creditor is entitled to enforce for his own benefit any securities which the principal debtor has given his surety by way of indemnity. In equity, such securities are considered as held by the surety in trust for payment of the principal obligation. In a sense they belong to the creditor, and proof that they were given to indemnify the surety would be sufficient to support the allegation that they were given for further security of the creditor, if such an allegation were necessary. *Blair State Bank v. Stewart*, 57 Neb. 58, 63 [77 N. W. 370]; *Longfellow v. Barnard*, 58 Neb. 612, 617 [79 N. W. 255, 76 Am. St. Rep. 117]. In the latter case it was held that 'a mortgage given to indemnify a surety or guarantor is, in legal effect, a security to the owner of the debt, even though he did not originally rely on it or know of its existence.' It follows that when the sureties, through their trustee, assigned the security to the county by conveyance of the land, the county could enforce it, although the sureties might not have done so themselves without first discharging the obligation. The security is regarded as given for discharge of that obligation, and must be applied thereon, either directly, or by satisfying those who have discharged it. Equity does not insist upon the circuitous procedure of payment by the sureties and enforcement by them. It looks to the substance, and will permit, or even require, an application upon the debt directly at suit of the creditor. \* \* \* We are unable to see any reason why, after default in the conditions of such bond, the county may not take advantage of securities given by the treasurer to the sureties thereon, whether by way of suit for subrogation or by procuring an assignment from the sureties, as any other creditor might do."

See, also, *Whitehead v. Henderson*, 67 Ark. 200, 56 S. W. 1065.

The real controversy being between Martin and the Elliots, their rights are to be determined by reference to the building contract and bond, which is a promise to pay in any event. The stipulations in the trust deed are for the benefit of the surety, and it is not resisting the execution of the trust. In *Brown & Haywood Co. v. Ligon (C. C.)*

92 Fed. 851, the defense was "that the bond sued on is one of mere indemnity, and that the obligees in the bond are not shown to have been actually damnified." The court had resort to and construed the primary obligation which was a building bond, and found that the surety had become a surety for the performance of all the "covenants and conditions of the building contract." It was held:

"That the bond sued on is, in effect, an agreement that Long shall carry out the terms of his contract with Pierce county, including the payment to subcontractors for all materials furnished by them and used in the construction of the courthouse and jail in question. It is also an agreement to save Addison, and the others who were sureties on Long's bond, harmless from the obligation and liability which they had assumed as sureties on that bond, and, in addition thereto, is an agreement to save Addison and others harmless from actions, cost, and damages. Such being the condition of the bond, it is more than a bond for indemnity, and the actual payment of the judgments obtained by the Brown & Haywood Company and others against Addison and others is not a necessary prerequisite to liability of defendants in this action. *Johnson v. Risk*, 137 U. S. 300, 11 Sup. Ct. 111 [34 L. Ed. 683]; *Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Locke v. Homer*, 131 Mass. 93 [41 Am. Rep. 199]; *Farnsworth v. Boardman*, 131 Mass. 115; *Shattuck v. Adams*, 136 Mass. 34; *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439; *Jones v. Childs*, 8 Nev. 121. \* \* \* If the complainants Addison and others could have recovered, the case clearly falls within the principle entitling the complainant the Brown & Haywood Company to be subrogated to the rights of Addison and others. The defendants' underwriting bond is a security taken by the Brown & Haywood Company's debtors, Addison and others, which, by reason of their insolvency, the Brown & Haywood Company is entitled to resort to, as an equitable asset, to satisfy its demands against its principal debtor."

In so holding the court did no more than to apply the maxim that equity will do that which ought to be done. This case being between the principal debtor and the creditor on the contract and the bond, it can make no difference whether the surety has discharged its obligation (suffered loss or damage) or not; for equity will treat it as discharged in virtue of the insolvency of the surety, and will make all assets in its hands available for the discharge of the principal debt. Nor does it make any difference whether the principal creditor knew of the contract of indemnity between the principal debtor and the surety. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Curtis v. Tyler & Allen*, 9 Paige (N. Y.) 432. To state the proposition in another way: If the surety company were solvent and able to respond, the Elliots would have a right of action against the surety company on its bond, and could compel the company to use the trust property to satisfy the bond. Under the present state of facts, the Elliots, being creditors of the surety company, are entitled to take the assets in its hands and apply them to the discharge of the specific obligation which it assumed when it signed

the bond, and which it would be called upon to pay but for its insolvency. To hold otherwise would be to say that a surety who held property in trust to meet a debtor's obligation to another could discharge its obligation of suretyship by becoming insolvent. It would seem to be reasoning in a circle to say that, because the surety company became insolvent and unable to pay its obligation, and has neglected to perform its contract, the creditor cannot assume directly and at once the same legal position that he might have taken if the surety company were solvent and contesting his claim. The sum of the authorities may be stated thus: Equity will seize upon and execute a trust, when derelict between a principal debtor and his creditor, when the subject-matter of the trust has been pledged by the debtor to meet a specific obligation that the debtor is primarily obligated to pay, and but for which the trust would not have been created, "upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor." *Keller v. Ashford*, supra.

But it is said that there can be no subrogation, for the reason that subrogation, although it does not rest upon contract, always grows out of contract, and that contracts will not be distorted so as to admit subrogation, in the absence of a clear expression of intention; that there is no privity of contract between the Elliots and the Martins which the property now sought to be charged is the subject-matter. We have already shown by reference to the authorities that equity charges the property upon the theory that there is a privity, and, where this is so, the contract of the surety ought to be performed; that equity has done or will do what the surety has engaged itself to do, which in this case was to apply the property held by it to the satisfaction of any loss that might occur to the Elliots by reason of their contract with Martin.

The Supreme Court of this state has taken its stand with those courts which have declared that the right of subrogation will be allowed when the equities of the case demand it. *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. Martin executed a bond with surety as a condition precedent to the building contract. His obligation in equity is no more or less than his contract obligation to save the other contracting party harmless. The ultimate object and purpose of the Martins trust deed was to save the Elliots, as well as the surety company, harmless; to pay their debt, if any, out of their own property. They pledged it for that purpose, and equity, having

jurisdiction of the parties and the subject-matter, will reach out and apply the trust fund to the ultimate purposes of the trust.

There is some suggestion that Martin entered into another contract which may have fallen under the protection of the trust deed. Whatever the fact may be, we are of opinion that the rights of the Elliots would not be entirely defeated. They might be subjected to a marshaling of the assets in the event that a claim is made upon the receiver, but with that contingency neither this court nor the respondent Martin have any thing to do at the present time.

The judgment of the lower court is reversed, with directions to enter such decree as will protect the interest of the appellants Elliots and the receiver in the trust property, subject, however, to the lien of the Johnson mortgage.

CROW, C. J., and PARKER, GOSE, and MORRIS, JJ., concur.

(83 Wash. 430)

BAYER et al. v. BAYER et al. (two cases).  
(No. 12207.)

(Supreme Court of Washington. Jan. 8, 1915.)

1. EXECUTORS AND ADMINISTRATORS (§ 315\*)—  
ORDER OF DISTRIBUTION—JURISDICTION OF  
SUPERIOR COURT.

Const. art. 4, § 6, gives the superior court jurisdiction in all cases in equity, in certain cases at law, and in "all matters of probate," and Rem. & Bal. Code, § 1444, provides that in nonintervention wills, where the estate is solvent, it shall not be necessary to take out letters testamentary, except to admit the will to probate and to file an inventory, and that after probate and inventory the estate may be managed and settled without intervention of the court. Testator, dying in K. county, appointed an executor and directed that the estate should be settled and distributed without recourse to any court, and declared his property in this state to be community property, and that in another state to be his separate property and confirmed his widow's community and dower interests to her, with remainder to his brothers and sisters. The executor filed his final account in the superior court of K. county, and petitioned for a distribution, alleging that all the property was community property, in which the widow had a one-half interest, and upon notice the guardian of the widow's person and estate appeared without objection to the jurisdiction, and the court settled the account and distributed the realty as community property and the personalty in the same proportions. *Held*, that although the executor could not be compelled to come into the probate court at the suit of a third party, he might himself invoke its jurisdiction, that though the superior court was not a probate court, but a court of general jurisdiction, it had power to order distribution, and, to that extent to construe the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 7\*)—  
POWERS—STATUTE—"TRUSTEE."

Under Rem. & Bal. Code, § 1444, providing that, as to nonintervention wills, it shall not be necessary to take out letters testamentary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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except to admit the will to probate, the executor derives his powers, not from the court, but from the will, and is in fact a "trustee."

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 19, 20; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, First and Second Series, Trustee.]

### 3. COURTS (§ 200\*)—PROBATE COURTS—TRIAL OF ISSUES.

A superior court sitting in probate may settle issues and try a case as any other civil cause.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 441, 442, 454, 469-471; Dec. Dig. § 200.\*]

### 4. WILLS (§ 257\*)—CONSTRUCTION—JURISDICTION OF SUPERIOR COURT.

Under Const. art. 4, § 6, giving the superior court jurisdiction in all cases in equity, in certain cases at law, and in "all matters of probate," the court, as a court of general jurisdiction, may construe wills at the suit of proper parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 592, 593; Dec. Dig. § 257.\*]

### 5. CONSTITUTIONAL LAW (§ 309\*)—JUDGMENT (§ 749\*)—DECREE FOR DISTRIBUTION—DUE PROCESS OF LAW.

A decree of distribution, entered upon notice of publication according to Rem. & Bal. Code, § 1499, relating to an executor's sale of realty after order for interested persons to appear, section 1500 requiring copy of such order to be personally served on persons interested, and section 1589, authorizing a decree for distribution after notice to persons interested, as required on the executor's application for sale of land, is based on due process of law, and is conclusive as any other judgment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.\* Judgment, Cent. Dig. §§ 1302-1305; Dec. Dig. § 749.\*]

### 6. EXECUTORS AND ADMINISTRATORS (§ 82\*)—DIRECTIONS OF COURT.

An executor, as trustee, may apply to the courts for directions in the execution of his trust, and the courts have jurisdiction to direct and control his acts in the premises.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 335; Dec. Dig. § 82.\*]

### 7. APPEARANCE (§ 9\*)—VOLUNTARY APPEARANCE.

In view of Rem. & Bal. Code, § 238, declaring a voluntary appearance of a defendant equivalent to a personal service of summons upon him, the guardian of the person and property of an insane widow, who on notice of the hearing on the final account of her deceased husband's executor, and his petition for the distribution of the estate personally appeared in the action, appeared generally to the petition and was before the court for all purposes.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.\*]

### 8. JUDGMENT (§ 385\*)—VACATION—COURT OF CO-ORDINATE JURISDICTION.

The judgment or decree of the superior court of K. county in the distribution of an estate of which it had jurisdiction could not be set aside by the superior court of L. county, a court of co-ordinate jurisdiction.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 385.\*]

Department 1. Appeals from Superior Court, Lincoln County; Jos. Sessions, Judge. Petition by Martha E. Bayer and J. N.

Dotson, as guardian of her person and estate, against John A. Bayer and others, consolidated with an action by Martha E. Bayer against John A. Bayer and others. Judgment for petitioners, and for plaintiff in the action, and defendants appeal. Reversed, with directions to dismiss.

Reynolds, Ballinger & Hutson, of Seattle, for appellants. Jas. R. Chambers, of Seattle, for Martha E. Bayer.

GOSE, J. In this case two actions were consolidated. The first was brought by petition in the superior court of Lincoln county. The object of the action was (a) to vacate a decree of distribution entered in the superior court of King county upon a nonintervention will, and (b) to vacate a decree of partition entered in the superior court of Lincoln county following the decree of distribution. A second action was brought in the same court to recover the value of a quantity of grain grown upon the land in controversy. Martha E. Bayer was the petitioner in the first action and the plaintiff in the second action. She recovered in both cases in the court below, and this appeal followed.

The salient facts are these: Frederick A. Bayer died testate in King county, where he then resided, on the 8th day of December, 1908. His will bore date December 2, 1908. He named Fred Eidemiller as executor of his will. In his will he declared:

Item 1: "That all real and personal property in my possession or standing in my name in the state of Washington is the community property of myself and of Martha E. Bayer, my wife; and that all property standing in my name in the state of Oregon is my separate property, subject, however, to my wife's dower rights as prescribed by the statutes of the state of Oregon."

Item 2: "I do hereby confirm in my said wife her said community and dower interests aforesaid, and do direct that in the settlement of my estate her said community and dower interests be set apart to her. All the remainder and residue of the property, both real and personal, in my possession or standing in my name at the time of my death, I hereby give, devise, and bequeath to my brothers John A. Bayer \* \* \* Samuel B. Bayer, \* \* \* and my sisters, Kate Bayer \* \* \* and Laura H. Eidemiller, \* \* \* it being my intention that my said wife shall receive and retain her community and dower interests; \* \* \* all my estate remaining after the setting apart of said interest of my wife, shall be divided equally between my brothers and sisters aforesaid."

The will directs that no bond shall be required of the executor, and provides that the estate shall be settled by the executor without recourse to any court except for the purpose of proving the will—

"hereby conferring upon said executor full power and authority to settle and distribute my said estate in accordance with this my will without interference from any court."

The will was proven and admitted to probate in the superior court of King county on the 12th day of December, 1908. J. N. Dotson was appointed guardian of the person

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and estate of Martha E. Bayer, then insane, in the superior court of King county on the 31st day of December following. Dotson, who is a brother of Mrs. Bayer, remained guardian of her person and estate until the 28th day of July, 1913, at which time Mrs. Bayer was adjudged sane. On January 6, 1909, an order was entered in the superior court of King county directing a publication of notice to creditors. On the 20th day of January, 1909, a homestead was set aside to Mrs. Bayer and an allowance was made for her support upon the petition of her guardian, by an order duly entered in the same court. On February 9th the executor filed an inventory wherein all the property in controversy was classified as community property. On February 26th the estate was duly adjudged to be solvent. The order recites "that said estate may be managed and settled without the further intervention of this court." On April 23d an order was entered adjudging that due notice had been given to creditors. On June 30th the guardian filed a petition for an advance of \$400 to be charged to the distributive share of the estate of his ward. The petition alleges that all the property of the deceased and Martha E. Bayer, both real and personal, was community property. On the same day an order was entered directing an advance of \$400 to the widow. On October 23d the executor filed a petition for authority to lease all the real property of the estate for one year. The guardian united in the petition. An order was thereupon entered directing a lease of the property. On February 1, 1910, the executor filed his final account and petition for distribution of the estate, in which he described all the property of the estate real and personal. The petition alleges that all the property, both real and personal, including the rents, issues, and profits of the real estate, is community property, and that the widow's distributive share of the estate is an undivided one-half. On March 8th, after due and legal notice of the hearing had been given conformably to the statute and the order of the court, a decree of settlement and distribution was entered. The decree adjudges that due notice was given of the time and place of settlement. It recites the appearance of the executor in person and by his attorneys, and the appearance of J. N. Dotson, as guardian of the person and estate of Martha E. Bayer, in person and by his attorneys. It recites that the account contains "not only the condition of the account and of the separate estate of Frederick A. Bayer, deceased, but also of the estate of the community of Frederick A. Bayer, deceased, and Martha E. Bayer, his wife." It adjudged that the final account was true and correct, except as to one item of \$280.75, which it reduced to \$40.75. The decree recites "that said estate consists wholly of the community property of decedent and his said wife." It described the property of the estate

as it was described in the petition for distribution. It distributed the real property, an undivided one-half to the widow, "the same being in satisfaction of her community interest in said property," the remaining undivided one-half to the brothers and sisters named in the will, in equal shares; that is, an undivided one-eighth to each thereof. It divided the personal property in the same proportions. There is nothing in the record which shows that any person at any time questioned the jurisdiction of the court to settle the estate.

The real property comprises 2½ sections of land in Lincoln county. Nine hundred and sixty acres, which are referred to as "the big farm," are claimed by the widow to be community property. Section 4 she claims as her separate property, and the trial court found in harmony with this view. The trial court also found that the judgment of the superior court of King county is "absolutely void," and vacated it, and also vacated the decree entered in the partition proceedings in the superior court of Lincoln county, and divided the personal property on the same basis as the real estate; that is, on the theory that 960 acres were community property and section 4 was the separate property of the widow.

[1] The crucial question is, Is the decree of distribution entered in the superior court of King county void? The Constitution (article 4, § 6) provides that the superior court shall have jurisdiction in all cases in equity, in certain cases at law, and in "all matters of probate." Rem. & Bal. Code, § 1444, provides that in nonintervention wills, where it appears to the court, by the inventory filed and other proof, that the estate is solvent, which fact may be established by an order of the court on the coming in of the inventory—

"it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide: But provided, that in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time."

This section further provides that if the party named in the will shall fail to execute the trust faithfully, it shall be the duty of the court of the county wherein the estate is situated to cite the executor to appear before the court upon the petition of a creditor of the estate, or of any of the heirs, or of any person on behalf of any of the heirs. It further provides that, if upon such hearing it shall appear that the trust in the will is not faithfully discharged, and that the parties interested, or any of them, have been or

are about to be damaged thereby, letters testamentary or of administration shall be had, and that all other matters and proceedings shall be had and required as are now required in the administration of estates.

[2] Under the Constitution the superior court is a court of general jurisdiction. It has jurisdiction of equity cases, actions at law, and proceedings in probate. It has been held that, under the statute to which reference has been made, the executor derives his powers, not from the court, but from the will, and that he is in fact a trustee. *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

[3] It has also been held that a court sitting in probate may settle issues and try a case as any other civil cause. *Fille v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Sloan v. West*, 63 Wash. 623, 116 Pac. 272.

[4] The Constitution does not make the superior courts probate courts. On the contrary it makes them courts of general jurisdiction, including "all matters of probate." As a court of general jurisdiction, it has the power to construe wills at the suit of proper parties. *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

[5] A decree of distribution, entered upon notice of publication in harmony with the statute (*Rem. & Bal. Code*, §§ 1499, 1500, and 1589) is upon due process of law and conclusive, the same as any other judgment. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990; *Alaska Banking, etc., Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492; *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100.

In the *Noyes Case* we said: "The decree [of distribution] was in itself a construction of the will."

In *Re Bell's Estate* we said:

"Probate matters in this state are referred to the superior court, a court of general jurisdiction, and its jurisdiction in probate may be submitted to in the same manner and is entitled to the same presumptions in its favor as its jurisdiction in any other class of cases."

In *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147, we said:

"When a superior court has presented to it, through a petition, in any matter of probate, any issue touching the estate, it has jurisdiction both of the parties and of the subject-matter, and it deals with them, not as a court of limited, but of general, jurisdiction. It may exercise all of its powers, legal or equitable, and may even invoke the aid of a jury to finally determine the controversy. The Constitution has no more limited its powers in such cases than in others of which jurisdiction is conferred by the same constitutional provision."

In *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 139 Pac. 650, we said:

"Jurisdiction is the power to hear and determine. The superior court is a court of general jurisdiction. The court had jurisdiction of the estate, and one of the incidents of that jurisdiction was the power and duty to determine who shall take the estate. The relator was before the court, both in person and by counsel. Hence the court had jurisdiction of the parties."

[6] A trustee may maintain a suit in equity for directions "as to the particular course which he ought to pursue," and if he follows directions, he will be released from responsibility. 3 *Pomeroy's Equity Jurisprudence* (3d Ed.) §§ 1064, 1153, 1156. In 18 Cyc. at page 208, it is said:

"It is always the right and frequently becomes the duty of an executor or administrator to apply to the courts for direction and guidance in the performance of the duties of his trust, and the courts have jurisdiction to direct and control his acts in the premises."

See, also, *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025.

[7] "A voluntary appearance" of a defendant is equivalent to a personal service of the summons upon him. *Rem. & Bal. Code*, § 238. In the case at bar the guardian was given notice of the time and place of the hearing of the final account and the petition for the distribution of the estate conformably to the statute and to the order of the court, and he personally appeared in the action. In *Re Bell's Estate* we said:

"The only purpose of notice in any case is to give a party opportunity to be heard. They not only had notice, but appeared and asked for a continuance and afterwards stipulated for the hearing. We think that action must be held to constitute a general appearance to the petition, and that they were before the court for all purposes."

In that case one of the parties who appeared was the guardian ad litem of a minor heir. A nonintervention will was not involved in any of the above cases.

[8] The judgment or decree of a court of competent jurisdiction cannot be set aside by a court of co-ordinate jurisdiction. *Case Threshing Machine Co. v. Sires*, 21 Wash. 322, 58 Pac. 209.

"The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made. As between courts of co-ordinate jurisdiction, such as two county courts or circuit courts of the same state, the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face; relief must be sought in the court where the judgment was entered." 1 *Black on Judgments* (2d Ed.) § 297.

See, also, 17 *Am. & Eng. Ency. of Law* (2d Ed.) page 842; *Missouri Pacific R. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338, 17 *Ann. Cas.* 605.

The respondent, in support of her contention that the decree of distribution entered in the superior court of King county was without jurisdiction and hence void, has cited *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1041; *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641; *State ex rel. Cox v. Superior Court*, 21 Wash. 575, 59 Pac. 483; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025; *In re Macdonald's Estate*, 29 Wash. 422, 69 Pac. 1111; *Moore v. Kirkman*, 19 Wash. 605, 54

Pac. 24; English-McCaffery Logging Co. v. Clowe, 20 Wash. 721, 70 Pac. 138; Peck v. Peck, 76 Wash. 548, 137 Pac. 137.

Fulmer v. Gable is not in point. In *State ex rel. Cox v. Superior Court*, it was held that a creditor of devisees under the will could not bring the executors of a nonintervention will into probate court upon a charge of mismanagement under the provisions of the statute. In *Re Macdonald's Estate*, it was held that an order of discharge of an executrix and a decree of distribution where the executrix was acting under a nonintervention will was without jurisdiction. The decision was obiter, however, as the executrix had ineffectually pleaded her discharge in the federal court and had not appealed from an adverse judgment. In *Moore v. Kirkman* it was held that notice given to creditors by the executors of a nonintervention will had no legal efficacy. In *English-McCaffery L. Co. v. Clowe* all the property, both real and personal, was devised and bequeathed to a daughter and a son of the testator in equal shares, by the terms of a nonintervention will. The daughter was named as the sole executrix. After the due probate of the will, the daughter conveyed all her right, title, and interest in the real estate in controversy to her brother and codevisee, who later sold and conveyed the property to the defendants for a valuable consideration. After both deeds were filed for record, the executrix under an order of court sold the property to the plaintiff. The sale was confirmed. It was held that the judicial sale was ineffectual; that the title had theretofore passed from the estate to the defendant for a valuable consideration, and that the plaintiff "had full knowledge of all these facts, and was a participant in their invalidity." In *Peck v. Peck* it was held that an action will lie to quiet title where a nonintervention will is invoked as a muniment of title the same as where the title is predicated upon any other instrument. In *Re Guye's Estate* the executors named in the will accepted the trust, and thereafter took such steps as were necessary under the statute to establish their right to manage and settle the estate without the intervention of the court. After this had been done, the widow petitioned the court before whom probate proceedings were had for an allowance out of the estate, and sought to bring the executors before the court. It is true that we there said that the court was without jurisdiction. We also said:

"The statute authorizing such a will has been on the statute books since early territorial days, and has uniformly been construed to confer upon the executors of a will drawn pursuant to its provisions the right to execute the trust without interference on the part of the court"

—except upon the happening of some one or more of the contingencies expressed in the

statute. In each of the cases relied upon by the respondent, except in *re Macdonald's Estate*, it was sought to require the executor or trustee named in the will to take specific action. The statute itself provides, "Such estates *may be* managed and settled" without the intervention of the court. It does not provide that they *must* be managed by the executor without the intervention of the court. There is nothing in the statute which prevents an executor from invoking the jurisdiction of the superior court, whether it be called the equity or probate jurisdiction, if he deems it expedient to do so. He cannot be compelled to come into probate court at the suit of a third party except upon the happening of some contingency expressed in the statute. In the case at bar we have no doubt that the executor had a right, under the peculiar provisions of the will, to go into the superior court and have it construed. The fact that the proceeding was entitled in probate does not militate against this right. It will be presumed that the court sitting in probate entered the same order that it would have entered had the proceeding been brought upon the equity side of the court. Nine hundred and sixty acres of the real estate stood of record in the name of Frederick A. Bayer. Section 4, which the respondent claims as her separate property, stood of record in the name of "Martha E. Bayer and husband." The executor believed that all of the estate was community property, and he had a right to go into court and have that fact determined by a court of competent jurisdiction, and when it was so determined, the guardian having appeared after due notice the judgment was final and conclusive against an attack in a court of co-ordinate jurisdiction. The point we desire to emphasize is that there is a marked difference between a proceeding by a third party to require the executor of a nonintervention will to come into probate court and a proceeding by the executor himself invoking the jurisdiction of such court. We think that, under the Constitution and the statute, the judgment of the superior court of King county was not void, and it follows that it could not be vacated by a court of co-ordinate jurisdiction.

We do not understand that it is claimed that the respondent was wronged by the decree in the partition suit, if the decree of distribution is *res judicata*. The petition alleges that the guardian acted upon the advice of reputable counsel, and that he then believed that the property belonged to the community.

The judgment is reversed, with directions to dismiss.

PARKER, MAIN, MOUNT, and MORRIS, JJ., concur.

(83 Wash. 578)

**PERRAULT v. EMPORIUM DEPARTMENT STORE CO.** (No. 11041.)

(Supreme Court of Washington. Jan. 16, 1915.)

**1. EVIDENCE (§ 43\*)—JUDICIAL NOTICE—JUDICIAL RECORDS.**

Courts will take notice of their records of prior proceedings in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.\*]

**2. APPEAL AND ERROR (§ 1195\*)—LAW OF CASE—QUESTIONS DECIDED.**

A decision of the Supreme Court on appeal from an order granting a new trial for inadequacy of the damages awarded plaintiff for a personal injury, which affirms the order and adjudges that defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, is the law of the case on a subsequent trial, on the same pleadings, on the issue whether plaintiff was an invitee or a mere licensee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

**3. APPEAL AND ERROR (§ 1096\*)—LAW OF CASE.**

Questions determined on appeal, or which might have been determined had they been presented, will not be considered on a second appeal of the same action, but, as to such questions, the first appeal conclusively settles the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353-4357; Dec. Dig. § 1096.\*]

**4. APPEAL AND ERROR (§ 1194\*)—LAW OF CASE.**

A decision of the Supreme Court affirming an order granting a new trial for inadequacy of the damages awarded plaintiff for a personal injury, thereby disposing adversely to defendant the claim of its freedom from negligence and of plaintiff's contributory negligence, is the law of the case on a subsequent trial, as against the claim that plaintiff might have minimized the damages by submitting to an earlier operation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.\*]

**5. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where the damages awarded in a personal injury case are not excessive, any technical error in the instructions on the measure of damages arising from the failure to advise the jury that the damages must be no more than compensatory is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Florestine Perrault against the Emporium Department Store Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 71 Wash. 523, 128 Pac. 1049.

Englehart & Riggs, of North Yakima, for appellant. John H. Lynch, of North Yakima, for respondent.

ELLIS, J. This is an action for damages suffered by the plaintiff in attempting to

step into an elevator owned and operated by the defendant in its department store. The case is here for the second time on appeal. On the first trial the plaintiff recovered a judgment for \$800. A new trial was granted on the ground that the damages awarded were so inadequate as to show that the jury in reaching the verdict was influenced by passion and prejudice. In the course of the first trial the defendant moved for a nonsuit, for a directed verdict, and for judgment non obstante. These motions were all overruled. The defendant's first appeal was from the orders denying all of these motions and from the order granting a new trial. On the first appeal no objection was made to its scope, and all of these orders of the trial court were reviewed and the order granting a new trial was affirmed. That affirmation necessarily included an affirmation of the other orders appealed from. This is apparent from the following language found in the opinion on the first appeal:

"The several motions of the defendant for a nonsuit, a directed verdict, and a judgment non obstante were denied, and the motion of the plaintiff for a new trial on the ground of 'inadequate damages appearing to have been given under the influence of passion or prejudice' was granted. The defendant has appealed. It concedes that, if the court was not in error in denying its several motions, the order granting a new trial was not an abuse of discretion. Its contentions are: (1) That it was not guilty of negligence; and (2) that the respondent was guilty of contributory negligence materially contributing to and causing her injury, and hence that it incurred no liability." *Perrault v. Emporium Dept. Store Co.*, 71 Wash. 523, 524, 525, 128 Pac. 1049.

Reference is also made to that opinion for a statement of the evidence, to which it is only necessary to add that there was some evidence tending to show that the plaintiff entered the store for a matter of her own convenience, and neither made not attempted to make any purchase while there. There was also evidence that she refused for some time to submit to an operation advised by her physician, who also told her that the operation might produce a stiff knee, but that the danger of that result was not great. After taking treatment for a short time from an osteopathic physician, she finally underwent the operation at first advised. The result was satisfactory, though the knee at the time of the second trial was still weak and the limb slightly reduced in size.

On the second trial the plaintiff recovered a verdict for \$1,500, for which amount and costs judgment was entered. Within the statutory time the defendant moved for a new trial upon the grounds of insufficiency of the evidence and errors in law. This motion was overruled. From the judgment and from the order denying a new trial the defendant prosecutes this appeal.

The appellant urges a reversal upon three grounds, namely: (1) That the evidence tends

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to show that the respondent was in the store as a mere licensee, and that the court should have given certain requested instructions covering that point; (2) that the court erred in refusing to give a requested instruction as to the duty of the respondent to have minimized her damages by earlier submitting to an operation; (3) that the court failed to instruct that the respondent in no event could recover more than compensatory damages. We may preface the consideration of these points by calling attention to the following facts which will materially affect their decision:

[1] The pleadings on the second trial were identical with those on the first. The instructions were, in substance, the same, save a slight difference in the instruction touching the measure of damages, to which we shall presently advert. The evidence was in every material particular the same on the first trial as on the second, save that on the second trial it was probably more definite than on the first that the elevator boy was at his post at the time of the accident, holding the elevator door open as an invitation to the respondent to enter. If there was any other difference, the appellant has not attempted to point it out, and a careful examination of the record of both trials on our part has failed to reveal it. The appellant says there is nothing before this court showing that fact, but in their briefs both parties invite an examination of the record on the former appeal. Moreover, courts will take notice of their records touching prior proceedings in the same case. *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *O'Brien v. Washington Water Power Co.*, 79 Wash. 82, 139 Pac. 771; *Hays v. Merc. Investment Co.*, 73 Wash. 586, 132 Pac. 406.

[2] 1. It is clear that the first point cannot be successfully invoked on this appeal. The question whether the respondent was in the store on business as an invitee or for her own pleasure as a mere licensee could only be material as bearing upon the extent of the appellant's duty to avoid causing her any injury while there; that is, as determining the degree of care imposed by law upon the appellant and as bearing upon the degree of care for her own safety incumbent upon the respondent. These were questions necessarily inhering in the determination of the main questions whether the appellant was guilty of any negligence imposing a liability, and whether the respondent was guilty of contributory negligence precluding her recovery, both of which were decided on the first appeal adversely to the appellant. The appellant now complains of the court's refusal to give a requested instruction to the effect that, if the jury should find from the evidence that the plaintiff entered the store for the sole purpose of her pleasure or convenience, and made no purchase of anything for sale therein, then the verdict must be

for the defendant, and also of the refusal to give another instruction to the same effect, but stated at greater length. The same instructions were requested and refused at the former trial. This, of course, is not the law, but it was as nearly the law, as applied to the same evidence, at the time of the former trial as it is now, and should have been presented for determination on the first appeal if the appellant ever intended to raise the point, or to claim error in the instructions touching the measure of liability as actually given. The appellant urges that it was not then seeking a new trial; hence could not argue errors in the instructions. The situation presented is just this: The appellant was willing to accept the law of the case as given to the jury by the court's instructions on the first trial, rather than ask for a new trial on the ground of errors now claimed in the law as given. It staked its whole case on the chance of defeating the action in toto on the ground of absence of any negligence or liability on its part, or on the ground of contributory negligence on the respondent's part. As shown by the former opinion, it conceded that, if these claims were not well taken, there was no error in granting a new trial on the sole ground of inadequacy of the damages. In effect, it thus admitted that the only error consisted in not taking the case from the jury on the evidence. The appellant was willing to speculate on the chance of defeating any recovery by the first appeal on the facts alone, and accepted as correct the law of the case as given in the court's instructions.

[3] The law of the case, as applied to the same facts, shown by the same evidence, was thus settled for all time. This court has often said that it will not entertain appeals piecemeal. In an unbroken line of decisions we have consistently held that questions determined on appeal, or which might have been determined had they been presented, will not be considered upon a second appeal of the same action. As to such questions the first appeal conclusively settles the law of the case. *State v. Boyce*, 25 Wash. 422, 424, 65 Pac. 763; *Crooker v. Pac. Lounge & Mattress Co.*, 34 Wash. 191, 198, 199, 75 Pac. 632; *Wheeler v. City of Aberdeen*, 47 Wash. 405, 92 Pac. 135; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 62 Wash. 436, 113 Pac. 1104; *Seattle v. Northern Pacific Ry. Co.*, 63 Wash. 129, 114 Pac. 1038; *Pattison v. Seattle, Renton & So. Ry. Co.*, 64 Wash. 370, 116 Pac. 1089, 35 L. R. A. (N. S.) 660; *Forrester v. Reliable Transfer Co.*, 65 Wash. 602, 118 Pac. 753; *O'Brien v. McKelvey*, 66 Wash. 18, 118 Pac. 885; *Budman v. Seattle Electric Co.*, 67 Wash. 133, 120 Pac. 877; *Provine v. Seattle*, 70 Wash. 326, 126 Pac. 927; *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840; *Boothe v. Summit Coal Mining Co.*, 72 Wash. 679, 131 Pac. 252.

[4] 2. A consideration of the second ques-

tion is even more distinctly foreclosed by the former appeal. The respondent's motion for a new trial at that time was upon the ground that the damages awarded by the jury were inadequate. Whether the respondent might have minimized the damages by submitting to an earlier operation was clearly involved in the question of adequacy of damages there presented. The appellant, by then conceding that there was no abuse of discretion in awarding a new trial on that ground if it was liable for any damages, is estopped to raise the question now upon the same evidence. It is a question which not only could have been, but in all propriety ought to have been, raised on the first appeal, if at all. Moreover, an examination of the evidence, as adduced at both trials, convinces us that, if the appellant is liable at all, a question concluded by the first appeal, the damages awarded are no more than adequate to compensate the respondent for her injuries regardless of any minimization. In fact, it is not seriously contended that the damages awarded are excessive.

[5] 3. What we have already said also disposes of the third question. There being no serious contention that the damages awarded are excessive in view of the serious character of the injury and the pain and suffering, loss of time, and expense to which the respondent was subjected, the technical error in the instruction, in that it failed to advise the jury that the damages awarded must be no more than compensatory, was clearly immaterial. Demonstrably, it had no prejudicial effect.

The judgment is affirmed.

FULLERTON, MOUNT, CROW, and MAIN, JJ., concur.

(83 Wash. 399)

MOORE v. PARKER et al. (No. 12101.)

(Supreme Court of Washington. Jan. 8, 1915.)

1. REFORMATION OF INSTRUMENTS (§ 45\*) — SUFFICIENCY OF EVIDENCE.

Before an instrument in writing will be reformed for mutual mistake, the evidence must be clear and convincing that it is not what the parties intended it to be, and that the mistake was mutual.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

2. MORTGAGES (§ 463\*) — MORTGAGE NOTE — SUFFICIENCY OF EVIDENCE.

Evidence, in an action to foreclose a mortgage, held not sufficient to show that, by mutual mistake, the note and mortgage were so drawn as to render the defendants personally liable thereon, when it had been agreed that they should not be personally liable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1361, 1363-1368; Dec. Dig. § 463.\*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Samuel G. Moore to foreclose a mortgage against Julia A. Parker and husband. Decree for deficiency judgment against Ed. Parker only, and plaintiff and defendants appeal. Reversed and remanded, with instructions to enter a decree against both defendants.

Englehart & Rigg, of North Yakima, for plaintiff. Parker, Richards & Fontaine, of North Yakima, for defendants.

MOUNT, J. This action was brought to foreclose a mortgage for \$4,000 upon certain described lands in Yakima county. The notes and mortgage are the usual forms of notes and mortgage executed in such cases. The defendants, Julia A. Parker and Ed. Parker, who were the makers of the notes and mortgage, appeared in the action and interposed three affirmative defenses, the first of which was the one relied upon, and the only one necessary to be stated. It was to the effect that, prior to the execution of the notes and mortgage, it was agreed between the parties thereto that there should be no personal liability upon the notes; that by mistake the notes and mortgage were so drawn as to render the defendants personally liable thereon, when, in fact, there was an agreement that they should not be personally liable. They therefore prayed that the notes and mortgage be reformed so that there should be no personal liability over against the makers of the notes if the mortgaged property was not sufficient to extinguish the debt. This affirmative matter was denied by the plaintiff.

Upon the trial of the case the court found that the contract was as alleged by the affirmative defense mentioned, but that the defendant Ed. Parker was so negligent in executing the notes and mortgage that he could not now claim that there was a mutual mistake. The court also found that Julia A. Parker was not negligent, and concluded that the notes and mortgage should be reformed as to her, and that there should be no personal liability against her upon the notes. A decree was entered to the effect that a personal judgment should be entered against Ed. Parker for any deficiency after the sale of the mortgaged property. A deficiency judgment against Julia A. Parker was denied. The plaintiff has appealed from so much of the decree as refused a deficiency judgment against Julia A. Parker, and the defendants have appealed from that part of the decree which authorizes a personal judgment against Ed. Parker. This presents the only question made upon the briefs upon appeal. It is largely a question of fact.

[1] The rule is settled in this court that, before an instrument in writing will be reformed, the evidence must be clear and convincing that the writing is not what the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Cases & Rep'r Indexes

parties intended it to be, and that the mistake was mutual. *Bruce v. Grays Harbor Drug Co.*, 68 Wash. 668, 123 Pac. 1075; *Hapeman v. McNeal*, 48 Wash. 527, 93 Pac. 1076; *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755; *Heffron v. Fogel*, 40 Wash. 698, 82 Pac. 1003.

In *Hapeman v. McNeal*, supra, we quoted the rule from 2 Pomeroy, *Equity Jurisprudence* (3d Ed.) § 859, saying:

"\* \* \* Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error."

[2] We are satisfied from a careful examination of the record that the evidence fails to show, even by a preponderance of the evidence, that there was any mutual mistake between the parties when the notes and mortgage in this case were executed. It is conceded that there were four promissory notes. Three of them were for \$500 each, and one for \$2,500. These notes were executed upon printed forms. The notes themselves contain no interlineations or additions to the printed forms. These forms do not provide that there shall be no personal liability against the makers. It is conceded that Julia A. Parker executed these notes, and that her husband, Ed. Parker, also executed them. The mortgage also is the usual form. It does not contain any reservation that the mortgaged property shall be the only security for the payment of the debt. It was shown upon the trial of the case without any dispute that Ed. Parker, one of the makers of these notes and mortgage, was a lawyer who had for 20 years practiced his profession. He was a man who had dealt largely in real estate transactions. He had executed many notes. He was a man of more than ordinary intelligence, and knew the forms of contracts, and especially of notes and mortgages. His wife, Julia A. Parker, was likewise a woman of more than average intelligence. She had means of her own. Both makers of the notes and mortgage could read and write the English language and understood its purport. They testified upon the trial of the case that at the time the agreement was made and these notes and mortgage were executed it was understood between the payee of the notes and the makers that there should be no personal liability, but that the mortgaged property should be the sole security for the debt. They testified that, after the contract was made, the parties went to the office of a brother of Ed. Parker, which brother was also a lawyer practicing his profession, and related to him the contract which had been entered into; that this brother made memoranda of the terms of the contract, and turned the same over to his stenographer to prepare the notes and mortgage; that this stenographer, instead of preparing the notes and mortgage as directed, failed to include

in the notes and mortgage the agreement that no personal liability should rest upon the makers if the mortgaged property was insufficient to pay the debt; and that, relying upon the contract as drawn by the stenographer, the makers signed the notes and mortgage without reading them.

The plaintiff testified that there was no such agreement. He testified that the notes and mortgage as executed contained the whole agreement, and that there was no reservation of any kind, except as stated in the notes and mortgage themselves. There was other evidence which tended to corroborate his statements.

So far as the oral evidence goes, considering each of the witnesses as being equally credible, we are satisfied that the oral evidence is about evenly balanced upon the question whether there was or was not an agreement to the effect that there should be no personal liability against the makers of the notes and mortgage. But we are satisfied from the whole evidence, and all the circumstances in the case, that there was no sufficient evidence upon which the court could conclude and be satisfied by clear and convincing evidence that the writings, as finally executed, were not as intended; especially when we consider the circumstances surrounding the transaction. In the first place, the notes and mortgage are clear upon their face. They contain no provision that the makers shall not be personally liable. As is stated above, the brother of the makers of the notes and mortgage was a lawyer. He examined the notes and mortgage personally. The notes were the usual printed form. A mere glance at the notes would show that there was no exception stated therein. If any interlineations appeared, or if any additions were made to the printed form, it would plainly show upon the face of the notes. Therefore, when the makers of the notes, who were intelligent people, accustomed to notes, glanced at them, they must have seen that there was no such exception as they now claim should have been inserted therein. It is unbelievable that a man or a woman of the intelligence of the makers of these notes could be deceived into signing them believing that there were exceptions therein which were not in the ordinary notes. The record shows that at the time the notes and mortgage were executed, the mortgagor Ed. Parker and the mortgagee Samuel G. Moore were present in the office of Fred Parker, where the notes were drawn and prepared. Prior to the execution of the notes and mortgage Mr. Moore stated that he desired to have his attorney examine the notes. He was then told, and this fact is conceded, that the notes and mortgage were in the usual form, and that he might take them to his attorney to be examined. Mr. Moore did so. His attorney examined them and corroborated

what had been said. The notes and mortgage were then immediately returned to be executed. Mr. Ed. Parker thereupon signed them, and subsequently they were executed by his wife Julia A. Parker. Mrs. Parker was not present at the time Ed. Parker signed. She testified that at the time she signed the notes and mortgage she asked Fred Parker, her brother-in-law, if there would be any personal liability against her, and that she was informed that there would not be, and for that reason she signed the notes. This may be true. But this falls far short of showing that at the time the notes and mortgage were executed there was a mutual mistake. Because in order to be mutual, the mistake must have been made by both parties, and not by one party to the instrument.

There are other circumstances which might be mentioned, but what we have said makes it unnecessary to mention them, because we are satisfied that, even if the oral evidence was evenly balanced, and there were no other circumstances, in such case the court should not reform a written instrument. But, in addition to the oral evidence, from the circumstance that the makers of these notes by a simple glance at them, without even taking time to read them, must have seen and known that the notes were the ordinary printed forms and contained no changes or interlineations, they must necessarily have known also that the extraordinary exception such as they now contend for was not contained therein. As we have said above, the makers of these notes were intelligent people. They had dealt largely in notes and mortgages, and in real estate. Mr. Ed. Parker at least was acquainted with the forms of notes and mortgages, and knew the effect thereof. We cannot think, in view of these circumstances, that there was any mutual mistake in the execution of these notes and mortgage.

The judgment of the trial court is therefore reversed, and the cause is remanded, with instructions to enter a decree as prayed for in the complaint against both Julia A. Parker and Ed. Parker, as makers of the notes and mortgage.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 319)

FERRELL et ux. v. WASHINGTON WATER POWER CO. (No. 11899.)

(Supreme Court of Washington. Jan. 8, 1914.)

1. CARRIERS (§ 320\*)—INJURIES TO PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

The opening by the conductor of the gates on a car of the pay-as-you-enter type may be found to be an invitation to a passenger to alight, where she had undertaken to alight before reaching her destination, and when informed of her mistake remained standing facing the con-

ductor, and the act of opening the gates while the car is in motion may be found to be negligence so as to authorize a recovery for injuries to the passenger proceeding to alight and thrown from the car by a sudden jerk.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

2. TRIAL (§ 140\*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The credibility of witnesses is for the jury, and the court on appeal will not determine the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by E. O. Ferrell and his wife against the Washington Water Power Company. From a judgment of nonsuit plaintiffs appeal. Reversed and remanded for new trial.

W. H. Plummer and Jos. J. Lavin, both of Spokane, for appellants. Post, Avery & Higgins, of Spokane, for respondent.

CHADWICK, J. Plaintiff Anna Ferrel was a passenger on a Riverside avenue street car operated by the defendant company in the city of Spokane. She intended to alight at Stevens street, which is one block east of Howard street. When the car, which was a pay-as-you-enter car having gates at the rear, arrived at Howard street, plaintiff started to alight. She was told that she had not arrived at her destination, which was one block to the east. She stood in the aisle, holding a perpendicular handlebar inside of the door leading into the vestibule of the car. The vestibule was a few inches lower than the floor of the car. As the car approached its stopping place on the off side of Stevens street, the conductor opened the gates while the car was still moving. Appellant says that, thinking the car had stopped, she stepped down into the vestibule, when within a moment of time the car gave a sudden jerk or lurch forward and she was thrown out of the car and onto the pavement, sustaining the injuries of which she complains. A further statement of the facts is unnecessary to a discussion of the legal principles involved. Plaintiff appeals from a judgment of nonsuit.

[1] The determinative question is, What was the proximate cause of the injury? It is insisted that there is no showing of negligence in that the opening of a gate upon a street car is not an invitation to a passenger to alight, and, further, that a showing that the car gave a sudden jerk or lurch is not enough to satisfy the law, which demands that there be a showing of negligent operation upon the part of the motorman, or that the track or equipment was defective. An answer to the question, What was the



proximate cause of the injury? will be decisive of the case. Respondent relies upon the following cases: *Crowley v. Boston Elevated Ry. Co.*, 204 Mass. 241, 90 N. E. 532; *Hannon v. Boston Elevated Ry. Co.*, 182 Mass. 425, 65 N. E. 809; *Gagnon v. Boston Elevated Ry. Co.*, 205 Mass. 483, 91 N. E. 875; *Bullock v. Butler Exchange Co.*, 22 R. I. 105, 46 Atl. 273; *Cashman v. N. Y., N. H. & H. Ry. Co.*, 201 Mass. 355, 87 N. E. 570; *Wile v. Northern Pacific Ry. Co.*, 72 Wash. 82, 129 Pac. 889; *McGann v. Boston Elevated Ry. Co.*, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509; *Allen v. Northern Pacific Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; and *Work v. Boston Elevated Ry. Co.*, 207 Mass. 447, 93 N. E. 693. In many of these cases it is held, under the facts occurring in the particular case, that the opening of the door or gate of a car or elevator is not an invitation to the passenger to alight from or enter the vehicle. The cases relied on were reviewed and were the subject of consultation in the case of *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343. We were there of opinion that a hard and fast rule that the opening of a door or gate on a moving vehicle is not an invitation to a passenger, could not be laid down. Whether it was such invitation was a mixed question of law and fact to be resolved in the light of all the attending facts and circumstances. It is a matter of common knowledge that transportation companies are adopting cars of the pay-as-you-enter type, having gates under the control of the motorman or conductor. A reason, among others, for installing them is that passengers may be protected from their own folly and negligence, and that the company may be saved from the consequences of negligent operation by its own servants while passengers are entering or alighting therefrom. The books are full of cases where passengers have claimed injuries in consequence of a sudden starting or stopping or jerking or lurching of the car just as they were about to get off or get on. One of the principal objects sought to be accomplished by the use of such cars is to overcome the uncertainty of oral testimony, by the use of a mechanical appliance.

Having these considerations in mind, and assuming that it is a matter of common knowledge of a passenger that the gates of a pay-as-you-enter car are closed while it is in motion, we think it would be going too far to hold that the opening of the door was not an invitation to appellant to pass out of the car, or at least to step down into the vestibule. She had undertaken to pass out of the car at Howard street. When informed of her mistake, she remained standing, facing the conductor. The jury might well infer that, with her mind intent upon her destination, the opening of the door was an invitation to her. If we admit that there was

no such lurch or jerk as to warrant a recovery, the fact remains that the accident would not have happened if the door had not been opened while the car was in motion. This conclusion is well within the doctrine of *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049. In that case the elevator had landed about four or five inches below the level of the floor. Plaintiff entered without looking and fell. Contributory negligence was set up as a defense. The court said: "The open door, with the elevator boy at his post, was an invitation to enter. \* \* \*"

[2] Counsel sincerely argue the insufficiency and probable untruth of appellant's evidence. Whatever our opinion may be, its credibility was a question for the jury.

We are of the opinion that the case should have gone to the jury. Reversed and remanded for a new trial.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 382)

CITY OF SPOKANE v. LADIES' BENEV. SOCIETY et al. (No. 12046.)

(Supreme Court of Washington. Jan. 8, 1915.)

1. EMINENT DOMAIN (§ 101\*)—NECESSITY FOR COMPENSATION — DAMAGING PROPERTY — CHANGE OF STREET GRADE.

The owner of a city lot in front of which the street grade has been fixed by ordinance, but the street never actually graded, is not entitled to damages for the change of grade, if he has made no improvements in reliance thereon.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

2. EMINENT DOMAIN (§ 101\*)—NECESSITY FOR COMPENSATION — DAMAGING PROPERTY — CHANGE OF STREET GRADE.

The owner of a city lot who has improved it in reliance upon a street grade established by ordinance may recover, on the ground of estoppel, damages for a change in the grade, though such change was made before the street was actually brought to grade.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Condemnation proceeding by the City of Spokane against the Ladies' Benevolent Society and others. From a judgment assessing damages the plaintiff appeals. Reversed and remanded, with instructions.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for appellant. Skuse & Morrill, of Spokane, for respondents.

CHADWICK, J. The grade of Calispel street in the city of Spokane was established by ordinance in the year 1889. The streets were not brought to a physical grade, although some property has been improved with reference to what we will call the paper

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

grade. In 1910 the city, intending to grade the street, passed an ordinance re-establishing the grade of the street. The former paper grade was materially changed. The city then brought an action to condemn and assess the damages, if any, caused by the grading of the street to the grade line established by the later ordinance. Respondents are owners of abutting lots. This court has held:

"In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication." *Ettor v. Tacoma*, 57 Wash. 51, 106 Pac. 479; *Schuss v. Chehalis*, 144 Pac. 916, and authorities cited therein.

See, also, *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089; *Muller v. Great Northern Ry. Co.*, 75 Wash. 631, 135 Pac. 631.

[1, 2] It is not contended by the corporation counsel that the city is not liable for the damaging of property that has been improved by the owner in faith of the first or paper grade.

"The question [as stated by counsel for respondents] is whether a city of the first class can establish and fix the grade of a street by an ordinance duly enacted, and thereafter change such grade, and grade the street to the re-established grade to the damage of abutting property, and not be liable to the owners of such property for the damage so caused."

Or, in other words, is a paper grade, unacted upon by the city, a grade established, or an initial grading, within the meaning of our own cases so as to prevent a change thereof without meeting the damages to unimproved property under article 1, § 16, of the Constitution, which provides that private property shall not be taken or damaged for a public use until the damages have been ascertained and paid?

It cannot be denied that a grade is, in a sense, established when it is defined by ordinance, but we cannot make ourselves believe that it is sound doctrine to hold that a city having an original and continuing power to establish grades and to grade streets in conformity therewith (*Abbott, Munic. Corp.* § 810) should be held to a rule of too strict interpretation.

If no ordinance had been passed in 1889 the city would not have been foreclosed of its right to make an original grade without payment of the resultant damages, notwithstanding the lapse of time or the improvement of the property. *Mattingly v. City of Plymouth*, 100 Ind. 545. For it is held, and properly so, that the holding and improvement of the property is subject to the legislative will of the city as to the time when a street shall be graded; that this will not be controlled by the courts, and consequently there can be no estoppel because of the lapse of time, either to the burden of the city or to the benefit of the property owner.

The right to recover damages at all against a city for grading or regrading a street rests upon the theory that there is a physical in-

vasion. Until there has been a physical invasion, therefore, it would be more logical to hold that the mere adoption of a paper grade would not exhaust the right of the city to redefine the grade line so as to make a grade that will better serve the whole public, compensating only those who have built upon or improved their property and who are damaged by the change. Compensation being allowed, not upon the theory that the city cannot change the grade of a street, for that it has ample statutory authority to do, but upon the ground of estoppel, or, as Judge Dillon says, upon the "basis of natural justice." *Dillon, Munic. Corp.* (5th Ed.) § 1865.

The cases involving the exact question here presented are few. In fact we have found none which can be called *quatuor pedes* with it. There are, however, expressions in the books which indicate that the subject has been considered.

It has been quite generally held that the mere establishment by ordinance of a paper grade changing an existing grade or establishing an original grade in those jurisdictions where damages are allowed therefor will not give a right of action. The right rests inchoate until such time as the city acts upon it. A paper grade gives no right of action. *Clark v. Philadelphia*, 171 Pa. 30, 33 Atl. 124, 50 Am. St. Rep. 790. Damages for the grading or change of grade are not given until the actual operation on the ground. *Plan 166*, 143 Pa. 414, 22 Atl. 669.

In New Jersey awards for damages, flowing to those who had built upon their land, because of changes or alterations in street grades, are made under certain statutes similar in form and purpose to section 7874, Rem. & Bal. Code. It is said in *State, etc., v. Sayre*, 41 N. J. Law, 158:

"As the claim of the landowners can stand on these statutes alone, it is plain that those who had no 'house or other building' erected on their land at the time of the alteration of grade have no legal right to compensation, and the awards made to them must be set aside, unless some of the reasons alleged for the noninterference of this court be sufficient."

A consideration of these and other cases impelled Mr. Abbott to say:

"The mere establishment of a grade on paper prior to the one which was consummated by physical construction cannot be considered." *Abbott, Munic. Corp.* vol. 2, p. 1917, note 584.

The case, or rather the observations of the judge who wrote the case, which most nearly touches this case, is *Manning v. City of Shreveport*, 119 La. 1044, 44 South. 882, 13 L. R. A. (N. S.) 452:

"The adoption of a (paper) grade may be said to fix the liability of the property affected by it to future damage, but the weight of authority is to the effect that such damage is not recoverable until actually inflicted, and hence that it is the owner at the time who may recover it.

"A municipality may not be able to grade all of its streets at one time, but it has the undoubted right to declare in advance what the grade shall be, and though, quoad property then existing and affected or to be affected, the liability to damage is thereby imposed, and the

right to recover it may be said to attach to the property, to be exercised when the damage shall be actually inflicted, *it cannot be said that any such liability is imposed, or that any such right attaches, with respect to property which is then nonexistent.* In other words, by the adoption of a grade, to be thereafter established, the municipality fixes the status of an existent lot as property which must sooner or later be affected by the actual establishment of the grade so adopted, and the right to recover for such damages as it may sustain, though inchoate at the moment, becomes perfect when the damage is actually inflicted, and may be exercised by the then owner of the lot. But, if the lot be not improved when the grade to be actually established in the future is adopted, no liability for damage to improvements is imposed, and no right of recovery with respect thereto, whether inchoate or otherwise, is created. Under such circumstances, if the then nonexistent improvements are subsequently, and at the option of the owner, placed upon the lot, they come into existence subject to conditions already established and of which the owner of the lot has notice, and he must govern himself accordingly."

The Supreme Court of Utah has held that an abutting lot owner can recover consequential damages for an original grade of the street, but it is worthy of notice that the writer of the opinion in the case of *Kimball v. Salt Lake City*, 32 Utah, 253, 90 Pac. 395, 10 L. R. A. (N. S.) 483, 125 Am. St. Rep. 859, where many cases were considered, found the rule in some jurisdictions to be:

"It is likewise true that in some states the law is still to the effect that consequential damages are recoverable only where one established grade is changed to another, and that, until the grade is actually established and acted upon, the municipality is not liable for consequential damages."

This finding seems apropos, inasmuch as we hold that consequential damages are recoverable where a grade once made is changed. It is our opinion, as it was the opinion of the writer, gathered not so much from apt words and expressions as from the logic of the cases, that a grade is not actually established when considered in connection with statutes or Constitutions allowing damages for a "taking or damaging" until it is "acted upon." The logic of our former decisions is that there can be no taking or damaging of abutting property subject to an initial grade, and where the owner of an unimproved lot is in the same position he would have been in had the city never passed the ordinance of 1889, he is in no position to assert or claim damages for the actual grading of the street.

Coming now to the cases relied on by respondent: *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048; *Rettire v. North Yakima*, 75 Wash. 143, 134 Pac. 699; *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, 137 Pac. 819; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304.

The *Sargent* Case does not touch our question. The court had under consideration a statute (Rem. & Bal. Code, § 7874) protecting owners who had built with reference to a grade established by actual improvement of a street to a grade, or by reference to a grade formally adopted by ordinance. It is no broader in its holding than the statute it

construes. The cases cited in the *Sargent* Case all go to the one proposition that a grade established either by ordinance or user and acted upon by the property owner is such an establishment as will compel a city to meet the resultant damages.

In *Stewart v. Clinton*, 79 Mo. 603, the street had been graded. The case of *Mattingly v. City of Plymouth*, 100 Ind. 545, goes primarily to the degree of proof required to show the establishment of a grade. In so far as it bears on this case it is consistent with our reasoning.

"As the initial point in the appellant's case, it was necessary to show the existence of a duly established grade by the city authorities at the time the improvements were made, that the improvements were made with reference to a grade so established, and that the city was proceeding to change the grade so established, to the appellant's damage, without the assessment and tender of the damages so occasioned. This was neither averred in the complaint nor shown in the evidence, and so both are fatally defective."

The case of *Nebraska City v. Lampkin*, 6 Neb. 27, also goes to the degree of proof required to show an established grade, and seems to hold, inferentially at least, that a grade is not established until it is defined and "worked." In the *Rettire* Case the grade had been established and the street improved under an ordinance passed in 1903. The only question before the court was whether the city was bound to follow the elevation of the curb when later fixing a grade for sidewalks. In the *Jones* Case the fact, as found by the court, was that there was a paper grade; that it was the only grade, and that the plaintiff *Jones* had made his improvements in defiance of it. It is the antithesis of the case of the claimants in this case, who have made improvements with reference to the paper grade, and is therefore an authority sustaining their right to recover damages as for change of grade.

In the *Thorberg* Case the city council by resolution had "adopted" the natural level of the land as a grade and had improved the street at the expense of the abutting property. That case is sustained by reference to the doctrine of estoppel, the elements of which are entirely wanting in this case.

The case of *Goodrich v. City of Milwaukee*, 24 Wis. 422, is also relied on. In that case the street had been paved at the expense of the lot owners, and it was held that the city was estopped to regrade without meeting the consequent damages.

Finally it is insisted that this court has settled the present controversy in *Hart et al. v. Seattle et al.*, 42 Wash. 113, 84 Pac. 640, where it is said:

"It is first contended that it was error to grant any restraining order in the premises. It is said that the city denies that it is changing the grade, and it is also argued that, inasmuch as the lots are unimproved, the threatened change can result in but slight damage, for which reason the court should not have interfered. With regard to the fact as to the threatened change of grade, we think the court was

justified, under the pleadings and affidavits submitted, in reaching the conclusion that such change was threatened by the city's officers. We also think the showing as to resultant damage justified interference by injunction. One of the affidavits placed the damages as high as \$5,000, and that attendant facts stated are such as, we think, bring the case within the rule established by this court that where a proposed change of the grade of a street will seriously damage an abutting owner's property, the change may be enjoined, unless the damage has been ascertained and paid."

Counsel say "plaintiff's [Hart's] property was unimproved." That case holds that unimproved property may be damaged by a change of grade. The question of damages for an initial grade was not involved. In fact, reference to the briefs and record will show that the city had not only established, but had physically graded, the street in front of the property and were about to make, as was alleged, a most material change. The defense of the city was that the grade was too steep for asphalt pavement, and that "it was necessary to take up and relay the pavement in front of lots 13 and 14," being the lots owned by plaintiff.

Our conclusion is that one who buys a city lot abutting a street dedicated, but not graded, takes it subject to the continuing right of the city to establish an initial street grade which will be conformable to the convenient use of the public, and if his property be unimproved at the time a physical grade is made, his injury, if any, falls within the operation of the rule *damnum absque injuria*. If, on the other hand, the city has adopted a paper grade and pending a physical grade a lot owner has improved his property with reference to such paper grade, he may recover damages as for a change of grade; his right being referable to the doctrine of estoppel.

It is but fair to say that the novelty of the questions occurring at the trial impelled the trial judge to express a doubt as to the true rule. He accordingly admitted all testimony offered, and overruled motions for a judgment and for a new trial, upon the theory that if this court held with the city, it could "simply disregard the jury's verdict as to all the lots not improved," whereas, as he said, if he ruled otherwise and this court did not sustain his judgment, the case would have to be remanded for another trial.

Remanded, with instructions to enter a judgment consistent with this opinion.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 390)

WILBERT v. DAY et al. (No. 12081.)  
(Supreme Court of Washington. Jan. 8, 1915.)

1. PROCESS (§ 141\*)—CONCLUSIVENESS OF RETURN.

The sheriff's return upon a summons, in so far as it states facts not within the special

knowledge of the officer, is *prima facie* only, and may be rebutted.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 189-192; Dec. Dig. § 141.\*]

2. PROCESS (§ 149\*)—RETURN—EVIDENCE IN CONTRADICTION—SUFFICIENCY.

Where a sheriff's return stated that he served a summons on defendant by delivering to and leaving it with defendant's wife at the dwelling house, and the house of the usual abode of defendant, said wife being a person of suitable age and discretion and resident therein, and a member of the family of defendant, but an uncontradicted affidavit by defendant stated that for several years past he had been and still was a resident of another state and was an elector in said state only, and had his usual place of abode therein and no residence or usual place of abode in the state of Washington, and that his wife was temporarily within the state to procure medical aid, and that the summons was served by leaving a copy with his wife at her temporary lodgings, it sufficiently appeared that there was no valid service, and the service should have been quashed.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 202-205; Dec. Dig. § 149.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by C. D. Wilbert against P. A. Day and others. From a judgment by default, defendants appeal. Reversed.

John Peñetier, of Spokane, for appellants. Scott & Campbell, of Spokane, for respondents.

MOUNT, J. The only question upon this appeal is the sufficiency of the service of the summons upon the defendant L. F. Connolly to give the court jurisdiction of the person of the defendant. The service was made by the sheriff of Spokane county where the action was pending. Omitting the formal parts of the sheriff's return, it is as follows:

"I served the within summons and complaint upon the within named defendant, L. F. Connolly, in the county of Spokane, state of Washington, on the 6th day of December, 1913, by then and there delivering to, and leaving with Mrs. L. F. Connolly, at the dwelling house, and the house of the usual abode of said defendant L. F. Connolly, for said defendant a true copy of said summons and complaint in said action.

"The said Mrs. L. F. Connolly being then and there a person of suitable age and discretion, and resident therein, and a member of the family of said defendant, to wit, the wife of said defendant, I, after due diligence and inquiry, being unable to find the defendant in said county."

After this service was made, the defendant appeared specially and moved to quash the service. At that time he filed an affidavit stating, in substance, that for several years last past he has been and still is a resident of Harrison, Kootenai county, Idaho, and is an elector in said state only, and has his usual place of abode therein; that he has no residence or usual place of abode in the state of Washington; that his wife was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

temporarily in Spokane for the purpose of procuring medical and surgical treatment for a minor son; that the purported service of the summons was made by leaving with his wife a copy of the summons in Spokane, Wash., at the temporary lodgings of his wife; that these temporary lodgings were not the usual place of abode of the defendant. This affidavit was not denied. The motion to quash the service was denied, and thereafter a judgment by default was entered against the defendant. This appeal followed.

[1] The statute provides at section 226, Rem. & Bal. Code, that the summons shall be served by delivering a copy thereof "to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service." The sheriff's return upon a summons, in so far as it states facts not within the special knowledge of the officer, is *prima facie* only, and may be rebutted. In the case of *Mitchell, Lewis & Staver Co. v. O'Neil*, 18 Wash. 108, 47 Pac. 235, which was a case similar to this one upon this point, where service was had upon the father of the defendant, and where the court allowed the defendants to prove that they were residents of and lived within the county at the time of the service, but resided in a different place in the county from where the father of the defendant resided, and had no notice of the proceedings, we said:

"The plaintiff contends that this proof was inadmissible on the ground that the sheriff's return could not be contradicted. If the return was to be construed to show a service upon the father of Robert O'Neil, at Robert O'Neil's usual place of residence, we think that last statement could be contradicted, and that it is not within the rule contended for by the plaintiff."

And in the case of *Krutz v. Isaacs*, 25 Wash. 566, 68 Pac. 141, where the respondent contended that the officer's return must be taken as conclusive, and that it could not be attacked, we held otherwise. We there quoted from a Kansas case (*Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466), saying:

"We find upon examination that the courts have generally held the sheriff's return on mesne and final process conclusive between the parties and privies, though this is by no means a rule of universal application; but that in cases of original process there has been a general disposition to let in the truth. \* \* \* We know of no statute that makes a sheriff a final and exclusive judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation, or where their place of business is; and when the statute made it the duty of the sheriff to ascertain these facts it did not make his return of such facts conclusive. Of his own acts his knowledge ought to be absolute, and himself officially respon-

sible. Of such facts as are not in his special knowledge he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive."

Several authorities are there cited to that effect. So it is clear, therefore, in this case, that the sheriff's return upon the question of the residence and usual place of abode of the defendant was merely *prima facie* and subject to be refuted by the truth.

[2] The affidavit in this case is clear to the effect that, at the time the service was made upon the defendant's wife, she was not at her residence or usual place of abode. The usual place of abode of the defendant Connolly was in the state of Idaho. His wife was temporarily in Spokane. These facts are not in dispute. They are practically conceded upon the record. It seems plain, therefore, that no valid service was made upon the defendant, and the court should have quashed the service.

The judgment entered by default against the defendant Connolly is therefore reversed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 355)

FITCH v. GOETJEN et al. (No. 11996.)

(Supreme Court of Washington. Jan. 8, 1915.)

CHATTEL MORTGAGES (§ 278\*)—SUFFICIENCY OF EVIDENCE—LIABILITY OF LOSS OF SECURITY.

In an action to foreclose a chattel mortgage begun before the maturity of the debt, evidence held to show that the mortgagee did not have reasonable cause to believe that the property was apt to become lost as his security, so as to be entitled to commence foreclosure proceedings under Rem. & Bal. Code, § 1111.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 567; Dec. Dig. § 278.\*]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

Action by E. N. Fitch against Henry Goetjen and another to foreclose a chattel mortgage. From a judgment for the amount of the mortgage which defendants paid into court, but denying recovery for costs and attorney fee, plaintiff appeals. Affirmed.

Smith & Gresham, of Conconully, for appellant. Neal & Neal, of Conconully, for respondents.

PARKER, J. The plaintiff, E. N. Fitch, commenced this action in the superior court for Okanogan county to recover upon a promissory note and foreclose a chattel mortgage given by the defendants Henry and Charles Goetjen, to secure the same, before maturity of the debt so evidenced and secured. The plaintiff rests his claimed right to commence the action before maturity of the debt upon the ground of his alleged rea-

sonable cause to believe that the mortgaged property would be removed by theft from the jurisdiction of the court, which gave him the right to commence the action before maturity of the debt under Rem. & Bal. Code, § 1111, which reads as follows:

"Where the debt is not due for which the mortgage is given, and the mortgagee has reasonable cause to believe that the mortgage property will be destroyed, lost, or removed, he shall have the right to an immediate action in the superior court of the county having jurisdiction where the property is situated, for the recovery of his debt, and the court may make any order it may deem fit, in order to secure said property so as to make the same available for the satisfaction of said debt."

There is remaining of this controversy only the question of plaintiff's claim of his right to judgment for costs and attorney's fees in the superior court; the full amount of the principal and interest having been duly tendered by the defendants at the time of the maturity of the debt and thereafter kept good by deposit in court.

Trial before the court resulted in findings and judgment awarding the plaintiff, as a matter of course, the amount of the tender deposited in court, but denying to the plaintiff judgment for costs incurred in the superior court. From this disposition of the cause the plaintiff has appealed to this court.

The evidence is not here; the cause being before us for determination upon the findings of fact, which are very voluminous. The controlling facts to be gathered therefrom may be summarized as follows: On September 9, 1912, respondents executed and delivered to appellant their promissory note for the sum of \$650, payable one year from date with 12 per cent. interest, at the Okanogan State Bank, Riverside, Okanogan county. To secure the debt thus evidenced, respondents at the same time executed and delivered to appellant a chattel mortgage upon certain horses and farm machinery belonging to them. On August 2, 1913, over a month before the maturity of the debt, appellant commenced this action in the superior court for Okanogan county, alleging, in addition to facts constituting the usual cause of action in foreclosure, facts upon which he rested his right to commence foreclosure proceedings before the maturity of the debt. On August 14, 1913, appellant procured from the superior court an order authorizing the seizure of the mortgaged property by the sheriff of Okanogan county and the holding of the same pending the foreclosure, which was accordingly done. The property was thereafter returned to respondents by order of the court upon them giving bond therefor. Appellant's claim of right to commence the foreclosure before the maturity of the debt is based upon his alleged reasonable belief that the mortgaged horses would be stolen and taken out of the country; his alleged belief being that the property might be so stolen and removed by members of a family of

the neighborhood by the name of Haley. The principal facts bearing upon the cause of such alleged belief were found by the trial court as follows:

"At the time of the execution of said instruments, the note and mortgage herein referred to, the defendants had arrived at the vicinity of Tunk Creek Valley, near the Okanogan river, and were then engaged in hay harvesting for one Dougal McAllister, about five miles from plaintiff's ranch, on said Tunk creek. That defendants' prospective destination, when leaving the state of Oregon, was British Columbia. That, upon the inducements and persuasions of said plaintiff, said defendants leased plaintiff's said ranch in the Tunk Creek Valley, and purchased from said plaintiff certain hay, farm machinery, and other personal property, for which the note herein set out was executed, and then and there leased said plaintiff's ranch for the term of one year from September 9, 1912, and immediately thereafter moved to said leased premises, and took with them the personal property described in the mortgage set out in the complaint herein. \* \* \* As an inducement and consideration to defendants for leasing said premises, plaintiff stated to defendants that the range surrounding his ranch was good, and that the Tunk Creek Valley was the best horse pasture in the country, that both the range and water were good and convenient and easy of access to the stock and horses, which defendants had with them, and a part of which they thereafter mortgaged to said plaintiff as security for the payment of their promissory note executed for the purchase price of the personal property hereinbefore referred to. \* \* \* Immediately after the execution of said note and mortgage, defendants moved to plaintiff's ranch and took with them the horses described in said mortgage, together with other horses and property not included therein, and turned said horses onto the range of the commons, in the vicinity of plaintiff's ranch. That plaintiff was present at the time, not having then removed from his said ranch, and had personal knowledge of the fact that said mortgaged horses were being turned out to range on the commons in that vicinity, and made no objections whatever to such act on the part of defendants in turning said horses onto the public range, and did not then, and had not theretofore, in any manner whatever, informed or advised defendants that there was or would be any danger whatever of said horses being stolen or taken away by thieves, or otherwise. \* \* \* Said plaintiff then and there well knew that it was the intention of said defendants to permit said horses to range on the commons in the vicinity of said ranch, except during the winter season, when the same would require feed, and made no objection whatever to such intended acts on the part of defendants, and that said horses did in fact continue to range on the commons, except during the winter season. \* \* \* In the spring of 1913, again turned out upon the commons in that vicinity. That said horses ranged thereabouts and within a radius of from two to three miles from said premises, and watered almost the entire time in Tunk creek, in the vicinity of plaintiff's said ranch. That plaintiff visited said ranch at various times after the execution of said note and mortgage and saw said stock, and was well acquainted with the conditions surrounding the same, and did not, at any time, make any complaint to defendants, or advise them in any manner whatever that said stock was in any danger whatever from thieves. \* \* \* That during all the times since the execution of said mortgage, said defendants properly cared for, looked after said mortgaged property, and caused the same to range within the immediate vicinity of said premises. \* \* \* After the execution of said note and mortgage and lease, the defendants also leased what had for a long time been known as

the Haley ranch. \* \* \* After said Haley premises were leased by said defendants, they (the defendants) were necessarily upon and at the Haley ranch for the purpose of cultivating and harvesting the crops thereon, and for the purpose of irrigating a portion thereof during the irrigation season, and that defendant Henry Goetjen spent and continued to spend a portion of his time at the Haley place, when not engaged in farming or looking after their crops thereon. \* \* \* That after said defendants had moved to said plaintiff's premises, they were advised and informed by plaintiff that the Haleys had, prior thereto, borne rather a bad reputation for horse and cattle stealing, but that they were better than some of the people who talked about them, and that they were good neighbors, and plaintiff did not, at such time, or at all, advise, state, or indicate to defendants that there would be any danger of losing any of said horses by reason of their being permitted to range on the commons in the vicinity of said Haleys."

Other findings were made reflecting upon the character and reputation of the Haleys and referring to respondents' association with them, but not otherwise reflecting upon the character or reputation of respondents. The trial court's view of the grounds of appellant's suspicion is summarized in its findings to the effect that appellant's suspicions were based upon gossip, rumor, and hearsay, and the general reputation of the community for horse and cattle stealing; the court finding, however, that such reputation was well known to the appellant at the time of the execution of the note and mortgage and long prior thereto, but was unknown to respondents at and prior to the execution of the note and mortgage. This reputation of the neighborhood, however, apparently had undergone no change during all this time. Respondents have never done anything or failed in their duty in any respect so as to forfeit their right to hold possession of and use the property until the maturity of the debt.

Other findings, which we regard more as conclusions than findings of specific facts, are to the effect that at the time of the commencement of this action appellant honestly believed that he would lose his debt by removal of the property, should he delay action until the maturity of the note, yet the court finds:

"That the plaintiff without sufficient cause or excuse, prior to the maturity of the note and mortgage involved in this action, caused the sheriff of Okanogan county, under the order of this court, to dispossess the defendants of the possession, use, and enjoyment of the work horses described in said mortgage."

There are many more detailed facts set forth in these voluminous findings, but we think the foregoing is a sufficient summary of the facts controlling the rights of the parties here involved.

In view of the appellant's knowledge of the reputation of the neighborhood for horse and cattle stealing, his knowledge of respondents' intention to allow the horses to go upon the range of the neighborhood in compliance with the apparent usual custom of the country, the apparent lack of any change in conditions and reputation of the neighborhood as

to horse and cattle stealing, the fact that respondents did nothing themselves to impair the safety of the property at any time, and the fact that respondents' association with the Haleys seems to be the only new cause for appellant's suspicions, we are of the opinion that the learned trial court correctly concluded that appellant did not have reasonable cause to believe that the mortgaged property would become lost as his security, at the time he commenced this action, and that he therefore commenced it prematurely.

Counsel for appellant invoked the general rule, as announced by some courts under statutory or chattel mortgage provisions similar to our statute, that a mortgagee's right to commence foreclosure and cause the mortgaged property to be seized, prior to the maturity of the debt, depends only upon the mortgagee's good faith and his acting upon probable cause, and not upon the actual existence of danger of loss of the property as his security.

The Illinois Supreme Court, in *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151, entertained this view in considering a chattel mortgage which by its terms permitted the mortgagee to so proceed prior to the maturity of the debt secured, at any time he should "feel himself unsafe or insecure."

In *Woods v. Gaar, Scott & Co.*, 93 Mich. 143, 53 N. W. 14, dealing with a chattel mortgage provision almost exactly of the same language as that noticed in *Roy v. Goings*, the Michigan court reached the same conclusion. This view, however, is apparently out of harmony with that of the Nebraska court announced in *Newlean v. Olson*, 22 Neb. 717, 36 N. W. 155, 3 Am. St. Rep. 286, where, considering a chattel mortgage provision reading, "if the mortgagee shall at any time feel unsafe or insecure he may seize and sell, \* \* \*" the court said:

"To justify the mortgagee, \* \* \* in his action in declaring that he feels unsafe and insecure, where there is an implied contract that the mortgagor shall remain in possession, the mortgagor must be about to commit, or has committed, some act which tends to impair the security; and unless such facts exist the right does not become operative."

This view was adhered to in *J. I. Case Flow Works v. Marr*, 33 Neb. 215, 49 N. W. 1119. However, we shall not attempt at this time to determine which of these views we would follow, but content ourselves with simply expressing the opinion that the facts in this case as disclosed by the findings warranted the learned trial court in concluding that appellant acted without reasonable cause in commencing his action and causing seizure of the property before maturity of the debt. From which, together with the fact of the tender of full amount of the principal and interest due on the note at the time of its maturity by respondents, it results that appellant is not entitled to his costs in the foreclosure action.

Apparently this court has had occasion to



deal with the question of commencement of foreclosure and seizure of chattel-mortgaged property before maturity of the debt secured thereby, in but one instance, that of *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392. While the plaintiff's claimed right to so act before maturity of the debt was there sustained, it is manifest that the defendants were themselves responsible for the danger which threatened the mortgaged property. Such is not the case here.

We conclude that the judgment must be affirmed. It is so ordered.

CROW, C. J., and GOSE and MORRIS, JJ., concur.

CHADWICK, J. I dissent from the judgment of the court. Appellant had reasonable cause to believe that the mortgaged property would be destroyed, lost, or removed, if left in the keeping of the mortgagor. Whatever may have been the character of the respondents at the time the mortgage was made, the record and findings of the court make it certain that at least one of the respondents was keeping company with people of ill repute, who were suspected of "rustling" stock. Appellant had been told by one Guyer that Charles Haley, a reputed rustler and companion of one of the respondents, was about to make a secret trip into British Columbia. The mother of respondents told appellant that she did not want to see him lose his money; that respondents were going to beat him out of it; that they intended to run the horses out of the country. Appellant sought counsel and assistance of a neighbor, Art Smith, who told him, from what he had seen of the respondents, that he believed that one of them was a horse thief. It further appears that appellant and Henry Goetjen had a personal altercation, and that respondent in his anger told appellant that he would beat him out of the debt that was owing to him. Furthermore, the court below found that:

"At the time of the commencement of this action, the plaintiff honestly and in good faith believed that he would lose his property and his debt, and that the mortgaged property would be destroyed, lost, or removed if he delayed his action until the maturity of said note."

The court below and this court has assumed to try out the case as if it were our duty to find whether the property would have been in fact lost or destroyed if it had been left in the hands of the respondents. The court below found that appellant's honest belief "was based upon gossip, rumor, hearsay, and the general reputation of the community." If honest belief cannot be founded upon rumor and hearsay and general reputation, I do not know how it may be founded.

The effect of the court's decision is to deny a right to take property in satisfaction of a

mortgage before the maturity of the debt, for it may be assumed that a dishonest mortgagor would swear that he did not intend to take or dispose of the property. Against such assertion, however well founded and honest the belief of the mortgagee may be, he would be powerless to avail himself of the privileges of the statute. I admit that there must be some grounds "or reasonable cause to believe." An arbitrary taking will not satisfy the law; but if there be some ground, and the court can find that there was "reasonable cause to believe," a mortgagee should have his remedy.

(83 Wash. 441)

#### STATE v. KENNEY. (No. 12301.)

(Supreme Court of Washington. Jan. 8, 1915.)

#### 1. INDIANS (§ 34\*)—SALE OF LIQUOR—CITIZEN HALF-BREEDS.

That one is a citizen, because his father was a white man and a citizen, though his mother was an Indian, does not exempt him from Sess. Laws 1909, p. 537, prohibiting the giving of liquor to one more than one-eighth Indian.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 60; Dec. Dig. § 34.\*]

#### 2. CONSTITUTIONAL LAW (§ 206\*)—INDIANS (§ 34\*)—PRIVILEGES AND IMMUNITIES.

Even in case of a half-breed who is a citizen, no privilege or immunity of citizens is abridged, in contravention of Const. U. S. Amend. 14, by Sess. Laws 1909, p. 537, prohibiting the giving of liquor to one more than one-eighth Indian; it being referable to the police power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 625-648; Dec. Dig. § 206; \**Indians*, Cent. Dig. § 60; Dec. Dig. § 34.\*]

#### 3. CRIMINAL LAW (§ 201\*)—FORMER JEOPARDY—STATE AND FEDERAL COURTS.

It is not a bar to prosecution under Sess. Laws 1909, p. 537, for giving liquor to an Indian, that defendant has been acquitted on a like charge in the federal court; as, where a transaction constitutes a crime under federal laws as well as under state laws, there may be a punishment for both crimes.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 404-406; Dec. Dig. § 201.\*]

#### 4. CRIMINAL LAW (§ 1144\*)—APPEAL—REVIEW—DISCRETION—IMPOSITION OF SENTENCE.

The sentence imposed, two years' imprisonment in the penitentiary, for giving liquor to an Indian, being within the limit fixed by Sess. Laws 1909, p. 537, it must be presumed, in the absence of showing to the contrary, that there was no abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

Department 1. Appeal from Superior Court, Lincoln County; Jos. Sessions, Judge.

George Kenney was convicted of giving liquor to an Indian, and appeals. Affirmed.

E. A. Hesseltine, of Wilbur, and H. N. Martin, of Davenport, for appellant. Jas. S. Freece, Pros. Atty., and C. A. Pettitjohn, both of Davenport, for the State.

CHADWICK, J. Appellant was convicted in the court below upon a charge of giving

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



liquor to an Indian of mixed blood and within the protection of chapter 140, Session Laws 1909.

[1] It is first contended that the court erred in holding that the person to whom the liquor was given was an Indian. The father was a white man, a veteran of the Civil War. The mother was an Indian woman. The statute makes no exceptions in favor of citizen Indians or the offspring of those who are citizens. If there be the blood of an Indian to the degree of more than one-eighth in the person to whom liquor is given or sold, they are within the statute. *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088; *State v. Mamlock*, 58 Wash. 631, 109 Pac. 47, 137 Am. St. Rep. 1085.

[2] The case of *United States v. Hadley* (C. C.) 99 Fed. 437, is relied on. That case is seemingly in point, and we would be inclined to follow its reasoning if it could be applied under our statute. The defendant in that case was charged under a federal statute (Act March 3, 1885, c. 341, § 9, 23 Stat. 385 [U. S. Comp. St. 1913, § 10,502]) providing for the punishment of "all Indians committing upon the person or property of another Indian or other person, any of the following crimes, namely, murder," etc. It was for the court to decide whether the person charged was an Indian. It was held that a half-breed child of a citizen parent was a citizen under the fourteenth amendment, and entitled to the rights and privileges and immunities of a citizen. Our statute says more than that liquor shall not be sold to an Indian; it bars the sale or gift to "a mixed-blood Indian being more than one-eighth." Our statute, as was said in the cases cited, is referable to the police power under which the state may define a class to which intoxicating liquors shall not be given or sold. A citizen cannot claim a constitutional right to get drunk. Neither can he claim a constitutional right to give or sell intoxicating liquor to one of a class that is protected by the law because of its weakness and a disposition to be improvident when accustomed to use liquor even in moderate quantities. If it were so, laws prohibiting the sale of liquors to habitual drunkards, minors, and others to whom its use may result in harm to society could not be sustained. The right of the state to enact the statute complained of does not rest upon any question of citizenship. The fourteenth amendment, which is relied on, is therefore in no way trenching upon or violated.

Counsel has made an able argument addressed to the policy of the law and in opposition to our former holdings, but we are inclined to our former position. It is for the Legislature to work out the iniquities of criminal statutes.

[3] Defendant was acquitted upon a like charge in the federal District Court at Spokane. The judgment roll was offered in evi-

dence by the defendant and rejected. There was no error in this. The rule is:

"As the same transaction may constitute a crime under the laws of the United States, and also under the laws of a state, the accused may be punished for both crimes; and an acquittal or conviction in the court of either is no bar to an indictment in the other." 12 Cyc. 289; *State v. Coss*, 12 Wash. 673, 42 Pac. 127.

[4] Defendant was sentenced to serve a term of two years in the state penitentiary. This is complained of as excessive. We admit that it seems ample, but it is within the limit fixed by the Legislature, and we must presume, in the absence of any showing to the contrary, that the trial judge did not abuse his discretion.

Finding no error, the judgment is affirmed.

CROW, C. J., and GOSE, PARKER, and MORRIS, JJ., concur.

(83 Wash. 444)

#### STATE v. AUSTIN. (No. 12300.)

(Supreme Court of Washington. Jan. 8, 1915.)

##### 1. JURY (§ 95\*)—COMPETENCY—DISCRETION.

Permitting jurors to serve, who had served in a like case against another is not an abuse of discretion; they qualifying and asserting that they would render a verdict on the facts disclosed in the case, disregarding the testimony in the other case.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 424-430; Dec. Dig. § 95.\*]

##### 2. WITNESSES (§ 361\*)—CROSS-EXAMINATION—CHARACTER WITNESS.

Asking character witnesses, called to sustain those whose reputations had been put in issue, whether they did not know defendant had been guilty of some misconduct, and had lived and associated with people of questionable character, is within the limit of legitimate cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1167-1175; Dec. Dig. § 361.\*]

Department 1. Appeal from Superior Court, Lincoln County; Jos. Sessions, Judge. J. F. Austin was convicted, and appeals. Affirmed.

H. N. Martin, of Davenport, and E. A. Heselstine, of Wilbur, for appellant. Jas. S. Freece, Pros. Atty., and C. A. Pettijohn, both of Davenport, for the State.

CHADWICK, J. [1] In addition to the questions raised and decided in the case of *State v. Kenney*, 145 Pac. 450, it is complained that the court erred in permitting jurors to serve or to become subject to challenge by the defendant; it appearing that the jurors objected to had served as jurors in the *Kenney* Case. The court did not abuse its discretion. The jurors qualified themselves. So far as we have been able to discover, no juror was allowed to sit in the case who had not asserted that he would disregard the testimony given in the other case and render a verdict upon the facts as disclosed in the instant case.

[2] It is also contended that the prosecuting

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attorney and counsel for the state were guilty of misconduct, in that they persistently called the attention of the jury to the fact that the defendant was a brother-in-law of one Ed Gray, who had been convicted of horse stealing. The only acts of counsel which, if torn from their settings, might be called misconduct, was in asking character witnesses called to sustain those whose reputations had been put in issue whether they did not know that defendant had been guilty of some misconduct, and whether they (the witnesses) did not know that he lived with and associated with people of questionable character. This was within the limit of legitimate cross-examination.

We find no error, and the judgment is affirmed.

CROW, C. J., and GOSE, PARKER, and MORRIS, JJ., concur.

(88 Wash. 314)

VINCENT et al. v. CITY OF SOUTH BEND.  
(No. 11809.)

(Supreme Court of Washington. Jan. 8, 1915.)

**1. MUNICIPAL CORPORATIONS (§ 296\*)—LOCAL IMPROVEMENT—ORDINANCE.**

Rem. & Bal. Code, § 7974, provides that, at the time of the initiation of all improvements, the city council shall cause an estimate to be made of the cost and the expense incident, which shall be approved by the city council, while section 7983 provides that, if the estimate be too high, the excess shall be rebated, and, if it be too low, the sufficient additional amount shall be added to the assessment. *Held*, that the estimate of the cost of the improvement, contained in the ordinance directing it, is not for the protection of property owners but the guidance of municipal officials, for only the actual bona fide cost of the improvement can be assessed against the property benefited after due notice and hearing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 792-795; Dec. Dig. § 296.\*]

**2. MUNICIPAL CORPORATIONS (§ 462\*)—LOCAL IMPROVEMENT—ASSESSMENT.**

An assessment for a local improvement, though greatly in excess of the estimated cost, is not void, where the assessment did not exceed the benefits and was no more than the bona fide cost of the improvement; it appearing that the improvement was more expensive than expected, owing to the refusal of the federal government to assist, as had been expected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1106; Dec. Dig. § 462.\*]

**3. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS.**

A finding in accordance with the preponderance of the evidence will not be disturbed because there is other evidence in conflict therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Department 1. Appeal from Superior Court, Pacific County; Edward H. Wright, Judge.

The City of South Bend assessed property for local improvement, and H. E. Vincent and others objected. From a judgment confirming the assessment roll, the objectors appeal. Affirmed.

H. W. B. Hewen, of South Bend, for appellants. Fred M. Bond and Welsh, Welsh & Richardson, all of South Bend, for respondent.

MORRIS, J. Appeal from a judgment below confirming a local improvement assessment roll. The city of South Bend is a city of the third class, and on April 17, 1911, its city council passed an ordinance providing for the filling of certain lowlands and tidelands within the city, the ascertainment of the damages for property taken or damaged, creating an improvement district, and providing for an assessment upon property benefited. The filling of the designated area was to be made in accordance with certain plans and specifications on file in the office of the city engineer, showing a fill averaging approximately three feet in depth. Section 7 of this ordinance fixed the estimated cost of the improvement at the sum of \$9,500, providing that if, after the making up of the assessment roll, this estimated cost should be found too high, the excess should be rebated pro rata to the property owners; but that if, on the other hand, it should prove too low, the city council upon due notice and hearing might add the required amount to the assessment roll to be apportioned among the several parcels of land upon the same basis as the amount originally included. Other provisions of the ordinance need not be referred to. It is enough to say it was the kind of ordinance usually passed with such purpose in mind. The federal government was at this time contemplating the dredging of the Willapa river through the city of South Bend, and the intention of the city in initiating the improvement at this time was to take advantage of this situation and obtain the material for filling these lowlands at a nominal cost; it being estimated that the dirt so obtained would fill the entire district to a depth of 18 inches; the remaining 18 inches to be provided for by a subsequent plan not then determined. The city and the federal officials entered into a contract under which the dirt from the river was to be deposited upon the area embraced within the district, free of cost, for a distance of 1,500 feet, and beyond that a small charge per cubic yard was to be made. Anticipating this arrangement, the cost of the improvement was fixed at \$9,500. After proceeding with the work, the officials in charge of the government work informed the city officials that all the material would be deposited within a 1,500-foot limit. The effect of this procedure was to increase the fill within the 1,500-foot area from 18 inches, as at first con-

templated, to 36 inches, and leave that part of the district outside of the 1,500-foot limit in the same situation it had been before the work was undertaken, save that between it and the river, its natural drainage, the ground had been raised 36 inches. Another effect was that those living within the 1,500-foot limit, who had raised their buildings to accommodate an 18-inch fill, were compelled to provide for a 36-inch fill. The city council thereupon, partly upon its own initiative and partly upon the petition of some of the property owners, entered into a contract with a dredging company to fill that part of the district lying outside of the 1,500-foot limit. This contract was performed, making the actual cost of the improvement to be borne by property benefited \$89,199.92, instead of \$9,500. Some of the appellants were among those petitioning for this second fill; others were not. The assessment roll, as confirmed, is made upon the basis of the actual cost, thus materially increasing the assessment upon benefited property from what it would have been under the original estimates.

There is some attack made upon the findings of the lower court. We find them amply sustained by the record, and they are adopted.

[1-3] This local improvement district was established pursuant to the act of 1909. 2 Rem. & Bal. Code, §§ 7971-7987, both inclusive. This act provides that the cost of all improvements instituted under the act shall be borne by special assessment upon the property benefited, if the ordinance directing the improvement shall so provide. Section 7974 provides that, at the time of the initiation of the improvement, the city council shall cause an estimate to be made of the cost and of the expenses incident to the improvement, which estimate shall be approved by the city council. Section 7983 provides that when an assessment roll is made up, and it is found that the estimated cost is too high, the excess shall be rebated pro rata to the property owners, but that when the estimated cost is found to be too low, and the actual bona fide cost of the improvement is greater than the estimate, the city shall, after due notice and hearing, add the required additional amount to the assessment roll, apportioning the amount to the several pieces of property benefited as if it had been an original estimate. Referring to the provisions of the ordinance as quoted, it will be seen that the ordinance contained these provisions of the statute. This provision for an assessment roll that shall represent the actual bona fide cost of the improvement, irrespective of the estimate, is so clear that it requires no interpretation. Counsel for appellant says in his brief that the trial court based its judg-

ment largely on the opinion that the estimate of cost of the fill contained in the ordinance was not for the information, benefit, or protection of the owners of the property, but only for the guidance of the municipal officials. The lower court might well have based its conclusion upon this contention, for it must be upheld as a correct interpretation of the statute. The only purpose of this estimate is to influence the city council in determining whether it will initiate any given improvement; the right of the property owner to be determined by the actual bona fide cost of the improvement which, when it exceeds the estimated cost, can only be assessed against the property benefited after due notice and hearing, at which time all the rights of the property owner may be protected. The amount of excess is large in this case, but there is no showing that the excess amount does not represent the actual bona fide cost of the improvement. In fact, there is no attempt to make such a showing; it being conceded, so far as the record goes, that the ultimate cost was the bona fide actual cost. The excess is readily accounted for when it is understood that, instead of being made at a nominal cost, as was first contemplated under the arrangement with the government engineers, it was necessary to make arrangements with private contractors to complete the work that should have been undertaken and completed under the contract with the government engineers, thus largely increasing the cost of the improvement, but not increasing the assessment beyond the actual bona fide cost of the improvement. Such an assessment is valid. *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; 2 Page & Jones, *Taxation by Assessment*, § 819.

It is contended that the ordinance is void for indefiniteness and want of specifications. We do not so find it. The ordinance is too long to be set out in full. A reading of it in connection with the statute is convincing that it contains all the material provisions and is a full compliance with the statutory requirements. There is also an attempt to show lack of benefits. Upon this point, as is usual in cases of this character, the evidence is conflicting; but we agree with the court below that it strongly preponderates in favor of the benefit assessed. Other attacks are made upon the assessments; but without making special reference to them for want of time and space, we find regularity in all the proceedings and no escape open to these appellants from assuming the burden that has been rightfully cast upon their lands in the manner provided by law.

The judgment is affirmed.

CROW, C. J., and GOSE and PARKER, JJ., concur.

(83 Wash. 427)

**BICKFORD v. HUPP.** (No. 12197.)

(Supreme Court of Washington. Jan. 8, 1915.)

**1. TROVER AND CONVERSION (§ 8\*) — WHAT CONSTITUTES.**

Where defendant sold goods belonging to plaintiff which were stored in a warehouse and the buyer took possession, defendant assumed constructive possession and was guilty of a conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 8.\*]

**2. COMPROMISE AND SETTLEMENT (§ 16\*)—EFFECT.**

Where all of the claims between plaintiff and defendant were settled, the settlement bars an action for defendant's conversion of plaintiff's property.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 54-65; Dec. Dig. § 16.\*]

**3. COMPROMISE AND SETTLEMENT (§ 24\*)—EVIDENCE—JURY QUESTION.**

Whether plaintiff's action was barred by a settlement held for the jury.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 95; Dec. Dig. § 24.\*]

**4. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR.**

Where it was conceded that the goods for which plaintiff was allowed to recover in suit for conversion were sold by defendant, the erroneous admission of a deposition relating only to that subject was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**5. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERRORS.**

Assignments of error not relied upon are waived and will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by O. W. Bickford against Fred R. Hupp. From a judgment for plaintiff, defendant appeals. Affirmed.

Peacock & Ludden, of Spokane, for appellant. Alex. M. Winston, of Spokane, for respondent.

**MOUNT, J.** This action was brought by the plaintiff to recover the value of certain goods alleged to have been converted by the defendant. The answer of the defendant consisted of a general denial, and also an affirmative defense to the effect that prior to the date the property was alleged to have been sold by the defendant, a settlement was had between the plaintiff and the defendant; that the defendant had paid the plaintiff a certain sum of money in satisfaction of all claims and demands. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff. The defendant has appealed.

At the close of the plaintiff's evidence the defendant moved the court for a nonsuit on the grounds: First, that the evidence failed

to show a conversion; and, second, that the evidence of the plaintiff showed a final settlement. Upon the trial of the case the plaintiff testified, in substance, that he was the owner of the goods alleged in his complaint to have been converted by the defendant; that he had stored these goods at a warehouse in Copperfield, Or., with certain goods of the defendant; that thereafter the defendant, without the knowledge of the plaintiff, sold the goods in the warehouse to a firm known as Bates & Rogers Construction Company; that this company had afterwards moved the goods away. The plaintiff also testified as to the value of the goods. He also testified that at a certain time after the storing of the goods and before he knew of the sale thereof, he had made a settlement with the defendant for the amount due him for certain contract work which he had performed for the defendant. He also testified that at the time of this settlement the property stored in the warehouse at Copperfield was not considered and did not form a part of the settlement for moneys due under the contract.

[1] It is contended by the appellant that there could be no conversion of the goods under this statement of facts, and that the rule is that the defendant could not be charged with conversion of goods unless he had actual or constructive possession of them at the time of the alleged conversion. If this is the rule, we are satisfied that under the evidence the defendant at the time he sold the goods assumed constructive possession. If the goods belonged to the plaintiff and were stored by him in a warehouse, and afterwards were sold by the defendant to a third person, who removed them, this was clearly a conversion. In the case of *Ramsby v. Beezley*, 11 Or. 49, 8 Pac. 288, that court says:

"Of the different ways by which a conversion of personal property may be effected, one is where a party sells the property of another without his authority or consent. Such sale is the assumption of ownership, of dominion over, or right to control, the property, inconsistent with, and in denial of the rights of the true owner. Hence it is said, 'Every assuming by one to dispose of the goods of another is a conversion.' Trover, Bacon's Abridg., 631. Or 'the assumption of authority over property, and actual sale constitutes a conversion.' *Gilman v. Hill*, 36 N. H. 324. No actual force need be used (*Gibbs v. Chase*, 10 Mass. 128), nor any manual taking or removal of the property (*Reynolds v. Shuler*, 5 Cow. [N. Y.] 326; *Connah v. Hale*, 23 Wend. [N. Y.] 465), nor proof that the defendant had actual possession of the property (*Fernald v. Chase*, 37 Me. 290), for, in the language of Shepley, C. J.: 'The exercise of such a claim of right, or dominion over the property as assumes that he is entitled to the possession, or to deprive the other party of it, is a conversion.'"

We are satisfied, therefore, that if the plaintiff's evidence is to be believed, there was a conversion.

[2, 3] It is also argued that there was a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

settlement between the parties. It is no doubt true, if this settlement took into consideration these goods, that the plaintiff is not entitled to recover. But if his statement is true that these goods were not taken into consideration, but that the settlement was only for the contract price of certain construction work, then he is entitled to recover, if the defendant sold his goods and delivered them to a third party. These were both questions for the jury under the evidence in the case.

[4] It is also claimed by the appellant that the court erred in not striking a certain deposition. There was no prejudicial error in this, because it was conceded, as we understand the record, that the goods for which the plaintiff was allowed to recover were sold by the defendant. The testimony of this witness related only to that subject.

[5] Several assignments of error are made upon the instructions. But these are apparently not relied upon. The court very clearly, fairly, and fully instructed the jury with reference to the law of the case. We think it is unnecessary to review these instructions. We find no error in the record.

The judgment is affirmed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 419)

# STATE v. WILSON. (No. 12179.)

(Supreme Court of Washington. Jan. 8, 1915.)

## 1. PERJURY (§ 6\*) — ELEMENTS OF OFFENSE — DEFINITION OF "PERJURY"—CONSTRUCTION.

Rem. & Bal. Code, § 2351, declaring that every person who, in any action or proceeding, in which an oath may be lawfully administered, shall state as true any material matter which he knows to be false, shall be guilty of "perjury," is broader than common-law perjury, confined to the giving of false testimony in a judicial proceeding before a competent jurisdiction, but applies only to cases where the alleged false oath is taken and testimony is given in a judicial proceeding.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 7-17; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, First and Second Series, Perjury.]

## 2. PERJURY (§ 5\*)—STATUTORY PROVISIONS—"PROCEEDING OR INVESTIGATION AUTHORIZED BY LAW"—"PERJURY IN SECOND DEGREE."

Rem. & Bal. Code, § 2353, providing that every person who, in a proceeding or investigation authorized by law, shall knowingly swear falsely, shall be guilty of "perjury in the second degree," applies to investigations held under the warrant of the Legislature, as distinguished from an offense recognized as criminal at the common law, and covers offenses not included in section 2351, punishing perjury in the first degree and applicable in all cases where the false oath is taken and testimony given in a judicial proceeding, and one charged with perjury in a judicial proceeding may not be convicted under section 2353 on the theory that the elements of the offense denounced thereby are included within section 2351.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 4-6, 35; Dec. Dig. § 5.\*]

## 3. PERJURY (§ 11\*) — STATUTES — CONSTRUCTION.

Rem. & Bal. Code, § 2352, providing that it shall be no defense for perjury in the first degree that accused did not know the materiality of his false testimony, if it was material, and might have affected the proceeding, does not provide that false material testimony shall be perjury in the first degree punishable by section 2351, and if not material shall be perjury in the second degree punishable by section 2352.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.\*]

## 4. INDICTMENT AND INFORMATION (§ 186\*)—OFFENSES INCLUDED—STATUTES.

Lesser crimes are not to be included unless demanded by the plain provisions of the statute punishing crime, or the facts proved at the trial bring the case within the definition of the lesser crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 576; Dec. Dig. § 186.\*]

## 5. CRIMINAL LAW (§ 361\*)—EVIDENCE—EXPLANATORY MATTERS.

Where the state showed that accused had previously made defamatory statements in a spirit of malice and ill will toward the prosecuting witness, accused should be given an opportunity to deny or explain the statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802, 803; Dec. Dig. § 361.\*]

## 6. PERJURY (§ 37\*) — INSTRUCTIONS — SUFFICIENCY.

An instruction that every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false, and that to find accused guilty of perjury the jury must find that he willfully gave the testimony knowing the same to be false and untrue, and that intent is the basis of every moral action, and that the words "knowingly and willfully" mean with a criminal intent, sufficiently submits the issue of reasonable ground of accused for believing his testimony to be true or evident forgetfulness and want of intent to willfully testify falsely.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134-138; Dec. Dig. § 37.\*]

Department 1. Appeal from Superior Court, Okanogan County; C. E. Claypool, Judge.

W. C. Wilson was convicted of perjury in the second degree, and he appeals. Reversed and remanded for new trial.

William C. Brown, of Okanogan, for appellant. J. W. Faulkner, of Okanogan, Neal & Neal, of Conconully, and Chas. A. Johnson, of Okanogan, for the State.

CHADWICK, J. Appellant is charged by information with the crime of perjury in the first degree. A further statement of the charge is unnecessary to the determination of the case in this court. After a trial, appellant was convicted of the crime of perjury in the second degree. A judgment upon the verdict was rendered, and defendant was sentenced to imprisonment in the state penitentiary for a term of not less than six months nor more than two years.

Numerous errors are assigned, but few of them will require discussion in this court.

The court instructed the jury that an in-

formation charging perjury in the first degree includes the lesser crime of perjury in the second degree, and if the jury found to their satisfaction and beyond a reasonable doubt that all of the essential elements of the crime charged had been proven, except the materiality of the testimony charged to have been falsely given, the defendant would be guilty of the crime of perjury in the second degree, and that it should find accordingly.

At common law the crime of "willful and corrupt perjury" is defined by Sir Edward Coke to be:

"A crime committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question." 4 Black. Com. 137; 3 Inst. 164.

"Perjury by the common law seemeth to be a willful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." Ba. Abr. Tit. "Perjury"; 1 Russ. Crimes (Int. Ed.) 294.

"Perjury, not speaking of its affinities, is the willful giving under oath, in a judicial proceeding or other course of justice, of false testimony material to the issue or point of inquiry." 1 Bishop, N. C. Law, 468 (4).

False swearing in any proceeding other than in a court of justice was not taken account of as a crime at common law. Perjury, however, was noticed and punished solely upon the theory that a false oath was "an obstruction of justice." At common law the false oath "must be taken either in a judicial proceeding of the like nature, where in the king's honour or interest are concerned." 1 Russ. Crimes (Int. Ed.) 294.

"The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution; for it esteems all other oaths unnecessary, at least, and therefore will not punish the breach of them." 4 Black. Com. 137.

"In the case of perjury, I take the circumstances requisite to be these: The oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending." Lord Mansfield, in *Rex v. Aylett*, 1 T. R. 63.

[1] Our Legislature has defined perjury:

"Every person who, in any action, proceeding, hearing, inquiry or investigation, in which an oath may lawfully be administered, shall swear that he will testify, declare, depose or certify truly, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, and who in such action, proceeding, hearing, inquiry or investigation shall state or subscribe as true any material matter which he knows to be false, shall be guilty of perjury in the first degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years." Rem. & Bal. Code, § 2351.

This statute is clearly no broader than was the common law, and must, when considered in the light of other statutes, be held to apply in all cases where the alleged false oath is taken and testimony is given in or in aid of a judicial proceeding. Courts and Legislatures have recognized that perjury as

defined at common law and by statute is not only complete within itself, but is exclusive of other offenses against the truth. Consequently the Legislature of this state and of other states have passed many special statutes, and many general statutes making certain offenses perjury that would not be so either under the common law or under the statute, for crimes are not to be created by construction. If there be a reasonable doubt, justice demands that it be resolved in favor of innocence of the party charged. *State v. Hazeltine*, 143 Pac. 436; *State v. Furth*, 144 Pac. 907.

An evidence of the legislative intent to reflect this principle in its work may be found in statutes making the following offenses perjury: Any willful, false swearing in any bank examination (section 3300); the taking of a false oath when registering for voting in a school district of the first class (section 4702); false statements by candidates at primary elections (section 4835); the swearing in of an illegal vote at an election (section 4838); a false sworn statement under the Sales in Bulk Law (section 5298); a false oath in procuring marriage licenses (sections 7164, 7165); a false oath to support the registration of a land title under the Torrens Act (section 8898); a false listing of property for taxation (section 9130). These offenses, in the absence of a special statute, would not be punishable under section 2351.

[2] Section 2351 was passed in 1909. At the same time and as a part of the same act, the Legislature passed a general statute, which, as counsel states and, so far as we know, is unknown to the law of any other state. It is an original conception so far as the law of this state is concerned.

"Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree and shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year." Rem. & Bal. Code, § 2353.

Section 2351 defines a felony. Under section 2353, one may be punished as for a felony or a misdemeanor, as the trial judge may determine.

It is the contention of the state that, in so far as perjury may be committed "in a proceeding or investigation authorized by law," perjury in the second degree is included in a charge of perjury in the first degree. We cannot assent to this reasoning. If it were so, the Legislature has done a vain and useless thing. The adoption of section 2353 would serve no purpose and lead only to irreconcilable conflict and confusion; for if both sections can be made to apply to the same state of facts and cover any and "all proceedings or investigations authorized by law," and these words include a civil "action" (section 2351) or a proceeding in a court

of justice or in furtherance of its jurisdiction and its functions, any convicted person could contend for a sentence under the misdemeanor clause of section 2353. Thus a false oath taken in a court of justice, which from the earliest times has been held in disfavor and contempt (it was called "willful and corrupt" perjury at common law), and punished by the severest penalties, would be reduced to a misdemeanor if the judge pronouncing the sentence so willed. We cannot believe that the Legislature ever intended such consequences, but rather by adopting section 2353 it meant to cover those offenses against truth which occur in extrajudicial proceedings and investigations and proceedings and investigations held by quasi judicial boards, commissions, and committees where a false oath could not be held to be perjury under the theory that it operated as an "obstruction of justice" as the stream of justice flows in the courts of the state, or in proceedings ancillary or in aid of the jurisdiction of the courts to try and determine public and private controversies. "Proceedings or investigations authorized by law" must be held to mean proceedings or investigations defined by or held under the warrant of the legislative body, as distinguished from an offense recognized as criminal at the common law, which is adopted in so far as it is not inconsistent as an integral part of our criminal code.

It is evident that section 2353 was passed to cover by general statute, offenses which in some states have been called false swearing and made punishable *eo nomine* by statute. 2 Bish. N. C. L. 1014. No other construction can be given to section 2353, for from the very nature of things there can be no shades or degrees in the crime of perjury when committed in a court of justice. Neither the common law nor the statute makes any distinction between a black lie and a white lie. If either is willfully false and material to the issue, it is perjury.

If a convicted man is entitled to consideration, it may be given him, for the judge has a wide discretion. He may meet and measure any extenuating circumstance or circumstances when passing sentence. But the crime, if committed, is complete when a person takes an oath and willfully testifies as the truth that which he knows to be false.

The perjury alleged to have been committed in this case occurred in an action in which an oath was lawfully administered. In such cases "every person \* \* \* shall be guilty of perjury in the first degree." Section 2351.

[3] Counsel contend that the judgment of the court may be sustained upon the theory: If the testimony be material to the issue, the offense would fall within section 2351, and, if not material, under section 2353. The answer to this contention is that the statute makes no such distinction. Counsel have misread section 2352. That section does not

provide that testimony given under the one section, if material, shall be perjury in the first degree, and if not material to the issue shall be perjury in the second degree. It says that it shall be no defense for perjury in the first degree that the defendant did not know the materiality of his false statement if it was indeed material and might have affected such proceeding. The statute goes, not to the materiality of the testimony, but to the mental status of the person giving the testimony.

Nor can the verdict and judgment be sustained upon the theory that perjury in the second degree is a crime included within the definition of perjury in the first degree. We have already held that there can be no degrees of guilt when the false oath and materiality of the testimony has been established. The offender is either guilty or he is not guilty.

[4] Furthermore, we have held that lesser crimes are not to be included, nor are compromise verdicts to be invited unless demanded by the plain provision of a statute or the facts developed at the trial bring the case within the definition of the lesser crime. *State v. McPhail*, 39 Wash. 190, 81 Pac. 683; *State v. Kruger*, 60 Wash. 542, 111 Pac. 769; *State v. Pepon*, 62 Wash. 635, 114 Pac. 449; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43; *State v. Harsted*, 66 Wash. 158, 119 Pac. 24; *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; *State v. Hart*, 79 Wash. 225, 140 Pac. 321.

[5] We shall not make a close argument upon the remaining assignments of error, except to say that in the event of a retrial, if the state introduces evidence tending to show that the defendant had theretofore made defamatory statements in a spirit of malice and ill will toward the prosecuting witness, the defendant should be given a like opportunity to deny or explain away the alleged statements. 3 Bishop's New Procedure, § 935; 30 Cyc. 1444.

[6] Appellant requested an instruction covering honest belief, reasonable ground for believing his testimony to be true, evident forgetfulness, and lack of intent to willfully testify falsely. The court when instructing the jury told them that:

"Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false."

It is complained that the court did not instruct the jury that this statutory definition should be taken with the qualification that there must be a criminal intent, an absence of honest belief, or honest mistake. On the other hand, it is contended that the court covered this objection by instructing the jury that, in order to find the defendant guilty, they must find that he willfully gave the testimony knowing the same to be false and untrue. The court instructed the jury that intent is the basis of every moral ac-

tion, and the words "knowingly and willfully" mean with a criminal intent. We are not prepared to say that the instruction of the court did not meet the full intendment of the law.

Other assignments of error are made, but the matters discussed will not be material or are not likely to occur upon a retrial. For the reasons assigned, the judgment of the lower court is reversed. Remanded for a new trial.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 303)

**GUSTAVESON v. DWYER. (No. 11518.)**

(Supreme Court of Washington. Jan. 8, 1915.)

**1. ADVERSE POSSESSION (§ 7\*)—MUNICIPALITY.**

Though the general statute of limitations (Rem. & Bal. Code, § 167) applies to actions by counties and municipalities, it does not apply to a municipality holding property in a governmental capacity for public purposes, and title by adverse possession cannot be acquired against it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.\*]

**2. LIMITATION OF ACTIONS (§ 11\*)—LIMITATION AS AGAINST COUNTIES AND MUNICIPALITIES.**

A county, purchasing, as required by Rem. & Bal. Code, § 9268, land at a tax sale for want of another purchaser acts as the agent of the sovereign, and the general statute of limitations does not run against it while the title acquired rests in it, and one may not by adverse possession acquire title.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.\*]

**3. LIMITATION OF ACTIONS (§ 11\*)—LIMITATION AS AGAINST COUNTIES AND MUNICIPALITIES.**

The general statute of limitations, though applicable to counties and municipalities, does not bar a right by them to enforce the collection of taxes.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.\*]

**4. ESTOPPEL (§ 62\*)—ADVERSE POSSESSION—COUNTY.**

Where an individual in possession of land, title to which a county acquired at a tax sale, made no improvements adding to the value of the land, and the county, during the period of his possession, did not levy any tax on the land, and he did not at any time pay any tax thereon, the county was not estopped from asserting title against him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151-153; Dec. Dig. § 62.\*]

Gose and Chadwick, JJ., dissenting.

En Banc. On rehearing. Overruled and judgment affirmed.

For former opinion, see 78 Wash. 336, 139 Pac. 194.

Garvey, Kelly & MacMahon, of Tacoma, for appellant. A. O. Burmeister and Gordon & Remann, all of Tacoma, and W. V. Tanner, Scott Z. Henderson, and L. L. Thompson, all of Olympia, amici curiæ, for respondent.

PARKER, J. This case is before us upon rehearing. It was decided in respondent's favor on February 28th last by department 2 of the court, upon the theory that the adverse possession upon which appellant rests his claim to the land involved did not sustain his claim of title because ten years had not elapsed since title to the land was in the county by virtue of the county having purchased it at tax sale for want of another purchaser, though appellant may have been in actual possession of the land since the purchase thereof by the county at tax sale more than ten years prior to the commencement of this action; and that the county purchased and held title in trust for the state as well as for the county and municipalities which were entitled to share in the tax for which the county purchased the land, thus preventing the statute of limitation from running in favor of appellant while title to the land was in the county. *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194.

In the department decision, certain sections of our revenue statutes were noticed, from which the conclusion was drawn that, upon the purchase of the land by the county, the proceeds of sale thereof to be thereafter made by the county were by law required to be distributed to the state, as well as the municipalities entitled to the tax, for which the county was by law compelled to purchase the land for want of another purchaser. The trust relation which the department decision assumed existed between the county and the state upon the purchase of the land by the county was rested upon these provisions of our revenue statutes alone; and upon this theory, the state being held to be a beneficiary having an interest in the land, the adverse possession of appellant was of no avail to him while the land was so held by the county, because the statute of limitation does not run against the state. Certain other sections of the revenue statutes are now called to our attention which lend some support to the present contention of counsel for appellant that this view of the statute entertained by department 2 was erroneous. However this may be, further consideration has led us to the conclusion that there is a broader view of the relation of the state to the title of the land thus purchased by the county in pursuance of the statute at tax sale for want of another purchaser, which must control the question of adverse possession here presented.

[1] While our general statute of limitations applies to actions by or for the benefit of counties and other municipalities (Rem. & Bal. Code, § 167), it has been held that the statute does not apply as against a municipality so as to permit the acquisition of title by adverse possession to a portion of a street within the municipality. *West Seattle v. West Seattle Land & Improvement Co.*, 38

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Wash. 359, 80 Pac. 549. This holding rests upon the theory that such property is held by the municipality, or rather controlled by it, in a governmental capacity for public purposes. And to hold the general statute of limitations applicable to actions involving title to property so held would be to hold that such statute runs against the state. The rule touching the inapplicability of a general statute of limitations in such cases, although such statute by its terms be applicable to municipalities as well as private individuals, is stated in 19 Am. & Eng. Encl. of Law, 191, as follows:

"The better rule seems to be that, where a municipality seeks to assert rights which are of a public nature and such as pertain purely to governmental affairs, the exemption in favor of sovereignty applies, and the statute of limitations will not constitute a bar, unless it is expressly so provided. But, in all other respects, counties, cities, and other municipal subdivisions are governed by the statute as fully and to the same extent as individuals."

Upon this principle the decisions of this court in *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115, and *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188, are rested, although those decisions involved the question of the general statute of limitations running against the state direct, at a time when the statute was in terms applicable to the state. It was there held that adverse possession could not impair the title of the state to school and university lands, upon the theory that such lands were held by the state for a specific public purpose, and not in a mere proprietary capacity.

We regard the vital question here to be: Does the county hold land, acquired by purchase at tax sale for want of another purchaser, in a governmental capacity, as distinguished from a proprietary capacity? since it is plain the statute would not run against the county in the former instance but would in the latter.

[2,3] Looking to the power in the exercise of which the county's title to this land originated, we are constrained to hold that the county did not acquire or hold the land in a proprietary capacity but in a governmental capacity. The land is not acquired by the county voluntarily, but in the exercise of a mandatory duty prescribed by the state and in the exercise of the sovereign power of taxation. Rem. & Bal. Code, § 9268. It acts in effect as the agent of the sovereign, even though its action is largely for the benefit of the people of the county and the municipalities entitled to share in the tax for which the county is compelled to purchase the land for want of another purchaser. By the greater weight of authority it is held that a general statute of limitations, though it may be in terms applicable to counties and other municipalities, will not bar the right of such municipality to enforce the collection of taxes. These holdings rest upon a principle which we regard as

controlling here, although no decision has come to our notice dealing with the application of a statute of limitation to the exact situation here involved. In *Port Townsend v. Eisenbeis*, 28 Wash. 533, 551, 68 Pac. 1045, 1051, Judge Anders, speaking for the court, said:

"An action to recover a tax is an action to enforce a public right. And it has been held that the statute of limitations does not affect such actions, although it may be applicable to actions to enforce private rights. *Greenwood v. La Salle*, 137 Ill. 225, 26 N. E. 1089; *Black, Tax Titles*, § 164. See, also, *Sims v. Frankfort*, 79 Ind. 452, and 2 *Dillon, Municipal Corporations*, § 673."

That decision, however, was rested largely upon certain provisions of the special charter of Port Townsend.

In *Osawatimie v. Miami County*, 78 Kan. 270, 96 Pac. 670, 130 Am. St. Rep. 369, there was involved a claim of the city against the county for funds, the proceeds of taxes, which had been collected by the county for the city and not accounted for. The county invoked the general statute of limitations which apparently by its terms was applicable to counties and cities in that state. Disposing of this contention in holding that such statute had no application, Justice Mason, speaking for the court, said:

"Inasmuch as the city exists in part as an agency of the state for general governmental purposes, and its maintenance depends upon its power to levy and collect taxes, it might be argued that the state itself, or the general public, has an interest in protecting the exercise of that power. But the same argument might apply, although with less force, to the prosecution of any money demand, upon the ground that the purpose of enforcing it is to aid in meeting the expenses of maintaining the municipality. We think the more vital consideration has relation to the character of the power in exercise of which the demand originates. The power of taxation is an essential attribute of sovereignty. This is true no less of taxes levied by minor political divisions than of those directly imposed by the state. 27 A. & E. Encycl. of L. 620. No statute of limitation should apply to any step in the exercise of that power, unless a legislative intention that it should do so is expressly stated or appears by the clearest implication."

In *Greenwood v. Town of La Salle*, 137 Ill. 225, 26 N. E. 1089, an action to recover taxes where the general statute of limitation was invoked as a defense, which by its terms was applicable to cities and towns Justice Wilkin, speaking for the court, said:

"The question to be determined in this case is, therefore: Does appellee here seek to enforce a private right? This question, we think, must be decided in the negative. A town, under our township organization system, is but a civil division of a county, and exists as a municipal corporation merely for the purposes of carrying on the state government. It can only levy and collect taxes for the purpose of carrying on that subdivision of such government. It must be admitted that town taxes may be levied for purposes in which the public, generally, are directly interested, such as 'constructing or repairing roads, bridges or causeways,' within the town. Rev. Stat. c. 139, art. 4, § 40; *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38 [52 Am. Dec. 479]. Other improvements may

also be lawfully paid for out of a town tax, in which the public at large have as much interest as those residing within the boundaries of the township. We entertain no doubt that the right here sought to be enforced is of such a public nature that no statute of limitations could be interposed against it."

In *Wastenev v. Schott*, 58 Ohio St. 410, 415, 51 N. E. 34, where a general statute of limitation was invoked in defense of an action to collect taxes, the court, in holding such statute not applicable to such cases, observed:

"When the action, though brought in the name of the state, is prosecuted for the enforcement of some private or individual right, and the state has no substantial interest in the litigation, the plea of the statute may be interposed. On the other hand, if the state is the real party in interest, the plea of the statute is not available, though the action be not prosecuted in its name; and actions under section 2859 of the Revised Statutes, for the recovery of personal taxes, are, we think, of that character, and not subject to the bar of the statute, notwithstanding they are required to be brought in the name of the county treasurer. Revenues are essential to the maintenance of the state and the execution of its governmental functions. Taxation is a recognized constitutional and lawful means of raising such revenues for most, if not all, public needs; and the courts will take notice that general taxes levied by the state directly, or through local agencies, to which it has delegated that power, constitute a source of revenue for use in the due performance of the functions of the state government. Whether voluntarily paid or collected by suit, they go partly to the general funds of the state for its disbursement in the administration of public affairs, and are in part disbursed in the due course of local administration by officers exercising the delegated powers of the state, deemed necessary and proper for that purpose. In the latter case, as well as the former, the fund belongs to the state's revenues, and the disbursement is for the public benefit, although local advantages may also result. Through county, township, municipal, and other organizations, they are paid out in the administration of public justice, the maintenance of the public order and security, the support of the public schools, and other purposes of a public nature pertaining to the state government. Hence, for all such taxes levied on real property, the lien thereon provided by statute is declared to be in favor of the state; and, while it was probably deemed impracticable to create a lien on personal property for the taxes laid against it, the fund derived from them is expended in common with that arising from real estate taxes, and for the same purposes."

In *Hagerman v. Territory*, 11 N. M. 156, 66 Pac. 526, the action was brought by the county authorities to recover delinquent taxes; the statute expressly declaring such taxes sought to be thus collected to be the property of the county. In holding against the contention that the general statute of limitations was a defense, the court said:

"It is further insisted by the appellant that the general principle that the ordinary statute of limitations cannot be interposed to defeat a claim of the government has no application to the case at bar, as the government (i. e., the territory of New Mexico) has no interest in the taxes delinquent July 1, 1895, here involved; the Legislature having provided (section 21, c. 60, Session Laws 1897; section 4184, C. L. of N. M. 1897) that 'all delinquent taxes due the territory on the 1st day of July, 1895, are

hereby declared to be the property of the respective counties in which the same are assessed, and, when collected, shall be paid to the general county fund of the several counties of the territory.' We think, however, that the principle has application to this case. Under our system of government, a county is a civil subdivision of the territory, and exists as a municipal corporation merely for the purpose of carrying on the territorial government; and it is well settled that the plea of the statute of limitations is no defense to those actions by such corporation involving public rights, such as taxation, unless the statute expressly so provides."

It is apparent from the doctrine of these authorities that a general statute of limitations has no application, whether the tax sought to be collected is to become the property of the state and payable directly into the state treasury, or whether it is to become the property of the particular county or municipality, and payable into the municipal treasury, to be expended for municipal purposes. In either case, the tax has been imposed and collected for the express purpose of carrying on the functions of government. Among additional authority supporting this view we note the following: *Delta County v. Blackburn et al.*, 100 Tex. 51, 93 S. W. 419; *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734; *Simplot v. Chicago, M. & St. P. Ry. Co. (C. C.)* 16 Fed. 350; *Logan County v. City of Lincoln*, 81 Ill. 156; *People v. Hamill*, 259 Ill. 506, 102 N. E. 1052.

Like the Kansas court in *Osawatimie v. Miami County*, above quoted from, we think the vital question here has relation to the character of the power in the exercise of which the county acquired the land at tax sale and thereafter held it. The case before us, it is true, does not involve the question of the bar of the statute of limitation as between the original owner of the land and the county; but we are unable to see that the acquiring the land and holding it thereafter is any less the exercise of a right emanating in the power of taxation than is the levy and imposition of the tax in the first instance. All of the rights of the county here involved are traceable to and rest in the sovereign power of taxation. It is not a proprietary right or power exercised by the county in either instance, but purely governmental, looking to the administration of governmental functions. We are of the opinion that the general statute of limitations, though by its terms made applicable to counties, does not run against the county in favor of an adverse possessor of the land while the title of the land rests in the county.

These conclusions may seem in conflict with our decision in *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999. Our views here expressed are plainly out of harmony with the expression found at page 180 of 68 Wash., at page 1000 of 122 Pac., of that decision, as follows:

"The property was held by the appellant in a proprietary capacity, as distinguished from the governmental or quasi governmental capacity."

That case involved Franklin county's claim to land acquired as this land was acquired in Pierce county. The statute of limitation was not there involved, but the county was held to have lost its and the public's right to the land by estoppel, growing out of its questionable tax title and a compromise with the original owner allowing him to redeem the land. We think the ultimate conclusion of the court in that case would necessarily have been the same whether the land was regarded as being held by the county either in a proprietary or governmental capacity. That decision contains no discussion or citation of authority bearing upon the question of whether land so acquired by a county is held in a proprietary or governmental capacity. The fact that public streets may be lost to public use by vacation seems to furnish room for the working of estoppel as against a municipality affecting the loss of a street or portion thereof to the public, notwithstanding a street is held and controlled by a municipality in a purely governmental capacity. In *West Seattle v. West Seattle Land, etc., Co.*, supra, the court rested its decision in favor of the city exclusively upon the inapplicability of the statute of limitations to such cases, pointing out that there was no element of estoppel affecting the right of the city or the public in that case, leaving the inference that the rights of the public in a street might be lost by estoppel. In *Spokane Street & Ry. Co. v. Spokane*, 6 Wash. 521, 33 Pac. 1072, the railway company was held to have acquired a franchise right in the street by estoppel growing out of acts of the city. This seems to be a recognition of the rule announced by a number of the courts that would call for the ultimate conclusion reached by us in *Franklin County v. Carstens*, regardless of whether land acquired at tax sale by a county for want of other bidders is thereafter held by the county in a proprietary or governmental capacity. Hence our decision in that case would have been the same whatever our views may then have been upon that question. We adhere to the conclusion there reached, but are of the opinion that, in so far as the language of the decision announces that the land was held by the county in its proprietary capacity, it should be overruled in the light of the authorities above noticed.

[4] There is no element of estoppel here involved. While the land was held by the county by virtue of its purchase at tax sale, appellant made no improvements thereon adding to its value in the least; nor did the county during that period levy any tax upon the land; nor has appellant ever at any time paid any taxes thereon.

We adhere to the final result reached in the department opinion of February 28th.

The judgment of the superior court is therefore affirmed.

CROW, C. J., and ELLIS, MORRIS, MOUNT, and MAIN, JJ., concur.

GOSE and CHADWICK, JJ. (dissenting). We cannot acquiesce in the view that the immunity which protects taxes from the operation of the statute of limitations extends to property acquired by the county at a tax sale. The sale cancels and satisfies the taxes, penalties, interest, and costs. The statute expressly so provides. The statute declares that the county acquires title to this property "as absolutely as if purchased by an individual." Rem. & Bal. Code, § 9268.

"No claim shall ever be allowed against the county from any municipality, school district, road district or other taxing district for taxes levied on property acquired by the county by tax deed under the provisions of this act, but all taxes shall at the time of deeding said property be thereby canceled." Rem. & Bal. Code, § 9271.

After a tax deed is issued to the county, the property may be sold by the county treasurer upon the order of the board of county commissioners at public sale to the highest bidder. Rem. & Bal. Code, § 9273. The crucial question is: Does the county hold land which it purchases at a tax sale in a governmental capacity or a proprietary capacity? We think the true test of the capacity in which the municipality holds property is the use to which the property is to be devoted. The property in question was not devoted to a public purpose, nor was it essential to the exercise of municipal functions. It is true that the county took the land in lieu of the taxes; but, when its title became complete, it was subject to sale the same as any other property held in a proprietary capacity. In the last analysis a municipality acquires title to all its property through the exercise of the sovereign power of taxation. Indeed, it is only by the exercise of the taxing power that it can acquire property or procure funds with which to perform its governmental functions. The tools and implements which the city or county purchases to be used in constructing and repairing roads and bridges are purchased with money derived through the taxing power. Are they held in a governmental capacity? The courts of the country are agreed that municipal corporations hold property and exercise functions in a dual capacity, viz., governmental and proprietary. The line of demarcation must necessarily be drawn somewhere. In respect to property, we think the test should be the use to which the property is to be devoted; that is, is it to be used for the purpose of carrying on its governmental functions? If it is to be so used, the statute of limitations does not apply; otherwise the plea of the statute may be invoked.

We therefore dissent.

(83 Wash. 322)

DETAMORE et al. v. HINDLEY et al., City Com'rs (CHICAGO, M. & ST. P. RY. CO., Intervener). (No. 11908.)

(Supreme Court of Washington. Jan. 8, 1915.)

**1. MUNICIPAL CORPORATIONS (§ 590\*)—DELEGATION OF POLICE POWER—CITY.**

Const. art. 11, § 11, authorizing any city to make and enforce within its limits all local police, sanitary, and other regulations, not in conflict with the general laws, is a direct delegation to a city of the police power, as ample within its limits as that possessed by the Legislature, and no legislation is necessary for the exercise of the power so long as the subject-matter of the exercise is local, and the regulation reasonable and consistent with general laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1309; Dec. Dig. § 590.\*]

**2. RAILROADS (§ 99\*)—ABOLITION OF GRADE CROSSINGS—POLICE POWER.**

Where a railroad crosses the streets of a city, the power to compel the separation of grades and to authorize means to that end, not unreasonably impairing the use of the streets by the public, is a legitimate exercise of the police power conferred by Const. art. 11, § 11, authorizing any city to make and enforce within its limits regulations not in conflict with the general laws.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 293-295, 297-304; Dec. Dig. § 99.\*]

**3. MUNICIPAL CORPORATIONS (§§ 680, 681\*)—POLICE POWER—CONSTITUTIONAL AND STATUTORY PROVISIONS—"OVER."**

Under Const. art. 11, § 11, authorizing a city to make and enforce within its limits local police, sanitary, and other regulations, and Rem. & Bal. Code, § 7507, empowering a city to authorize the location of any railroad or street railroad in any street and to provide for the change of grade and to construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof, and section 7510, conferring on any city the power, by ordinance, to authorize the location, construction, operation of all railroads "in, along, over and across" any street or public place in the city, on such conditions as the council may prescribe, a city may authorize a railroad to lay its tracks across or along streets and authorize an overhead construction of the tracks for the use of the railroad, for the word "over" discloses an intention to confer the power to authorize overhead construction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.\*]

For other definitions, see Words and Phrases, First and Second Series, Over.]

**4. STATUTES (§ 188\*)—CONSTRUCTION—MEANING OF WORDS.**

A statute should, if possible, be so construed as to give every word its true significance.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.\*]

**5. MUNICIPAL CORPORATIONS (§ 63\*)—POLICE POWER—JUDICIAL INTERFERENCE.**

Where a city exercises its police power, the means appropriate to the exercise are largely in the discretion of the city, and courts will not interfere in the absence of a clear abuse of discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.\*]

**6. MUNICIPAL CORPORATIONS (§§ 680, 681\*)—USE OF STREETS—RAILROADS—OVERHEAD CONSTRUCTION.**

The use by a railroad of a street for the base of such supports as may be reasonably necessary to carry tracks over the street to obviate the danger of crossing at grade is not a surrender of any part of the street to the exclusive use of the railroad, where the part of the city involved is sparsely settled and many of the streets are ungraded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.\*]

**7. MUNICIPAL CORPORATIONS (§§ 680, 681\*)—USE OF STREETS—RAILROADS—OVERHEAD CONSTRUCTION.**

A city may, within its police power, authorize the construction of structures for overhead railroad tracks supported by piers in the center of the street and at the curb line, where between the center piers and curb line piers there remains a roadway of 20 feet, and where between the curb line piers and the property line there remains a clear sidewalk space of 11½ feet, though bridges with a single span could have been constructed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.\*]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by George W. Detamore and others against W. J. Hindley and others, as Commissioners of the City of Spokane, and another, in which the Chicago, Milwaukee & St. Paul Railway Company intervened. From a judgment for defendants and intervener, plaintiffs appeal. Affirmed.

Skuse & Morrill, of Spokane, for appellants. H. M. Stephens and W. E. Richardson, both of Spokane, and F. M. Dudley and Geo. W. Korte, both of Seattle, for respondents.

ELLIS, J. In this action the plaintiffs sought a writ of mandate requiring the defendants, commissioners of the city of Spokane, to cause to be removed from Erie, Ivory, Denver, Perry, Hogan, Helena, Madelia, Magnolia, Pittsburgh, and Napa streets in that city the supports of certain bridges or overhead crossings maintained therein by the intervener, Chicago, Milwaukee & St. Paul Railway Company, for its railroad tracks.

The case was tried upon a statement of agreed facts in substance as follows:

In January and May, 1910, the Chicago, Milwaukee & Puget Sound Railway Company, predecessor in interest of the intervener, applied for certain franchise ordinances permitting the crossing of the streets in question with its tracks to be laid at grade. The city council refused to grant the application, but required that the tracks be carried over the streets in the manner specified in two ordinances finally passed on June 14, 1910, and February 23, 1911. These ordinances are in evidence. They prescribe the manner in which the bridge or viaduct cross-

ing each of the streets in question should be constructed. These provisions we shall not notice more specifically, since it is not claimed that the actual structures do not conform to the ordinances. These ordinances then provide that the bridges or viaducts shall be constructed either of steel or concrete, or a combination of these, and shall preserve such width of roadway and sidewalks as may be determined by the city council, but that if the bridges be made of steel they shall be constructed without center posts unless the span extending over the street from curb to curb is more than 40 feet in length. It is further provided that the grantee shall be permitted to erect temporary wooden viaducts, which shall be replaced by permanent structures as required by ordinance within three years.

After receiving the franchise and prior to constructing its road, the Puget Sound Company filed with the city council plans, specifications, and profiles showing the elevations of the bridges and viaducts which it proposed to construct. These were approved by the city council. The intervener, by an assignment of the franchise ordinance, has succeeded to all the rights of the Puget Sound Company in the premises.

Between December 1, 1911, and January 1, 1913, all the bridges were completed. Those over Denver, Perry, Hogan, Helena, and Madella streets were constructed of reinforced concrete. Those over Pittsburgh, Magnolia, Erie, and Ivory streets were of wood. The tracks were carried over Napa street on a wooden bridge previously constructed by and belonging to the Spokane & Inland Empire Railroad Company. It is admitted that the additions to this bridge made necessary by its use by the intervener do not materially add to the obstruction of the street.

The bridge over Denver street is typical of the concrete structures. It is supported by three rows of concrete piers, one in the middle and one on each side of the street at the curb line. There are four piers in each row 20 feet in height over the roadway; the base of the center piers in the middle of the street being 3 feet 6 inches wide and 30 feet 8 inches in length, lengthwise of the street. The piers on each side of the street at the curb line are on bases 2 feet 7 inches wide and 27 feet in length, lengthwise of the street. Between the center piers and the curb line piers, on each side, is a clear roadway of 22 feet. Between the curb line piers and the property line, on each side, is a clear sidewalk space of 11 feet 6 inches.

The wooden bridges follow the same general plan. The clear roadways on each side of the central supports vary from 16 to over 20 feet, save that on Ivory street there is a single clear driveway over 33 feet wide between the bents.

Neither of the streets crossed by the temporary wooden bridges has ever been graded, save such grading as was done by the rail-

road company in constructing the bridges. Bridges without supports resting in the streets would have required a span in each instance of much over 40 feet in length.

The total cost of all these bridges was approximately \$110,000. The plaintiffs had notice and knowledge that the bridges were being constructed, but made no complaint to any one until the month of May, 1913, more than five months after they were all completed.

In addition to the stipulation, the plaintiffs offered in evidence a picture of another bridge crossing a street with a span of over 84 feet. This was offered for the purpose of showing the practicability of constructing the bridges in question without supports in the street. The offer was refused.

When the plaintiffs had rested their case, the defendants and intervener moved for a dismissal, for the reasons, among others, that none of the structures complained of are unlawful, and that the plaintiffs by their laches are estopped from maintaining their action. The motion was granted in its entirety, and the action was dismissed. The plaintiffs have appealed.

The briefs take a wide range and discuss many interesting questions, but the principal contention of the appellants is that the provisions of the franchise ordinances, authorizing the carrying of the railroad tracks over the streets on bridges having supports within the street lines, are ultra vires. This presents a question going to the very basis of the case. If the power exists and was not abused, the writ was properly denied and a consideration of the other questions becomes unnecessary.

It is admitted that the Legislature has the power to confer upon a municipality the authority to authorize the placing of these supports in the street. It is conceded that the city has sufficiently authorized them if it has been so empowered. The one vital question therefore is: Has the requisite power been granted to the municipality? The answer must be found in the fundamental and statutory law of this state.

[1] The state Constitution (section 11 of article 11) provides:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

This is a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, the regulation reasonable and consistent with the general laws. *Odd Fellows Cemetery Ass'n v. San Francisco*, 140 Cal. 226, 73 Pac. 987.

[2] Where a public service railroad crosses the streets of a city, the power to compel the separation of grades and to authorize means to that end, not unreasonably impairing the use of the street by the public, it is a legiti-

mate exercise of the police power so conferred in the interest of the public safety. Any change in the street so necessitated is a public use. *Spokane v. Spokane & I. E. R. R. Co.*, 75 Wash. 651, 655, 656, 135 Pac. 636; *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47. Such an exercise of the broad police powers by a city is not only not in conflict with the general laws of this state, but is in direct accord with them.

[3] The statute defining the powers of cities of the first class (Rem. & Bal. Code, § 7507) declares:

"Any such city shall have power \* \* \* (9) To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads. \* \* \* (12) To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof."

By an act of 1907 (Rem. & Bal. Code, § 7510), the Legislature further declared:

"Any city of the first class shall have the power by ordinance to authorize the location, construction and operation of railroads in, along, over and across any highway, street, alley or public place in such city, for such term of years and upon such conditions as the city council of such city may by ordinance prescribe. \* \* \*"

It will be noted that these provisions relate to commercial as well as street railroads. It will also be noted that by the statute last quoted the power is given to authorize their location, construction, and operation, not only along and across the street or highway, but also over it. The authority conferred by subdivision 9 of section 7507 "to prescribe the terms and conditions upon which" the railroad may be constructed, coupled with the authority "to provide by ordinance for the protection of all persons and property against injury in the use of such railroads," is clear authority, if any were needed in addition to that granted by the Constitution, to provide for a grade separation by carrying the tracks over or under the street. Moreover, the grant contained in section 7510 of the power to authorize the location, construction, and operation of railroads "in, along, over and across any highway, street, alley or public place in such city \* \* \* upon such conditions as the city council of such city may by ordinance prescribe," is clear and explicit.

It is plain that these statutes empower the city to authorize the construction of railroads in the streets longitudinally as well as transversely. Such is the clear import of the words "along and across." *County of Cook v. Great Western R. Co.*, 119 Ill. 218, 10 N. E. 564. In fact, we have held that a statute giving power to cities of the fourth class to

authorize the laying of tracks on the streets, without the use of the words "along and across" (Rem. & Bal. Code, § 7731, subd. 13), confers the power to authorize a longitudinal as well as a transverse construction. *State ex rel. Sylvester v. Superior Court*, 64 Wash. 594, 117 Pac. 487. But the act of 1907 (Rem. & Bal. Code, § 7510) uses the word "over" in direct conjunction with the words "along and across." In view of the clear power to authorize the laying of tracks both lengthwise and across the street and the clear police power to compel a separation of grades in the interest of public safety, it cannot be doubted that the Legislature used the word "over" advisedly with the intent to confer power to authorize an overhead construction. We have so construed the word "over" in practically the same connection as used in the statute (Rem. & Bal. Code, § 9080) relating to the authorization of the construction of railroads of which the motive power is other than steam. *State ex rel. Ford v. Superior Court*, 67 Wash. 10, 120 Pac. 514.

It is true that in that case some stress, arguendo, was laid upon the power given by the statute to prescribe "the grade or elevation at which the same shall be maintained or operated"; but it is clearly held that the controlling words of the statute, even extending the meaning of the words last quoted, are the words "upon, over, along and across," coupled with the further provision giving the city power to prescribe "the terms and conditions" upon which such roads shall be constructed and operated. This is made plain by the following language:

"The relator says: 'The conferring of the power to prescribe the grade or elevation simply means that the Legislature has said to the city council that you may have the power and authority to protect the inhabitants of the city whom you represent officially against any public service corporation attempting to fix its line at an improper grade or elevation.' This argument is hardly in harmony with the contention that the city had no power to permit the construction of the road except upon the surface of the street. Moreover, such authority had already been conferred upon the council by the use of the words 'upon, over, along and across,' and by the further provision giving it the power to prescribe 'the terms and conditions' upon which such roads shall be constructed, maintained, and operated." *State ex rel. Ford v. Superior Court*, 67 Wash. 10, 15, 120 Pac. 514, 516.

Any other construction of the statute would make the word "over" superfluous.

[4] Statutes should, if possible, be so construed as to give every word its true significance. *Crozer v. People*, 206 Ill. 464, 69 N. E. 489.

So far as the question here involved is concerned, the controlling provisions of the two statutes (Rem. & Bal. Code, §§ 7510 and 9080) are practically identical. No just distinction can be found in the fact that the one relates to commercial railroads employing steam as the motive power and the other to street railroads employing electric or any

motive power than steam. In fact, conceding, as we must, the power of the city to authorize the construction of both kinds of roads upon, along, and across its streets, the necessity for the exercise of the police power by requiring a grade separation is obviously more imperative in the case of a steam road than of any other. It is clear that both the terms of the statute and the reasons for its enactment sustain the view that cities of the first class are empowered to authorize a separation of grades where commercial railroads are constructed either along or across the streets.

Whatever argument in favor of the city's power can be drawn from the condemnation statutes in the case of street railroads is equally present in the case of commercial roads. By an act of 1903 (Laws of 1903, p. 383) section 4334 of Bal. Code was amended so as to grant the power to railway companies to appropriate by condemnation "rights of way for tunnels beneath the surface of the land and any elevated rights of way above the surface thereof." This statute was re-enacted in 1907 (Rem. & Bal. Code, § 8740) by the same Legislature which enacted section 7510, above quoted, giving express power to cities of the first class to authorize railway companies to construct their tracks "in, along, over and across" any street. True, the power of eminent domain cannot be exercised to appropriate the interest of the abutting landowner in the street until a franchise to use the street itself has been secured from the city. *State ex rel. Sylvester v. Superior Court*, supra. But that is equally true of an appropriation by a street railway company if it involves an injurious change of grade. It seems to us that the parallel is complete.

[5] Since the power to require the grade separation exists as an integral part of the police power of the city, the appropriate means to its exercise must rest largely in the discretion of the city's governing body. The courts will not interfere with that discretion in the absence of a clear abuse. *Wabash R. Co. v. City of Defiance*, 52 Ohio, 262, 40 N. E. 89; *Murphy v. Chicago*, R. I. & P. Ry. Co., 247 Ill. 614, 93 N. E. 381. Piers reasonably necessary to that purpose and authorized by the city are not nuisances that can be enjoined by an owner whose property abuts on the street. *Gates v. Kansas City B. & T. Ry. Co.*, 111 Mo. 28, 19 S. W. 957; *Summerfield v. City of Chicago*, 197 Ill. 270, 64 N. E. 490; *Village of Winnetka v. C. & M. Electric Ry. Co.*, 204 Ill. 297, 68 N. E. 407; *Selbert v. Missouri Pac. Ry. Co.*, 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72; *Miller v. Long Island R. Co.*, 17 Fed. Cas. 332.

[6] The appellants place their chief reliance on the decision of this court in *State ex rel. Schade Brewing Company v. Superior Court*, 62 Wash. 96, 113 Pac. 578, in which we used language to the effect that a city of

the first class in this state has no power to grant to a railway company the right to appropriate any part of the street to the entire exclusion of the public, and in effect that the granting of a franchise purporting so to do was ultra vires. The language used in that case, however, must be construed with reference to the facts of that case. There one-half of the street for a distance of several hundred feet was surrendered to the absolute and exclusive use of the railroad company, not merely the space for supports for overhead crossings in aid of the safe use of the street by the public. The action of the city in that case could not be sustained by a reference to the police power. In that case there was an absolute surrender of a very material part of the street to serve alone the private use of the railroad company. Here no very material part of the street's surface is obstructed, and that only to make the joint use of the street by the railroad company and the public reasonably safe. The use of so much of the street for the base of such supports as may be reasonably necessary to carry the railroad tracks over the street in order to obviate the danger and inconvenience to the public of a grade crossing is not in any just sense a surrender of any portion of the street to the exclusive use of the railroad company. What is a material portion of a street is, of course, a relative matter. Three feet of the street's surface might be a very material encroachment in some localities and of little practical moment in others. The section of the city here in question is sparsely settled, and many of the streets are as yet not graded.

[7] Viewed in the light of the circumstances and conditions, the obstructions here in question are only technical obstructions. In view of the broad police powers of the city conferred by the Constitution, and in view of the clear authority conferred by statute upon cities of the first class to authorize a separation of grades, where railroads are permitted to occupy the streets, we are constrained to hold that the authorization of the structures here in question was a valid exercise of the police power of the city, and not an abuse of its discretion. While it may be true that nearly all of these bridges could have been constructed with a single span crossing the street, and that the supports in the streets were therefore not absolutely necessary, still, since all of the spans would have exceeded 40 feet, it is clear that the supports were reasonably necessary. In view of the end to be gained, namely, the safe use of the streets, we think that a reasonable necessity is all that should be required.

Upon mature consideration, it seems to us that the true distinction, between the *Schade Case* on the one hand, and the *Ford Case* and this case on the other, is to be found in the fact that in the *Schade Case* there was a clear abuse of the city's discretion and an



improper exercise of its police powers, while here there is no abuse of discretion, but a clearly proper exercise of that power.

Any attempt to review the many authorities cited by appellants from other jurisdictions would uselessly extend this opinion. They are nearly all distinguishable on the facts, and in those which are not so distinguishable there was apparently lacking the broad police power conferred upon cities of the first class in this state or the express statutory power to permit the construction of railroads over the streets.

A persuasive argument is advanced by the respondents tending to sustain the courts' decision on the ground of the appellants' laches in making no complaint until the intervenor had expended over \$100,000 on the faith of its franchise. We prefer, however, to base our decision upon the broad ground of the police power and the express statutory authority.

The judgment is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

(83 Wash. 248)

SNELL v. STELLING et al. (No. 11782.)  
(Supreme Court of Washington. Jan. 7, 1915.)

1. BOUNDARIES (§§ 35, 52\*)—PROCEEDINGS TO RESTORE—SURVEY—COMMISSIONERS—PAROL TESTIMONY.

Where, in a proceeding to restore a lost or uncertain boundary between adjoining proprietors claiming under deeds from a common grantor, it does not appear that the dispute cannot be solved by application of the two descriptions to the ground by an actual survey, the court, pursuant to the authority given by Rem. & Bal. Code, § 948, should appoint disinterested commissioners to make a complete survey of both tracts, and should admit parol testimony as to the location of the line only after it appears that the disputed lines, as located by such survey, will not coincide.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183, 253-260, 262, 263; Dec. Dig. §§ 35, 52.\*]

2. ADVERSE POSSESSION (§ 68\*)—ACQUISITION OF TITLE—SUFFICIENCY OF POSSESSION.

Where neither of the adjoining proprietors claiming land intends to claim beyond the true line as fixed by the description in his deed, possession of either up to the supposed dividing line will not vest him with a prescriptive title thereto under the seven-year statute (Rem. & Bal. Code, §§ 786, 788) as against the other.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. § 68.\*]

3. ADVERSE POSSESSION (§ 65\*)—ACQUISITION OF TITLE—POSSESSION UNDER MISTAKE—NOTICE.

For possession originating in mistake to become adverse, it is essential that there be a hostile intent to initiate an adverse holding and facts imposing notice thereof.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.\*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Ejectment by Catherine A. Snell against H. Jacob Stelling and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

Chapman & Bailey and B. F. Jacobs, all of Tacoma, for appellant. Blackburn & Gielen, of Tacoma, for respondents.

ELLIS, J. The plaintiff brought this action to eject the defendants from and to quiet title to a narrow strip of land which she claims as a part of her property, and especially to enjoin the defendants from interfering with her use of a spring located upon the disputed strip. As a first cause of action she claims title by deed from prior owners dated December 1, 1899, conveying a certain tract of land, described by metes and bounds as in the first description in the stipulation, to which we shall presently refer; avers that the north boundary of this tract ran along a rail and brush fence about 40 feet north of the spring; that in September, 1904, by pipes she connected this spring with a water system installed upon her farm, and has since used the water for domestic and farm purposes; that about December 1, 1912, the defendants entered upon the land and erected a fence 80 feet south of the north boundary line thereof, cutting the plaintiff off from the spring, threatening to disconnect the pipes and claiming title to the strip so fenced off. For a second cause of action it is alleged that about December, 1899, the plaintiff appropriated the waters of the spring for the watering of her stock and in September, 1904, permanently appropriated the water by means of pipes, and claims title by adverse possession and payment of taxes each year for more than seven years last past "upon said property." The defendants by answer denied that the plaintiff is or ever was the owner of or in possession of any part of a certain tract of land which is described by metes and bounds substantially as the second description in the stipulation hereinafter set out. Practically all of the allegations of the complaint are denied, save that the defendants admit that they erected the wire fence and claim that it is on the true boundary line between the two tracts. It is then averred by way of cross-complaint that a certain tract of land described as in the second description in the stipulation referred to was conveyed by one Darius M. Ross and wife on April 21, 1888, to one Elbridge Bartlett, and through mesne conveyances and by deed dated March 21, 1908, conveyed to the defendants; that the land so conveyed is the same land described in their answer; that the spring in controversy is located upon their land so described at a point about 20 feet north of its south boundary; that they and their predecessors in interest have been the owners thereof and in actual open and uninterrupted possession

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



thereof, and claiming adversely under color of title, for more than 10 years, and have paid all the taxes on the land so described. It is also averred that the plaintiff, on December 6, 1899, took an assignment of a certain mortgage upon the lands now belonging to the defendants, and by written release satisfied the same in October, 1901, and is thereby estopped to claim title to any part of the land so described. The defendants pray that title to the land upon which the spring is located be quieted in them. The reply puts in issue the affirmative allegations of the cross-complaint. The trial was to the court without a jury. Immediately after entering upon the trial the plaintiff offered in evidence a written stipulation, to which we have referred. It was received without objection. Omitting caption, it reads:

"It is stipulated by and between the parties hereto as follows:

"I. That on and prior to the 21st day of April, 1888, Darius M. Ross and Eliza J. Ross, his wife, were the owners of and in the possession of all of the property hereinafter described, a part of which is now in dispute between the parties in this action.

"II. That on said day said Darius M. Ross and wife made, executed, and delivered a deed to a part of the property by them owned as aforesaid to Albert S. Ross. The property conveyed to said Albert S. Ross, being described in said deed as follows: 'Beginning at the quarter section corner on the east side of section 30, township 20, N. R. 4 E. of W. M., thence north 88° 15' west Var. 22 E. along center line east and west of section 30, 60 chains to the west  $\frac{1}{16}$  line of the section, thence north Var. 22° east 6 chains and 50 links to a stake, thence south 88° 15' east 33 chains and 40 links to a stake, thence north 56° east 36 chains and 44 links to the left bank of Clark's creek, thence with the meander of the left bank of Clark's creek, and extending to the center of Clark's creek, south 35° east 0.93 chs., south 49° east 3.23 chs., south 77° east 3.00 chs., north 89° east 2.70 chs., thence south 42° 30' east 3.24 to a stake on the left bank of Clark's creek, thence south 35 west 26 chains and 1 link to the place of beginning, containing 84 acres more or less.' Which deed was recorded on the 23d day of April, 1888, in Book 30 of Deeds, at page 57 of the deed records of Pierce county.

"III. That on said 21st day of April, 1888, said Darius M. Ross and wife made, executed, and delivered a deed to a part of the property by them then owned as herein set forth to Eldridge Bartlett, also known as Elbridge Bartlett; the property in said deed to Eldridge Bartlett being described as follows: 'Beginning at the intersection of the west  $\frac{1}{16}$  line of section thirty (30) township twenty (20) north of range four (4) east of the Willamette meridian with the boundary line on the south side of the Puyallup Indian Reservation which is a government corner properly witnessed, thence north seventy degrees (70°) east Var. 22° east along said reservation line sixty-three chains and seven links (63.07 chs.) to the intersection of the east line of section thirty (30) with the Indian Reservation line, thence south 3.30 chains to the left bank of Clark's creek, south 47° 45' east 3.87 chains, south 17° east 1.74 chains, south 35° east 1.66 chains to a stake on the left bank of Clark's creek, thence south fifty-six degrees west thirty-six chains and forty-four links to a stake, thence north eighty-eight degrees and fifteen minutes (88° 15') west thirty-three chains and forty links (33.40) chs. to stake on

the west  $\frac{1}{16}$  line of section thirty (30), thence north six chains and forty links (6.40) to the place of beginning, and containing eighty-four (84) acres more or less.' Which deed was recorded May 15, 1889, in Book 36 of Deeds at page 375 of the deed records of Pierce county, Wash.

"That by virtue of mesne conveyances and proceedings the plaintiff herein has succeeded to the right and title of said Albert S. Ross in the land so conveyed to him, and the defendants herein have succeeded to the right and title of said Eldridge Bartlett in the land conveyed to him as herein set forth.

"B. F. Jacobs,

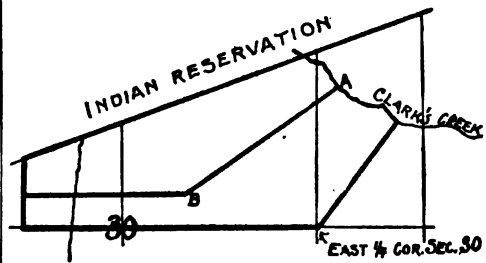
"Chapman & Bailey,

"Attorneys for Plaintiff.

"Blackburn & Gliens,

"Attorneys for Defendants."

The evidence is voluminous. We can do no more than give its purport. We here reproduce a plat of the lands drawn by one Wheeler who made a partial survey with a view to determining the dividing line between the two tracts in December, 1901. This bare outline was all that was offered in evidence of this Wheeler survey. No field notes were produced. Wheeler is now dead. The plat is reproduced merely to illustrate the evidence.



The plaintiff's husband testified that this Wheeler survey placed the spring on the plaintiff's land. The plat itself, however, is silent on the subject. This survey is of little probative value; no distances are marked, nothing to show the starting point nor how the various corners, lines, and angles were located.

In 1903 the plaintiff procured a partial survey of the dividing line between the two tracts by one Funk, then county surveyor. The plat of this survey which is in evidence places the spring about 23 feet south of the dividing line and on the appellant's land. Funk testified that he ran this line from the plaintiff's deed. There is no evidence that he ran all the lines in that deed, or attempted to locate all the corners and monuments. The other parts of the plat were drawn by mere computation. He began at the east quarter corner of section 30, ran thence west along the east and west center line of the section to what he computed to be the west sixteenth corner of that section on that line, ran thence north 6.5 chains, or 429 feet, thence east, parallel with the east and west center line of the section, 33.4 chains the distance of the third call in the deed. There is no evidence that from there on he ran any of the other lines.

In October, 1912, the plaintiff had a third partial survey made by one Webb. This line, like the other, was a survey only to establish the west part of the dividing line according to the third call of the plaintiff's deed. It was made in the same way as the Funk survey. Webb testified that this line runs 15.1 feet north of the spring, thus disagreeing by something over eight feet from the location of the spring with reference to the line as shown upon Funk's plat. Webb testified that by reversing the calls in the defendants' stipulated deed, that is, running the last call first, the west part of the dividing line which he surveyed would almost coincide with his survey. He states, however, that he did not survey the east part of the tract, nor attempt to locate the intersection of the dividing line with Clark's creek according to the calls in either deed.

In November, 1912, the defendants had the dividing lines between the two tracts surveyed by one Nicholson. The lines were actually run by Joseph Bell, a man in Nicholson's employ, but were checked up by Nicholson from Bell's field notes. Both Bell and Nicholson testified that they began at the east quarter corner of section 30, ran thence north to the intersection of the east line of section 30 with the southerly line of the Puyallup Indian Reservation for a point of beginning. Thence following the calls in the defendants' deed from that point, they located the point on the left bank of Clark's creek, called for in the defendants' deed as the beginning of the dividing line, thence, following the courses and distances in the defendants' deed, ran a line in a southwesterly direction to the brow of the hill, thence, following the calls and distances in the deed, ran the line west to what they claim is the west sixteenth line of section 30. This line so found, although parallel with the east and west center line of section 30, is several feet south of the line as located by Funk and Webb, and extends a few feet beyond the west sixteenth line of section 30 as located by Funk and Webb. The spring is about 20 feet north of this line. From their computations, but not by actual survey, both Nicholson and Bell testified that the dividing line, if run completely according to the calls and distances of the plaintiff's deed, continuing from the point where the Webb survey actually ended diagonally across the bottom land for the distances called for in the deed, would extend the line several feet across Clark's creek. So far as the evidence of these various surveys goes, it tends to establish the fact that neither the description in the stipulated deed of the plaintiff, nor the description in the stipulated deed of the defendants, would close when actually surveyed upon the ground, and that the division lines as described in the two deeds do not coincide.

There was evidence of a survey prior to any of these. That survey was made by one

Miller in the spring of 1888, and was for the purpose of dividing the entire tract, including the lands claimed by both parties, between Albert S. Ross and Eldridge Bartlett, the grantees mentioned in the stipulation, under the following circumstances: Darius M. Ross owned all of the land. Albert S. Ross, his son, and Eldridge Bartlett, his son-in-law, had purchased the land from him. They desired to divide it as nearly as possible equally, yet so that each would have one-half of the more valuable bottom land. Three arbitrators, selected in the usual manner, made the division with the assistance of the surveyor, Miller. The result was the two descriptions in the deeds to Albert S. Ross and Eldridge Bartlett substantially as set out in the above stipulation. Miller, however, made no plat nor, so far as the record shows, were his field notes preserved otherwise than as recited in the two deeds. He was not produced as a witness. One of the arbitrators, Frank R. Spinning, and Albert S. Ross and his brother Charles H. Ross, both of whom assisted in the survey, testified that this survey and division as marked upon the ground at the time placed the dividing line between the two tracts south of the spring in dispute, so that the spring fell upon the Bartlett tract. All of these witnesses claim to remember that fact because Albert S. Ross was particularly desirous of getting the spring, but did not get it. They all testified that the arbitrators selected as a starting point for the dividing line a point on the left bank of Clark's creek, where a stake was set. For convenience of illustration we have marked this point "A" on the plat. Thence they ran the line in a southwesterly course to the brow of the hill so as to divide the valuable bottom land as nearly as possible equally. At the point reached by this course on the brow of the hill a stake was set; this point we have marked "B." The dividing line was run thence west in a straight line to the western boundary of the entire tract. The Ross brothers testified that this line was marked on the ground at the time by blazing the trees. There were slight evidences of this blazed line at the time of the trial. There was clear evidence, however, that shortly after the division Albert S. Ross and Eldridge Bartlett built a fence, along what they both conceded to be their dividing line, from the stake on the left bank of Clark's creek to the point on the brow of the hill where the line turned west. At the time of trial there were seven or eight panels of old post and rail fence running west from the end of the old diagonal fence. There were distinct evidences of both of these old fences on the ground at the time of the trial. There were slight evidences of an old brush fence extending a little distance further west in an irregular line. If extended in its general direction, it would pass to the south of the spring. The court, evidently conceiving that the conflicting surveys dem-

onstrated the ambiguity of the two deeds when applied to their subject-matter so as to admit of extrinsic evidence, took the angle where the old fence across the bottom land met the seven panels of post and rail fence as the point on the hill to which the call from the stake on Clark's creek was intended in the original division to run, and thence ran the line west to the west boundary of the two tracts. This line ran between the Webb and Nicholson lines, but placed the spring in controversy on the respondents' land. The decree went accordingly, save that, it appearing that the plaintiff in 1901 had built a new fence five feet north of the line of the old fence diagonally across the bottom land, she was accorded that five-foot strip. The plaintiff appealed.

[1, 2] We shall not attempt a discussion of the various claims of error assigned, since they resolve themselves into the single claim that the trial court should have established the line of the Webb and Funk surveys as the dividing line, and that parol evidence was inadmissible to establish the location of the line on the ground at the time of the original division between Ross and Bartlett. Some of the questions elaborately discussed are eliminated by the stipulation which we have set out. This stipulation, deliberately entered into at the outset, narrows the issues presented by the pleadings by eliminating all claim of title on either side save that taken by Albert S. Ross on the one hand and by Bartlett on the other by their respective stipulated title deeds. It eliminates the plaintiff's claims of title by adverse possession with payment of taxes under the seven-year statute (Rem. & Bal. Code, §§ 786, 788), because it limits her color of title to the description in her title deed and limits her entire claim of title, rightful possession, and payment of taxes to that land. *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073. It is not pretended that she has paid taxes by any other description than that included in her title deed. On the other hand it limits the defendants' claims of title in the same way, since by this stipulation they claim rightful possession of no more than is included in the description in the stipulation as the Bartlett land.

"Where neither party intends to claim beyond the true line, possession, up to what is erroneously supposed to be the true dividing line between adjoining proprietors, will not work a disseisin in favor of either of any land occupied by him under such erroneous belief." 2 Devlin on Deeds (2d Ed.) § 1037, p. 1457. *Milbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053; *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836, 33 L. R. A. (N. S.) 923.

[3] It is true that possession originating in a mistake may become adverse. That, however, is a question of fact. There must be some evidence of a hostile intent and facts imposing notice of that intent to initiate an adverse holding. *Johnson v. Ingram*, supra; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936. There is no such evidence in this case.

We are clear that this narrowing of the issues is the inevitable effect of this stipulation, and that the whole dispute must be solved by the application of these two descriptions to the ground itself, if by a complete survey according to the calls, monuments, and distances in each stipulated description they can be made to inclose the respective tracts so that the north line of the one shall coincide with the south line of the other. If this can be done, this dividing line, wherever it falls, is by this stipulation conceded to be the correct dividing line, and the right and title to the waters of the spring must be adjudged accordingly. If this cannot be done, but only then, parol evidence would be admissible to determine where the dividing line was intended to be and where it was actually placed upon the ground and acquiesced in by Ross and Bartlett when the division was made. Had there been clear evidence that the descriptions cannot, by actual survey, be so applied to the land as to fix the dividing line, we would deem the parol evidence sufficient to establish this line where the trial court placed it. The parties have, in effect, stipulated that the plaintiff stands in the shoes of Albert S. Ross, and can claim nothing more than Ross could claim against Bartlett, and that the defendants stand in the shoes of Bartlett and can claim nothing more than Bartlett could have claimed against Ross. The last paragraph of the stipulation makes this plain. The fact that the deed to Albert S. Ross was first recorded is therefore immaterial. Both deeds were of record when the parties here acquired their respective lands. The deeds were executed on the same day under circumstances showing a clear intention of all concerned that they should be simultaneously delivered. In short this stipulation reduces the action to one in its essence to restore a lost or uncertain boundary as contemplated by the statute touching such cases. Rem. & Bal. Code, c. 7, §§ 947-949.

It is obvious that parol testimony would be inadmissible to establish this common boundary line unless there is some defect or ambiguity in one or both of the stipulated descriptions. There is no patent ambiguity appearing upon the face of either description, nor do we believe that it can be fairly said that the partial surveys in evidence demonstrate, with any degree of certainty, that there is a latent defect or ambiguity in either description when laid upon the ground. So far as the record shows, no survey since the Miller survey, made for the purpose of dividing the land, was a complete survey running all of the boundaries of both or either tract according to the monuments, calls, courses, and distances included in both or either description. Since the action has been reduced in its essence to one to restore a lost or uncertain boundary, we think the case is one peculiarly calling for the appointment of disinterested commissioners to make a complete

survey of both tracts upon the ground, with a view to establishing the common boundary between the two tracts, if it can be done by a survey following the descriptions, and in any event returning to the court a plat of their survey with their field notes, together with their report. The discretion to appoint commissioners for that purpose is clearly given by the statute (Rem. & Bal. Code, § 948), and we think, under the state of the record now before us, that had such an application been made by either party in the court below, a refusal to follow that course would have been an abuse of the discretion.

We are therefore of the opinion that the decree should be vacated, and the cause remanded, with direction to the trial court to open the case for further evidence, appoint three commissioners as provided in the above-mentioned statute for the purpose of surveying the land, and upon their return of such survey to take their testimony and consider the same in connection with all of the testimony touching the several surveys admitted at the former trial. If from this testimony the court is satisfied that the two stipulated descriptions by an actual complete survey cannot be harmonized so that the south line of the one will coincide with the north line of the other, he shall then consider the parol testimony relative to the original establishment of the line upon the ground, and the acquiescence of Ross and Bartlett therein, as properly admitted, and upon the whole record so supplemented make his decree.

We deem it proper to state that since neither party is seeking a reversal of this decree in so far as it establishes the present fence of the appellant across the bottom land as a boundary line, to that extent the line may be considered as agreed to, but of course not for the purpose of locating the remainder of the dividing line running thence west.

The decree is reversed and the cause is remanded for further proceedings in accordance with this opinion. Neither party will recover costs on this appeal.

CROW, C. J., and CHADWICK, GOSE, and MAIN, JJ., concur.

(83 Wash. 514)

STATE v. JACKSON et al. (No. 11885.)

(Supreme Court of Washington. Jan. 11, 1915.)

**1. CRIMINAL LAW (§ 721½\*)—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY.**

Where the prosecuting attorney, during the trial, demands the production by accused of an instrument in his possession, he is guilty of misconduct, because compelling accused to give evidence against himself by producing the instrument, or permitting the jury to draw unfavorable inferences arising from his refusal to produce it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.\*]

**2. WITNESSES (§ 300\*)—PRIVILEGE OF WITNESSES—RIGHTS OF ACCUSED.**

The rules of practice prescribed by Rem. & Bal. Code, § 2137, providing that issues in a criminal case shall be tried by a jury, and that the law relating to the drawing, retaining, and selecting of jurors and trials by jury in civil cases shall apply, and section 2152, declaring that rules of evidence in civil actions, so far as applicable shall be applicable to criminal prosecutions, and section 2158, requiring the court to decide all questions of law arising in the course of the trial, which shall be conducted as civil actions, cannot deprive accused of the protection guaranteed by Const. art. 1, § 9, declaring that no person shall be compelled in any criminal case to give evidence against himself, and the prosecuting attorney may not, during the trial, demand of accused the production of an instrument in his possession, as a condition to the introduction of secondary evidence; for the right of the state to introduce secondary evidence does not depend on notice to produce instruments in the possession of accused, and which are believed to be incriminating.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. § 300.\*]

**3. WITNESSES (§ 305\*)—PRIVILEGE OF WITNESSES—SELF-INCRIMINATION.**

Accused, who offers himself as a witness to explain testimony which he has been forced to give against himself by inferential and indirect methods, based on his refusal to produce, on demand of the prosecuting attorney, an instrument in his possession, is not a voluntary witness, and the misconduct of the prosecuting attorney in demanding the production of the instrument is not removed thereby.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.\*]

**4. CRIMINAL LAW (§ 656\*)—TRIAL—MISCONDUCT OF TRIAL JUDGE—COMMENT ON TESTIMONY.**

The action of the court in so questioning a witness for accused as to indicate a doubt as to the credibility of the witness is a comment on the evidence, in violation of Const. art. 4, § 16.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

**5. CRIMINAL LAW (§ 1053\*)—MISCONDUCT OF TRIAL COURT—"EXCEPTION"—NECESSITY—"RULING"—"DECISION."**

The misconduct of the court in so questioning a witness for accused as to indicate a doubt as to his credibility is reviewable without an exception, within Rem. & Bal. Code, § 381, declaring that an "exception" is a claim of error in a ruling or decision of the court made in the course of the trial; the conduct of the court not being a "ruling" or "decision."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2661, 2665; Dec. Dig. § 1053.\*]

For other definitions, see Words and Phrases, First and Second Series, Exception; Decision; Ruling.]

**6. WITNESSES (§ 349\*)—IMPEACHMENT—PROOF OF IMMOBILITY.**

A witness may be impeached by proof of her general bad reputation for morality, either on her cross-examination, or by witnesses testifying to her bad reputation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.\*]

Department 1. Appeal from Superior Court, Pacific County; Edw. H. Wright, Judge.

J. W. Jackson and another were convicted of crime, and appeal. Reversed and remanded.

J. T. Welsh and M. M. Richardson, both of South Bend, and Robt. G. Chambers, of Raymond, for appellants. H. W. B. Hewen, of South Bend, for the State.

CHADWICK, J. Appellants were convicted of the crime of conspiracy to pervert and corrupt public justice and the due administration of law, in the superior court of Pacific county, Wash., in a case there pending entitled *J. W. Coleman and Belle Coleman v. City of Raymond*. They have brought their case here, making 21 assignments of error. We will not discuss assignments which, in our judgment, have no merit, or which will not likely recur upon a new trial, or those which we regard as without prejudice.

[1] It is one of the contentions of the state that the defendants, acting in conspiracy, had paid money to suborn the testimony of certain witnesses. The city of Raymond had drawn a warrant which had been forwarded to one of the defendants at Portland, Or., where it is alleged the witnesses were corrupted. The state also contended that a witness had been induced to make a certain statement in writing, and that the statement tended to prove the crime charged. Prior to the trial the prosecuting attorney made a demand upon the defendants to produce the draft and statement. They were not produced. A witness was called to give secondary evidence as to the contents of the bank draft, and the witness, who it is alleged signed the statement, was called for a like purpose. The prosecuting attorney, in the presence of the court and jury, and over the objections of counsel renewed his demand for the production of the documents. This, in our judgment, constitutes reversible error.

"To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the Constitution [of the United States], providing that no person in any criminal case shall be compelled to be a witness against himself." *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358.

The reasoning to sustain this principle lies in this: That the state is not put to the necessity neither will it be permitted to put an inference of guilt which necessarily flows from an imputation that the accused person has suppressed or is withholding evidence, when the Constitution provides that no person shall be compelled to give evidence against himself. Not being bound to produce evidence against himself, the demand is futile, and can serve no purpose, except to put defendant in a false light before the jury, and compel him to defend himself against the inferences arising from a collateral circumstance and to the stress of extricating himself from a position in which the Consti-

tution says he shall not be placed. The state, under the ordinary rules of evidence, could have examined either one of the witnesses as fully and as completely as it desired without demanding the documents.

In *Gillespie v. State*, 5 Okl. Cr. 546, 115 Pac. 620, 35 L. R. A. (N. S.) 1171, Ann. Cas. 1912D, 259, it is said:

"When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon." *McKnight v. U. S.*, 122 Fed. 926, 61 C. C. A. 112; *State v. Merkley*, 74 Iowa, 695, 39 N. W. 111; *Ellis v. State*, 8 Okl. Cr. 522, 128 Pac. 1095, 43 L. R. A. (N. S.) 811; *Hibbard v. U. S.*, 172 Fed. 66, 96 C. C. A. 554, 18 Ann. Cas. 1040.

While the question has never come to this court in just the same way, the principle is recognized in the case of *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 933, where a reversal was predicated upon a record showing that the court had compelled a defendant, who was a witness on his own behalf, and over his objection, to testify that certain letters and documents had been written by him, and in *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382, where it was held that the right of the state to introduce secondary evidence did not depend upon a notice to produce documents possessed by a defendant, and which were believed to be incriminating, for the reason that it was beyond the power of the court to enforce the demand. The court followed *McGinnis v. State*, 24 Ind. 500:

"It is difficult to perceive what benefit could result, either to the state or the defendant, from giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury, upon his refusal to procure it after notice."

[2] But it is contended by the prosecuting attorney that the rules of practice in civil cases, in the absence of a special statute (*Rem. & Bal. Code*, §§ 2137, 2152, 2158), are made the rule of practice in criminal cases. Admitting that in a proper case this contention would be well founded, it is sufficient answer to say that no statutory rule of practice, whether in a civil or criminal case, would interfere to bar a defendant of the protection of section 9, art. 1, of our Bill of Rights and of the fifth amendment to the Constitution of the United States.

The prosecuting attorney earnestly and sincerely challenges the rule in the case of *McKnight*. He cites many cases holding that it is not error for the prosecuting attorney to comment upon the fact that a defendant has failed to produce evidence that was within his possession and under his control. Our answer to these cases and his argument is that this court, in the cases of *O'Hara* and *McCauley*, has adopted a different rule, and that they are, in our judgment, hostile to the

fifth amendment of the Constitution of the United States, and possibly to the Constitutions of the states where they were pronounced. The prosecuting attorney also relies upon the criticism of Mr. Wigmore, who, in his work on Evidence (volume 3 [1904 Ed.] p. 3149, § 2273, note 3), says:

"The following case is unique: 1902, *McKnight v. U. S.*, 54 C. C. A. 358, 115 Fed. 972 (after evidence that an incriminating document is in the accused's possession, no notice of production can be given by the prosecution, because the claiming of the privilege would permit inferences to be drawn against him. The ruling is made on the assumption that a copy could be used under such circumstances without notice to produce—an incorrect assumption, as shown ante, §§ 1202, 1205, 1207. It also involves the fallacy that the mere necessity of making a claim of privilege for documents is improper because of the possible resulting inference—a fallacy which reasons in a circle, because the privilege cannot be enforced until it is claimed, and the court cannot both enforce it and forbid the necessary condition precedent to enforcing it. The ruling also involves the fallacy that the accused's failure, on notice, to produce the document was equivalent to a claim of privilege, but it was not because it might have been done in precisely the same way for a noncriminating document, and would merely have served as a basis for the use of a copy by the prosecution. These three fallacies so subtly combine in this ruling that the result is a plausible one; but the ruling remains purely fallacious and wholly unsound)."

If we were treating the question in the abstract, it might with some plausibility be contended that we were reasoning in a circle, but reasoning cannot be rejected as meeting itself at the other side of a circle when at the point of meeting it comes counter to a constitutional provision which says that a thing shall not be done. This means, shall not be done directly or by the pursuit of indirect methods. Furthermore, the reasoning of the learned text-writer is faulty in this: The constitutional privilege of the defendant is known to the prosecuting attorney, and to demand a paper alleged to be incriminating, a jury being present, can bear but one construction, and that is a purpose to cast a reflection of guilt. We reject the authorities cited by the state for the further reason that, under our statute and under the fundamental principles of the law as we understand them to be, the state could have proved all that it hoped to prove without a demand either before or at the trial. The state contends also that, granting all this to be so, it was error without prejudice, because the defendants took the stand in their own behalf and testified as to the matters inquired into.

[3] The principle that one who voluntarily offers himself as a witness cannot invoke that provision of the Constitution which guarantees that no person shall be compelled in any case to give evidence against himself is relied on. *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800. These cases do not apply to the case at bar. It cannot be said that a witness who has been put un-

der the imputation of guilt (*Chamberlayne, Modern Law of Evidence*, 1080), in defiance of the Constitution of the state, and who offers himself as a witness to explain so far as he can the testimony which in law he has been forced to give against himself by inferential and indirect methods, is a voluntary witness. The fact that a witness may be compelled to answer to the jury for something that could not be introduced directly is in itself enough to sustain the protective clauses of the Constitution. If it were not so, the state, having no right to call for the testimony, could, by putting the imputation of guilt which follows an insinuated suppression of evidence upon a defendant, force an issue where there was none, and where none could have been raised directly. We are satisfied that the substantial and constitutional rights of the defendants were violated by the proceedings complained of.

[4] Mrs. Marguerite Jackson was called as a witness. Mrs. Jackson is not related to the appellant Jackson. She is a professional stenographer, and was apparently a disinterested witness. She had been employed at Portland, Or., by the defendant Welsh to prepare certain interrogatories to be put to the principal witness, Maggie Rose. She testified, as did two other witnesses, that she wrote out the interrogatories and the answers thereto, on April 15th, and that they were sworn to by Mrs. Rose on that day. Mrs. Rose at the trial testified that she had not signed interrogatories and answers in the office of the attorney where they are said to have been written, prior to the 25th day of April, 1913, when she gave a deposition in the case which was favorable to the defendants. Her testimony is to the effect that the appellants, prior to the 25th of April, met her at a hotel in the city of Portland; that they had questions and answers written out; that she was schooled as to the testimony she was to give; and that a copy of the questions and answers were given her so that she might perfect herself as a witness in behalf of the city in the case of *Coleman v. Raymond*.

We think it will hardly be contended that a conviction could have been had in this case without the testimony of Mrs. Rose. She swore that she had been paid money by defendant Jackson. During the progress of the examination of Mrs. Jackson, and while she was under cross-examination by the prosecuting attorney, and while the paper which Mrs. Rose says had been handed to her by Welsh for the purpose of rehearsing her testimony was a subject of inquiry, the court of its own motion interrupted and cross-examined the witness as follows:

"The Court: Where did this paper come from; part of the stock in the office of McUel? A. Yes; I used some of their stationery. The Court: You say you have your notebook here. Will you let me see it? A. Yes, sir. The Court: Turn to the notes of this particular proceeding. You just took a book over there? A.

Yes, sir. The Court: *No date on it?* A. No. (The court examines notebook.) The Court: *How many pages does that cover?* A. I think it covers three pages of typewriting. The Court: *Your notes I mean?* A. Nine pages. The Court: *You have no dates in this book at all?* A. No; I haven't. The Court: *What system of shorthand do you use?* A. Howard Pitman. Q. *Would you like to leave on the afternoon train; do you need this book particularly?* A. Yes; I have notes in there. I don't know as there is anything on the back of those notes that I wish to save. The Court: *You retain it so we can get it?* \* \* \* Mr. Hewen: When you commenced to use the book did you commence at this front portion? A. I did. Q. Why was it then that on the very first sheet of this book the case of J. W. Coleman and Belle Coleman against the city of Raymond is titled? A. I took the interrogatories that were dictated to me by Mr. Welsh to be propounded to the witness on the 26th. Q. That was on the 15th? A. Yes; that was on the 15th. Q. But here these interrogatories about which you have testified that were propounded to her on the 15th occur nine or ten pages, or a number of pages, further over in the book; why is that? \* \* \* Those interrogatories were dictated so they could be propounded on the 26th. The Court: The first page shows the title of the case and then that is followed by what—the interrogatories to be given on the 26th? A. Yes, sir. Q. And that is followed by what? A. By her statement she made. Q. And that dictation was taken as I understand you during the half hour preceding the arrival of Mrs. Rose? The Court: *That seems to be in consecutive order.* Mr. Hewen: Q. Will you turn to the first page of your book and read the interrogatories there contained of which you have just testified? Mr. Welsh: Which interrogatories? Mr. Hewen: The first ones."

"The Court: The ones to be used on the 26th. (The witness here reads questions and answers from her notebook.) Witness (reading): A. What is your name and where do you reside? Q. Next? Witness (reading): A. Where were you residing on or about the 1st day of October, 1912? Q. Yes? Witness (reading): A. Are you acquainted with J. W. Coleman, the plaintiff in the above-entitled action, and, if so, for how long have you known him? Q. Yes? Witness (reading): A. Did you see said J. W. Coleman on the night of the 1st of October, 1912, or the morning of the 2d of October, 1912, and, if so, state when and where and what was he doing, and did you have any conversation with him at that time, and, if so, what was it?"

#### Examination resumed:

"Mr. Hewen: Q. Let me ask you a further question: If those were the interrogatories to be propounded on the 26th that were dictated to you by Martin Welsh, did Mr. Welsh at that time make any explanation, when Mrs. Rose a few minutes afterwards came in and those other questions were propounded, why he didn't propound those questions to her? A. No; he wouldn't make any explanation like that to me. Q. He made no explanation? A. No. Q. But went forward and propounded an entirely different set of interrogatories? A. He never used any paper at all in asking his questions. Q. He didn't ask you to read these off? A. He didn't. I was not a notary."

We have italicized that part of the examination, or rather cross-examination, by the court which, in our judgment, is objectionable and sufficient, when taken in connection with other facts and circumstances in the case, especially the great importance,

if not the absolute essentiality, of the testimony of the witness Maggie Rose, to sustain the contention that the conduct of the trial judge was prejudicial to the rights of appellants. No inference can be drawn from the record other than that the court entertained some doubt as to the credibility of the testimony given by the witness. We think the conduct of the court was clearly a comment upon the evidence and violative of the rights of the appellants under article 4, § 16, of the Constitution. His comment that there was no date on the book and his inquiry as to where the paper upon which the interrogatories and answers were written had been obtained indicated a doubt as to the integrity of the witness. It at least insinuated the possibility that her statement might be inquired into upon an independent investigation. His remark that the notes seemed to be in consecutive order stands out as the marking of a circumstance to be considered as against the insinuated doubt. His inquiry as to the system of shorthand used by her likewise indicated a belief on the part of the court that her testimony might bear further investigation, and that he intended to refer the notes to some one who was familiar with the Howard Pitman system of shorthand. This conclusion seems inevitable when the court had the witness read some of the interrogatories from her book, so that he might compare them with the written interrogatories and answers, and the final request of the court that the witness leave her notebook, and a final charge to her that she retain it so that "we can get it."

[5] The prosecuting attorney does not seriously combat this contention of the appellants, but it is insisted that no exceptions were taken to the conduct of the court. An exception "is a claim of error in a ruling or decision of a court, judge or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein." Rem. & Bal. Code, § 381. The conduct of the court cannot be called either a ruling or a decision, but it is nevertheless a part of the record upon which a claim of error may be predicated and sustained if actually or impliedly prejudicial. Indeed, such an act would ordinarily put a person accused of crime, and who is attended by a presumption of innocence, to great embarrassment, and make it more likely that prejudice would result if counsel engaged the court even to the extent of excepting to his remarks. Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men



who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy a juror would not be a man if he did not, in some of the distractions of mind which attend a hard-fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

"It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness that nothing, in either the tone or inflection of the voice, the play of the features, the manner of propounding or framing the question, or the course of investigation pursued in the examination will indicate to the jury the trend of mind of the questioner. An extended examination of a witness by the court, must be unfair, unless it partakes partly of the nature of a cross-examination, and, though great skill and tact and perfect fairness be employed, there is much danger the impression or opinion of the court as to the truthfulness, candor, and reliability of the witness and as to the weight and value of his testimony will be manifested to the jury. Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness, or facilitate the progress of a trial without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable." *Dunn v. People*, 172 Ill. 582, 50 N. E. 137.

"In a criminal case the action of the trial judge in subjecting the witnesses of defendant to a rigid and extended examination on the vital points of the defense, or in catechizing them at length as to their knowledge of the facts as to which they have testified, has a tendency to discredit them, and is prejudicial error requiring a new trial in case of conviction." 40 Cyc. 2440.

While counsel cites many cases to the effect that an exception must be taken before alleged misconduct of the court can be taken notice of on appeal, the authority is not apt or pertinent. As said in the case of *State v. Crotts*, 22 Wash. 245, 60 Pac. 403, our Constitution, in so far as it declares that a judge should not comment upon the facts, is unlike the Constitutions of other states.

"There is no other Constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours."

The principle relied on has been decided by this court in the case just cited. It was urged that misconduct of the court in questioning a witness could not be taken advantage of in this court, because no exceptions had been taken. Judge Dunbar, whose keen sense of fairness and justice was never doubted by any man, wrote the opinion, saying:

"It is urged by the respondent that, as no exceptions were taken by the defendant to the questions propounded by the judge at the time they were propounded, under the general rule, and under the rulings of this court, no basis for a determination of those questions in this court has been laid. It is true that the ordinary rule is in consonance with the ruling, frequently announced by this court, that alleged errors will not be reviewed without they are excepted to at the time they are committed; but we do not think the error alleged in this instance falls within the rule, nor that the rule should be enforced when its observance would tend to destroy the very object for which the objection is ordinarily made. An attorney is placed in a delicate position under such circumstances. It is dangerous for him to enter into a controversy with the court in relation to matters and proceedings which the court itself is instituting. The court should not place counsel in this position without it becomes absolutely necessary for the furtherance of justice. In this case the defendant's counsel had to choose between the probability, or at least the possibility, of prejudicing his case in the minds of the jury by reason of his expressed opposition to the course pursued by the court, or else lose the benefit of an objection which he was entitled to make. We do not think counsel should be compelled to imperil their cause in the lower court for the purpose of protecting their rights in the appellate court. \* \* \* There are different ways by which a judge may comment upon the testimony, within the meaning of the Constitution referred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The Constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues."

See, also, *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131.

[6] Appellants undertook to prove the general reputation of the witness Maggie Rose for morality in the neighborhood in which she lived. The court sustained an objection to this form of proof. Maggie Rose, as we have said, was the principal witness for the state, and without her testimony it is not likely that a conviction could have been had. The testimony was competent under the authority of *State v. Coella*, 3 Wash. 90, 28 Pac. 28. The rule, as stated by Underhill in his work on *Criminal Evidence* (2d Ed.) § 237, is as follows:

"Impeachment by showing the general bad character of the witness aside from truthfulness. A few authorities reject all evidence to prove the good or bad character of a witness, except so far as it is confined to his reputation for truthfulness, or the reverse. If the witness possessed no knowledge of that particular trait of character, he is incompetent. But the majority of cases allow greater latitude. In most cases, evidence involving the whole moral character of the witness will be received upon the reasonable theory that a man who is addicted to vicious habits, or who is prone to commit immoral acts, may be presumed to have lost respect for truth and to be ready to perjure himself when it is to his interest to do so."



(19 N. M. 623)

The prosecuting attorney seeks to distinguish the Coella Case. He says that the witness was there asked upon cross-examination "if she were not a prostitute," and there is a greater latitude allowed in cross-examination than when offering independent proof. We nevertheless believe that the reputation of a witness for immorality may be inquired into, either upon cross-examination or by a resort to general reputation. It is not the manner of proof that concerns the law so much as the object sought to be attained, for, as said by this court in the Coella Case, a woman cannot ruthlessly destroy that quality upon which most other good qualities are dependent, and for which, above all others, a woman is revered and respected, and retain her reputation for truthfulness unsmirched. We can mark no distinction between receiving evidence as to the reputation of a witness for truth and veracity and receiving evidence of reputation as to moral character, when this court has said that a reputation for immorality is a thing to be considered when passing upon the credibility of a witness.

The state contends that the case of *State v. Poyner*, 57 Wash. 489, 107 Pac. 181, is not in point. In that case the question, "Do you know the reputation for chastity in Cle Elum of Minnie Black?" was asked of a witness. Counsel say that the question was proper because of the nature of the crime charged, which was that the defendant associated and cohabited with a woman not his wife. On the contrary, it is evident that the purpose of the testimony was to create a reasonable ground for an inference that the woman, who was a witness upon the trial, was not a person of dependable veracity. If it were not so, then the question would have been irrelevant and immaterial to the issue, for the statute then in force made one so cohabiting guilty, without reference to the character of the woman with whom he cohabited.

It is strenuously contended that upon the whole case there is not enough testimony to sustain a conviction. The case comes to us with a statement of facts and record comprising some 2000 pages. We cannot review the facts within reasonable compass. It is enough to say that, after an examination of the record, we are of the opinion that, however weak the testimony may be as viewed by an appellate court, there is some evidence which would carry the case to a jury.

There are a number of assignments calling attention to incidents attending the trial, but not going to the substantive facts or law of the case which, although not regarded by us as sufficiently prejudicial to warrant a reversal, should not occur on a retrial.

Reversed and remanded for a new trial.

CROW, C. J., and MORRIS, GOSE, and PARKER, JJ., concur.

WILLIAMS et al. v. DOCKWILER.  
(No. 1717.)

(Supreme Court of New Mexico. Dec. 23, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—MORTGAGE FORECLOSURE—ATTORNEY'S FEES—AMOUNT—APPEAL.

Where the question as to the amount of recovery by plaintiff as attorney's fees upon a suit filed to foreclose a real estate mortgage, securing the payment of a promissory note for approximately \$10,000, is submitted to the court, upon conflicting evidence, and the court awards the sum of \$500, and the award is sustained by the evidence, the same will be upheld on appeal, in the absence of evidence showing oppression or collusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. APPEAL AND ERROR (§ 1054\*)—HARMLESS ERROR—SUFFICIENCY.

In cases tried before the court the erroneous admission of testimony will afford no ground for reversal unless it is apparent that the court considered such testimony in deciding the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.\*]

3. BILLS AND NOTES (§ 534\*) — ATTORNEY'S FEES—RIGHT TO RECOVER.

Where a promissory note provides for the payment of a reasonable attorney's fee, if suit be brought on the note, or if attorneys are employed to collect the same upon default in the payment of the note, or other condition broken, and the note is placed in the hands of attorneys for collection, the payee of the note is entitled to recover from the payor such sum, as attorney's fees, as he has paid, or become liable to pay, to the extent of the reasonable value of such services, whether the note is paid in cash, or a new note is executed in lieu of the past-due obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.\*]

Hanna, J., dissenting.

Appeal from District Court, Santa Fé County; E. C. Abbott, Judge.

Action by W. A. Williams and others against Alphonse Dockwiler. From judgment for defendant, plaintiffs appeal. Affirmed.

M. T. Dunlavy, of Santa Fé, for appellants. E. P. Davies and Catron & Catron, all of Santa Fé, for appellee.

ROBERTS, C. J. Appellee filed suit against appellant to foreclose a mortgage on certain real estate, given to secure the payment of a promissory note for the sum of \$9,000, interest, etc., alleging in his complaint that appellant had failed to pay interest and taxes due, and that by the terms of said mortgage deed the whole sum secured thereby became due and payable. The note provided:

" \* \* \* And if the same shall not be paid when due, we jointly and severally promise and agree to pay all costs of collection, including

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reasonable attorney's fees, if suit be brought on this note or if attorneys are employed to collect the same."

The mortgage also provided for the payment of attorney's fees.

E. P. Davies was employed by appellee as attorney to conduct such foreclosure proceedings, and he prepared and filed the complaint, held frequent conferences with appellee relative to the suit, made certain other interested parties defendants, and investigated the records in the recorder's office for the purpose of determining other liens that might exist against the real estate in question and briefly the legal questions likely to arise on the trial of the cause. He also examined certain mortgages and notes prepared by other attorneys, representing Williams. Appellee made no special agreement with Davies relative to his charges for his services in the case, except an agreement that Davies would only charge him \$100 in the event the cause was compromised and settled on or before February 12, 1914. The case was not settled by that date, however, but was subsequently adjusted by Williams' paying appellee a certain amount in cash, and executing a new note and mortgage for the balance, at an increased rate of interest, but appellant's attorney performed no further legal service relative to said litigation after February 12th, except possibly the examination and approval of the new note and mortgage. By the terms of the settlement between the parties it was agreed that appellant should be liable to appellee for such attorney's fees as appellee should be required to pay his attorney, which was to be subsequently adjusted with Mr. Davies. The parties were unable to agree upon the amount which should be paid Mr. Davies, and this question, upon evidence heard, was submitted to the district judge, without a jury. The trial court found that \$500 was the amount reasonably owing Mr. Davies by Mr. Dockwiler, and entered judgment against appellant for that amount, and costs of suit. From this judgment Williams appeals, and by his assignment of errors raises the following questions: (1) That the court erred in rendering judgment for \$500 and interest thereon, as a reasonable attorney's fee for the value of the services rendered by appellee's attorney; (2) that the court erred in allowing the appellee's attorney to testify as to services rendered on behalf of one Kerlee, a codefendant, for which he received a fee; (3) that the court erred in basing its judgment for a reasonable attorney's fee upon the total amount of the note and interest, as the evidence showed that appellee recovered only \$3,275.00 in cash, taking a new note for the balance due. These questions will be considered in the order stated.

[1] 1. Had appellee effected a settlement with appellant prior to February 12, 1914, he would have become liable to his attorney

for only the sum of \$100, and this sum would have been the measure of his recovery against appellant for attorney's fees. The cause was not adjusted at that time, however, and of course appellant's attorney was not bound by his agreement with Mr. Dockwiler, and was entitled to the reasonable value of his services. As Dockwiler was liable to Davies for the reasonable value of his services, he was entitled to recover from Williams, under the provisions of the note and mortgage, such reasonable sum as he should be required to pay for the services rendered in the foreclosure suit. The parties, being unable to agree upon the amount of compensation, submitted the question to the court, upon the evidence, for determination. Mr. Davies, testified in detail as to the various services performed by him in the foreclosure proceeding, and stated that, as a favor to Mr. Dockwiler, he had agreed, to accept \$100 in payment for services rendered in this case, if a settlement was effected with Williams at a stated time; that the settlement was not agreed upon at the time stated, and both parties to the suit clearly understood that the fee to be paid was the reasonable value of Davies' services. Upon the question as to what the reasonable value of the services was worth in money, appellee introduced three witnesses, all reputable members of the bar, who testified that the service rendered was reasonably of the value of from \$500 to \$1,000. Opposed to this, appellant produced an equally reputable member of the bar, who testified that, considering the agreement made by the attorney to accept \$100, if settlement were made by a certain date, which was not made, however, until a day later, \$150 would be a reasonable fee, but, independent of any agreement, he thought \$250 would be fair compensation for the service actually rendered. The court, after hearing all the evidence, found that \$500 was the reasonable value of the service rendered, for which amount judgment was entered. This was a question for the trial court to determine, upon the evidence, and as the evidence supports the findings in this regard, we cannot interfere. This rule is so well established in this state that the citation of authority is hardly necessary. We cite, however, *Vasquez v. Spiegelberg*, 1 N. M. 464; *Romero v. Desmarais*, 5 N. M. 142, 20 Pac. 787; *Patterson v. Hewitt*, 11 N. M. 1, 66 Pac. 552, 55 L. R. A. 658; *Hancock v. Beasley*, 14 N. M. 239, 91 Pac. 735; *James v. Hood*, 142 Pac. 162.

The rule stated in *Thornton on Attorneys at Law* (section 449) as to the elements which may properly be considered in determining the reasonable value of the services of an attorney at law, is as follows:

"It may be said generally that it is customary to consider: (1) The ability, standing, skill, and experience of the attorney; (2) his reputation as a specialist in the particular line of professional business in which he was retained; (3) the necessity and demand for his services;

(4) the nature and character of the controversy, the questions involved therein, and the importance of the litigation; (5) the responsibility assumed; (6) the time and labor expended, and the benefits derived therefrom; (7) the amount involved; (8) the result; and (9) any other circumstance attending the cause which, according to established usage, will serve as a guide in determining what is a proper charge."

The same author further says (section 548):

"Indeed, it is a matter of common knowledge that attorney's fees are higher in some states than in others, and, in the same state are much higher in large cities than in small towns, and frequently there is a marked difference in this respect even between cities or towns of equal size and importance."

In view of the overwhelming weight of the expert evidence given in this case by attorneys familiar with the charges made for legal services in the city of Santa Fé, which fully warranted the judgment of the court, and in view of the standing of these attorneys, one of whom was at one time an associate justice of the Territorial Supreme Court, and of the fact that the trial judge was familiar with the ability, standing, skill, and experience of the attorney who rendered the services in question, and because the cause in which such services were rendered was pending in his court, and his presumed knowledge of the charge usually made in his district by attorneys for similar services, it would be somewhat presumptuous for this court to set aside the allowance and enunciate the doctrine that we will determine, regardless of the evidence and the findings of fact by the trial court, based on its supposedly superior knowledge of the actual service rendered and the charges usually prevailing in that locality for such services, the amount of compensation which should be allowed attorneys in all cases wherein such question comes before us for determination.

In the case of *Forrester & MacGinniss v. B. & M. Co.*, 29 Mont. 397, 74 Pac. 1088, the court, in discussing a similar question said:

"The amount to be allowed, however, was a matter for the trial court to determine in the first instance from all the facts and circumstances in evidence. 3 Enc. Law, 423. There was a conflict in the testimony, and the determination of the trial court, being supported by evidence which it deemed credible, will not be disturbed on appeal."

In the case of *Farmers' Loan & Trust Co. et al. v. McClure*, 78 Fed. 209, 24 C. C. A. 64, the rule announced by Judge Sanborn is stated in the syllabus, as follows:

"When the question of the value of the services of a solicitor, rendered in a suit for the foreclosure of a mortgage, has been decided, upon conflicting evidence, by the court in which the suit is pending, and which is familiar with the proceedings therein and the amount of services rendered, such decision will not be disturbed by an appellate court, in the absence of an obvious error of law, or a serious and important mistake in the consideration of the evidence."

In the case of *Warren Deposit Bank v. Barclay*, 60 S. W. 853, the Kentucky Court of Appeals was asked to review an allowance made the attorney of an administrator for

services rendered. The court, among other reasons stated, for not interfering with the allowance made, said:

"And, having before it [the trial court] the record of the proceedings involving the appointment of the administrator, and being more familiar with the standing of the attorney, his ability, and the customary charges allowed and collected at that bar and in that community for similar services, we are disinclined to interfere with his finding."

It is true, as appellant contends, appellee was only entitled to recover such sum as he had become liable for as attorney's fees on account of the default of appellant, and, if he had incurred no liability, no recovery in this regard could be had. The reasonable value of the service rendered by appellee's attorney was a fact to be proved, like any other fact in a case, and the burden was on appellee to establish appellant's liability. To this end evidence was introduced, which, as we have shown, clearly justified the judgment entered. This being so, and there being no evidence of oppression or collusion, this court cannot set aside the judgment on the grounds urged.

[2] 2. In considering appellant's second proposition it is perhaps advisable to set out the claimed objectionable testimony in full, for, if as claimed by appellee, the services were a part of the duties which Davies owed appellee, by reason of his employment it was proper for the court to consider such services in fixing the compensation which Davies was entitled to recover from appellee, notwithstanding the services so performed might have resulted in a benefit to some other person, for it is to be presumed that the court would take into consideration any fee which appellee's attorney was entitled to collect from some other source in fixing the amount he would be entitled to receive from appellee, and would reduce the same accordingly. The claimed objectionable evidence was as follows:

"Q. Can you recall other matter or any other work performed in connection with this case? A. I prepared a brief upon the proposition as to whether or not the mortgagee could hold the subsequent purchaser to the payment of all the indebtedness which was covered by the mortgage, the subsequent purchaser, Kerlee, having purchased from Williams with constructive notice that this mortgage of \$9,000 and interest and taxes covered this property which he bought from Williams. Q. For whose benefit was this last work? A. It was for the primary benefit of the mortgagee, of course. Q. Did you prepare any other papers? A. I prepared a release of the contract of purchase between Williams and his wife, Kerlee and his wife and mother-in-law, in order to clear the record so that this deal could go through and be consummated and leave the matter in proper shape on the records of the court. Q. What other papers, if any, did you prepare? A. I prepared a mortgage, two mortgages in fact, and worked out difficult technical descriptions so that Mr. Kerlee and his wife could give mortgages back to Williams and thus make possible a consummation of the settlement between Dockwiler and Williams."

The ground of objection interposed to each of the above questions, and of the motion to

strike out the answers thereto, was that the services above shown were all performed for Kerlee and his two defendants in interest, whom Davies also represented.

The contract of purchase between Williams and Kerlee is not incorporated in the record. From the answer to the first question it is not clear as to whether the attorney briefed the question as to whether the mortgagee would be required to first exhaust the real estate still standing in Williams' name, before proceeding against the land purchased by Kerlee, or whether he was seeking to ascertain whether the mortgagee could hold Kerlee to the payment of all the indebtedness owing by Williams to Dockwiler, in the event the proceeds of the sale of the land failed to satisfy the same. However this may have been, certainly the attorney properly prepared himself upon the legal propositions which might arise, and this duty he owed to Dockwiler.

The release and the mortgages which Davies testified he prepared were necessary in order to effect the settlement between Williams and Dockwiler, and we fail to see wherein the court erred in refusing to strike out this testimony.

Appellant also contends that the hypothetical questions propounded to the witnesses for appellee included certain services performed for Kerlee. Only one of the questions will be incorporated, because all the questions included the same enumeration of services performed. The following is the question propounded to Mr. Charles C. Catron:

"Q. Mr. Catron, in event that a client should come to you with a note aggregating \$10,200, or thereabouts, principal and interest, together with a mortgage securing the same, and employed you to foreclose the mortgage and recover on the note, and that you first conferred with the plaintiff fully advising him as to his rights and as to the foreclosure; that on a subsequent date you again had a conference with your client in reference to the foreclosure proceedings, advising him further in the matter and having in the meantime given the matter considerable study; that again at a later date you prepared a complaint and filed the same and had summons issued; that still later you prepared a lis pendens and filed the same; that you attempted to get service of the summons at the residence of the defendant, some five or six miles from town, and later did obtain summons on two of the defendants and the wife of one; went to see Leo Hersch to find out whether or not he had filed involuntary bankruptcy proceedings against the defendant; had practically daily consultations with the plaintiff between January the 25th to the following February 28th concerning the case; subsequently examined the abstract of title to the property involved, examined and passed upon two mortgages which had been prepared by the counsel for defendant; spent a whole day ascertaining the correct description of the property to be included in the new mortgage—what, in your opinion, considering the premises, would be a reasonable attorney's fee?"

The question itself answers this contention. All the services enumerated were either in preparing and filing the complaint, procuring service of summons, etc., or in perfecting a settlement of the litigation. For

all these services Dockwiler was liable to Davies, and he could recover the reasonable value of the same from Williams.

But assuming the evidence as to the preparation of the brief, the release of the contract of purchase and the two mortgages to have been incompetent, under the rule established in this jurisdiction, it will be presumed that the court ultimately disregarded the testimony, unless it is apparent that the court considered the same in deciding the case.

In the case of *Radeliffe v. Chaves*, 15 N. M. 258, 110 Pac. 699, Justice Pope stated the rule as follows:

"In cases tried before the court the erroneous admission of testimony will afford no ground for reversal unless it is apparent that the court considered such testimony in deciding the case. *Lynch v. Grayson*, 5 N. M. 487 [25 Pac. 992]; [*Grayson v. Lynch*] 163 U. S. 468 [16 Sup. Ct. 1064, 41 L. Ed. 230]." See, also, *Rehling v. Brainard* (Nev.) 144 Pac. 167; *Smith v. Scott*, 51 Wash. 330, 98 Pac. 763; *Alexander v. Wellington*, 44 Colo. 388, 98 Pac. 631.

In this case there is nothing to indicate that the court considered such testimony in determining the amount of recovery. The hypothetical questions propounded to the witnesses who testified as to the value of the services rendered by appellee's attorney as shown did not include any of the services rendered by said attorney for Kerlee. It may be argued that in examining the mortgages, executed by Williams and Kerlee to Dockwiler, for the \$7,000, it was the duty of Davies, as Kerlee's attorney, to examine and pass upon the sufficiency of the same. But this assumption is erroneous, for Davies when acting for Kerlee, owed no duty to Dockwiler. As Dockwiler's attorney, however, it was his duty to see that the mortgages, securing the new notes for the \$7,000, were in proper form and correctly described the real estate intended to be included therein.

[3] 3. Appellant contends that where a note provides for the payment of an attorney's fee in the event that the note is collected, the taking of a new note is not a collection within the provision. Assuming, without so deciding, that the above is a correct statement of the law, the principle has no application to this case. The note, upon which this suit was brought, provided for the payment of a reasonable attorney's fee, "If suit be brought on this note or if attorneys are employed to collect the same." Under this provision appellee was entitled to recover from appellant the reasonable value of his attorney's services, where he had placed the note in the hands of an attorney for collection, upon default in the payment of the note, or other condition, provided appellee was liable therefor. Appellant cites the case of *Davis v. Cochran*, 76 Miss. 439, 24 South. 168, but in this case the note only provided for the payment of the fee "if not paid at maturity and if collected by an attorney."

This provision is quite different from that contained in the note in this case.

In the case of *Moore, Adm'x, v. Staser et al.*, 6 Ind. App. 364, 33 N. E. 665, the court said:

"When a party executing a note containing an unconditional agreement to pay attorney's fees, whether the amount is a stated per cent. or undetermined, has failed to meet his obligation when due, and the payee, in good faith, and because he deems it necessary so to do in order to enforce collection, places the note in the hands of an attorney at law for collection, who renders professional services in and about the collection thereof, either by suit or otherwise, he must pay, in addition to the principal and interest, such reasonable attorney's fees as shall be sufficiently adequate to compensate him for the services rendered in order to discharge the obligation."

See, also, *Morrison v. Ornbaun et al.*, 30 Mont. 111, 75 Pac. 953.

Where a provision in a note limits the amount of recovery to a stated sum, or a named percentage, of course there can be no recovery in excess of such sum or percentage, regardless of the amount the payee may be required to pay for the services rendered. But where a promissory note provides for the payment of a reasonable attorney's fee, if suit be brought on the note, or if attorneys are employed to collect the same, upon default in payment of the note, or other condition broken, and the note is placed in the hands of an attorney for collection, the payee of the note is entitled to recover from the payor such sum, or attorney's fees, as he has paid, or becomes liable to pay, to the extent of the reasonable value of such services, whether the note is paid in cash, or a new note is executed in lieu of the past due obligation.

Finding no available error in the record, the case must be affirmed; and it is so ordered.

PARKER, J., concurs.

HANNA, J. (dissenting). I find it impossible to agree that the majority opinion in this case correctly states the law in holding that, in cases tried before the court, the erroneous admission of testimony will afford no ground for reversal, unless it is apparent that the court considered such testimony in deciding the case. Nor can I agree that the principle of law, even though correctly stated, is applicable to the facts in this case. My objection to the principle, as stated, is that it is not sufficiently clear that the application of the rule is not to be made in any case where evidence has been erroneously admitted, unless it plainly appears that such erroneous admission of evidence was harmless or without prejudice to the party complaining. The Territorial Supreme Court, in the case of *Lynch v. Grayson*, 5 N. M. 487, 25 Pac. 992, upon which is based the ruling of the same court in the case of *Radcliffe v. Chaves*, 15 N. M. 258, 110 Pac. 699, correctly stated the ruling as it is followed by those jurisdictions ad-

hering thereto, and qualified the principle as I believe it should be qualified, if given force and effect; the court saying in the case of *Lynch v. Grayson*:

"And in a trial by a court 'the admission of incompetent evidence at a trial below is no cause for reversal, if it could not possibly have prejudiced the other party.'"

When such condition appears, it may be presumed, perhaps, that the trial court did not consider the objectionable testimony in deciding the case, although such presumption might be seriously questioned. It has been said that no rule is better settled than that where error is shown injury is presumed, unless the contrary appears affirmatively. *Hayne*, New Trial and Appeal, § 287.

This is not the ground of my objection to the rule as enunciated, however, except in so far as it indicates that the rule is not based upon a presumption that the court did not consider the inadmissible evidence, but rather that the true test of the rule is whether or not the error complained of was harmless. I am aware that the grounds set out in the opinion may be so considered to indicate that in the opinion of the court the error was harmless, and the opinion would thereby qualify the rule, as I contend it should be qualified. But this does not make the statement of the principle less objectionable, as the qualification does not therein appear, and must be arrived at by considering the application of the principle to the facts of the case.

The authorities which I have examined upon this point, without exception, so far as I have found, deal with the admission of evidence where the question arose during the stress of the trial, and the trial judge was called upon to pass upon the question relating to the admission of evidence without time for reflection or study, and, it subsequently developing that the court had erred for technical reasons, and that such error was not prejudicial, the appellate court has, in effect, said that the evidence could not be considered because inadmissible, but the party complaining not having been harmed by its admission, the verdict or judgment would not be disturbed.

As stated in 2 R. C. L. § 205, at page 250, where a large number of cases are quoted in a note to the text—

"the broadness of the statement of the harmless error doctrine, however, necessarily leaves room for dispute about the prejudicial effect of a certain species of evidence, and no hard and fast rule can be laid down as to what errors can be deemed harmless."

It seems to me, however, that a sound test as to whether the admission of the evidence was in fact harmless might rest upon the inquiry as to whether or not the objectionable evidence was given weight or taken into consideration in making findings or rendering judgment. Ordinarily, where the court had simply ruled on the admission of the objectionable evidence, in advance of its

admission, it would be naturally presumed that the court had subsequently disregarded it. But in this case, after the court had ruled upon the objectionable evidence, and at the close of plaintiff's case, the defendant moved to strike such evidence, renewing his objections as set out when objection was urged to its admission. The court, upon consideration of this testimony, refused to strike the evidence. This would indicate that the court did consider the inadmissible evidence. The evidence in question, it is contended by appellant, went to show that some of the services rendered by the attorney for appellee had been actually rendered for codefendants of Williams, and that therefore Williams was not liable for the services so rendered.

The question before us now, as was before the district court, is to determine whether the fee claimed by the attorney was a reasonable fee, for the services rendered, the burden being upon the attorney to prove such services, as well as the reasonableness of the fee. If it be true that the services rendered were performed for one of the codefendants, the other defendant, appellant here, not being liable therefor, and such services have been taken into consideration in arriving at the amount of the judgment in this case, the evidence in question cannot be said to be harmless. This was not a case where all the evidence was simply cumulative, but is a case where all the evidence, taken together upon the question of services performed, would necessarily be considered in making up the gross amount allowed and given as a judgment in the case, and therefore it cannot be said that it is not apparent that the court considered such testimony. Nor do I agree that the hypothetical question propounded to the witnesses who testified as to the value of the services did not include any of the services rendered by said attorney for the codefendant, Kerlee.

It is my conclusion, after a careful examination of numerous authorities, and I think this is borne out by the opinion of the United States Supreme Court in the case of *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230, that the real reason why the appellate court will not set aside the findings or the judgment and order a new trial for the admission of incompetent evidence is that there is other competent evidence to support the conclusion arrived at, aside from the question that the incompetent evidence was harmless, and I do not think that any case where the conditions existed should be sustained unless it does clearly appear that there is competent evidence to support the conclusion. This being true, the rule is not applicable, in my opinion, to the present case, because, as stated, this evidence, with all the other evidence as to services, must have been considered together as making up the amount

found by the trial court to be due the attorney for the services performed. It is not a question of whether the attorney was entitled to the fee allowed for performing the other services, outside of the services to Kerlee, on the ground that you can disregard this evidence because of other evidence remaining to prove that he was entitled to the same fee. All the evidence, taken as a whole, was found to justify the fee of \$500 allowed, and if you are compelled to disregard the testimony as to a portion of the services, he loses his right to recover the amount of the judgment.

Some courts have gone so far as to hold that in cases of trial by the court without a jury, the admission of illegal evidence raises a presumption of injury, and requires a reversal of judgment, unless the remaining evidence is without conflict, and is sufficient to support the judgment without giving consideration to the objectionable evidence. *First National Bank Talladega v. Chaffin*, 118 Ala. 246, 24 South. 80; *Miller v. Mayer*, 124 Ala. 434, 26 South. 892.

Other cases to the same effect could be cited, but it is unnecessary and unimportant to do so.

In this case the remaining evidence is not without conflict and, in my opinion, is not sufficient to support the judgment, although my principal objection to the rule as announced by this court, is upon the other grounds stated.

The evidence in this record discloses that the attorney prepared and filed a complaint, held frequent conferences with appellee relative to the suit, made certain interested parties defendant, and investigated the records in the recorder's office for the purpose of determining other liens that might exist, briefed some legal questions likely to arise on the trial of the case, examined certain mortgages and notes prepared by other attorneys after the case had been settled by the parties, and contended that these services were worth \$1,000, and upwards, and has been given a judgment for \$500, which, in my opinion, is clearly excessive in view of all the circumstances of the case as disclosed by the record, and is so clearly so as to closely approximate oppression and justify the reversal of the judgment, which, in my opinion, is the disposition that should be made of this case.

(19 N. M. 495)

GROSS, KELLY & CO. v. BIBO et al.  
(No. 1631.)

(Supreme Court of New Mexico. Dec. 2, 1914.)

(Syllabus by the Court.)

1. CONTRACTS (§§ 98, 274\*)—RESCISSION FOR FRAUD—WHEN EFFECTED.

A transaction which is capable of being rescinded on the ground of fraud is to be treated as good until rescinded, and not as bad until confirmed; but such contract is not to be con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sidered as rescinded only as of the date of the decree of the court setting the transaction aside, but as of the date of the unequivocal and open declaration of the injured party that he demands a rescission, followed, upon a refusal, by a prompt application to the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 447, 1202-1206; Dec. Dig. §§ 98, 274.\*]

**2. COMPOSITIONS WITH CREDITORS (§ 20\*)—AGREEMENT—SECRET PREFERENCE—RESCISION OF CONTRACT.**

A secret preference given to one of the creditors signing a composition agreement, in order to induce him to assent to the same, renders the composition agreement, as to the innocent creditors who sign the same, voidable only, and such contract continues in full force and effect until the fraud is discovered, and the election to rescind is exercised.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 38-49; Dec. Dig. § 20.\*]

**3. CONTRACTS (§ 50\*)—CONSIDERATION—VALIDITY—MEETING OF MINDS.**

Consideration, like every other feature and element of a contract, is a matter of agreement, upon which the minds of the contracting parties must meet and agree.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 222; Dec. Dig. § 50.\*]

**4. COMPOSITIONS WITH CREDITORS (§§ 8, 22\*)—AGREEMENT—CONSIDERATION—MEETING OF MINDS.**

Hence, where B.'s creditors signed a composition agreement, whereby they agreed to accept 35 per cent. of their claims against him in full settlement, but the signature of M., one of such creditors, was obtained by B.'s agreeing to give him secret preference of 15 per cent. and G., another of his creditors who had signed the agreement, upon being paid the 35 per cent. provided for, demanded of B. that he execute and deliver to him promissory notes for the 65 per cent., which was done, but G. at that time had no knowledge of the secret preference given M., and did not base his demand upon that fact, but such fact caused B. to execute the notes, because of his fear that G. would unearth the fraud, and all the creditors would attempt to avoid the composition, *held*, that the minds of the contracting parties did not meet and agree upon the consideration. *Held*, further, that while G., upon discovering the fraud, could avoid the transaction, and recover the balance of his claim, such fraud, when discovered, would not relate back to the execution of the notes, and supply a consideration which was not the consideration upon which the minds of the parties met and agreed.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 8, 64-67; Dec. Dig. §§ 8, 22.\*]

**5. RELEASE (§ 38\*)—SUBSEQUENT PROMISE TO PAY—EFFECT TO REVIVE DEBT—CONSIDERATION FOR NEW PROMISE.**

After the voluntary release of a debt, an express promise does not revive it, nor does it form a sufficient consideration to support a new promise.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 49, 50; Dec. Dig. § 38.\*]

**6. CONTRACTS (§ 116\*)—AGREEMENT TO REFRAIN FROM COMPETITIVE BUSINESS—PUBLIC POLICY.**

A naked agreement by one party not to engage in business in competition with another party is in contravention of public policy, and therefore void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.\*]

**7. CONTRACTS (§ 116\*)—RESTRAINT OF TRADE—SALE OF GOOD WILL.**

Where a contract in restraint of trade is subsidiary to the main purpose of disposing of an established business, or other legitimate object, and the restraint is no broader than is necessary to protect the good will of the business sold, the restraint is reasonable and the contract valid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.\*]

*(Additional Syllabus by Editorial Staff.)*

**8. WORDS AND PHRASES—"MOTIVE"—"CONSIDERATION."**

There is a clear distinction sometimes between the "motive" that may induce to entering into a contract and the "consideration" of the contract. Nothing is "consideration" that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the cause or meritorious occasion requiring a mutual recompense in fact or in law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration; Motive.]

Appeal from District Court, Bernalillo County; M. O. Mechem, Judge.

Action by Gross, Kelly & Co. against Simon Bibo and another. From judgment for defendants, plaintiff appeals. Affirmed.

This action was instituted in the court below by the appellant against the appellees, to recover on four promissory notes, dated April 2, 1908, aggregating \$8,058.85, and due, respectively, on or before October 15, 1908, January 15, 1909, August 1, 1909, and January 1, 1910. The notes contained the ordinary 10 per cent. attorney's fee clause, and provided for interest at the rate of 6 per cent. per annum.

The defendants, by their answer, admitted the execution and delivery of the notes, and that the same had not been paid, but alleged that there was no consideration for any of said notes, and set up that on or about March, 6, 1908, the plaintiff, among other creditors, accepted and became a party to a creditors' composition agreement, whereby the creditors of the S. Bibo Mercantile Company, of which the defendant Simon Bibo was the owner and proprietor, agreed to accept a 35 per cent. cash compromise of their respective claims as a final settlement in full of the claims and amounts due to them respectively from the S. Bibo Mercantile Company and the said defendant Simon Bibo, and they filed with their answer a copy of the composition agreement. They further alleged that the remaining creditors of the S. Bibo Mercantile Company and the defendant Simon Bibo accepted said creditors' composition agreement a short time subsequent to March 6, 1908, and that, in pursuance of said creditors' composition agreement, said 35 per cent. of their respective claims was paid to all creditors, in behalf of said S. Bibo Mercantile Company and Simon Bibo,



including the plaintiff; that said composition agreement was executed; and that all of said creditors, including the plaintiff, released their respective claims against the S. Bibb Mercantile Company and the defendant Simon Bibb. They further set up that the amount of their original indebtedness to the plaintiff was \$12,398.23; that, in pursuance of the said composition agreement, they paid the plaintiff \$4,339.38; and that there remained unpaid to the plaintiff 65 per cent. of the original indebtedness, amounting to \$8,058.85, and alleged:

"That the taking, obtaining, and securing of these notes was an attempt upon the part of said plaintiff to secure a fraudulent preference over the other creditors after said composition agreement had been accepted by all the creditors, and, upon advice of counsel, that such taking, obtaining, and securing was in contravention of public policy."

Plaintiff, by reply, denied that the notes were executed without consideration, and alleged that they were made, executed, and delivered for a good and valuable consideration received by the defendants at and before the making, execution, and delivery thereof; admitted that the plaintiff became a party to and accepted the composition agreement; denied that, in pursuance of said composition agreement, 35 per cent. of the respective claims was paid to all creditors of the S. Bibb Mercantile Company, but, on the contrary, alleged that the S. Bibb Mercantile Company paid to the First National Bank of Albuquerque, one of the creditors, its claim in full, notwithstanding the said composition agreement, and as an inducement to said First National Bank to sign said composition agreement, all without the knowledge of the other creditors, etc.; that at the time of the making, execution, and delivery of the said promissory notes by the defendants to the plaintiff, the said composition agreement was, and was well known by the defendants to be, voidable at the election of the plaintiff because of the preference before that time agreed to be given by the defendants to the said First National Bank of Albuquerque.

The case was tried to a jury, and plaintiff failed to establish the allegations as to the secret preference of the First National Bank of Albuquerque. The evidence, however, developed the fact that the McIntosh Hardware Company had been paid 15 per cent. more than the 35 per cent. agreed upon in the composition agreement. Whether such payment was a secret preference was a disputed question. The evidence for the defendants was to the effect that it was agreed by the other creditors, including the plaintiff, that defendants should have the right to pay some of the small creditors more than 35 per cent. of their claims to effect a settlement, if necessary, and that the payment in question was made pursuant to said agreement. Plaintiff, on the other hand, offered proof to show the contrary. But it was

clearly established that the plaintiff had no knowledge of the alleged secret preference until the fact was developed upon the trial of the cause, whereupon plaintiff asked and was granted leave to file a trial amendment setting up such facts. Later during the trial, upon motion of the defendants, the paragraph of the reply setting up the alleged secret preference of the McIntosh Hardware Company was stricken out by the court, upon the theory that such secret preference, being unknown to the plaintiff at the time the notes were executed, would not furnish or supply a valid consideration for the notes.

The evidence offered on behalf of the defendants, briefly summarized, and viewed in the aspect most favorable to plaintiff, established the following facts: All the creditors, including plaintiff, had signed a composition agreement, agreeing to accept 35 per cent. of their claim in full settlement, except McIntosh Hardware Company, who refused to sign unless defendant agreed to pay it 15 per cent. additional, which defendants agreed to do, and did, but this fact was unknown to plaintiff, and was only developed upon the trial of the cause, as stated. Simon Bibb, on April 2, 1908, called at the office of plaintiff, and handed George Arnot, plaintiff's representative, a check for 35 per cent. of its claim, pursuant to the composition agreement which it had signed. Arnot refused to give him a receipt, and said that if he would not sign the notes for the balance they would open the whole case again; that he signed the notes without knowing what he was doing. There was other evidence to the same effect, but it is not material and will not be stated. There was also evidence tending to show that the creditors had authorized Bibb to pay some of the small creditors more than 35 per cent. of their claims, if necessary, in order to effect a settlement, but for the purpose of this case we shall treat the evidence as establishing the converse. At the conclusion of defendant's case, plaintiff moved for an instructed verdict, which was denied.

On behalf of the plaintiff, George Arnot testified in rebuttal that plaintiff accepted from the S. Bibb Mercantile Company the 35 per cent. provided for by the composition agreement, and discharged it from all further liability on account of that claim; that subsequent to the signing of the composition agreement by himself on behalf of the plaintiff he had a conversation with Simon Bibb and Solomon Bibb, in which he told them that, inasmuch as they had "stuck" the plaintiff for over \$8,000, "I propose to get that money and more back by going into business in competition with you in Grants, or near Grants, and that I had already had the matter up with a view of selecting a place where we would go in"; that on the 2d day of April, 1908, Simon Bibb and Solomon Bibb came to the office of plaintiff and tendered a check in payment of the 35 per cent.



dividend that was to relieve them and a receipt was given for the check; Solomon Bibb then asked in regard to the intention to establish a store at Grants, and Arnot told him it was the intention to start such a store in order to recover the money lost by plaintiff in trusting Simon Bibb; either Solomon Bibb or Simon told Arnot that, if plaintiff would not go into business out there, they would pay all the money that plaintiff had lost on the settlement that was made, and they proposed to give to plaintiff the notes in question if plaintiff would not go into business at or near Grants, as contemplated, in competition with the S. Bibb Company; plaintiff accepted the notes and refrained from entering into business in competition with Bibb at or near Grants because of the execution of the notes, and that the consideration for the notes was the agreement of plaintiff not to go into business in competition with the Bibbs at said place; that prior to signing the notes he had investigated business conditions at Grants, and was satisfied that by entering into the general merchandise and wool business in that vicinity, Gross, Kelly & Co. could recoup all the money it had lost by the composition agreement; that at the time the notes were signed he had no knowledge that any creditor had a secret arrangement whereby they would receive more than 35 per cent. as a consideration for their signature to such agreement.

On motion of counsel for defendant, the court struck out the testimony of Mr. Arnot as to the consideration for the notes, upon the ground that refraining from starting a store at Grants constituted a contract shown to be stifling competition and in unreasonable restraint of trade and against public policy.

Each party moved for a directed verdict in its favor, and the court sustained the motion of defendants, and overruled that of plaintiff, and a verdict was thereupon returned for the defendants, in pursuance of that direction. A motion for a new trial was made and overruled, and plaintiff appeals.

Neill B. Field, of Albuquerque, for appellant. Vigil & Jamison, of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). There are three principal and controlling questions presented for determination in this case, which may be stated as follows:

(1) Does a secret preference given to one of the creditors signing a composition agreement in order to induce him to assent to the same render the composition agreement, as to the innocent creditors who sign the same, void, or only voidable?

(2) Is it essential that the minds of the payor and payee of a promissory note meet

and agree upon the consideration for which the same is given?

(3) Is a naked agreement by one party not to engage in business in competition with another party in contravention of public policy?

[1] While there is a conflict of evidence in this case upon the question as to whether the preference given by the Bibbs to the McIntosh Hardware Company was with the knowledge and assent of the appellant, in considering the case we must assume that it was without such knowledge and assent, because the court could not properly have directed a verdict for appellees, in view of such conflict, if their rights were affected by such preference. There was no question but that Gross, Kelly & Co. had no knowledge of the alleged secret preference at the time they procured the execution of the notes by the Bibbs, as such fact, if full credit be given to the evidence of their representative, was unknown until it developed upon the trial of this case, some two or three years after the execution of the notes. If the secret preference rendered the composition agreement void, Simon Bibb owed Gross, Kelly & Co. the money represented by the notes at the time of their execution, and the only question then for determination would be as to whether this debt so owing was the consideration upon which the minds of the contracting parties met and agreed. On the other hand, if such secret preference rendered the composition agreement voidable only, at the election of the innocent creditor or creditors, the composition agreement would be valid and effective until the creditor unequivocally and openly demanded a rescission, or gave notice of his election not to abide by the composition agreement. Hence, if appellant had no knowledge of the fraud at the time the notes were executed, and had not elected to rescind because of such fraud, Simon Bibb would not owe it the balance of the debt, the compromise and release of which had been secured by the fraud, for, as stated by Mr. Bispham (*Bispham's Principles of Equity* [4th Ed.] § 472):

"A transaction which is capable of being rescinded on the ground of fraud is to be treated as good until rescinded, and not as bad until confirmed; or, in other words, that a contract which may be set aside at the option of the injured party is to be considered as being in effective operation until that party takes measures to enforce his right to rescind. This was well put by Mr. Mellish, in his argument in *Oakes v. Turquand* before the House of Lords, in the following query: When you say that an agreement is voidable and not void, and when the complainant endeavors to insist upon his right to treat it as void, is the agreement to be taken as valid until rescinded, or, when rescinded, to be taken to have been void from the first? And this query was answered by the tribunal to which it was addressed to the effect that the agreement was to be taken as subsisting until rescinded, but with this important qualification, that it was not to be considered as rescinded only as of the date of the decree of the court setting the transaction aside, but as of the date of the unequivocal and open declaration of the

injured party that he demands a rescission, followed, upon a refusal, by a prompt application to the courts." *Oakes v. Turquand*, L. R. 2 H. L. Cas. 325. And see, also, 9 Cyc. 431.

[2] Accepting the above as a correct statement of the law, the importance of determining whether the secret preference rendered the composition agreement void, or only voidable, will be apparent. An investigation of the text-books and reported cases discussing the question as to the effect of a secret preference given to a creditor to induce him to sign a composition agreement on the rights of innocent creditors who sign the same will disclose that the words "void" and "voidable" are used interchangeably, and without apparent distinction as to meaning. The two words, however, in so far as the rights of the parties to this case are concerned, have a widely different meaning. In many cases it is perhaps true that a distinction between the meaning of the words would be of no consequence. For example, in the present case, if Gross, Kelly & Co. had discovered the fraud prior to the execution of the notes, and had elected not to be bound by the composition agreement, such agreement would have been void as to them at the time the notes were executed; for by their election they would have made it void from the time of such election. For this reason, perhaps, the word "void" is often used when, in fact, "voidable" would be the technically correct expression. The following quotation from the case of *Van Shaack v. Robbins*, 36 Iowa, 201, is illustrative of the fact that the word "void" is not always used to convey the idea that a contract is null and incapable of ratification:

"The word 'void' has, with lexicographers, a well-defined meaning: 'Of no legal force or effect whatsoever; null and incapable of confirmation or ratification.' Webster's Dic. But it is sometimes, and not unfrequently, used in enactments by the Legislature, in opinions by courts, in contracts by parties, and in arguments by counsel, in the sense of voidable; that is, 'capable of being avoided or confirmed.' Id. The word 'void,' when used in any of these instruments, will therefore be construed in the one sense or the other, as shall best effectuate the intent in its use, which will be determined from the whole of the language of the instrument and the manifest purpose it was framed to accomplish. \* \* \* These cases abundantly show that the word 'void' does not always mean null and incapable of confirmation; but its true meaning is always to be determined from all the language used and the intent thereby manifested. Where the word is used to secure a right to or confer a benefit on the public, it will, as a rule, be held to mean 'null and incapable of confirmation.' But, if used respecting the rights of individuals capable of protecting themselves, it will often be held to mean 'voidable' only."

From an investigation of many of the reported cases we find that, where a court means "relatively void," as distinguished from "absolutely void," the word "void" is used as often, if not more so, than the word "voidable," to indicate that meaning, as it is seldom necessary to distinguish the meaning of the words, where the act has been avoid-

ed by the innocent party who has the right to avoid it. In the case of *Terrill v. Auchauer*, 14 Ohio St. 85, we find the following:

"And the use of the word 'void' in a loose and uncertain sense is no novelty either in legislation or the language of jurists."

Then the Ohio case quotes from *Allis v. Billings*, 6 Metc. (Mass.) 417, 39 Am. Dec. 744, which takes the position that the word "void" ought to be applied only to those contracts that are absolutely void, and that it should not be used to indicate what other jurisdictions say is relatively void. The court said:

"The term 'void,' as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from 'voidable'; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms 'void' and 'voidable,' in their application to the contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever, such as are a mere nullity, and incapable of confirmation and ratification."

In *Beecher v. Marq. & Pac. R. M. Co.*, 45 Mich. 108, 7 N. W. 697, Judge Cooley says:

"If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while, if the manifest intent is to give protection to determinate individuals who are sui juris, the purpose is sufficiently accomplished if they are given the liberty of voiding it."

In *Fuller v. Hasbrouck*, 46 Mich. 78, at page 82, 8 N. W. 697, at page 699, the court said:

"There is undoubtedly some difficulty in harmonizing all the provisions of this statute. The statute declares the assignment 'void' if the bond is not filed; but this word is frequently used in the sense of 'voidable' (*Beecher v. Marq. & Pac. R. M. Co.*, 45 Mich. 108 [7 N. W. 695]), and it must have that construction here if it shall be necessary to give other provisions of the statute effect."

In *Bromley v. Goodrich et al.*, 40 Wis. 131, at pages 139, 140, 22 Am. Rep. 685, the court said:

"Probably no words are more inaccurately used in the books than 'void' and 'voidable.' Statutes not unfrequently declare acts void which the tenor of their provisions necessarily makes voidable only. Perhaps the best excuse made for such inaccuracy is that of Parker, C. J., cited and adopted by this court: 'Whatever may be avoided may, in good sense, to this purpose, be called void, and the use of the term "void" is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded upon what is "absolutely void"; whereas from those which are only "voidable" fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them.' [*Crocker v. Belangee*] 6 Wis. 645 [70 Am. Dec. 489]."

We have been able to find no case in which, where the word "voidable" is used, the court's meaning was that the contract or in-

strument or legislative enactment in question was absolutely void, but these cases heretofore cited, along with many others, indicate that the books are full of cases where the word "void" has been used without qualification and the court has meant "relatively void." The logical conclusion, therefore, is that, where the word "void" is used, it is necessary to examine the context, whether it be a legislative enactment, a judicial opinion, or a contract or conveyance, in order to definitely ascertain whether or not "absolutely void" or "relatively void" is meant. *Fuller v. Hasbrouck*, 46 Mich. 82, 8 N. W. 697; *Terrill v. Auchauer*, 14 Ohio St. 80; *State v. Richmond*, 26 N. H. 232; *Kearney v. Vaughan*, 50 Mo. 284; *Van Shaack v. Robbins*, 36 Iowa, 201; *Inskeep v. Lecony*, 1 N. J. Law, 111; *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. Rep. 685; *Brown v. Brown*, 50 N. H. 538.

If the composition agreement in this case was rendered either void or voidable, it was by reason of the fraud practiced on the appellant and the other innocent creditors in inducing them to assent to the composition under the belief and upon the representation that all the creditors would be dealt with upon the same terms of equality; that all the creditors would receive 35 per cent. of their debts, and no more. When, therefore, they were induced to sign upon this understanding, and the debtor had, in fact, promised or agreed to give the McIntosh Hardware Company 50 per cent. of its claim, their signature to the composition contract and assent to the agreement were procured by fraud. The preferring of one creditor over another in a composition agreement does not render the contract invalid or subject to disaffirmance, if such preference is known and assented to by the creditors who become parties to the agreement. It is not contrary to public policy to pay one creditor more than another in order to secure the satisfaction of the debt; hence it could not be argued that such a contract so providing would be invalid and void on that ground. It is the fraud practiced on the innocent creditors by which they are induced to give their assent to the composition which renders the contract "voidable," and, as the fraud injures the individual or individuals, rather than the public, the contract is relatively void or voidable only. In *Bishop on Contracts*, § 198, the author says:

"Where the party makes the contract he means to, being moved thereto by fraudulent representations, rights vest under it. The other party who has perpetrated the fraud cannot take them away. As to him, the contract is perfect. The defrauded party, on discovering the fraud, has his election, where the principles of equity will permit its exercise, to reject the contract, or, if he will, he can confirm it. Therefore it is not void. The legal term for it is voidable."

At section 206 of *Bishop* he says:

"Though a defrauded party cannot both rescind a contract and affirm it, he may, as we have seen, elect between the two, and, if he chooses, do the latter. Any act of which, after

knowledge of the fraud, by which he treats the contract as subsisting, will be an affirmation. There can be no rescission afterward. The party in the wrong cannot set up his own fraud; the contract, therefore, is perfected."

In 9 Cyc. 431-433, we find this statement:

"On discovering the fraud by which he was induced to enter into a contract, the party defrauded may elect whether he will treat the contract as binding or refuse to be bound by it; but until he so elects it continues valid. An agreement procured by fraud is voidable and not void. A contract obtained by fraud, being voidable and not void, may be ratified by the party who was induced by the fraud to enter into the contract."

Cases are cited sustaining this proposition concerning fraud from Kansas, Kentucky, Massachusetts, New York, New Hampshire, South Carolina, United States, and England, and we think we are not hazarding an inaccurate statement when we say that there is no conflict concerning the proposition that fraud makes a contract voidable instead of absolutely void.

It is clearly established that, in a secret agreement of this character between a debtor and one or more creditors, the guilty creditors are not allowed to recover upon their original indebtedness, but, under the weight of authority, they can recover under the composition. Some cases go so far as to hold that even their rights under the composition are forfeited, but this is by no means the general rule. If by a secret agreement of this character, however, the composition was rendered "absolutely void," as distinguished from "relatively void" or "voidable," there could be no other logical conclusion but that the composition agreement was thereby rendered the same as if it had never existed, a mere nullity, something under which no legal rights of any character could vest. Then, if the composition agreement is absolutely void, it cannot be good as to some, the guilty, and bad as to others, the innocent; but it is a nullity, and no rights of any character in favor of any one could vest under it. This is the view which is taken in *Pearsoll v. Chapin*, 44 Pa. 9, which distinguishes between contracts which are absolutely void and those which are relatively void, and also the view which is taken in legal text works and judicial decisions distinguishing between "void" and "voidable." If the composition agreement, therefore, was absolutely void, the guilty creditors would be restored to their cause of action upon the original indebtedness along with the innocent creditors. What other logical conclusion could there be? The composition agreement is the only thing that stands in the way of an action on the original indebtedness in favor of the guilty creditor who has received the secret fraudulent preference against the debtor, and if that agreement is a nullity, what is there to deprive such guilty creditors of their original cause of action? If the meaning given by almost universal judicial opinion to "absolutely void" is that of a nullity, the result

we have indicated above must follow. This point is clearly argued by Judge Gray of the New York Court of Appeals, in the case of *Hanover National Bank v. Blake*, 142 N. Y. 404, at page 413, 37 N. E. 519, at page 522, 27 L. R. A. 33, at page 40, 40 Am. St. Rep. 607, at page 613, where he says:

"If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement by which the debt was compromised is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt—a view which Littledale, J., regarded as possible in *Howden v. Haigh*. It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement for any purpose."

That the composition agreement is thereby rendered "relatively void" or "voidable," in favor of the innocent creditors, but not in favor of the guilty creditor, is shown in *Huckins v. Hunt*, 138 Mass. 366, 367. The plaintiff agreed with the debtor that the debtor should pay the full amount of the debt to him in the future, and the court said:

This "avoided the composition deed as to the other creditors. \* \* \* But the plaintiff was bound by it, and cannot set up his own illegality to relieve himself from its consequences."

In the case of *Partridge v. Messer*, 14 Gray (Mass.) 180, 182, it is said that:

"An agreement procured by fraud may be avoided by him on whom the fraud is practised; he by whose fraud the agreement is procured not being permitted to set up the agreement as a defense against him whom he has defrauded."

It will be noted that the words "may be avoided" are used, showing power or an option on the part of the innocent to declare the composition agreement avoided.

In the case of *White v. Kuntz et al.*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886, the decision of the court leads to the same conclusion. In order to induce the plaintiff, White, to sign the composition agreement, Kuntz, the father of the debtor, secretly agreed to purchase of him the composition notes within a specified time at the price of \$10,000, when the composition notes aggregated only \$6,000. Kuntz, the father, refused to perform the secret agreement. Thereupon plaintiff filed his complaint, alleging these facts, and also that other creditors had been induced to sign by a secret agreement that they should receive a greater percentage than the one-third provided for in the composition agreement, and, therefore, that the composition agreement was void as to him (the plaintiff). He demanded its cancellation and a judgment against the debtor for the amount of the original indebtedness. Demurrer to the complaint was sustained in the trial court, and the appellate court affirmed the judgment of the nisi prius court. If the composition agreement had been made a nullity, or absolutely void, by the secret fraudulent agreements, both with Kuntz and the

other creditors, upon what principle of law could Kuntz have been prevented from suing upon his original indebtedness? He would have stood in the same position as if the composition agreement had never been thought of.

"A fraudulent preference does not *ipso facto* deprive an innocent creditor of his rights under the composition. The debtor cannot set up its invalidity as against such a creditor, and an innocent creditor may therefore, at his option, insist upon the performance of the composition according to its terms in so far as he is concerned." 8 Cyc. 477.

In the case of *Martin v. Adams*, 81 Hun, 9, at page 14, 30 N. Y. Supp. 523, at page 526, we find the following:

"But the referee finds that 'in or before the month of July, 1888, and before the last compromise notes were paid, the plaintiffs herein were informed of the alleged frauds committed in relation to said compromise, as set forth in said complaint, and with such knowledge the plaintiffs, and each of them, received and accepted the money due on said notes which became due in August, 1888, without protest or objection,' and that, 'after the payment of said last-mentioned compromise notes, and before the commencement of this action, the said plaintiffs did not, nor did either of them, obtain or acquire any additional information in relation to said alleged frauds.' Thus it appears that, with full knowledge of all the facts which the plaintiffs have proved, they proceeded in affirmation of the contract. They retained in their possession the notes not yet matured. At maturity they accepted the payment of them and surrendered the notes. Immediately thereafter this suit was commenced, but too late; for the rule is well settled that one who takes a benefit under a contract after knowledge of the fraud which vitiates it is not thereafter entitled to have the contract adjudged fraudulent. *Cobb v. Hatfield*, 46 N. Y. 533."

Another case in point is found in *Babcock v. Dill*, 43 Barb. (N. Y.) 577. As we understand the general rule, the innocent creditor who decides to avoid the composition agreement is not compelled to restore what he has been paid, the reason being that the money paid is referred to the original indebtedness and treated as a payment upon said original indebtedness; but in those cases where the debtor has not been the person to pay the money under the composition agreement, but it has been done by, for instance, the father of the debtor on account of his interest in his son's welfare, a different rule applies. This is true because a payment by the father who owed nothing to the creditors could not be referred to anything but the composition agreement, and, if that was invalid, it was necessary to return the money. In the case of *Babcock v. Dill*, supra, at page 583 of 43 Barb. (N. Y.), we find the following:

"At all events, they could not receive and retain the 40 per cent. and reject that part of the agreement which required them to cancel their debts. If they desired to raise the questions which the plaintiff now raises to avoid the contract, they should have returned the 40 per cent. to the old gentleman. If they discovered that they had been defrauded into the agreement, and desired on that account to rescind, they could only do so by returning the moneys which the old gentleman paid them to cancel their demands. It is no answer to say that the

contract was for the benefit of Robert L. Dill, and that he ought to be held responsible for the balance of the demand. It was also for the benefit of the creditors, and they must take the burden as well as the benefit of it. It would be an outrage upon the father to keep his money and refuse to discharge his son. The father had an interest in his son's welfare which furnished a highly meritorious consideration for his engagement with the creditors to pay them the 40 cents upon the dollar, upon their agreement to discharge his son from further liability."

In other words, they had a right to affirm the composition even after knowledge of the fraud, as in case of any other fraudulent contract, or they had a right to reject it and restore the 40 per cent. to the father, which they must do, since on the original indebtedness the father owed them nothing, as we have stated, and said payment could not be referred to the original indebtedness.

This view was also taken in the case of *Powers Dry-Goods Co. v. Harlin*, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460:

"By reason of the fraud it was within the power of the innocent creditors to ignore the composition and recover the balance due upon their claims."

These words "within the power" show an option such as the innocent party can exercise in any fraudulent contract which is voidable or relatively void. If it was absolutely void, it would not be within the power of the innocent creditors to ignore the composition. They would have to ignore it. It would be as if nothing existed; the law would have made it a nullity, and they would have had no power in, over, or concerning it.

The same principle which is applied in *White v. Kuntz*, supra, is applied in *O'Brien v. Greenebaum*, 92 Cal. 104, 28 Pac. 214, where a guilty creditor was denied relief on account of secret fraudulent preferences granted to other guilty creditors of which he knew nothing.

In the case of *Batchelder & Lincoln Co. v. Whitmore*, 122 Fed. 355, 58 C. C. A. 517, Judge Putnam, speaking for the Circuit Court of Appeals, First Circuit, says:

"It should be observed in this connection that, even if the transaction between the bankrupt and the Batchelder & Lincoln Company had been fraudulent in intent, this would not have rendered the composition void so far as the other creditors were concerned, because, notwithstanding the forms of expression heretofore used by the text-books and the courts, the modern rule is that, with rare exceptions, transactions are not void, but voidable."

In the case of *Mallalieu v. Hodgson*, 71 Eng. Com. Law Reports, 689, the court said (speaking of fraud in a composition agreement):

"And in *Pilbrow v. Pilbrow's Atmospheric Railway Co.*, 5 Com. D. 440, 453, there cited, Maule, J., said: 'It is not true that a deed that is obtained by fraud is therefore void. The rule is that the party defrauded may, at his election, treat it as void.' In *Murry v. Mann*, 2 Exch. 538, 541, Parke, B., said: 'Fraud does not make the contract actually void, but only voidable at the election of the party.' While, therefore, the contract in the present case was

not avoided, the duty of the plaintiff still attached."

Our conclusion, therefore, is that the composition agreement in this case was voidable only, at the election of the innocent creditors, and until the fraud by which they had been induced to sign the composition agreement was discovered, and the option to rescind was exercised, the contract continued in force and effect. This being true, at the time Bibos signed the notes in question here they did not owe Gross, Kelly & Co. the 65 per cent. of the old debt which had been surrendered and released by the composition agreement and the payment of the 35 per cent. thereunder. It is true, of course, that Gross, Kelly & Co. had the right to avoid the composition agreement, upon discovery of the fraud by which they had been induced to assent to it, and that they could retain the 35 per cent. which had been paid them and sue for the recovery of the balance of their original indebtedness. But this is not such an action. Here they are seeking to recover principal, interest, and attorney's fees on three promissory notes, which would have no connection with the original indebtedness, unless the balance of such indebtedness was owing and unpaid, and entered into and became the consideration for the notes, and both parties so understood.

[3, 4, 5] Under the facts established upon the trial, viewed with the utmost liberality toward appellant, it had no knowledge at the time it demanded and secured the execution of the promissory notes in question that appellees had given the McIntosh Hardware Company an unlawful, secret preference in order to induce it to sign the composition agreement. It may be admitted that Simon Bibo at that time had knowledge of the preference, and that his guilty knowledge induced him to readily assent to the execution and delivery of the notes in order to prevent appellant from attacking the composition, and that the composition agreement could have been avoided by appellant upon discovery of the fraud; still the question remains as to whether the original indebtedness, which appellant had agreed to release, but which agreement it might, at its election, either avoid or affirm because of the undiscovered fraud, upon acquiring knowledge thereof, was the consideration upon which the minds of the contracting parties met and agreed. The fear of discovery may be assumed to have been the motive which prompted Bibo to execute the notes, but "the motive" for entering into a contract and the "consideration" of the contract are not the same." Elliott on Contracts, § 204. "Consideration," like every other feature and element of a contract, is a matter of agreement upon which the minds of the contracting parties must meet. As stated by Mr. Justice Strong, in the case of *Philpot v. Gruninger*, 14 Wall. 570, 20 L. Ed. 743:

"It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'"

In the case of *Fire Insurance Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860, Mr. Justice Brown says:

"To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for the promise does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kirkpatrick v. Muirhead*, 16 Pa. 117, 128, it was said that 'consideration,' like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration."

See, also, *Elliott on Contracts*, § 204; 1 *Addison on Contracts*, 15; *Ellis v. Clark*, 110 Mass. 389, 14 Am. Rep. 609; *Levy & Cohn Mule Co. v. Kauffman*, 114 Fed. 170, 52 C. C. A. 126.

That the minds of the contracting parties to these notes did not meet and agree upon the consideration is evident. Appellant was attempting to secure a promissory note for a debt which it had agreed to release. It had signed the composition agreement, and could not subsequently withdraw its assent without the consent of the other creditors until after the time for compliance by the debtor had expired, or the agreement was breached by the debtor. Of course, if it had knowledge of a secret preference given to some other creditor, it could avoid the contract, but, until it discovered the fraud and elected to avoid, it could hardly be contended that the notes executed without consideration could be supplied with that necessary factor by the after-discovered fraud and appellant's election to avoid.

The question is: What was the present consideration for the notes at the time of their execution upon which the minds of the parties met and agreed? It must be evident there was none; for the debt which appellant was attempting to transmute into the notes was discharged by the composition agreement and its fulfillment or tendered compliance by Bibb, subject, of course, to its avoidance by appellant upon discovery of the fraud. But at this time it had not discovered the fraud and elected to rescind; consequently it did not have in mind, as a consideration for the notes, the balance of

its claim which it was entitled to collect because of appellee's fraud in giving a secret preference to the McIntosh Hardware Company, and did not offer this as the consideration, and it was consequently not regarded as the consideration by both parties. At the time the notes were given Bibb did not owe appellant the money represented by the notes; for this debt had been discharged by the composition agreement and the payment of the 35 per cent. therein provided for. It is true he might, at the election of appellant, have been indebted to it in this sum, assuming the fraud to have existed; still, until appellant exercised its option of avoiding the contract upon discovery of the fraud, the past indebtedness, which appellant supposed was discharged, could not have been recognized by it as the moving cause or element which it presented to Bibb as a consideration for the notes and upon which the minds of the contracting parties met and agreed.

[5] Appellant contends that the moral obligation to pay the debt was a sufficient consideration for a new promise to pay it, provided the new promise was not made until after the composition was completed, and was not intended to secure an advantage to the creditor as a consideration for his signature to the composition agreement. In support of this proposition the case of *Willing v. Peters*, 12 Serg. & R. (Pa.) 177, is cited, which concededly so holds. No other case has been called to our attention which supports this theory of the law, and the authority of the case cited was essentially impaired by the case of *Snevily v. Reed*, 9 Watts (Pa.) 396. The following quotation from the case of *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573, fully answers this contention:

"The case here is one where the original right of action was extinguished, not by the act of the law, but by the act of the parties. It was a voluntary release of the debt by the creditor to the debtor. In *Willing v. Peters*, 12 Serg. & R. (Pa.) 179, the question arose how far a promise to pay a debt thus discharged might be enforced; and, because of the analogy between waiving a discharge created by act of law and one created by act of the parties, the court upheld the action. Shaw, C. J., in *Valentine v. Foster*, 1 Metc. [Mass.] 522, 35 Am. Dec. 377, admits the closeness of the analogy, and suggests, if the rule be not narrow that allows the waiver in the one case to bind the party, and reject it in the other; but he adds that the Pennsylvania authority is the only one he has been able to find in support of the doctrine, and in the case then before him ruled that, when a creditor released a debtor to make him a witness, the subsequent promise of the debtor was not binding. Considering his own decision and that the case of *Willing v. Peters*, 12 Serg. & R. [Pa.] 179, was subsequently overruled in the same court, in *Snevily v. Reed*, 9 Watts [Pa.] 396, while in other courts it has been repeatedly adjudicated that after the voluntary release of a debt an express promise does not revive it, nor does it form a sufficient consideration to support the new promise, we may affirm that such, at present, is the settled law. *Warren v. Whitney*, 24 Me. 561 [41 Am. Dec. 406]; *Staford v. Bacon*, 1 Hill [N. Y.] 533, 37 Am. Dec. 366."

The following cases support the case of *Shepard v. Rhodes*, supra: *Rasmussen v. State Nat. Bank*, 11 Colo. 301, 18 Pac. 28; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *Grant v. Porter*, 63 N. H. 229; *Zoeblisch v. Von Minden*, 120 N. Y. 406, 24 N. E. 795; *Way v. Langley*, 15 Ohio St. 392; *Callahan v. Ackley*, 9 Phila. (Pa.) 99; *Id.*, 30 Leg. Int. (Pa.) 12; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573; *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Evans v. Bell*, 15 Lea (Tenn.) 569; *Cowper v. Green*, 10 L. J. Exch. 346, 7 M. & W. 633.

From what we have said it is apparent that the court properly refused to direct a verdict for the appellant on this phase of the case, and no error was committed in directing a verdict for the appellees.

[8, 7] There is another question, however, which requires consideration. As shown in the statement of facts, appellant offered testimony to show that the consideration for the notes was an agreement on the part of appellant not to engage in business at Grants, N. M., in competition with Bibo, who was at that time engaged in the mercantile business at that place. This testimony was stricken out by the court, upon the theory that such an agreement was in contravention of public policy, and therefore unlawful. Appellant contends that an agreement by it not to engage in business in competition with appellee is not unlawful and contravenes no public policy, and therefore furnishes a good and valuable consideration for the notes, even though such agreement was not incidental or ancillary to a valid contract for the sale of an established business and its good will, and for the purpose of protecting the good will of the business sold. Such an agreement is universally condemned, and held to be contrary to public policy and void, by all the standard text-books dealing with the subject.

*Elliott on Contracts*, § 814, lays down the doctrine as follows:

"The agreement restraining trade must be incidental to, and in support of, the contract or sale by which the one in whose favor it runs acquired some interest in the business he seeks to protect. One cannot make a valid contract in restraint of trade, no matter how limited as to space or time, where he does not purchase the good will or any interest in the matter and the main object of which is to stifle competition."

In *Page on Contracts*, vol. 1, p. 584, it is stated:

"Contracts whereby one or both of the parties thereto are restrained from engaging in a business, trade, or profession are of two kinds: (a) Those which are a part of a transaction involving the good will of a business, which are designed to protect such good will, and to that end to restrain some person or persons from engaging in business; and (b) those which have for their primary object not the protection of good will, but the formation of a monopoly in a given business. The first class, if objectionable at all, is so because the restraint is unreasonable; the second class is always illegal."

On page 686 of the same volume, the author says:

"Buying off Competition.—Where without a sale of good will, or other legitimate dealing therewith, one party agrees with the other to abstain from business, such contract is invalid, without regard to its reasonableness as to either space or time. Such contracts are equally invalid whether the competition is suppressed directly or indirectly."

A brief review of the decided cases on this proposition will show ample support for the texts above quoted. In *Oliver v. Gilmore* (O. C.) 52 Fed. 562, the court said:

"A contract between manufacturers whereby the first party agrees, in consideration of a percentage on the sale made by the second party, not to use his plant for the production of strap and T-hinges for five years, the contract to be void in case the second party increases his facilities for the production of such hinges, is void as against public policy."

In the case of *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, Judge Taft, speaking for the Circuit Court of Appeals, said:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the test laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horne v. Graves*, 7 Bing. 735, Chief of Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see *Lord Macnaghten's judgment in Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co.* [1894] A. C. 535, 567), used the following language: 'We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive,' and, if oppressive, 'it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy.' This very statement of the rule implies that the contract must be one in which there is a main purpose to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed and furnishes a sufficiently uniform standard by which the validity of such restraint may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract, as expressed therein, is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint; that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there



is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

In *Tuscaloosa Ice Manufacturing Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, the court said:

"As said by Putnam, Circuit Judge, in *Oliver v. Gilmore* [C. C.] 52 Fed. 568: '\*\*\* When the covenantor surrenders his trade or profession an equivalent is given to the public, because ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accomplished. The same occupation continues; the same number of mouths are fed.' And these considerations obtain where one already engaged in a business in good faith, for the purpose of enlarging and increasing his business, purchases the stock in trade or practice or plant of a rival, and, incident thereto, takes the covenant of the seller not to engage in the same business within the territory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid. But there is no room for the application of these reasons to cases in which the covenantee does not purchase the business, practice, trade, or plant of the covenantor, and the transaction involves nothing but a bald covenant in restraint of trade for which there is no other consideration than the payment of money for the obligation itself. In such case the business of the covenantor is not transferred merely; it is destroyed. His plant is not continued by the covenantee in useful production, but is left to rust and canker in disuse. The public loses a wealth-producing instrumentality. Labor is thrown out of employment; 'the same number of mouths' are not fed. The consideration the covenantor receives is not the just reward for his skill and energy and enterprise in building up a business, but is a mere bribery and seduction of his industry and a pensioning of idleness. The motives actuating such a transaction are always, in a sense, sinister and baleful. Its purpose and effect are not to protect the covenantee in the legitimate use of something he has acquired from the covenantor, but to secure to him the illegitimate use or the use in an illegitimate way of that which he already has, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection. Such an undertaking in restraint of trade, however limited as to time and place, would seem, upon all general principles, though we know of no case expressly and directly so deciding, to be necessarily unreasonable and vicious on the consideration alone that it is not entered into nor has it the effect of protecting some business, practice, trade, or interest which the covenantor has sold to the covenantee."

In the case of *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559, the Supreme Court of Michigan discussed the distinction between a contract in reasonable restraint of trade and one which tends to create or continue a monopoly. In this case the restraint was unlimited as to territory, but cases cited in the opinion, such as *Maxim Nordenfelt Guns & A. Co. v. Nordenfelt*, 1 Ch. 630, show that a restraint un-

limited as to territory may be good, if such restraint is necessary to protect the covenantee in the business which he acquires, especially in these days when some corporations trade all over the world in the commodities manufactured by them. The court said:

"Any such contract is invalid, whether the restraint be for one year, or any number of years, or is unlimited as to time. The agreement to close one part of a business is as much against the policy of the law as a contract to close the entire business. The one is as reprehensible as the other. They only differ in degree. Under this contention a party might agree with one person to close one part of his manufactory, and then agree with the second person to close the other part; the two constituting his entire business. In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325, 331, it is said: 'All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.'"

In *Webb Press Co. v. Bierce*, 116 La. 905, 41 South. 203, a contract by which one who had contemplated engaging in lawful business in a certain place for a pecuniary consideration agreed with one with whom he had had no previous relations, and who also contemplated engaging in the same business at the same place, to abandon his plan was held void as an unreasonable restraint of trade.

In the case of *Clemons v. Meadows*, 123 Ky. 181, 94 S. W. 13, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 365, a contract between the proprietors of the only two first-class hotels in Fulton, Ky., to close one of the places for a money consideration to be paid by the proprietor of the other, in order to give the latter a monopoly of the business, was held contrary to public policy and void. Appended to this case will be found a very instructive note reviewing the American cases which have discussed the question as to the validity of a stipulation not to engage in a particular business, when not ancillary to a lawful contract. The rule announced by the Kentucky court was followed in the two later cases of *Barrone et al. v. Moseley Bros.* (Ky.) 139 S. W. 869, and *Fields & Son v. Holland & Son*, 158 Ky. 544, 165 S. W. 699. Other cases to the same effect will be found cited in the note to *Clemons v. Meadows*, supra, and in support of the texts quoted from Elliott and Page on Contracts.

Appellant's able counsel, by a very ingenious and plausible argument, has attempted to apply the "rule of reason," as enunciated by the United States Supreme Court in the *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, to the case at bar. In his brief he says:

"I am not to be understood as contending that combinations to suppress competition whereby, as a practical result, a monopoly is created, or whereby prices are controlled, may not be lawfully forbidden. My contention is that it is not contrary to the public policy of any civ-



ilized state that A. and B. shall contract, the one not to compete with the other in a particular business at a particular place. I take it that, if the plaintiff in the case at bar had established a business in competition with the defendant Simon Bibb at Grants, and thereafter Bibb had agreed to buy all or a part of the stock in trade of the plaintiff, and plaintiff had agreed not further to compete at that place, such a contract would be conceded to be lawful and enforceable—a valid consideration for the execution of the promissory notes, which, in the opinion of the makers, were equal in amount to the benefit received. But the proposition advanced seems to be that, not having yet established the business, the attempt on the part of Bibb to stifle this competition in its inception is unlawful, although the result accomplished is the same in each case, and there is absolutely no difference so far as the effect upon the public is concerned. If it is not unlawful to stifle competition after it has once obtained a foothold, no sound reason can be advanced why such competition may not with equal propriety be stifled before it has obtained a foothold."

If the "rule of reason" be applied to this contract, it will not help appellant. Under this doctrine, which was firmly established by the Standard Oil Case, contracts in restraint of trade which are unreasonable are invalid. While originally, at common law, all contracts in restraint of trade were presumptively invalid (*Mitchel v. Reynolds*, 1 P. Wms. 181), because such contracts were deemed injurious to the public as well as to the individuals who made them, "in the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void; that is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid." *Standard Oil Co. v. U. S.*, *supra*. It is the purpose of the contract which makes it reasonable or unreasonable, coupled, of course, with the limitations put upon the right to engage in business. If the restrictions are no broader than are necessary to protect the party in the enjoyment of the benefits of the main contract, to which the restraint is incidental, the contract would be upheld as valid, because reasonable. On the other hand, if the restrictions are so broad that it necessarily appears that the restraint is unreasonable, the contract would be held to be illegal. Where the contract is subsidiary to the main purpose of disposing of an established business, or other legitimate object, the restraint would be held reasonable and the contract valid. In *Eastern States R. L. D. Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, the United States Supreme Court said:

"It is true that this court held in the *Standard Oil and Tobacco Cases*, *supra*, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade, and, summarizing the meaning of the act in the *Tobacco Case*, this court said (221 U. S. 179 [31 Sup. Ct. 648, 55 L. Ed. 663]):

'Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that, as the words 'restraint of trade,' at common law and in the law of this county at the time of the adoption of the Anti-Trust Act, only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have, and did have, but a like significance.'

"The same principle was affirmed in *Nash v. United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232. The court in the *Standard Oil Case* construed the act as intended to reach only combinations unduly restrictive of the flow of commerce, or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal [221 U. S. 58, 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734] 'all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusions that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.'

From the nature and character of a contract such as this, where it clearly appears that it was not entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, with the intent to do wrong to the general public and to limit the right of individuals or corporations, thus restraining competition and enhancing prices, the contract will be held invalid under the *Sherman Anti-Trust Act* (U. S. Comp. St. 1913, §§ 8820-8830), as it would have been so deemed under the common law, and this is clearly shown, we think, by the above excerpts from the decisions of the United States Supreme Court.

In the case of *Gallup Electric Light Co. v. Pacific Improvement Co.*, 16 N. M. 86, 113 Pac. 848, the territorial Supreme Court discussed the question of contracts in restraint of trade. In this decision the court quotes section 3 of the act of Congress of July 2, 1890 (U. S. Comp. St. 1913, § 8822). This statute was in force in this jurisdiction at the time this alleged agreement was entered into, as New Mexico at that time was still a territory. In the case referred to the court quotes with approval the following excerpt from the opinion written by Mr. Justice Peckham in the case of *United States v. Joint-Traffic Association*, 171 U. S. 567, 19 Sup. Ct. 31, 43 L. Ed. 259:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional

farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri Case [166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007] as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."

See, also, *Thomas v. Gavin*, 15 N. M. 660, 110 Pac. 841.

The Anti-Trust Act must be and is construed in the light of the common law, and such a contract as that testified to by the witness Arnot is contrary to public policy and illegal. This being true, it follows that the court did not err in striking out this testimony. It further follows that the court properly directed a verdict for the appellees.

The judgment is therefore affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(19 N. M. 620)

DE BACA v. ROTH et al. (No. 1696.)

(Supreme Court of New Mexico. Dec. 21, 1914.)

(*Syllabus by the Court.*)

JUDGMENT (§ 386\*)—VACATION—RIGHT—TIME. *Weaver v. Weaver*, 16 N. M. 98, 113 Pac. 599, followed as to control of district courts over their judgments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744; Dec. Dig. § 386.\*]

Appeal from District Court, San Miguel County; D. J. Leahy, Judge.

Action by Trinidad G. De Baca against Peter Roth and others. From judgment for defendants, plaintiff appeals. Affirmed.

Thomas B. Catron, of Santa Fe, for appellant. Hunker & Hunker, of Las Vegas, for appellees.

MECHEM, District Judge. This action was brought May 6, 1889. On December 10, 1910, it was stricken from the docket with leave to reinstate. On May 16, 1911, on motion of plaintiff's attorney it was reinstated upon condition that it be "disposed of within six months or stand dismissed." On December 30, 1911, a judgment of dismissal was entered which recited the previous orders relative to the case, and that the order of May 16, 1911, had not been complied with.

On December 13, 1913, plaintiff's attorney moved the court to set aside the judgment of dismissal as inadvertently entered, supporting the motion by his affidavit, which alleged that after the entry of the order of May 16, 1911, plaintiff's attorney had spoken to the district judge with respect to the importance of keeping this cause on the docket until another action then pending in the same

court, between the same parties, and involving the same subject-matter, should be finally determined, and that the said judge assured "affiant that this cause would not be disposed of until the other action should be determined, unless further notice should be given to affiant in regard to the same," and that the judgment of dismissal was entered without notice to him, and that the other action was then still pending. The lower court ruled that it was "without power to sustain the said motion and restore the said cause to the docket, and doth therefore overrule the same," which ruling is assigned as error here.

This case presents no features distinguishable from *Weaver v. Weaver*, 16 N. M. 98, 113 Pac. 599, which would call for a departure from the rule laid down there, and upon the authority of that case the judgment of the lower court is affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(45 Okl. 367)

HILL et al. v. STATE ex rel. COUNTY ATTORNEY OF GRADY COUNTY et al. (No. 4914.)

(Supreme Court of Oklahoma. Dec. 16, 1913. Rehearing Denied Jan. 9, 1915.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1146\*)—PRESENTATION FOR REVIEW—PROCEEDING BY STATE—DECISION.

Record examined, and held, that equity requires the decree entered below to be modified in the particulars indicated in this opinion. In all other respects, the decree of the court below is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4480-4482; Dec. Dig. § 1146.\*]

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

Proceedings by the State, on the relation of the County Attorney of Grady County and another, against Dave Hill and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Barefoot & Carmichael and Bond & Melton, all of Chickasha, for plaintiffs in error.

KANE, J. This was a proceeding, instituted under that part of section 14, article 3, chapter 69, Session Laws 1907-08, as amended by section 13, chapter 70, Session Laws 1911, which provides:

"\* \* \* And all places where any such liquor is kept or possessed by any person in violation of any provision of this act; and all places where persons congregate or resort for the purpose of drinking any such liquor, are hereby declared to be public nuisances, and upon the judgment of any court of record finding such place to be a nuisance under this section, the sheriff, his deputy, or undersheriff, or any constable of the proper county, or marshal or police of any city where the same is located,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shall be directed to shut up and abate such place by taking possession thereof and destroying all liquors found therein, the keeping or sale of which is prohibited by this act, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance. \* \* \*

The following findings and judgment of the court sufficiently state the facts disclosed by the evidence and the action of the trial court based thereon:

(1) That during the year 1912, up until September 25, of said 1912, intoxicating liquors were kept and sold continuously at the place known as the Mint, or Sam Cook's place, located on lot 6 of block 43 of the city of Chickasha.

(2) The court further finds that such place was owned, controlled, and run by Fred Smith and Sam Cook, and that said Sam Cook was a party to and interested in the affairs, control, and management of said place.

(3) The court further finds that such keeping and selling of such intoxicating liquors was permitted and carried on in such building and place up until the same was closed by injunction, viz., the 25th day of September, 1912.

(4) The court further finds that such building is owned by the defendant Dave Hill, and that said Dave Hill knew and had cause to know and did know that such intoxicating liquors were being kept and sold in said premises during the year 1912.

(5) The court further finds that the said Dave Hill and Sam Cook were under bond during the year 1912, conditioned that they, the said Sam Cook and Dave Hill, should pay to the state of Oklahoma, a certain sum of money if they knowingly permitted or caused to be sold, given away, or kept in or on said premises intoxicating liquors as is prohibited by law.

(6) The court further finds that such place known as the Mint, or Sam Cook's place, located on said lot 6, block 43, of the city of Chickasha, was reputed and generally known as the place where intoxicating liquors were kept and sold.

(7) The court further finds that on or about the 25th day of September, 1912, the defendant Fred Smith left the city of Chickasha, and that on said date the sheriff took possession of said building known as the Mint, or Sam Cook's place, and that the same has been shut up and locked and in the custody of the sheriff since said date, and that no contraband goods have been kept or sold in said building since said date.

This the 17th day of February, A. D. 1913.

Wherefore, it is ordered, considered, adjudged, and decreed by the court that the injunction heretofore granted against Dave Hill, Sam Cook, and Fred Smith, enjoining and restraining the said Dave Hill, Sam Cook, and Fred Smith, their agents, servants, and employees, from keeping, selling, or in any wise disposing of any intoxicating liquors of any kind or character in the buildings on the premises, known as the Mint, or Sam Cook's place, and being lot 6, block 43, city of Chickasha, Grady county, Oklahoma, and is hereby made perpetual as against said named parties.

It is further ordered that the injunction heretofore granted against the buildings and premises, being lot 6 in block 43, and all buildings situated or being on said lot and block, be and is hereby made perpetual.

It is further ordered by the court that the sheriff of Grady county, Oklahoma, be and he is hereby ordered and directed to immediately destroy all intoxicating or contraband now in or about the building and premises, being lot 6 in block 43 in the city of Chickasha, Oklahoma.

It is further ordered by the court that the sheriff of Grady county, Oklahoma, immediately take an invoice of all stock and fixtures now in said building, situated on said lot 6, block 43,

city of Chickasha, Oklahoma, and return the said invoice of all goods not of an intoxicating or contraband nature to the board of county commissioners of Grady county, Oklahoma, that said board may make such disposition of said stock and fixtures and furniture in any manner as provided by law.

It is further ordered by the court that the sheriff of Grady county, Oklahoma, shall immediately take full, absolute, and complete possession of lot 6, block 43, city of Chickasha, Oklahoma, together with all buildings thereon situated, and securely lock and fasten all openings to said building and hold the same for a period of one year from this date.

This the 17th day of February, A. D. 1913.  
[Signed] Frank M. Bailey, Judge.

Counsel for plaintiff in error have filed an able brief, assailing the law under which the proceeding is commenced and the action of the court below in several very important particulars. There is no brief on behalf of the state. Whilst the brief of counsel for plaintiff in error is full and persuasive, it is not so clearly convincing as to warrant us in reversing the judgment of the court below in toto, upon the authority of the line of cases which hold: Where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief, in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained, and where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties. *Taby v. McMurray*, 30 Okl. 602, 120 Pac. 604; *Purcell Bridge & Transfer Co. v. Hine*, 40 Okl. 200, 137 Pac. 668, handed down at this term. On account of the importance of the questions raised, and that full equity may be done in the instant case by a modification of the decree entered below, the court is not disposed to pass upon them until they arise in a case wherein they are briefed on behalf of the state, by the law officer charged with that duty.

The evidence shows that the building involved is of the value of \$15,000, and that it is of the rental value of \$1,500 per year; that it is very favorably situated and well adapted for use in any legitimate trade or business carried on in the city of Chickasha. Whilst the conduct of the owners in persistently permitting this building to be occupied and used for the sale of intoxicating liquors contrary to law was probably sufficient to justify the court in ordering the sheriff to take and retain charge thereof for the period of one year, upon the theory that it was the most effective means of abating the nuisance, we are of the opinion that the same purpose can be as well accomplished without withdrawing this large and valuable building, and the personal property not found to be of an intoxicating or contraband nature, entirely from the channels of legitimate trade or commerce for such a considerable period of

time. Assuming, therefore, that the court has not exceeded its jurisdiction in the premises, an examination of the findings and the record convinces us that justice requires the decree to be modified in two particulars. We are therefore of the opinion that that part of the decree which orders "that the sheriff of Grady county, Oklahoma, take an invoice of all stock and fixtures now in said building situated on said lot 6, block 43, city of Chickasha, Oklahoma, and return the said invoice of all goods not of an intoxicating or contraband nature to the board of county commissioners of Grady county, Oklahoma, that said board may make such disposition of said stock and fixtures and furniture in any manner as provided by law," should be modified by adding thereto the following:

"That all personal property seized and found not to be of an intoxicating or contraband nature, or used in keeping or maintaining such nuisance, shall be restored to the owner thereof."

After the proceeding in error was filed in this court, the plaintiff in error filed an application for supersedeas, and the action of this court thereon, as far as the building is concerned, seems fully to meet the requirements of the case in the way of abating the nuisance, and at the same time allows the owners of the building the use thereof for all legitimate purposes. As after the rendition of this order the Attorney General did not brief the case on its merits on behalf of the state, we take it that the order is satisfactory to the state and fully meets the purpose sought to be attained by the decree of the court below. The part of the order necessary for our present purpose is in substance as follows:

That the building located on lot 6, block 43, in the city of Chickasha, Grady county, Oklahoma, shall be turned over to the owners of said building by the sheriff of Grady county, upon condition that said owners shall observe in all respects the order of the court herein, and that said owners shall not at any time, either in person or by agent, or tenant, or subtenant, enter in or upon, or conduct any unlawful business of any nature whatsoever in or upon, the premises, or permit any person to conduct any such unlawful business on said premises. In consideration of said property being restored to the owners aforesaid, they are required to execute a bond with sufficient sureties in the sum of \$5,000, to be paid to the state as liquidated damages in case of violation of the judgment and decree by said Dave Hill, Sam Cook, Fred Smith, or their servants, agents, employes, or lessees; said bond to be filed and approved by the clerk of the district court, whereupon this decree shall immediately become effective. This order shall be continued in force.

In all other respects the decree of the court below is affirmed. All the Justices concur.

(45 Okl. 358)

In re BENEDICTINE FATHERS OF SACRED HEART MISSION. (No. 6834.)

(Supreme Court of Oklahoma. Nov. 10, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. CERTIORARI (§ 28\*) — JURISDICTION — SUPREME COURT.

This court has power, under the provisions of section 2, article 7, of the Constitution, to issue the common-law writ of certiorari, in cases where no appeal or proceeding in error lies, to bring up the record of an inferior court or tribunal for review as to jurisdictional errors only.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.\*]

2. CERTIORARI (§ 28\*)—JURISDICTION—SUPREME COURT—JUDGMENT OF COUNTY COURT.

Where upon appeal in a proceeding authorized under section 7449, Rev. Laws 1910, the county court exceeds its jurisdiction, by adjudging that property exempt from taxation under section 6, article 10, of the Constitution, shall be listed and assessed for taxation, a writ of certiorari will issue and such judgment will be quashed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. § 28.\*]

(Additional Syllabus by Editorial Staff.)

3. CERTIORARI (§ 1\*)—NATURE OF WRIT.

Certiorari is not a writ of right, but is to be granted or not in the discretion of the court. Proceedings on the return are confined solely to the record of the lower court or tribunal, and the writ will issue only in cases where no appeal or proceeding in error lies, and ordinarily where the error cannot otherwise be corrected.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, First and Second Series, Certiorari.]

Original action by the Benedictine Fathers of Sacred Heart Mission for a writ of certiorari. Writ issued.

Edward Howell, of Shawnee, and Arrington & Arrington, of Tecumseh, for petitioner. Baldwin & Carlton, of Shawnee, for respondent.

BLEAKMORE, J. This is an original action in this court. The Benedictine Fathers of Sacred Heart Mission filed its petition, praying the issuance of a writ of certiorari directed to Hal Johnson, judge of the county court of Pottawatomie county, Okla., commanding him to return to this court all the record in a certain action pending in said court in the matter of the assessment of property discovered to have been omitted and not listed and assessed for taxation. The petition alleges, in substance, that the Benedictine Fathers of Sacred Heart Mission is a corporation existing under the laws of the state of Oklahoma engaged solely in religious, charitable, and educational work; that all of its property attempted to be listed and assessed for the purpose of taxation is used exclusively for religious, educational, and charitable purposes; that on the 11th day of May, 1914, one R. C. Hurst, acting as tax

ferret, notified petitioner that certain of its property had not been assessed for taxation in the years 1910, 1911, 1912, and 1913, citing it to appear before the county treasurer and show cause why said property should not be assessed; that thereafter petitioner appeared before the county treasurer and set forth the facts, showing that its property was used exclusively for religious, educational, and charitable purposes, but that said county treasurer listed and assessed the same for taxation for said years; that an appeal was taken from the action of said treasurer to the county court, and that upon a hearing of said appeal evidence was introduced before said court establishing that petitioner was a corporation, under the laws of the state of Oklahoma, engaged solely in religious, educational, and charitable work, and that all of its property was used exclusively for its school and for religious and charitable purposes, but that, notwithstanding said fact, said court held that such property was subject to taxation. It is further alleged that under the provisions of the Constitution of Oklahoma said property is exempt from taxation, and that the county court exceeded its jurisdiction in rendering said judgment; that under and by virtue of said judgment taxes upon said property will be collected to the irreparable injury of petitioner. To said petition the county judge has demurred. The issuance of the writ of certiorari was waived, and the cause heard upon the petition and demurrer as upon the writ and return.

[1, 2] Upon the facts admitted to be true the property of the petitioner is exempt from taxation under the provisions of section 6, article 10, of the Constitution, which provides:

"All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges, and all property used exclusively for religious and charitable purposes, . . . shall be exempt from taxation."

The proceeding for the discovery, listing, and assessing of property, as in this case, is authorized under the terms of section 7449, Rev. Laws 1910, which provides:

"The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent. of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten day's notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the county court for the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court."

It is conceded that no appeal or proceeding in error will lie to this court from the judgment of the county court in such case.

Board of County Com'rs of Kingfisher County v. Guarantee State Bank et al., 27 Okl. 736, 117 Pac. 216; State et al. v. Cawthorn's Estate, 31 Okl. 560, 122 Pac. 522; Asher State Bank v. Board of Commissioners of Pottawatomie County, 31 Okl. 145, 120 Pac. 634.

The sole question in this case is whether a writ of certiorari will issue to review the action of the county court in the premises. It is contended on behalf of the county judge that, regardless of the error of the county court, its action is final, and that the writ of certiorari is not a proper remedy, and that this court is without jurisdiction to review the action of the county court in such proceedings thereby. Section 2 of article 7 of the Constitution provides:

"The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law, and to hear and determine the same."

It has been held that under said provision this court has the power to issue the common-law writ of certiorari to bring before it for investigation as to jurisdictional errors only the record of inferior courts and tribunals. *Baker v. Newton et al.*, 22 Okl. 658, 98 Pac. 931.

[3] As was said in that case, no procedure is prescribed by the Constitution, nor is it provided upon what conditions the writ shall issue. The scope of a writ of certiorari was quite limited at common law, and is therefore likewise limited in this state; the proceedings upon the return are confined solely to the record of the lower court or tribunal and the writ will issue only in cases where no appeal or proceeding in error lies, and, ordinarily, where the wrong or injury cannot otherwise be corrected. The purpose of the writ in all cases is to prevent injustice. It is not a writ of right, but is to be granted or not in the exercise of sound judicial discretion. The petition should conform to the rules of pleading at common law and allege all the facts required to confer jurisdiction on the reviewing court and the want of jurisdiction in the court below. In our opinion, the petition in the instant case is sufficient in this respect. It is undoubtedly within the power of this court, under the provision of the Constitution above quoted, to review upon certiorari the jurisdictional errors of a county court, in a case in which no appeal or proceeding in error will lie, to correct any wrong that may have been done the parties by reason of a judgment rendered without jurisdiction or in excess of the jurisdiction of the lower court. Under the facts admitted in this case the county treasurer was without authority to list or assess for taxation under any provision of the statutes of this state the property in question, specifically exempted from taxation by the provisions of the Con-

stitution; and the county court, upon appeal from such action of the county treasurer, was equally without jurisdiction to violate the constitutional right of petitioner by adjudging that property used exclusively for its school and for religious and charitable purposes should be listed and assessed for taxation. Such invasion of petitioner's constitutional rights is an injustice which will be prevented by the writ of certiorari. It cannot be said in this state that the constitutional right of any citizen may be infringed and his property taken, under the guise of statutory authority, by any officer or tribunal, although no appeal is provided from such action. The law of Oklahoma jealously and impartially guards the interests of all the people, and will always afford a remedy to control unlawful exercise of judicial force, such as in this case, by writ issued out of this court. It is not only the province, but it is the duty, of this court in the exercise of its power under the Constitution to prevent injustice and to uphold the law in all cases.

The county court of Pottawatomie county having exceeded its jurisdiction, its judgment is a nullity, and is hereby quashed. All the Justices concur, except KANE, C. J., absent and not participating.

(44 Okl. 794)

SEAY et al. v. PLUNKETT. (No. 3888.)  
(Supreme Court of Oklahoma. Dec. 1, 1914.  
Rehearing Denied Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. TRIAL (§ 260\*)—INSTRUCTIONS--REPETITION.

A judgment will not be reversed because of the refusal of the trial court to give an instruction, although such instruction may fairly state the law, if the law applicable to the issues in the case is fairly stated in the court's charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

2. INNKEEPERS (§ 10\*)—GUESTS—PERSONAL INJURIES—CARE REQUIRED.

A hotel or innkeeper, from the very nature of his business, extends an implied invitation to all persons to become guests at his hotel, and thereby becomes liable for injuries sustained by reason of the unsafe conditions of the hotel, and the law imposes upon him a degree of care and diligence for the safety of his guests reasonably commensurate with the circumstances and conditions.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*]

3. INNKEEPERS (§ 10\*)—GUESTS—PERSONAL INJURIES—INSTRUCTIONS.

It being stipulated that one of the defendants was the manager of the hotel, the court instructed the jury that such manager was responsible under the law for the condition of the hotel at the time of the accident, regardless of who may have owned the hotel or of who may have constructed it. *Held*, this was not error.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*]

4. TRIAL (§ 255\*)—INSTRUCTIONS—DUTY TO REQUEST.

A judgment will not be reversed for failure of the trial court to instruct upon any particu-

lar phase or issue, unless request is made at the trial for such instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

5. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—PLEADINGS.

Where the court in other paragraphs of the charge has defined to the jury what the issues are between the litigants, a judgment will not be reversed merely upon the grounds that the court set out the pleadings in full in his instructions to the jury, unless it is made to appear that the rights of the parties were prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

6. TRIAL (§ 194\*)—PROVINCE OF COURT AND JURY—EVIDENCE.

Where the court has separately and properly defined each of the elements of damage for which plaintiff might recover, provided the jury finds from the evidence that the plaintiff has sustained any such damage, and concludes with the words, "Provided such damages do not exceed in the aggregate the sum sued for," such language is not equivalent to saying such sum was reasonable damages in the premises, and the use of such language does not constitute reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

7. INNKEEPERS (§ 10\*)—INJURY TO GUEST—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to be sufficient to sustain the verdict and judgment.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*]

Commissioners' Opinion, Division No. 2.  
Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by Matthew Plunkett against A. J. Seay and another. Judgment for plaintiff, and defendants bring error. Affirmed.

P. S. Nagle and Marshal W. Hinch, both of Kingfisher, for plaintiffs in error. George L. Bowman, of Kingfisher, and Roberts & Curran, of Enid, for defendant in error.

HARRISON, C. This action was begun by Matthew Plunkett against A. J. Seay and Mrs. M. C. Baker for damages resulting from personal injuries sustained from falling through the areaway from the third floor to the second floor of a hotel owned by defendant Seay and operated by defendant Mrs. Baker. Plunkett, the plaintiff below, was a guest at said hotel, who, with some other guests, had arrived at the hotel late in the night. There was no one up about the hotel at the time except the night clerk. The other guests who arrived with him were shown to a room, after which the clerk, being informed that plaintiff wanted to retire, started to the third floor and directed the plaintiff to follow him. In following the clerk through the hallway toward the room assigned to him, the plaintiff stumbled over the banisters surrounding the areaway, or air shaft, and fell through on to the floor below, sustaining injuries for which he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

brought suit for \$20,278.76. Plaintiff alleged that in following the clerk to the room assigned to him the clerk traveled much faster than he did, and that by the time he reached the hallway on the third floor the clerk had disappeared down the hallway, thereby leaving him alone in the dark hallway; that in attempting to follow the clerk he stumbled over the banisters and fell through the areaway or air shaft on to the second floor. He charged that the hallway was dark, that the clerk had disregarded his safety and left him in the hall, and that the banisters around the areaway were so low that when he stumbled against them in the darkness he fell through, and that because of the negligence of the clerk in leaving him, a total stranger to the hotel, in the dark hallway, and the negligence of defendants in failing to keep such hallway sufficiently lighted for the safety of guests passing up and down same, and the negligence of defendants in failing to construct and maintain banisters around such areaway of sufficient height to prevent guests from falling over same, were the cause of his injuries.

The defendant answered, denying the negligence alleged by plaintiff, and alleged that plaintiff's injuries were caused by his carelessness and contributory negligence in attempting to go down the hallway alone; and further answered that the plaintiff had arrived at the hotel in a tired, worn-out, and sleepy condition, having been aboard the train for the two nights previous, that he failed to apprise the defendant of his condition, and that his injuries were caused by his own carelessness in approaching the railing around the areaway in the condition he was then in; and further alleged that, if plaintiff was suffering from any injuries, they were caused by being thrown from a buggy during a runaway which happened subsequently to his falling at the hotel. The trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$8,000; in fact, there has been two trials of this case, each resulting in a verdict for the plaintiff for about \$8,000. From the last verdict and judgment and order overruling motion for new trial, the defendants appealed upon nine separate specifications of error. Of these assignments of error, the second and third relate to the giving and rejection of certain instructions, the fourth, fifth, and sixth relate to the sufficiency of the evidence, and the seventh, eighth, and ninth relate to the admission and rejection of evidence. The first relates to the overruling of the motion for new trial. We shall review these groups in the order named.

[1] As to the instructions submitted by defendants below and refused by the court, instruction A was properly refused, for the reason that it does not state the law of this state. In such instruction the defend-

ant sought to instruct the jury that if Plunkett found the hallway to be dark when he reached the third floor, and found that the clerk had passed out of sight, it was his duty to call the clerk and to refuse to proceed further down the unlighted hallway, and that his failure to do this constituted such negligence on his part as to prevent a recovery. This instruction is not only against the weight of authority (see *West v. Thomas*, 97 Ala. 622, 11 South. 769; *Railroad Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354), but is against the plain provisions of section 6, art. 23, of our Constitution, which makes the defense of contributory negligence a question of fact for the jury. Besides, under the law, the plaintiff had a right to presume that defendants had provided reasonably safe corridors and passageways to the rooms and to presume that if there were any dangerous air shafts or pitfalls in such corridors or passageways that they would be properly lighted or safeguarded. See *West v. Thomas*, 97 Ala. 622, 11 South. 769; *Railroad v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354.

Instructions B, C, D, E, and J were properly refused, for the reason that they do not state the law. There was no error in refusing to give instructions I, O, and S, for the reason that the law offered in these instructions was given in the court's charge.

[2] Complaint is also made that the court erred in giving instructions numbered 4, 5, 6, 7, 11, and 16. In instruction No. 4 the court told the jury that a hotel or innkeeper "extends an implied invitation to all to come upon his premises, and he is therefore liable for injuries sustained in consequence of the bad condition of such premises." The giving of this instruction was not error. See 16 Am. & Eng. (2d Ed.) 547, and authorities in note 3; also *Railroad Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354; *Patrick v. Springs*, 154 N. C. 270, 70 S. E. 395, Ann. Cas. 1912A, 1209; *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; *West v. Thomas*, 97 Ala. 622, 11 South. 769; *Trulock v. Willey*, 187 Fed. 957, 112 C. C. A. 1. Besides, a hotel or innkeeper, in the very nature of his business, extends an implied invitation to all persons to become guests of his hotel, and thereby becomes liable for injuries sustained by reason of the unsafe conditions of the hotel or premises, and the law imposes upon him a degree of care and diligence for the safety of his guests reasonably commensurate with the circumstances and conditions.

[3] In paragraph 5 of the court's charge he told the jury that it is the duty of a hotel keeper to see that his hotel and premises are in a reasonably safe condition for the accommodation of guests, and, it being admitted that defendant A. J. Seay was the keeper of the hotel at the time, he was there-



fore responsible for the condition thereof, and it made no difference who was the owner of the building at the time nor by whom it was constructed. Complaint is made of this instruction because of prejudicial emphasis placed on the liability of A. J. Seay, the keeper. We are unable to see the error contended for by plaintiffs in error. The manager, A. J. Seay, was responsible under the law for the condition of the hotel at the time of this accident, regardless of who may have owned the hotel or of who may have constructed it.

Paragraph 6 of the court's charge is as follows:

"A hotel keeper for hire is not an insurer of the safety of his guests, but must use reasonable care and diligence for their safety, and must provide everything necessary for that purpose, including reasonably safe barriers around air shafts or areaways, and sufficient lights for the guests to see and observe any dangerous places, and must exercise to that end a reasonable degree of skill. It is for you to say under the evidence whether or not the balustrade maintained around the areaway referred to was reasonably sufficient to protect the same and to keep guests from falling through the areaway under the conditions which you may find existed there, and also it is for you to find from the evidence whether or not the hallway containing the opening or areaway was sufficiently lighted at the time of the accident, and whether or not the night clerk, or defendant's agents in charge, used reasonable skill and care in escorting the plaintiff to his room, and from all these considerations determine whether or not the defendants were guilty of any negligence. You must also take into consideration the circumstances under which the plaintiff came to the hotel, his physical condition, the manner in which he proceeded to his room, and determine therefrom whether or not he was guilty of any negligence which contributed to the injury complained of, and, if you find from the evidence that the plaintiff was guilty of such negligence, then the plaintiff cannot recover."

Complaint is made that in the foregoing instruction the terms "reasonable care," "reasonable degree of skill," "reasonable diligence," "reasonable skill and care," "reasonable care and diligence" are used without any explanation as to the meaning of such terms, and that a failure to do so was error. This contention is without merit, for the reason that in paragraph 14 of the court's charge he tells the jury that by the term "reasonable care" the law means such a degree of care as an ordinarily prudent person would exercise under similar circumstances or in the same situation. Whether this definition makes the meaning any clearer, or whether or not it sheds any additional light on the word "reasonable" itself, we cannot say, but it is the definition usually given by the courts, and is equally as full and lucid as the definitions given in the cases cited by plaintiffs in error.

[4] Objection is made to paragraph 7 of the court's charge, on the ground that the court, having used the term "proximate result" without specifically defining to the jury what is meant by such term, committed reversible error, citing *Swift v. Reanard*, 128 Ill. App.

181; *Mulderig v. St. L., etc., Ry. Co.*, 116 Mo. App. 655, 94 S. W. 801; *Holmes v. Clisby*, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103. While the authorities cited seem to support the contention made, yet, as no request was made by plaintiffs in error in the case at bar for a definition of the term "proximate result," this judgment will not be reversed for failure to define such term, and especially since it does not appear from the record that the rights of plaintiffs in error were prejudiced by such failure. Besides, the rule has been repeatedly announced by this court that a judgment will not be reversed for failure of the trial court to instruct upon any particular phase or issue, unless request was made at the trial for such instruction. See *C., R. I. & P. Ry. Co. v. Radford*, 36 Okl. 657, 129 Pac. 834, and cases cited.

[5] Complaint is also made that the court, instead of defining the issues made by the pleadings, set out the pleadings in full in his instructions, but from an examination of the court's charge it appears that in instruction No. 7 the court very clearly and concisely defines the issues between the litigants. Hence we find no error in this regard.

It is contended that the court erred in paragraph 7 by using the following language.

"\* \* \* Third, that the defendants were guilty of negligence in the way or manner or some of the ways complained of by the plaintiff; and, fourth, that the plaintiff was injured as the proximate result of such negligence on the part of defendants."

It is contended by plaintiffs in error that some of the acts of negligence complained of by the plaintiff below were not sufficient in and of themselves to constitute such negligence as would render the defendant liable, and that the court's language conveyed the idea that, if any one of the acts of negligence complained of was found to exist, then the plaintiff should recover. But this language, read in connection with the whole paragraph, conveys no such idea. The court was here merely defining the issues made by the pleadings; the third issue being that the defendants were guilty in the way or manner, or some of the ways complained of, and the fourth issue that plaintiff's injuries were the proximate result of such negligence. Hence the contention is not well taken. But if the court had instructed the jury that if they found from the evidence that the defendants were guilty of negligence in any one of the acts complained of, or in any two or all of such acts concurring, and that such negligent act or concurring acts were the proximate cause of plaintiff's injuries, still such instruction would not be error; for such is the law. See *Enid City Ry. Co. v. Decker*, 36 Okl. 367, 128 Pac. 709; 29 Cyc. 565; *Cole v. Gerrick*, 62 Wash. 226, 113 Pac. 565; *Westlake v. Keating Gold Mining Co.*, 48 Mont. 120, 136 Pac. 38; *C., R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 460, 138 Pac. 794.



[8] Complaint is also made that the court erred in paragraph 11, which is as follows:

"If you find the issues for the plaintiff, then he is entitled to recover reasonable damages; for the law only permits the recovery of reasonable damages. The measure of plaintiff's damages, if you find he is entitled to recover, is reasonable compensation for the physical pain which you may find he has suffered, also any loss which you may find he has sustained by being unable to work and earn money, together with any loss you may find he has sustained by reason of lessened capacity to labor since he left the hospital, also any loss which you may find he has sustained by reason of any permanent injuries, if you find he has sustained any injuries of that character, and also any expenses to which you may find he has incurred in the way of doctor's bills, hospital and nurse expenses; provided such damages do not exceed in the aggregate the sum of \$20,278.76."

The plaintiff sued for \$20,278.76, and it is contended by plaintiffs in error that the language used by the court in paragraph 11 was equivalent to saying such sum was reasonable damages, but an examination of the charge as a whole refutes this contention.

[7] It is also contended that there was no evidence of any special damage by reason of plaintiff's inability to work and earn money, but the testimony on this point was sufficient to justify the court in instructing the jury on that element of damage, and sufficient, if believed by the jury, to sustain their verdict.

Complaint is also made that the court erred in rereading instruction No. 16 and orally explaining same to the jury. In paragraph 16 the court told the jury that it would be unlawful for them to arrive at a verdict by casting lots or by entering into an agreement to accept the quotient obtained by adding together the amount determined by each individual juror and dividing such amount by 11 or any other number. We fail to see wherein the rights of plaintiffs in error were prejudiced by this action.

The contention that the verdict is contrary to law and not sustained by the evidence is not borne out by the record, nor do we find any material error committed in the admission or rejection of testimony. We think, upon the whole, that defendants below were given a fair trial; at least, we find no reversible error in the record.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

(11 Okl. Cr. 263)

CAFFEE v. STATE. (No. A-2085.)

(Criminal Court of Appeals of Oklahoma. Jan. 19, 1915.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 52\*)—VERIFICATION—SUFFICIENCY—CLERKS OF COURT—"MINISTERIAL ACT"—"JUDICIAL ACT."

In a prosecution for misdemeanor, the information was sworn to before the clerk of the court, and a motion to quash on the ground

that the information is not sworn to and verified in the manner required by law was overruled. *Held*, that the administration of an oath by an officer authorized to administer oaths is a ministerial, and not a judicial, act, wherefore the motion to quash was properly overruled.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.\*]

For other definitions, see Words and Phrases, First and Second Series, Ministerial Act; Judicial Act.]

2. INTOXICATING LIQUORS (§ 229\*)—PROSECUTION—POSSESSION WITH INTENT TO SELL—EVIDENCE OF REPUTATION.

In a trial for possession of intoxicating liquor with intent to sell the same, where the proof shows such possession at a place of public resort, and that such place was used for the purpose of selling intoxicating liquor, evidence of the general reputation of the place is admissible on the question of intent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 289; Dec. Dig. § 229.\*]

Appeal from Superior Court, Muskogee County; Farrar L. McCain, Judge.

George Caffee was convicted of a violation of the prohibition law, and appeals. Affirmed.

De Roos Bailey, J. E. Wyand, and Chas. A. Moon, all of Muskogee, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is prosecuted from a conviction had in the superior court of Muskogee county on the 5th day of July, 1913, in which the defendant was found guilty of the offense of having the unlawful possession of intoxicating liquors with intent to sell the same. The jury fixed the punishment at a fine of \$200 and confinement in the county jail for 50 days.

The evidence shows that the defendant's place of business was known as the "Busy Drug Store," located at 110 North Second street, Muskogee. On the day named in the information three officers searched the place and found the defendant behind the prescription case. The defendant dropped a whisky bottle in a tub with the remark that he and a friend had just taken a drink. The officers found there 60 half pints, 14 pints, and 2 quarts of whisky.

Over the objection of the defendant, three witnesses were permitted to testify that they knew the general reputation of the defendant's drug store as being a place where intoxicating liquors were sold and kept for sale.

The state introduced a certified copy of the records of the internal revenue collector showing the payment of the special tax required of liquor dealers by the United States covering the "Busy Drug Store," "Geo. C. Caffee," 110 North Second street, Muskogee, Okl.

[1] The first question presented upon the record is the sufficiency of the verification.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon arraignment the defendant filed a motion to quash the information on the ground that the same is not sworn to and verified in the manner required by law. The record shows that the information was sworn to before Robert Toomer, clerk of the superior court.

The learned counsel for the plaintiff in error contend that informations in misdemeanor cases must be sworn to before a magistrate.

Section 4288, Rev. Laws, provides that:

"The following officers are authorized to administer oaths: \* \* \*

"Third: Judges and clerks of the district, superior and county courts within their respective districts or counties."

The administration of an oath by an officer is a ministerial, and not a judicial, act.

The verification as made was clearly sufficient, and the motion to quash was properly overruled.

[2] The second question presented arises upon the rulings of the court admitting evidence of the general reputation of the defendant's place of business. This question was passed on in the case of *Wilkerson v. State*, 9 Okl. Cr. 662, 132 Pac. 1120. In the case of *Kirk v. State*, 11 Okl. Cr. —, 145 Pac. 307, it is said:

"The *Wilkerson Case* was a prosecution for unlawful possession with intent to violate provisions of the prohibitory law. It is held in that case, and uniformly in all cases where the offense charged was unlawful possession, that testimony tending to show that the defendant had previously sold other liquor or kept other liquor for sale is admissible on the question of intent, and if such liquors were kept at a place at which the public generally resorted, and the circumstances of the case indicated that such place was used for the purpose of selling intoxicating liquor, the general reputation of such place is admissible on the question of intent."

Under the facts in this case, evidence of reputation was admissible. After a careful examination of the various questions raised, we are satisfied that, under well-settled rules sustained and upheld by the decisions of this court, no prejudicial error has been committed.

Our conclusion is that the defendant had a fair trial, and was properly convicted.

The judgment of conviction is therefore affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(11 Okl. Cr. 168)

JENKINS v. STATE. (No. A-2124.)

(Criminal Court of Appeals of Oklahoma. Nov. 7, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 770, 805\*)—INSTRUCTIONS—INFORMATION.

The trial court should avoid writing his instructions so as to cover the surplus language used in an information. The charge of the court

should be reasonably concise and clear, and should conform to the charge set forth in the information.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1806, 1958, 1989; Dec. Dig. §§ 770, 805.\*]

2. CRIMINAL LAW (§ 1114\*)—INTOXICATING LIQUORS (§§ 215, 239\*)—PROSECUTION—INFORMATION — INSTRUCTIONS — APPEAL — PRESENTATION FOR REVIEW.

(a) When an appeal is by transcript only, this court will not undertake to determine questions raised by the petition in error argued in the briefs which cannot be correctly determined without the aid of the testimony produced at the trial.

(b) An information which uses the language "sell, barter, give away, or otherwise furnish" has been held by this court to charge a sale or barter only. The trial court should not include in his instructions the general language "give away and otherwise furnish" under an information which charges a sale only.

(c) When the state relies on the giving away or otherwise furnishing intoxicating liquor as a subterfuge for a sale, the facts must be pleaded in order that the court may determine whether or not a crime has been committed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2918, 2921; Dec. Dig. § 1114.\* *Intoxicating Liquors*, Cent. Dig. §§ 258-260, 331-347; Dec. Dig. §§ 215, 239.\*]

3. CRIMINAL LAW (§§ 778, 1173\*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—HARMLESS ERROR.

The court should always include in his charge to the jury an instruction upon the presumption of innocence, but when the jury is instructed fully upon the doctrine of reasonable doubt, and it clearly appears that the failure to instruct on the presumption of innocence was an oversight, and resulted in no injury to the accused, that no exception was taken by counsel, and the court's attention not called to the oversight, this court will not reverse a conviction upon that ground alone.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967, 3164-3168; Dec. Dig. §§ 778, 1173.\*]

4. CRIMINAL LAW (§ 274\*)—PLEA OF GUILTY — WITHDRAWAL—DISCRETION.

When a person charged with crime is arraigned and enters a plea of not guilty, the court, in its discretion, may allow the plea to be withdrawn in order to grant the accused an opportunity to file a plea to the jurisdiction of the court or attack the information by demurrer.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 632, 633; Dec. Dig. § 274.\*]

5. CRIMINAL LAW (§ 274\*)—TIME TO PLEAD—WITHDRAWAL OF PLEA.

If a plea of not guilty has been entered to an information, and the trial court grants permission to withdraw the plea for any purpose, the accused person is entitled to such delay or time in which to plead anew to the original information as the court in its discretion may deem just.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 632, 633; Dec. Dig. § 274.\*]

6. COURTS (§ 116\*)—RECORDS—CORRECTION.

A transcript of the record is defined by the statute and this transcript cannot be impeached by affidavits or other statements. The trial court can correct errors in a transcript or other records by proper proceedings and nunc pro tunc orders, but counsel cannot correct transcripts or records by filing affidavits or inducing the clerk to include over his certificate matters

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which are not part of the transcript as defined by the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 369, 371-373; Dec. Dig. § 116.\*]

Appeal from County Court of Bryan County; J. L. Rappolee, Judge.

Harrison Jenkins was convicted of violating the prohibitory law, and appeals. Affirmed.

Sprolws & Stone, of Durant, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**ARMSTRONG, P. J.** The plaintiff in error, Harrison Jenkins, was convicted at the September, 1913, term of the county court of Bryan county sitting at Durant on a charge of unlawfully selling intoxicating liquor, and his punishment fixed at a fine of \$150 and imprisonment in the county jail for a period of 90 days. This appeal is by transcript only. The information is as follows:

"Comes now Walter J. Turnbull, the duly qualified and acting county attorney in and for Bryan county, state of Oklahoma, and gives the county court of Bryan county and state of Oklahoma, to know and be informed that the above-named defendant, Harrison Jenkins, late of Bryan county, did, in Bryan county, and in the state of Oklahoma on or about the 1st day of July, in the year of our Lord one thousand nine hundred and thirteen, commit the crime of violating the prohibition laws, in the manner and form as follows: That is to say, the defendant did in said county and state, at the above-named date, unlawfully and willfully, sell, barter, give away and otherwise dispose of certain spirituous liquors, to wit, one pint of whisky to J. A. Strutton, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

[1, 2] It is contended that the court erred in giving instruction No. 2, which instruction is as follows:

"You are therefore instructed, if you find from the evidence in this case beyond a reasonable doubt that the defendant, Harrison Jenkins, did, within Bryan county, Okl., on or about the 1st day of July, 1913, unlawfully and willfully sell, barter, give away or otherwise furnish one pint of whisky or any amount whatsoever, to one J. A. Strutton, as charged in the information, then, and in that event the defendant would be guilty as charged, and you should so find in your verdict; otherwise the defendant would not be guilty, and you should so find in your verdict."

The instructions of the court should conform to the charge contained in the information and correctly state the law. Counsel having failed to bring up a transcript of the testimony, the court is not in position to determine definitely what the proof was, but it is apparent that the state relied upon an unlawful sale. Instruction No. 2 clearly indicates that fact. We are of opinion that instruction No. 2 should not have been given in the language it was given, but we cannot say it was error prejudicial to the rights of plaintiff in error, in the absence of a complete record. A correct instruction in this cause should have submitted only the propo-

sition of whether or not an unlawful sale or barter was made within the contemplation of the statute, because that is all the information properly charges. Any person interested in the making of a sale is guilty under the law.

[3] It is next contended that the court erred in failing to instruct upon the presumption of innocence. This instruction should always be given, but we are of opinion that in this case this oversight was unintentional, and was also without prejudice. Counsel failed to call the court's attention to the matter at the time, and failed to save any exceptions to the instructions on that ground. In *Beatty v. State*, 5 Okl. Cr. 105, 113 Pac. 237, we said:

"Where the court failed to instruct upon the presumption of innocence, but did instruct the jury fully upon reasonable doubt, and where the defendant did not request any instruction on the presumption of innocence or save an exception to the action of the court in neglecting to charge on this presumption, a conviction will not be reversed because the court omitted to give said instruction."

[4, 5] It is next urged that the court erred in the matter of allowing time within which to plead. The transcript shows that when the information was filed the plaintiff in error entered a plea of not guilty; that later he asked to withdraw the plea, which was granted, and filed a dilatory motion, which was overruled; that he then asked for further time in which to plead. The court granted him half an hour. Counsel fail to bring this case within the statutory rule. There was no error in this proceeding by the court. Counsel had no right to withdraw the plea in order to delay the trial, and, when the withdrawal was allowed, the time given within which to plead was in the discretion of the court, and there is nothing in the transcript to indicate an abuse of that discretion.

[6] It is next urged that the court erred in sentencing the prisoner to pay a fine of \$150 and imprisonment in the county jail for a period of 90 days. The contention of counsel is that the judgment should conform to the verdict, but no copy of the verdict is disclosed, except the recital in the judgment shown by the transcript, which reads as follows:

"We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find the defendant guilty as charged in the information and assess his punishment at \$150 and 90 days' imprisonment in the county jail."

Counsel have included a notation from the judge's docket, which is as follows:

"Time set for sentencing Monday, Sept. 15th, 1913. Sept. 15. Sentence to 30 days and \$150.00."

These later notations are no part of the transcript of the record, and could not be used to impeach the record proper or the recital of the verdict as it appears in the judgment. If, as a matter of fact, the court had made a mistake in rendering judgment, im-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

posing 90 days imprisonment, when the jury intended only 30 days, by their verdict, a proper motion to correct the judgment to conform to the verdict should have been made and proof offered to establish the facts. No such steps were taken. In fact, the judgment rendered and the verdict, as shown by the recital in the judgment, are the same. Each impose 90 days' imprisonment and a fine of \$150. Counsel undertake to impeach the record by filing an affidavit. This court has heretofore said that the record could not be impeached in any such manner. These corrections, if made at all, must be made by the trial court in the manner prescribed by law.

We have carefully reviewed the record, and find no error sufficient to justify a reversal.

The judgment of the trial court is therefore affirmed.

DOYLE, J., concurs. FURMAN, J., absent on account of sickness.

(26 Idaho, 712)

**SOUTHERN IDAHO CONFERENCE ASS'N  
OF SEVENTH DAY ADVENTISTS v.  
HARTFORD FIRE INS. CO.**

(Supreme Court of Idaho. Jan. 21, 1915.)

**1. TRIAL (§ 165\*)—MOTION FOR NONSUIT—DETERMINATION—EVIDENCE.**

Upon motion for nonsuit, as provided by section 4354, Rev. Codes, the defendant admits the existence of every fact which the evidence tends to prove, or which could be gathered from any reasonable view of the evidence, and plaintiff is entitled to the benefit of all inferences in his favor which the jury would be justified in drawing from the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

**2. INSURANCE (§ 651\*)—TRIAL—ACTION ON POLICY—EVIDENCE.**

The refusal of the court to admit certain evidence on the trial held reversible error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1673-1675; Dec. Dig. § 651.\*]

**3. INSURANCE (§ 664\*)—ACTION ON POLICY—PROOF OF LOSS—WAIVER—EVIDENCE.**

Where a waiver of proof of loss is an issue in a case, all evidence tending to establish such waiver ought to be admitted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. § 664.\*]

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by the Southern Idaho Conference Association of Seventh Day Adventists, a corporation, against the Hartford Fire Insurance Company, a corporation. From judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Richard H. Johnson, of Boise, for appellant. Martin & Martin, of Boise, for respondent.

SULLIVAN, C. J. This case was decided by this court on May 26, 1914, and a petition

for rehearing was thereafter granted and a rehearing had at the January, 1915, term of court.

The action was brought by the plaintiff, the Southern Idaho Conference of Seventh Day Adventists, a corporation, to recover \$3,500 on an insurance policy issued by the defendant, the Hartford Fire Insurance Company, a corporation, covering a school building situated near the village of Eagle in Ada county, which building was destroyed by fire on the night of November 21, 1911. The complaint alleges that said policy was executed and delivered on November 20, 1911, and the payment of premium of \$122.50 was made. The answer denies the execution and delivery of the policy, but on the trial counsel for defendant admitted that the policy was signed by the agent, but denied that it was delivered to the plaintiff. The complaint alleges, and it is admitted by the answer, that at all times mentioned in the complaint, Frank M. Gardner was the duly appointed, qualified, and acting agent of the defendant insurance company, residing at the village of Eagle, and was authorized to solicit and receive applications for fire insurance, and that he was duly licensed as such agent by the insurance commissioner of the state of Idaho, and that he was duly authorized by defendant to countersign and deliver for said defendant contracts or policies for insurance against loss or damage by fire, and to receive on behalf of said defendant payment of premiums therefor.

The case was tried by the court with a jury, and before plaintiff had completed the introduction of its evidence, the court refused to permit the insurance policy to be introduced in evidence. The plaintiff then offered other evidence to sustain the remaining allegations of the complaint, much of which testimony was offered for the purpose of showing a waiver on the part of the defendant of any want of authority from plaintiff to Gardner to execute the policy, even if such authority had not been fully shown by the testimony theretofore introduced. This evidence was all ruled out by the court and exceptions taken. The court thereupon sustained a motion for a nonsuit on the part of the defendant, and judgment of dismissal was entered against the plaintiff. The appeal is from the judgment.

[1] The assignments of error go to the action of the court in excluding certain evidence offered by the plaintiff and granting a nonsuit at the close of plaintiff's evidence. The motion for nonsuit was granted and judgment of dismissal entered on the ground that no evidence was introduced by the plaintiff showing that the agent of the insurance company had any authority or direction from the plaintiff to execute the policy sued upon, and the court by granting said nonsuit held that it was executed without authority from

the plaintiff, and therefore did not constitute a binding contract upon the insurance company. Since in our view of the matter the case must be sent back for a new trial, we shall not comment upon the evidence, but after a careful examination of all the evidence in the record, we are fully satisfied that there was evidence admitted and offered tending to show that the agent of the insurance company was authorized to issue the policy of insurance sued upon in this case, and that it was error for the court to grant a nonsuit and enter a judgment of dismissal.

It is a well-settled rule of this court that on a motion by the defendant for nonsuit, after the plaintiff has introduced his evidence and rested his case, the defendant is deemed to have admitted all of the facts of which there is any evidence, and all of the facts which the evidence tends to prove, and that the evidence must be interpreted most strongly against the defendant. *Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301, and authorities there cited; *Shank v. Great Shoshone & Twin Falls Water Power Co.*, 205 Fed. 836, 124 C. C. A. 35.

[2] The policy of insurance on which this action was based was offered in evidence and rejected by the court. That was error. The policy should have been admitted. Other evidence tending to show the understanding or agreement between the insured and the agent of the insurer was offered and rejected by the court. All evidence ought to be received that tends to sustain the material allegations of the complaint.

[3] The record shows that the proof of loss was not made within 60 days after the fire, and the question will be presented on a retrial as to whether the failure to make such proof precludes a recovery in this case. The evidence offered, showing or tending to show a waiver by the company of making the proof of loss within the 60 days, ought to be received on the trial.

The above is sufficient to indicate the views of the court upon the points discussed.

For the reasons above given, the judgment must be reversed and a new trial granted, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Costs awarded in favor of appellant.

BUDGE and MORGAN, JJ., concur.

(169 Cal. 26)

In re MATHEWS. (S. F. 6824.)

(Supreme Court of California. Dec. 16, 1914.  
Rehearing Denied Jan. 14, 1915.)

# 1. GUARDIAN AND WARD (§ 10\*)—RIGHT OF PARENT TO GUARDIANSHIP—STATUTE.

Under Code Civ. Proc. § 1751, the father or mother of a child under 14 is entitled to be guardian unless the parent is incompetent, even

though the child's health and welfare may be promoted by giving it to another.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 23-33; Dec. Dig. § 10.\*]

## 2. GUARDIAN AND WARD (§ 13\*)—COMPETENCY OF MOTHER—EVIDENCE.

On an appeal by the mother of a child under 14 from an order appointing a stranger his guardian, evidence held not to sustain a finding that the mother was unfit to act as guardian.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 40-52; Dec. Dig. § 13.\*]

Department 1. Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Application for the appointment of a guardian of Gerald Mathews, a minor. From an order appointing Warren A. Rouse guardian, the mother of the minor appeals. Order reversed.

J. L. Nagle and Louis H. Ward, both of San Francisco, for appellant. E. E. Parlin, of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal by the mother of Gerald Mathews, a minor, from an order appointing one Warren A. Rouse guardian of his person and estate. The minor was born January 28, 1906, and has been in the family of Warren A. Rouse and his wife, Carrie E. Rouse, for over seven years. It is not questioned that the Rouses are in all respects competent to properly care for him, or that he is being given a comfortable home with them and being raised as one of their own children. The application of Rouse for appointment alleged that the father of said minor is either dead or has abandoned the child, and that the mother is an unfit and improper person to have his custody. The trial court found that the father of the minor is dead, and that the mother "is an unfit, incompetent, and improper person to have the care, custody, or control of the said Gerald Mathews," and "that the interest, welfare, and safety and happiness of said minor \* \* \* will be promoted by" the appointment of Rouse.

[1] It is well settled that, under the provisions of section 1751 of the Code of Civil Procedure, the father or mother of a minor child under the age of 14 years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed, unless it finds such parent incompetent, notwithstanding the judge is of the opinion that the child's health and welfare may be promoted by giving it to another. In re Forrester, 162 Cal. 493, 123 Pac. 283; In re Salter, 142 Cal. 412, 415, 76 Pac. 51. Here, as we have seen, there is such a finding, and the only question is whether such finding has sufficient legal support in the evidence.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] We have given the evidence in this case very careful consideration and are unable to find therein sufficient support for this finding. Apparently the mother has always discharged her full duty to her child, in so far as she was able to do so. When he was but a few months old, immediately after the earthquake and fire of 1906, she advertised for a home for him, and in response to an answer to her advertisement she placed the infant in the care of the Rouses, as she says, upon an agreement that she was to pay for its maintenance \$25 per month. Her testimony as to an agreement to pay them is opposed to the testimony of Mrs. Rouse, but it is not denied that she constantly, up to a short time ago when she sought the return of the child, contributed substantially to its support, giving the money therefor to Mrs. Rouse. She visited the child at frequent intervals, and so far as we can see failed in no respect in the discharge of any of her obligations as a mother, in so far as she was able to discharge those obligations. She had no property and no home, and worked for a living as a domestic servant, and therefore was obliged to temporarily, at least, place the child somewhere else. It may be that she will still be unable to keep the child with her, but no sufficient reason appears in the evidence why she should be deprived of the legal custody of the child and the right to determine where he shall be kept. She testified that she wishes to place him with her brothers and sisters in their home in San Francisco, and that they have indicated their willingness to receive him. It does not appear that this would be in any way an improper place for the child, or that the child would not be properly cared for in such place. The evidence relied on as warranting a finding of incompetency is pitifully weak, and entirely insufficient in our judgment to warrant a conclusion that the mother is incompetent to act as guardian and should be deprived of the custody of her child.

The order appealed from is reversed.

We concur: SLOSS, J.; SHAW, J.

(168 Cal. 771)

In re WARNER'S ESTATE.

WARNER v. WARNER. (Sac. 2142.)

(Supreme Court of California. Dec. 12, 1914. Rehearing Denied Jan. 11, 1915.)

1. HUSBAND AND WIFE (§ 33\*)—ANTENUPTIAL CONTRACT — BREACH — RESCISSION — ESTOPPEL.

An antenuptial contract, by which, in consideration of an annual payment of \$100 and the support of her minor daughter, the wife released all her interest in his property except the sum of \$1,000, which she was to receive at his death. The marriage took place May 2, 1889, and the wife's daughter became of age July, 1895, about which time she married and left home. The wife continued to accept payments under the contract until the parties became estranged some seven

years thereafter, when there was litigation between them concerning her right to file a homestead claim on certain of his land. *Held*, that the husband's breach of the antenuptial contract by failing to support and care for the wife's daughter became complete in 1895, when the daughter became of age, and, the wife not having elected to rescind the antenuptial contract for that reason during the remainder of her husband's life, she was estopped after his death to repudiate the same in order to claim a widow's share of her husband's estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 196-202, 204, 885; Dec. Dig. § 33.\*]

2. CONTRACTS (§ 270\*)—RESCISSION—RIGHT TO RESCIND—TIME.

Rescission of a contract, when not effected by consent, can be accomplished only by reasonable diligence to rescind promptly on discovery of the facts giving the right so to do if the party entitled is free from undue influence and aware of his right, and if under such circumstances he does not elect to rescind within a reasonable time, but continues with knowledge of the facts to accept payments due under the contract, the right is barred.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.\*]

3. TRIAL (§ 397\*)—GENERAL FINDING—EVIDENCE—FAILURE TO MAKE SPECIAL FINDING.

Where, on an issue of estoppel against a widow to claim breach of an antenuptial contract by her husband since deceased, the court made a general finding that she was estopped, which was sustained by the evidence, omission to specifically find that her failure to exercise her right to rescind during the husband's lifetime was not caused by his undue influence was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

4. HUSBAND AND WIFE (§ 34\*)—ANTENUPTIAL CONTRACT—BREACH BY HUSBAND—ESTOPPEL OF WIFE—FINDINGS—EVIDENCE.

On an issue as to a widow's right to administer her deceased husband's estate, evidence *held* to warrant a finding that her failure to exercise her right to rescind an antenuptial contract between them during her husband's life was not caused by his undue influence, and that she was therefore estopped to deny that she was bound thereby because of his alleged breach of the contract which was complete 11 years prior to his death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 204, 205; Dec. Dig. § 34.\*]

In Bank. Appeal from Superior Court, Sacramento County; G. W. Nicol, Judge.

In the matter of the estate of Adam Warner, deceased. Applications by Katie Warner and by Adam J. Warner for letters of administration. From an order directing the issuance of letters to Adam J. Warner and denying the motion of Katie Warner for a new trial, she appeals. Affirmed.

See, also, 158 Cal. 441, 111 Pac. 352.

A. A. De Ligne and R. Platnauer, both of Sacramento, for appellant. A. L. Shinn and W. F. Renfro, both of Sacramento, for respondent.

PER CURIAM. A rehearing in bank was ordered in this cause after a decision in department 1 of this court. Upon further con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sideration of the case we are satisfied with the reasoning and conclusions reached in the opinion in department, adopt that opinion as the opinion of the court in bank, and affirm the orders appealed from.

The opinion in department, written by Justice SHAW and concurred in by his associates in department, Justices ANGEL-LOTTI and SLOSS, is as follows:

"In this matter, the appellant, Katie Warner, the widow of deceased, applied for letters of administration of his estate. The respondent, Adam J. Warner, a son of the deceased, filed a counter petition asking that letters be issued to himself. He also filed a written opposition to the widow's petition. The widow, in turn, contested his petition. After a trial of the issues thus presented, the court found in favor of the son and made an order directing that letters of administration issue to him. From this order and from a subsequent order denying her motion for a new trial, the widow appeals.

"There have been two previous appeals in the case. The son, in his written opposition, set up as a bar to the widow's right to letters an antenuptial agreement between her and the deceased, whereby she relinquished all right, claim, and interest in his estate, as heir or otherwise. In her answer thereto she alleged: (1) That the agreement was obtained by fraud; (2) that it was the result of a mutual mistake; (3) that it was without adequate consideration; (4) that Adam Warner in his lifetime waived the agreement; (5) that he had in his lifetime failed to perform it. A general demurrer to this answer was sustained, and letters were awarded to the son. She appealed, and the order was thereupon reversed by the District Court of Appeal, to which the appeal had been duly transferred. That court held that the agreement, on its face, barred her right to letters of administration, that the answer thereto was sufficient upon a general demurrer, and that the court, in that proceeding, had jurisdiction to inquire into the facts upon which she sought to impeach the agreement. See 6 Cal. App. 361. Upon the second hearing in the superior court, findings were made against her upon all the issues and letters were again awarded to the son. Again the widow appealed to the Supreme Court, and again the order was reversed. This reversal was placed on the ground that there was no evidence to support the finding that Adam Warner had performed the conditions of the contract on his part. In his petition and in his written opposition, the son had alleged such performance. Upon the first appeal this allegation was held to present a material issue. Upon the second appeal this statement upon the first appeal was held to have become the law of the case. 158 Cal. 441, 111 Pac. 352. It was further decided that the finding upon the issue as to performance was not sustained by evidence tending to show that the widow had waived performance by consenting to the nonperformance at or before the time of its occurrence. There was no finding that there had been such waiver.

"The antenuptial agreement provided that Adam Warner should take care of, keep, maintain, support, and educate the minor child of the widow, a daughter named Mary, then about 12 years old. It is claimed that Adam Warner failed to perform this covenant, in so far as it bound him to maintain and educate Mary during her minority. The son, after the last appeal, amended his pleadings by alleging a waiver of performance in this respect, and further by alleging that the widow was estopped to claim such failure of performance as a ground for the impeachment of the contract.

"In addition to the covenant to support her and to support and educate the child, the agreement provided that the said Adam Warner should pay

the said Katie Warner 'the sum of one hundred dollars per annum out of his own property' and that at his death she should receive \$1,000 from his estate. It was held upon the first appeal that this right to receive \$1,000 was a mere claim and did not give her an interest in the estate sufficient to entitle her to administration as widow or heir. The antenuptial agreement was executed on May 17, 1889. The marriage took place on the same day. Mary Winkelman, the daughter, became of age on July 9, 1895, and about that time she was married to L. H. Slater.

"The court below found that the widow did not refuse to allow Adam Warner to perform the covenant for the minor child's support and education or prevent such performance by sending her away from home and that she did not by reason thereof prevent or waive such performance. It based its decision giving letters to the son solely upon the ground that the widow was estopped to take advantage of the nonperformance to defeat the agreement. Upon this point the findings are as follows:

"That said Katie Warner is estopped to claim that the said agreement was not in full force and effect at the time of the death of said Adam Warner, and is estopped from claiming that the covenants relating to the care, maintenance, support, and education of said minor child were not fully performed by said Adam Warner. That said estoppel arises out of the following facts: That said Adam Warner failed to perform said covenant relative to the care, maintenance, support, and education of said minor child immediately after the marriage of said Adam Warner and Katie Warner, and at all times subsequent; that said minor child became of lawful age and was married more than ten years before the death of said Adam Warner and, at all times after the marriage of said Adam Warner and said Katie Warner, and up to the time of the death of said Adam Warner, said Katie Warner, with full knowledge of the default of said Adam Warner in the performance of said covenants, continued to receive and accept from said Adam Warner the annual payment of \$100 therein provided, and, at all times, the said Katie Warner and the said Adam Warner treated the said agreement as being in full force and effect, and each performed all of the covenants of said agreement, except that the said Adam Warner failed to perform the covenants relative to the care, maintenance, support and education of said minor child."

[1, 2] "It is not claimed that the specific facts set forth in this finding are contrary to the evidence. The appellant insists that they are insufficient, if true, to create an estoppel. This claim we think is wholly untenable. Adam Warner died on January 22, 1906. His breach of the contract became complete in July, 1895, at which time Mary, the minor child, became of age and was married. The right which the widow now claims, as against the validity of the agreement, is the right to repudiate or rescind it because of this breach and thus to avoid its results upon her. This right to rescind accrued to her, if at all, immediately upon the breach becoming complete in 1895. If she then desired to avail herself of it by repudiating the contract and to claim immunity from its effect to deprive her of any share of the decedent's estate as heir or otherwise, it was incumbent upon her to act promptly in the matter and to refuse further recognition of the contract. Rescission, when not effected by consent, can be accomplished only by the use of reasonable diligence to rescind promptly upon discovery of the facts which entitle the party to rescind, if such party is free from undue influence, and is aware of the right to rescind. Code Civ. Proc. § 1691. Where one has a right to rescind a contract because of a breach by the other party, and, with knowledge of such right, continues thereafter to accept from the other party payments due there-

under, the right of such person to rescind the contract for that breach is thereby barred. *Delano v. Jacoby*, 98 Cal. 280, 31 Pac. 290, 31 Am. St. Rep. 201; *Oppenheimer v. Clunie*, 142 Cal. 320, 75 Pac. 899; 2 Pom. Eq. Jur. §§ 817, 897, 917. The effect of such conduct is sometimes called a waiver of the right to rescind, and sometimes it is said that it creates an estoppel against that right. The mere name given to the effect of the conduct is immaterial. Upon the breach of the covenant she had her option either to treat the contract as subsisting and to rely upon her right to recover damages for that breach, or to rescind it altogether and thereafter to refuse to recognize it or act under it and thenceforth to claim a restoration to her prospective rights in his estate at his death as his widow. Her conduct in subsequently receiving and accepting these payments up to the time of his death clearly evinces an intention not to rescind the contract but to insist upon its validity. After having so acted for the ten years succeeding the breach and having thereby induced him to continue making the payments of \$100 each year as the contract provided, she cannot now assert her former right to rescind.

[3, 4] "It is suggested that the court does not expressly find that her failure to exercise her right to rescind was not caused by the undue influence of her husband, and hence that the presumption that she was under such influence must prevail, and that this excuses her failure to exercise her right. We are of the opinion that this point is covered by the general finding that she is estopped to claim that the agreement is now not fully performed by reason of the specific facts stated. If she had been prevented from earlier rescission by his undue influence, then she would not have been estopped. The finding therefore implies that she was not so prevented. Thus construing the finding, it is fully sustained on this point by the evidence. The parties were estranged during the last seven years of his life, and in the year 1900 there was sharp litigation between them concerning the effect of this agreement upon her right to file a declaration of homestead upon his land. He brought an action to cancel the homestead declaration on the ground that it was filed without his consent and that the antenuptial agreement prevented her from claiming a homestead interest in his property. In that litigation she had the advice of her own attorney in regard to the agreement and its legal effect. This occurred several years after the complete breach of the covenant and six years before his death, during all of which time she continued to receive the payments.

"There is no merit in the claim that this question of estoppel was decided against the son by this court on the last appeal and has now become the law of the case. The court there, in reversing the order on the ground that there was no evidence to sustain the finding on the material issue of nonperformance, said that this omission was not cured by the fact that evidence had been introduced tending to show that the widow had waived the nonperformance by consenting thereto at or before the time of the breach. On the issue of waiver there was no finding. No other reference was made to the subject of waiver or estoppel. The fact that she accepted annual payments after the breach occurred is not even mentioned, nor is anything said about the effect of such acceptance. No rule of law was announced in that opinion which could become the law of the case on the facts presented upon the present appeal on the subject of estoppel or waiver.

"These comprise all the questions presented in support of the appeal. We find no ground upon which the order complained of can be deemed erroneous."

The orders appealed from are affirmed.

We dissent: ANGELLOTTI, J.; MELVIN, J.

(169 Cal. 1)

**ALBERT PICK & CO. v. JORDAN, Secretary of State.** (S. F. 6392.)

(Supreme Court of California. Dec. 15, 1914. Rehearing Denied Jan. 14, 1915.)

**1. COURTS (§ 97\*)—FEDERAL COURTS—CONTROLLING DECISIONS.**

A state court in deciding a federal question must conform to the latest decision of the federal Supreme Court thereon, though it necessitates the reversal of its own prior decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

**2. TAXATION (§ 53\*)—"EXCISE TAX"—NATURE.**

An "excise tax" is an inland impost levied on articles of manufacture or sale and also on licenses to pursue trades or dealing in commodities, and is frequently denominated a privilege or occupation tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 127; Dec. Dig. § 53.\*]

For other definitions, see Words and Phrases, First and Second Series, Excise.]

**3. COMMERCE (§ 69\*)—CORPORATIONS—PRIVILEGES—EXCISE TAXES.**

The taxes imposed by Pol. Code, § 409, requiring the Secretary of State to charge and collect fees for filing articles of incorporation, graduated on the amount of the capital stock, and by St. 1905, p. 493, imposing an annual license tax on foreign corporations doing business in the state, are excise taxes, demanded as a privilege for the right to do a domestic business, and not taxes based on the capital stock but merely measured thereby, and the imposition of the taxes on a foreign corporation selling its merchandise in the state, though manufactured elsewhere, is not an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. § 69.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition for mandate by Albert Pick & Co. against Frank C. Jordan, as Secretary of State, to direct the filing of a certified copy of articles of incorporation, without payment of fees. From a judgment awarding the mandate prayed for, Frank C. Jordan, appeals. Reversed with directions.

U. S. Webb, Atty. Gen., Raymond Benjamin, Chief Deputy Atty. Gen., John H. Riordan, Asst. Atty. Gen., for appellant. McClellan & McClellan, J. C. Campbell, and David L. Levy, all of San Francisco, for respondent. Campbell, Weaver, Sheldon & Levy, of San Francisco, amici curiae.

HENSHAW, J. Petitioner is a corporation, organized under the laws of the state of Illinois, for the purpose of manufacturing and selling and generally dealing in china, glassware, pottery, restaurant supplies, and other merchandise. It manufactures none of the enumerated articles in the state of California. However, as it avers in its petition, it has for a long time been engaged in interstate commerce in these goods and wares between the state of Illinois, the state of California, and other states of the United States.



It maintains a branch office and place of business in the city and county of San Francisco, and sells its goods, wares, and merchandise in the city and county of San Francisco and in other states of the United States, and ships its goods, wares, and merchandise from the state of Illinois into the state of California and into other states, and from the state of California into other states. It has tendered to the secretary of state for filing a certified copy of its articles of incorporation with other appropriate papers required by the laws of the state, and the secretary of state has refused to file the same excepting upon prepayment of the fee fixed by section 416 of the Political Code (now 409, Pol. Code), and the fee prescribed by section 2 of the act relating to revenue and taxation providing for a license tax on corporations. Stats. 1905, p. 493. Petitioner, refusing to pay the fees, made application to the superior court of the city and county of San Francisco for mandate against the secretary of state directing him to file these papers without payment of the fee exacted by the terms of subdivision 4 of section 409 above cited and the corporation license tax of 1905.

The secretary of state answered, setting forth that the petitioner, besides the conduct of interstate commerce in which it is admittedly engaged, transacts—

"a large volume of intrastate business within the state of California; that said intrastate business forms no part of and is neither inextricably nor necessarily connected with the interstate business of said company; and respondent further alleges that its said interstate business is nowise dependent upon the aforesaid intrastate business of said company; that the authorized capital stock of said company amounts to one million dollars."

A general demurrer to this answer was interposed and sustained, and the trial court filed its findings of fact and conclusions of law, wherein it declared in accordance with the allegations of the petition and awarded the mandate prayed for. The secretary of state has appealed from this judgment.

[1] Upon this appeal we are asked to distinguish this case from that of *Mulford Co. v. Curry*, 163 Cal. 276, 125 Pac. 236, where this court, in the matter of the exaction of taxes or fees upon corporations engaged in interstate commerce, sought (though perhaps in vain) to determine the underlying principles and to follow the rulings of the Supreme Court of the United States enunciated in that series of cases beginning with *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. We are asked to do this because of the new light which it is said has been shed upon the legal questions involved by the cases of *Baltic Mining Co.* and *S. S. White Dental Manufacturing Co. v. Commonwealth of Massachusetts*, decided by the Supreme Court of the United States, and reported in 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

In *Mulford Co. v. Curry* this court expressed the reluctance it felt over the necessity of applying the principles of the *Western Union Telegraph Co. v. Kansas*, and the other like cases to the fiscal and revenue laws of the state. It did so under the compulsion of its oath to uphold the Constitution and laws of the United States as expounded by its highest tribunal. If we were in error in our understanding of the law, if the Supreme Court of the United States has latterly thrown additional light upon its own exposition of the law, or if it has receded from any of the views which it has expressed in the earlier cases, it is for this court to remodel its own decisions in swift conformity therewith.

It becomes necessary, therefore, even at the peril of prolixity, to set forth the understanding which this court had, and which in *Mulford Co. v. Curry* it expressed, of the legal principles enunciated and the legal controversies decided in that series of cases beginning with the *Western Union Telegraph Co. v. Kansas*.

By the law of Kansas every foreign corporation "seeking to do business in this state" was required to file a copy of its charter or of its articles of incorporation with the secretary of state, and, when so filing, to "pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first \$100,000 of its capital stock or any part thereof, and upon the next \$400,000 or any part thereof one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of \$500,000, \$200." The *Western Union Telegraph Company*, a New York corporation, was conducting business in the state of Kansas. That business was both interstate, involving the reception within the state of messages from points outside of the state, and, conversely, the sending of messages from points within the state to points outside the state, and intrastate or domestic, consisting of the sending and reception of messages between different points wholly within the state. It refused to make the filing and pay the fee prescribed by the Kansas statute, and the state brought its action in one of its own courts against the company, seeking to oust and restrain it from doing any domestic business within the state, such being one of the penalties by the laws of Kansas prescribed. The state court rendered its decree of ouster and restraint as prayed for. The cause was transferred under writ of error to the Supreme Court of the United States, and there decided by a sharply divided court upon an elaborate opinion handed down by Mr Justice Harlan. The *Western Union Telegraph Company* was capitalized for \$100,000,000. The "charter fee" (such is the description of the fee used by the state of Kansas) in the case of the *Western Union Telegraph Company* amounted to \$20,100.

Amongst the contentions of the state of Kansas in support of the validity of the judgment of its court were that it had the absolute right to impose the terms and conditions upon which a foreign corporation might do a domestic business within its territorial limits; that the fiscal law under review imposed as such condition the payment of a charter fee based on or admeasured by the par value of the capital stock of corporations; that this was not a tax upon the property of the corporation either within or without the state, but was "a local police regulation on local business only"; that the fact that the statute might cause inconvenience to interstate business did not render it unconstitutional; that the failure to comply with the law did not prevent the foreign corporation from continuing to the fullest extent in engaging in interstate commerce. The contentions of plaintiff in error are set forth by the Supreme Court in the opening paragraph of the opinion which it rendered in that case. They are as follows:

"The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the state, *a given per cent. of its authorized capital*, wherever and however employed, as a condition of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and therefore is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the state, a thing which could not be done consistently with the due process of law enjoined by the fourteenth amendment."

And here, at the outset, it may be well to state that each and every one of these contentions is to the fullest extent sustained by the decision. It is to be remembered that the Supreme Court itself declares that these contentions are the ones to which particular attention will be directed. What the Supreme Court decides is that without regard to the name by which the license, or fee, or excise, or impost, or occupation or privilege tax, may be called, when it takes the *form* that it took in Kansas, of an exacted payment of a given per cent. of the authorized capital stock, this exaction accomplishes two distinct illegal and unconstitutional results. First, it is in legal effect a tax upon all of the property represented by the capital stock of the corporation, therefore a tax upon such parts of the property as were engaged in interstate commerce, and therefore an invalid tax under the commerce clause of the Constitution of the United States; and, second, it is an attempt by the state to tax property beyond its territorial jurisdiction, and is therefore confiscatory in nature and violative of the fourteenth amendment of the Constitution. That there can be no possibility of misunderstanding the meaning of the Supreme Court in this particular, we shall employ a few

quotations from its decisions. But before doing so we will quote one sentence from the dissenting opinion of Mr. Justice Holmes in this particular case. Bearing in mind that the majority of the Supreme Court declared that the Kansas law imposed a tax, we note Justice Holmes in dissenting saying:

"I assume that a state cannot tax a corporation on commerce carried on by it with another state, or on property outside the jurisdiction of the taxing state; and I assume, further, that for that reason a tax on or *measured by* the value of the total stock of a corporation like the Western Union Telegraph Company is void."

Mr. Justice Holmes' argument proceeds upon the view that Kansas had not imposed a tax at all.

"She simply has said to the company that if it wants to do local business it must pay a certain sum of money. \* \* \* The whole matter is left in the Western Union's hands."

The prevailing opinion declared that there was no decision—

"holding that a state may, by any device, or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state. \* \* \* If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through the forms to the substance of things."

Then says the court:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent. of its *authorized capital*, representing, as that capital clearly does, *all of its business and property, both within and outside of the state, a condition of its right to do local business in Kansas*, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent. of its whole authorized capital, representing all of its property and all its business and interests everywhere. \* \* \* So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay *a given per cent. of*

its authorized capital stock, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business; or on the privilege of doing interstate business; for the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the telegraph company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported."

In the course of its argument and in demonstration that its reasoning was not meant to apply exclusively to that class of corporations known as common carriers, it uses this illustration:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a state, should, in addition, solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a condition of the right to engage in local business within its limits that the corporation pay a given per cent. of all fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition."

And in announcing the familiar doctrine that Kansas might exact a license tax of the corporation "strictly on account of local business done by it in that state," it couples this statement with the declaration:

"But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall first pay to the state a given per cent. of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the state."

And the opinion concludes as follows:

"The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution."

The next case of Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, arose under the same Kansas statute. Mr. Justice Harlan again delivering the opinion. It reiterates and reaffirms the opinion and decision of the Western Union Case, and defines that decision in terms, and in the following language:

"The Charter Board, we have seen, gave it permission to engage in intrastate business in Kansas on condition that it should pay to the

State Treasurer for the benefit of the permanent school fund of the state, as a charter fee, the sum of \$14,800, which is the prescribed statutory per cent. of the company's authorized capital, representing all of its property and interests everywhere, in and out of the state, and all its business, both interstate and intrastate. It does not appear how much of the single 'fee' demanded by the state is to be referred to the interstate business of the company nor how much to its property outside of the state, nor what part has reference to its intrastate business or to its property within the state. \* \* \* We hold: \* \* \* (2) That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property, interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state and contribute from its capital to the support of the public schools of Kansas."

Mr. Justice White filed a concurring opinion in that case, in which, while assenting to the views of his associates, he carried the doctrine further than they, declaring, with unimpeachable logic:

"It is not by me doubted that as a practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business."

Epigrammatically, he presents the controversy in the following sentences:

"The only right here challenged is the authority of a state to impose an unconstitutional tax and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business. And this upon the false assumption that absolute power to exclude exists; that is, to impose an unlawful tax and sustain it by another unlawful assumption of power, a process of reasoning which, to my mind, must rest on the proposition that in deciding questions of constitutional power it is to be held that two wrongs make a right."

Mr. Justice Holmes again dissented, reiterating in amplified form the views expressed in his earlier dissent, and concluding:

"I think that the tax in question, for I am perfectly willing to call it a tax, was lawful under all the decisions of this court until last week." (The italics are ours.)

The next case was Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423. This case had to do with an Arkansas law, which required all foreign corporations to file copies of their charters or articles of incorporation with the secretary of state, under heavy penalties for failure so to do, and required them also to pay into the treasury of the state, "for the filing of said articles, a fee of \$25 where the capital stock is \$50,000 or under; \$75 where the capital stock is over \$50,000 and not more than \$100,000; and \$25 additional for each \$100,000 of capital stock." The Supreme Court of the United States declared that the case could

not "be distinguished in principle from *Western Union v. Kansas* and *Pullman Co. v. Kansas*," and that the difference in the wording of the Kansas and Arkansas statutes—the former being in the nature of a percentage tax, the latter naming fixed sums of money based upon capitalization—did not differentiate the cases so as to take the Arkansas statute out of the ruling of the former cases. These cases were followed by *Atchison, etc., Railway Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050. The statute of Colorado exacted a "fee" of a foreign corporation of two cents upon each \$1,000 of its capital stock, which fee it was declared was for the right to do a local business within the state. The action was brought to recover the tax paid under protest. Mr. Justice Holmes, who dissented in the earlier cases, delivering the opinion of the court, declared:

"Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to do business wholly within the state."

Again the question arose in *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103. The *International Text-Book Company* was a Pennsylvania corporation organized for purposes of profit and with a capital stock. It combined the publication of text-books and courses of instruction in various arts and sciences with an educational school conducted by correspondence, to the students of which it transmitted for a consideration these text-books and educational courses. It employed salaried agents within specified territories to secure pupils or students. It did so in Kansas. It failed or refused to comply with certain provisions of the Kansas statute, one the provision for the charter fee considered in *Western Union Telegraph Co. v. Kansas*, supra, and another the provision requiring it to file with the secretary of state a detailed statement showing the authorized capital, the paid-up capital stock, the amount of assets and liabilities, etc. Among the penalties prescribed for a failure so to do was the denial of the right to the defaulting corporation to maintain an action in any of the courts of the state. The *International Text-Book Company* sued *Pigg* as a debtor under one of its contracts of instruction. The Supreme Court of the United States reaffirmed the invalidity of the Kansas charter fee statute, and further declared:

"It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state con-

fessedly could not control by legislation. It results that the provision as to the statement mentioned in section 1283 [Gen. St. 1901] must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of the same section which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

And, finally, was decided in *Bucks Stove & Range Co. v. Vickers*, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189, where this purely manufacturing and mercantile corporation offended against the same Kansas law and was held by the Supreme Court to be immune from punishment therefor, under authority of the *Pigg* Case, supra.

We have now considered all of the decisions of the Supreme Court of the United States (saving the Massachusetts case hereinafter to be reviewed) which can have any bearing upon the questions before us. It becomes pertinent here to take up for brief analysis the case of *Mulford Co. v. Curry*, supra, wherein in this state the foregoing decisions of the Supreme Court first came under review. The more pertinent does it become to do this since the statutes in the present case under review are in all substantial particulars identically the same as they were when *Mulford Co. v. Curry* was decided. A reference to *Mulford Co. v. Curry* will save a repetition of the language of those statutes. Additionally it should be added that section 410 of our Civil Code declares that every foreign corporation which shall neglect or fail to comply with the conditions of sections 408 and 409 of the Code shall be subject to a fine of not less than \$500, to be paid into the state treasury to the credit of the general fund, and every such corporation so failing is denied the right "to maintain any suit or action in any of the courts of this state, or acquire or convey any legal title to any real property within the state until it has complied with said section." This language is as general as language can be made. It is declared applicable to "every corporation organized under the laws of another state, territory, or of a foreign country." Section 408 requires "every corporation organized under the laws of another state, territory, or of a foreign country" to "file in the office of the secretary of state of the state of California a certified copy of its articles of incorporation," etc. The language of section 416 of the Political Code quoted in *Mulford Co. v. Curry* has become by amendment the language of the present section 409 of the same Code.

The *Mulford Company*, like the petitioner in the case at bar, was a commercial corporation organized to do, and doing, an interstate business and an intrastate business within the state of California. Like the present petitioner, it objected to the enforcement of the fees

exacted by our laws, and, after tendering certain nominal filing fees, sought mandate against the secretary of state to compel him to receive and file certain documents, the filing of which was called for by our laws. That part of our laws to which the Mulford Company in especial objected was section 416 of the Political Code (now 409). This law, it will be noted (as did the Kansas statute), imposes a single fee upon corporations which it is made mandatory upon the Secretary of State to collect for filing their articles of incorporation, the other sections referred to requiring that such articles be filed. In addition to this law, requiring foreign corporations to pay this fee before they can engage in business in the state of California at all, we have upon our books another law designated in its title as "A license tax upon corporations," requiring them to pay an annual license tax for the right to continue in business. Stats. 1905, p. 493. It was the first license law which this court had under especial consideration in the case of *Mulford Co. v. Curry*. This may be noted from the declaration in the case where the annual license fee law is set out, that it is set out as "having further relation to the matter." It was not important to the decision in the *Mulford Company Case* to elaborate our views upon these acts separately. The latter one was referred to, first, because it formed a part of the same fiscal system; second, because it, too, based its license fee charges upon the authorized capital stock of corporations; and, third, because the practical effect in the case of every foreign corporation seeking to engage in business in the state of California was to require it to pay two fees. To illustrate, if the *Western Union Telegraph Company* had undertaken to engage in business in California, an analysis and competition will show that it would have been required to pay a fee of \$10,000 under sections 409 of the Civil Code and 416 of the Political Code, and a fee of \$250 under the corporation license tax act, or a total of \$10,250 in California, as compared with \$20,100 in Kansas.

Turning to the judgment in *Mulford Co. v. Curry*, it will be found that the only judgment rendered is a declaration that the requirement of section 408 of the Civil Code, that the petitioner file its articles of incorporation, is a reasonable requirement, but that the further requirement that, as a condition of such filing, the petitioner pay the fee exacted by section 409 of the Civil Code and 416 of the Political Code is illegal. Neither by the terms of the judgment nor by any express language in the opinion itself was the annual license tax declared to be unconstitutional under the authority of the federal cases. But since the Supreme Court of the United States had declared that such fees, when based upon the total capital stock, were invalid exactions for the reasons given, the fear was felt and expressed that even

the annual corporation license tax, so founded upon the capital stock, might fall under the same ban, and this court sought to advise the Legislature as to what it conceived the Supreme Court of the United States had declared to be the limit of the law-making power in the matter.

What, then, did the Supreme Court of the United States decide in its cases?

It decided: (a) That it would review and consider the language of each state fiscal act and determine for itself, regardless of the determination of the states' legislative or judicial departments, what in fact the law did mean and what in fact it did accomplish, quoting with approval from *Galveston, Harrisburg, etc., Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, to the following effect: "Neither the state courts, nor the Legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. (b) If under the interpretation of the Supreme Court it resulted that a particular statute "either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business." (c) It decided that interstate commerce was illegally burdened by a tax or fee directly on or based on the capital stock of a corporation which, though engaged in local business within a state, was also engaged in interstate commerce. Thus we find the court in *Pullman Co. v. Kansas* saying that "the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests and business of the company, within and out the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas." Again, we find Mr. Justice Holmes in his dissenting opinion "assuming" and conceding that "a tax on or measured by the value of the total stock of a corporation like the *Western Union Telegraph Company* is void." And again we have him declaring in his dissenting opinion in the *Pullman Case*: "I think that the tax in question, for I am perfectly willing to call it a tax, was lawful." (d) We find that the unconstitutionality and illegality of the tax so based and levied are declared to exist upon two separate and wholly distinct grounds, which grounds are enunciated and re-enunciated time and again. Those grounds may be thus stated: The requirement to pay a given per cent. of the capital stock as a prerequisite of the right to do a local business exacts burdensome and unconstitutional conditions from the corporation; the first that the

state thus taxes the instrumentalities and properties used in interstate commerce which lie without the taxing power of the state, and thus unduly burdens interstate commerce in violation of the commerce clause of the Constitution; and the second that such an act in taxing property without the jurisdiction of the taxing power requires a corporation seeking to do local business within a state to waive its constitutional right of exemption from taxation on its property lying outside of the state. (e) These results are declared to follow from the act of taxing the whole capital stock of such a corporation and are nowhere and nowise declared to be dependent either upon the amount of the capitalization of the corporation nor upon the amount of the tax exacted from that corporation. We perceived, or thought we perceived, the ground for this in the principle that if the power to tax in a given way be conceded, the amount of the tax is vested wholly in the discretion of the taxing power, and we had in mind not only the language of Chief Justice Marshall "that the power to tax involves the power to destroy" (*McCullough v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579), but also the language of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, quoted with approval in the *Western Union Case*, in reference to such license taxes, that "if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible." (f) That, in thus guarding interstate commerce from unlawful interference, the Supreme Court would be governed not by what a given charge was or was called, but by consideration of what in its operation was its effect upon such commerce. For we find in the *Western Union Telegraph Case* the following language quoted with approval from *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773:

"Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

(g) We believe that the Supreme Court meant and declared, for the indicated reasons, that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the capital stock of such corporations was forever inhibited, the Supreme Court saying:

"There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company." *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 811.

And to the declaration of Mr. Justice Holmes in his dissenting opinion to the following effect: "If, after this decision, the state of Kansas, without giving any reason sees fit simply to prohibit the Western

Union Telegraph Company from doing any more local business there, or from doing local business until it has paid \$20,100, I shall be curious to see upon what ground that legislation will be assailed,"—we believed that the answer would be, as above indicated, that it was not the amount of the charge which determined the invalidity, but the fact that the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights.

These, then, were some of the conclusions which we drew from the decisions of the Supreme Court, and which, with more or less completeness, we sought to declare in *Mulford Co. v. Curry*. One part of the judgment of the Supreme Court we conceived to be apodictic, and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the Constitution of the United States, and it was under this conviction that we sought in *Mulford Co. v. Curry* to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation.

There arose in Massachusetts two cases of similar import, *Baltic Mining Co.*, 207 Mass. 381, 93 N. E. 831, and the *S. S. White Dental Manufacturing Co. v. Commonwealth*, 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805. For convenience we may refer to but one and call that the *Dental Company Case*. The *Dental Manufacturing Company* was a Pennsylvania corporation, having no factories in Massachusetts, but engaged in domestic business within the state of Massachusetts, as well as in interstate commerce. The Massachusetts revenue laws provided that:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner, of one-fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of \$2,000."

The *Dental Manufacturing Company* objected to the payment of the tax upon the three grounds so clearly enunciated in *Western Union Telegraph Company v. Kansas*. Those grounds, as stated by the Supreme Court of the United States, to which the case subsequently went on writ of error, being:

"First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the common-

wealth of Massachusetts; and, third, the tax denies to the plaintiffs in error the equal protection of the law."

The Supreme Court of Massachusetts, after a painstaking review of its taxation history, its peculiar system of taxation and the decisions of its courts, held the tax to be a pure excise tax, "excise tax" as thus employed meaning a privilege tax upon the right to pursue an occupation, and not a tax upon property at all. It declared that it recognized that the Supreme Court of the United States would look through the form to the substance, and determine for itself whether such an impost was or was not a property tax or a burden upon interstate commerce, and to this point cited the decisions of the Supreme Court which we have been considering. But it declared that there were "at least two important and, as we think, vital distinctions between these cases and the one at bar." The first of those distinctions is declared to be the fact that in the cases before the Supreme Court of the United States the corporations, though one and all engaged in domestic commerce, were common carriers, organized for the transportation of intelligence, commerce, and persons between the states, and that their local business could not be given up without impairing their capacity to transact their interstate business. And the second distinction was that the maximum fee allowed by the Massachusetts statute was \$2,000, while in the Kansas and Arkansas statutes the tax was graded and increased by the amount of the capital stock, and to the mind of the Supreme Court of Massachusetts "this provision demonstrates that it is not a property tax, but only an excise, so limited that it cannot reach beyond a reasonable license fee." Further, the Supreme Court of Massachusetts points out that a flat rate of \$2,000 might have been exacted of all corporations without doing violence to any right guarantied by the Constitution of the United States, and that in fact what Massachusetts has done has been to diminish the burden upon corporations of smaller capitalization. Again, the Massachusetts court points out, as a compelling reason for its determination, that the authorized capital stock of the Dental Company is \$1,000,000, while its assets aggregate \$5,711,718.29, thus to its mind evidencing the fact that the tax was an excise and not a property tax on or based on its authorized capital stock. And, lastly, the Supreme Court of Massachusetts decided that the act did not apply to common carriers, railroad, telegraph, and telephone, which were taxed upon another plan; that it did not apply to corporations whose sole business within the state was interstate commerce, nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intrastate business was conducted in such close connection with the other that it could not be abandoned without seri-

ous impairment of the interstate business. It held that the Dental Company's intrastate business was severably distinct from its interstate business, and that therefore it was liable to the payment of this excise tax for the privilege of carrying on that intrastate business.

These cases (*Baltic Mining Co. and S. S. White Dental Mfg. Co. v. Commonwealth of Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127), as has been said, went to the Supreme Court of the United States, and in an opinion handed down by Mr. Justice Day, the judgment of the Supreme Court of Massachusetts, upholding the validity of its foreign corporation license tax law and the liability of the Dental Company to pay this tax, was sustained, Chief Justice White, Mr. Justice Van Devanter, and Mr. Justice Pitney dissenting. The ground of their dissent has not been stated, but we think it beyond peradventure that, looking through form to substance, they believed this Massachusetts tax, call it excise or what you will, was in fact a tax upon the total capital stock of the dental corporation, and thus was a tax within the inhibition declared in the *Western Union Telegraph Company v. Kansas* and the other like cases.

[2] The Supreme Court of the United States adopts without reservation the determination of the Supreme Court of Massachusetts that this fee was an excise tax as distinguished from a property tax. It may at once be granted that it is that form of an excise tax which is frequently denominated a privilege or occupation tax, but it by no means follows that, being an excise tax, this is conclusive that it is not levied upon property. Indeed, many forms of excise tax are distinctly and admittedly levied upon property, and every definition of excise includes this kind of tax. An excise is "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." *Patton v. Brady*, 184 U. S. 617, 22 Sup. Ct. 496, 46 L. Ed. 713. To say that because a tax is an excise it is not levied upon property is to throw all the reasoning of the Supreme Court in all these cases to the four winds. The argument was made in these cases, and it was a sound argument, that the laws under consideration merely imposed an occupation or privilege tax—in short an excise tax—for the right to do a local business, and this was conceded by all of the justices of the Supreme Court. Their answer, however, to the conclusion sought to be drawn from this was that, notwithstanding that it is an excise tax or privilege or occupation tax, it is levied upon property beyond the taxing power of the state, and by the fact that it is so levied imposes a burden upon property without the state which is engaged in interstate commerce. We are unable to perceive, therefore, how the determination that the Massachusetts tax is an excise tax relieves



it from the condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation. As little do we perceive that the amount of the tax imposed by the Massachusetts law has materiality in the consideration. If the principle upon which its tax is based is a sound one, it may to-morrow increase the amount of the tax to any extent. It is true that in the earlier cases the corporations involved were common carriers, and the Supreme Court of the United States makes mention of that fact in the Dental Case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the Constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers—the instrumentalities by and through which commerce is conveyed—shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation. The Supreme Court of the United States points out very truly that in the Western Union Telegraph Company Case and in the Pullman Case “there was no attempt to separate the intrastate business from the interstate business.” No such attempt is made by the Massachusetts law. True, the Massachusetts Supreme Court, under a stipulation of facts, finds that about 5 per cent. of the business of the Dental Company was intrastate. But there is no attempt in the law to impose any tax upon that part of its business nor upon the \$100,000 worth of property which represents the company's holdings in the state. It would have been just as easy and as practical to have shown in the Western Union Telegraph Company Case the proportion of its local business as compared with its interstate business, and, indeed, in the case of every common carrier or commercial concern, we venture the assertion that not the slightest practical difficulty will be found in so doing. Indeed, we may recall the fact that this is required to be done in this state as a part of its revenue laws in the case of every common carrier engaged in interstate as well as intrastate business, and we have yet to hear of the slightest complaint touching the difficulty or impracticability of so doing. True it is that in the case of most, and we may say all, common carriers engaged in interstate commerce, the deprivation of local business is an injury and impairment of their business as a whole. But this is equally

true of every commercial corporation likewise engaged in interstate and domestic business. Nor have we yet been told, nor are we told by this last decision of the Supreme Court, that this is a fundamental ground for destroying a state privilege tax otherwise constitutional. True, also, it is that in *Western Union v. Kansas* it is said that:

“We cannot fail to recognize the intimate connection which, at this date, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.”

But in that same connection it is said that:

“It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burdens rights secured by the Constitution and laws of the United States.”

But as a state may absolutely exclude even a common carrier from doing a local business within its territory, and as this has been distinctly and in terms held in *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586, and *Pullman v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877, where in the prevailing opinion in the *Western Union Telegraph Company Case* it is said, referring to these two cases, both dealing with common carriers, “The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce, and as, in even stronger language, the same principle is declared in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164, it is not permissible for us to hold that the mere interference with or deprivation of local business by a state statute not in itself otherwise unconstitutional becomes unconstitutional for its indirect influence on the interstate business of the company affected. As little are we able to perceive that the accidental fact that the *White Dental Company's* capital stock is \$1,000,000, while its total assets aggregate \$5,711,000 has any determinative value in this consideration. If a corporation called upon to pay a tax of  $\frac{1}{100}$  of 1 per cent. of its total capital stock has assets amounting to five times the par value of its total capital stock, the tax amounts to  $\frac{1}{250}$  of 1 per cent. upon its total assets. If another corporation, however, capitalized for the same amount, has assets to the value of only  $\frac{1}{4}$  of its capital stock, it results that the property of that corporation is taxed  $\frac{1}{10}$  of 1 per cent. So the burden is the heavier upon the poorer corporation. And in neither case is there any attempt to segregate and impose the tax upon that portion of the property or that portion of the whole business lying within or done within the state imposing the tax. Or, again, if we consider the Kansas law in connection with the Massachusetts law, it is indisputable that both levy a per centum tax in terms upon the



total capital stock. An important difference in favor of the Kansas law is that when this charge is once paid, the privilege of engaging in domestic business is continuously and indefinitely assured. It is one single occupation tax. In Massachusetts, however, it is an annual burden year by year. The corporation annually must pay the per centum for the renewed right to continue in business. In Kansas a corporation with a capital stock of \$2,500,000 would pay a single tax of \$700. In Massachusetts that same corporation would pay annually a tax of \$500. It is certainly reasonable to suppose that corporations engaging in interstate and domestic commerce desire to continue their local business for more than one year. In two years the Massachusetts tax upon this corporation would exceed the Kansas charge. So while the Supreme Court of the United States does not follow the reasoning advanced by the Supreme Court of Massachusetts, which the latter court held to differentiate its revenue law from that considered in the Kansas and other cases, it does in its recitals state many of the facts which the Supreme Court of Massachusetts considered to have a determinative bearing upon the question, some of which we have just now ourselves been considering. What the Supreme Court of the United States does say is to reannounce the familiar proposition that every case involving the validity of a tax must be decided upon its own facts, and at the conclusion of this recital to declare as follows:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

If we analyze this language correctly, it is a declaration that if a state imposes a privilege tax upon the right of a foreign corporation to engage in strictly domestic business within that state (thus we construe the language "the tax levied upon a legitimate subject of such taxation") "this tax is not void because it is imposed (levied or assessed) upon property beyond the state's jurisdiction" for the reason that "the property itself is not taxed. The authorized capital stock is used only as a measure of taxation." Still further paraphrasing this language, we are unable to perceive that it means anything other than if a state desires to impose an occupation tax upon a foreign corporation for the right to do a strictly domestic business within its limits, it may impose this license tax upon the capital stock of the corporation, because, notwithstanding that the tax is imposed upon the capital stock and thus upon

property beyond the state's jurisdiction, the Supreme Court of the United States will hold that the tax is valid, because it will say that in the last analysis the property itself is not taxed, but that the capital stock is used only as a "measure of taxation." Again, we fail to perceive how every word of this might not equally well have been said in the Western Union Telegraph Company Case, thus forcing the irresistible conclusion that the Supreme Court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases. But again, unfortunately, we are confronted in the same opinion with the declaration of the court that it has "no disposition to limit the authority of those cases." We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our Brethren of the Supreme Court of Montana are similarly afflicted, for they, too, declare *State ex rel. v. Alderson*, 140 Pac. 82:

"We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in *Western Union Telegraph Co. v. Kansas*, and held to impose a general tax upon all of the property of the company, and the statute of Massachusetts, considered in *Baltic Mining Co. and S. S. White Dental Co. v. Commonwealth*, 231 U. S. 68, 84 Sup. Ct. 15, 58 L. Ed. 127, and held to be a mere excise."

We have said here, as well as in *Mulford Co. v. Curry*, that we sought to arrive at, and thought we had arrived at, the fundamental and governing principle of the decisions, which was that to tax the total capital stock of a corporation for the indicated purposes compelled the corporation paying the tax to submit to two unconstitutional burdens, and that while in dollars and cents the same charge might be imposed upon the corporation, this particular form of tax could not be permitted. It is apparent from the last decision of the Supreme Court that in some forms it *is* permitted, and only the Supreme Court of the United States can say what are the permitted forms. We have reached the point where, if it be *said* that the state occupation or privilege charge be an excise tax (and every one of them of necessity must be excise taxes), then it is not a property tax. And even if it be in terms a percentage tax upon the capital stock of a corporation, if it be *said* that this is not a tax on the capital stock, but that the capital stock and per centum are taken as constituting merely a convenient measuring rod for fixing the tax, then the property is not taxed, and all constitutional objections are obviated.

[3] As these questions greatly affect the revenues as well as the rights of the states, as the determination of each one of them is

to rest upon its facts, and as, in the event of a decision adverse to a state by its own courts, the state, because of a most unfortunate hiatus in the law, is deprived of a right of a review of the question by the Supreme Court of the United States, we are moved in the present condition of the decisions to hold, and we do hold, that as to both of the license fees in question their payment is exacted as a privilege or occupation tax exclusively upon the right to do a domestic business within the state of California; that these taxes are excise taxes and not property taxes, and that the tax is not on, nor based on, the capital stock of the corporation, but is merely ad-measured by that capital stock; that in every case, and so in this case, it is practicable (for what it may be worth) to segregate the strictly domestic business of a corporation from its interstate business; that the case of *Mulford Co. v. Curry* should no longer be regarded as an authority; that the respondent in this case should pay the fees prescribed by our law; that the general demurrer sustained to defendant and appellant's answer in the trial court should not have been sustained; that the judgment rendered in favor of respondent in the trial court should be reversed and the relief accorded it denied. And in conclusion we may add that if again we are mistaken, at least the doors of the Supreme Court of the United States are open for the correction of our error.

The judgment appealed from is therefore reversed, with directions to the trial court to proceed in accordance with the views herein expressed.

We concur: SULLIVAN, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

(169 Cal. 304)

MELVILLE CLARK PIANO CO. v. JORDAN, Secretary of State. (S. F. 6631.)

(Supreme Court of California. Dec. 15, 1914.)

In Bank. Application for mandamus by the Melville Clark Piano Company against Frank C. Jordan, as Secretary of State. Mandate denied.

Judson W. Reeves, of Healdsburg, and Willard P. Smith, of San Francisco, for petitioner.

PER CURIAM. The questions involved in this cause are the same as those considered in *Albert Pick & Co. v. Frank C. Jordan*, as Secretary of State of the State of California (S. F. No. 6392) 145 Pac. 506, this day decided. Upon the authority of that case the writ of mandate herein prayed for is denied.

(169 Cal. 33)

BIAS v. REED et al. (S. F. 6485.)

(Supreme Court of California. Dec. 17, 1914.)

1. TRIAL (§ 109\*)—DIRECTION OF VERDICT ON OPENING STATEMENT.

While a verdict should not be directed in advance of the introduction of evidence on the opening statement of one of the parties unless

it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or defense, where these conditions are complied with the court may accept the statements and admissions of counsel and direct a verdict required by such statements and admissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270, 367, 888, 395; Dec. Dig. § 109.\*]

2. APPEAL AND ERROR (§ 927\*)—REVIEW—DIRECTED VERDICT.

In reviewing an order directing a verdict on the opening statement of one of the parties, every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted as facts which would have been proved had the case been tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

3. HUSBAND AND WIFE (§ 129\*)—COMMUNITY PROPERTY—ESTOPPEL—KNOWLEDGE OF HUSBAND.

That a wife, to whom her husband had conveyed land, by her acts and conduct intentionally led her husband to believe that she considered the property to be community property, did not constitute an estoppel, where the facts respecting the ownership of the land were as completely known to the husband as to the wife, and the husband was not led, by his belief that she considered the property to be community property, to take or omit any action material to the protection of his interests.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 283, 468-470; Dec. Dig. § 129.\*]

4. DEEDS (§ 211\*)—EVIDENCE—SUFFICIENCY.

In an action by the administrator of a wife against the administrator of her husband to quiet title, evidence that the husband executed a deed to the wife which he handed to her after being advised that a delivery was necessary to vest title in her, and that nothing was said relative to the deed not taking effect unless he died first, made a prima facie case for the wife's administrator.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

5. HUSBAND AND WIFE (§ 47\*)—TITLE TO LAND.

A husband by remaining in possession of land conveyed to his wife, farming it and paying the taxes thereon, and conveying parts of it, could not regain title unless he maintained an adverse possession in the manner and for the time required by the Code.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232-241; Dec. Dig. § 47.\*]

6. HUSBAND AND WIFE (§ 16\*)—ADVERSE POSSESSION OF LAND.

Where land conveyed by a husband to his wife was occupied by both parties as their home before and after the conveyance, the joint occupancy could not furnish a basis for a claim of prescriptive title by one against the other.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100-106; Dec. Dig. § 16.\*]

7. HUSBAND AND WIFE (§ 16\*)—ADVERSE POSSESSION OF LAND.

Where a husband conveyed land to his wife by an unrecorded deed, conveyances of part of the land by him did not evidence a claim on his part adverse to that of the wife in the absence of proof that his action was known to her and that she did not assent thereto.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100-106; Dec. Dig. § 16.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**8. HUSBAND AND WIFE (§§ 47, 263\*)—TITLE TO LAND—EVIDENCE.**

Where a husband conveyed land to his wife as her separate estate, the subsequent execution of deeds by each party to the other of all of the lands owned by either, including that in question, and the deposit of such deeds with a third person for delivery to the survivor, by which transaction it was not claimed that any title passed, did not tend to show that the land in question belonged to the husband rather than the wife, or that it was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232-241, 915; Dec. Dig. §§ 47, 263.\*]

**9. HUSBAND AND WIFE (§ 264\*)—TITLE TO LAND—EVIDENCE.**

The character of property as separate or community property is to be determined from proof showing the mode of its acquisition, rather than by the declarations of the parties, and while the declarations of a wife that property conveyed to her by the husband was community property might have some weight if supported by proof of other facts, or if the evidence regarding the acquisition of title were consistent with either a separate or community character, it was not sufficient alone to overcome proof that the land was conveyed by a deed stating that she was to hold it as her separate estate, and that the husband relinquished all right or claim to it as community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.\*]

**10. HUSBAND AND WIFE (§ 266\*)—COMMUNITY PROPERTY—PROPERTY CONVEYED BY HUSBAND TO WIFE.**

Where property was conveyed by a husband to his wife as her separate estate, the husband relinquishing all claim thereto as community property, it could thereafter become community property only by a conveyance by her or an agreement between the husband and wife pursuant to Civ. Code, §§ 158, 159, authorizing a husband and wife to contract with each other respecting property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925-928; Dec. Dig. § 266.\*]

**11. EVIDENCE (§ 273\*)—ADMISSIONS—DECLARATIONS AGAINST INTEREST.**

The declarations of a wife that a deed to her from her husband was not to become effective unless she survived her husband were provable as declarations against interest, if the fact admitted by her was material.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.\*]

**12. EVIDENCE (§ 444\*)—PAROL OR EXTRINSIC EVIDENCE—DELIVERY OF DEED—CONDITIONAL DELIVERY.**

Under Civ. Code, § 1056, providing that a grant cannot be delivered to the grantee conditionally, and that delivery to him is necessarily absolute and the instrument takes effect, discharged of any condition, where a husband who had been advised that delivery was necessary to pass title, delivered to his wife a deed conveying land to her, and no right to recall the deed or revoke the delivery was retained, it could not be shown that the deed was not to be effective unless the wife survived the husband.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

**13. DEEDS (§ 66\*)—DELIVERY—QUESTIONS OF FACT.**

Whether or not a deed has been delivered either to the grantee or to a depository is a question of fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.\*]

**14. DEEDS (§ 56\*)—DELIVERY—ACTS CONSTITUTING—NECESSITY OF INTENTION.**

To constitute a delivery of a deed a manual tradition of the instrument is not sufficient unless accompanied by the intent of presently transferring title, and unhampered by the reservation of a right of revocation or recall.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.\*]

In Bank. Appeal from Superior Court, San Mateo County; John Hunt, Acting Judge.

Action by W. H. Bias, administrator with the will annexed of Elizabeth Reed, deceased, against William H. Reed, administrator with the will annexed of James Reed, deceased, and another. From a judgment on a directed verdict for plaintiff, defendants appeal. Affirmed.

Edw. F. Fitzpatrick and Ross & Ross, all of Redwood City, for appellants. Chas. M. Cassin, of San Jose, Harry J. Bias, of Santa Cruz, and James L. Atteridge, of San Jose (Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, of counsel), for respondent.

PER CURIAM. A hearing in bank of this cause was ordered after judgment in department 1.

Upon further consideration of the questions involved we have reached the conclusion that the views heretofore expressed in department are correct, and the department opinion is hereby adopted as the opinion of the court in bank. For the reasons stated in that opinion, the judgment is affirmed.

The following is a copy of the opinion of department 1:

This is an action by the administrator, with the will annexed, of the estate of Elizabeth Reed, deceased, against the administrator, with the will annexed, of the estate of James Reed, deceased, and M. J. Perry, to quiet title to a tract of 152 acres of land in San Mateo county and to recover possession of the same from defendants together with the value of the use and occupation thereof. James Reed and Elizabeth Reed, the testator and testatrix represented by the two administrators here contesting, were husband and wife. The plaintiff's complaint alleged that, at the time of her death, and long prior thereto, his testatrix had been the owner of the tract in controversy. The defendants answered, denying that Elizabeth Reed had at any time been the owner of the property and asserting that James Reed had at all times until his death been the owner and in the possession of said property. Other matters, which so far as they are deemed important will be referred to hereafter, were set up by an amended answer. The action came on for trial before the court and a jury. The plaintiff introduced his evidence and submitted his case. Thereupon one of the attorneys for the defendants made an opening statement detailing the facts that the defendants intended to prove. Upon this statement the plaintiff moved the court to direct the jury to bring in a verdict in favor of the plaintiff and the court granted this motion. From the judgment entered pursuant to this verdict the defendants appeal.

[1] It is no doubt true, as is argued by the appellants, that the practice of directing a verdict, in advance of the introduction of evidence, upon the opening statement of one or the other

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

party, is a dangerous one, and that an order granting such motion can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be. "We would observe," said this court in *Emmerson v. Weeks*, 58 Cal. 382, "that it would be much better not to nonsuit on an opening statement, unless it is clearly made, and it is \* \* \* evident therefrom that no case can be made out." Where, however, these conditions are complied with, the court is authorized to accept the statements and admissions of counsel and to direct a verdict required by such statements or admissions. 38 Cyc. 1567; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Liverpool, etc., S. S. Co. v. Immigration Com's*, 113 U. S. 33, 5 Sup. Ct. 352, 28 L. Ed. 899; *Lindley v. A. T. & S. F. R. Co.*, 47 Kan. 432, 28 Pac. 201; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602. In *Estate of McNeill*, 155 Cal. 353, 100 Pac. 1086, where conflicting petitions for letters of administration of the estate of a decedent were presented, the court, after hearing the proof in support of one of the petitioners and an opening statement on behalf of the other, nonsuited the latter and directed a verdict in favor of the former. The judgment was upheld on appeal; the court concluding that the facts offered to be shown on behalf of the appellant would not have entitled her to a grant of letters.

[2] In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence. Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried.

It is entirely clear from the record that the opening statement made by the appellants here was full and complete. After counsel had first outlined the facts to be proved, the plaintiff moved the court for the directed verdict. Counsel for the appellant declared his readiness "to argue that proposition right now." The court thereupon directed that the reporter read over the opening statement, suggesting that counsel for the appellants might have omitted something. In response to this suggestion appellants' counsel amplified his statement, whereupon argument on the motion proceeded, and, as already stated, the court directed a verdict in accordance with the motion. Under these circumstances, there is, of course, no ground for the claim that the statement was made without an understanding of the necessity for making it exhaustive or that any substantial fact intended to be proved was omitted therefrom by inadvertence. The further question, then, is whether the facts so offered to be proved, if accepted as true, were such as to have constituted any defense to the action.

The plaintiff had introduced evidence tending to prove the following facts: Elizabeth Reed, the wife, died on December 19, 1908. James Reed, the husband, died on the 19th of October, 1910. In July, 1883, James Reed owned the tract of land in question and other lands in San Mateo; all of said lands being community property. The property in controversy was occupied by Reed and his wife as their home. On July 21, 1883, Mr. and Mrs. Reed were visiting at the home of the plaintiff in Santa Cruz. At the request of James Reed, the plaintiff, Bias, accompanied Reed to the office of Z. N. Goldsby, an attorney at law then engaged in practice at Santa Cruz. Reed stated to Goldsby that he desired to make a deed of the property to his wife. Goldsby wrote a deed of gift of the property in

controversy and had such deed ready for execution on the afternoon of the same day, when Reed, accompanied by Mrs. Reed, Bias and John D. Chace, returned to his office. At that time the deed was read over in the presence of these persons (except, perhaps, Mr. Chace), and Reed assented to it. Reed signed the deed and acknowledged it. At the same time a will in which Mrs. Reed was named as sole beneficiary was executed by Reed, Bias and Chace signing as attesting witnesses. They also signed as witnesses to the grantor's signature upon the deed. Prior to this time Mr. Goldsby had advised Reed that it was necessary to deliver the deed in order to vest title in his wife, and after the signing and acknowledgment of the paper Reed handed it to Mrs. Reed. The deed itself was introduced in evidence. The foregoing facts with reference to the signing and delivery of the deed were testified to by Bias and Goldsby. Chace had died prior to the trial. Mr. Goldsby further testified that at the time of the delivery nothing was said with reference to the deed not taking effect unless Reed died before his wife.

Upon Mrs. Reed's death in 1908 search for the deed was made without avail. After James Reed's death a sister of Mrs. Reed prosecuted further inquiries and finally discovered the deed under the linoleum on the floor of the room which had been occupied by the Reeds. The plaintiff's case also included some testimony regarding declarations made by James Reed after the date of the deed in question and tending to support the wife's title. The possession of the land by the defendants was admitted.

This was the state of the case when the defendants made their opening statement. The statement is somewhat protracted, but we think its substance is fairly contained in the following summary: Counsel, after stating that he would introduce deeds showing the acquisition of the property in question by James Reed, went on to state that he would prove that at various times after 1883 James Reed deeded portions of the land to various persons without having his wife join in the conveyances. He declared his intention of showing, further, that in 1901 Mr. and Mrs. Reed sent for one Levy and requested him to prepare deeds from Reed to Mrs. Reed and from Mrs. Reed to Reed of all of the lands owned by either, including the tract in controversy. These deeds were subsequently prepared, were executed and acknowledged by the respective parties and were put in the possession of Levy, who was directed to hold them and upon the death of either Mr. or Mrs. Reed to deliver to the survivor for record the deed of the one so dying. A controversy subsequently arose between the Reeds and Levy, and the Reeds requested one Coburn to draw similar deeds to take the place of the two that had been deposited with Levy. This transaction, however, was never consummated. The opening statement went on to state that in December, 1908, shortly prior to Mrs. Reed's death, she made a will in which she declared that all of the property was community property. It was stated that the appellants would show that Mrs. Reed had stated to one Thompson, a physician, that the deed of July 21, 1883, "was made and given to her with the understanding that it should not become effective unless she should outlive her husband." Just prior to Mrs. Reed's death, she requested Mr. Thompson to prepare a will for her and had declared that the property in question was the community property of herself and her husband, but no will was prepared by Mr. Thompson. Reference was made to other witnesses who would testify to oral declarations of Mrs. Reed that she considered the property community property; that she owned one half of it and Mr. Reed the other half. Another witness, it was stated, would testify that in 1905 both Mr. and Mrs. Reed stated to him that the property was community property and that they had arranged their af-

fairs so that whoever should outlive the other should get all the property. Counsel also undertook to show that at all times down to the death of Reed he had entire charge of the property, farmed it, and paid all expenses in connection with it and during all this time the property had been assessed to and the taxes paid by him.

[3] The answer contains a plea of estoppel and with reference to this counsel incorporated into the opening a statement "to the effect that Mrs. Reed, by her acts and conduct, intentionally led her husband to believe, and that he did believe that she considered all this property to be the community property of herself and her husband and not her separate property." With reference to the matter last quoted, it is quite obvious that the statement of counsel falls far short of meeting the requirements of estoppel in pais. The facts with respect to the ownership of the land were as completely known to Reed as they were to his wife. It was not stated that she induced a mistaken belief regarding any such fact. All that counsel claimed was that Mrs. Reed led her husband to believe that she "considered" the land to be community property. It is not apparent that her opinion of the legal status of the property could have any bearing upon her husband's rights or conduct, and the statement of counsel contains no intimation that Reed, if he was induced by her to believe that she "considered" the property to be community, was led by this belief to take or omit any action material to the protection of his interests. Without further discussion of this question, we simply refer to *Boggs v. Merced M. Co.*, 14 Cal. 279, 367, 368, where the court, in considering the necessary elements of estoppel in pais, defined those elements in language which has been quoted and followed many times.

[4] That the plaintiff made out a clear prima facie case is not to be doubted. If the issues had been submitted to the jury on the plaintiff's evidence alone, the court could not properly have sanctioned a verdict in favor of the defendants. The question, then, is whether the matters which defendants declared they would prove—and which we must assume they were able to prove—were, in law, sufficient to meet or overcome the prima facie case established by the plaintiff.

[5-7] The fact that James Reed remained in possession of the land, farming it and paying taxes upon it, would not be effective to weaken or impair the title of his wife. If title had passed to her by a conveyance executed in 1883, no ownership or control asserted by her husband thereafter would revest title in him, unless he had maintained an adverse possession in the manner and for the time required by the Code. There is nothing here to indicate that the possession was adverse at all. The tract was occupied by both parties as their home, before and after the conveyance to Mrs. Reed. The occupancy was consistent with an ownership by either husband or wife. It was, in fact, a joint occupancy, and could not, on the facts offered to be shown, furnish the basis for a claim of prescriptive title by one against the other. *First N. B. v. Guerra*, 61 Cal. 109; *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804. The same conclusion applies to the statement that James Reed had conveyed parts of the land after 1883. Since the record title remained in him, this was a convenient mode of transfer, and it would not evidence a claim adverse to that of the wife, in the absence, at least, of proof that the husband's action was known to the wife and that she did not assent to it. The matters just discussed, which, as we have seen, did not make out a title by prescription, could certainly have had no effect as bearing directly upon the transaction of July 21, 1883. The force of an executed conveyance is not to be impaired by subsequent acts or declarations of the grantor.

[8] Another part of the opening statement had to do with the deposit with or Levy of deeds from Reed to his wife and from her to him. It is not claimed that any title passed by this transaction. See *Kenney v. Parks*, 125 Cal. 146, 57 Pac. 772. This being so, we are unable to see that the offered testimony tended in any way to meet the case already made by the plaintiff. The fact that the Reeds made an ineffectual attempt to provide for the transfer, upon the death of one of them, of all property owned by either to the survivor, does not indicate that any particular parcel of that property belonged to one, rather than the other, or that it was community property. The subsequent talk with Coburn, looking to a second arrangement of like kind, was never consummated, and is, of course, entitled to no greater weight than may be given to the deposit of the deeds with Levy.

[9, 10] The opening statement contained, in addition to the various items already discussed, a promise to prove certain acts and declarations of Mrs. Reed. Counsel undertook to show that in her will, made shortly before her death in December, 1908, Mrs. Reed had declared that the property was community property. Oral statements to the same effect had been made by her to different persons at various times. This court has, on several occasions, expressed the view that the character of the ownership of property, whether separate or community, is to be determined by the proof showing the mode of acquisition, rather than by any declaration of one of the parties that the property was or was not community property. *Estate of Grannia*, 142 Cal. 1, 75 Pac. 324; *Estate of Learned*, 156 Cal. 311, 104 Pac. 315; *Estate of Claiborne*, 158 Cal. 648, 112 Pac. 278. It would seem, however, that such declaration is admissible in evidence against the declarant or his successors in interest. In *re Bauer*, 79 Cal. 304, 21 Pac. 759. In the very recent case of *Estate of Hill*, 138 Pac. 690, the admissibility of such declarations was asserted in an opinion which had the concurrence of only three members of the court, three of the remaining justices joining in the judgment upon grounds which did not require them to state their views on this point. But, assuming the admissibility of Mrs. Reed's declarations that the property was community, we think this evidence standing alone cannot be deemed sufficient to overcome the uncontradicted proof that the land was conveyed to her by her husband by means of a deed which, in express and elaborate terms, stated that she was to hold the land as her separate estate, the grantor relinquishing "all right or claim to the same or any part thereof as community property." A declaration that the property was community estate might properly be regarded as having some weight, if supported by proof of other facts pointing in the same direction, or if the evidence regarding the acquisition of title were consistent with either the separate or community character of the ownership. But under the evidence which had been here introduced, the husband had conveyed the property to the wife by a deed which, by its express declarations, as well as by the presumptions of law (*Estate of Klumpke*, 139 Pac. 1062) made the property her separate estate. It could become community property thereafter only by an agreement between herself and her husband. *Civ. Code*, §§ 158, 159; *Yoakum v. Kingery*, 126 Cal. 33, 53 Pac. 324. There was no offer to prove either a conveyance by her or an agreement with her husband. It having been clearly shown that the property had been acquired by her as her separate estate, her mere declaration that it was community would not, we are satisfied, be enough to sustain a finding that she had conveyed to her husband or had agreed with him that it should belong to the community.

[11-14] The only remaining piece of evidence

which defendants announced their intention of introducing consisted of the declaration of Mrs. Reed to Mr. Thompson that the deed of July 21, 1883, had been made and given with the understanding that it should not become effective unless she should outlive her husband. As a declaration against interest this was admissible if the fact thus stated by Mrs. Reed militated in any way against the validity of the title claimed by plaintiff as her administrator. We think the alleged fact could have no such operation. Whether or not a deed has been delivered, either to the grantee or to a depository is a question of fact. A manual tradition of the instrument is not sufficient, unless the passing of the paper is accompanied by the intent of presently transferring title to the property, and be unhampered by the reservation of a right of revocation or recall. *Follmer v. Rohrer*, 158 Cal. 758, 112 Pac. 544.

"No precise form of words and no particular character of act is necessary. \* \* \* Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title conveyed, are sufficient. \* \* \* When a deed is executed and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered." *Moore v. Trott*, 162 Cal. 275, 122 Pac. 462.

The deed here in question was handed by the grantor to the grantee. No third party was interposed as depository. Before the signing of the deed James Reed had been advised that in order to pass title it was necessary for him to make delivery to the grantee. If Mr. Thompson had been allowed to testify as it was stated he would testify, the declaration of Mrs. Reed could have had no greater force than to show that the paper had been delivered to her upon the condition that, if she did not survive her husband, the property would not pass to her, but that, if he died first, the title should vest in her. No right to recall the deed or to revoke the delivery was retained. In one event title was to pass. In the other it was not. But it was not contemplated that under either contingency anything further was to be done. If the fact upon which the title was to pass (i. e., the death of Reed during the life of his wife) should occur, the deed was to become operative by virtue of the delivery made on the 21st day of July, 1883, which was the only delivery which the parties ever had in mind. We have, then, the case of a delivery, to the grantee, upon a condition which may, according to the outcome, make the transfer effective or nugatory. Such a delivery, if made to a third party, might have been ineffectual. But where the deed is handed to the grantee personally, the situation is different. In that case, the condition is, by the law, discarded, and the delivery is regarded as absolute. Such is the express declaration of our statutes. Section 1056 of the Civil Code provides:

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

Under this section, the proof offered would not have justified the court in ruling that anything but an absolute delivery, free of condition, has been shown. The precise point was involved in *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17, and the court there held, on a state of facts identical, so far as the point under discussion is concerned, with those here presented, that the deed was operative as an immediate, absolute conveyance. See, also, *Elliott v. Merchants B. & T. Co.*, 22 Cal. App. 536, 132 Pac. 280; *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

Such cases as *Kenney v. Parks*, 137 Cal. 527,

70 Pac. 556, *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 989, and *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1, are not in conflict with the views herein expressed. In *Kenney v. Parks*, the parties were under the mistaken belief that a deed, although delivered, did not transfer title until recordation, a mutual mistake which, as is said in *Hammond v. McCollough*, supra, "conclusively established the absence of an intent to create a present and a new vestiture of title." *Black v. Sharkey* and *Denis v. Velati* were decisions laying down the unquestioned rule that the manual tradition of a deed unaccompanied by the purpose or intention of passing title is not a good delivery. In none of these cases was the court dealing with a situation of a delivery made to the grantee, both parties intending that in a certain event title should pass by virtue of the delivery then and there made.

The conclusion to be drawn from the foregoing discussion is that the facts contained in the opening statement of defendants, if proved, would not have raised a substantial conflict authorizing the jury to find against the plaintiff's claim of title. This being so, it was not error for the court to direct a verdict in plaintiff's favor. No other points are made.

The judgment is affirmed.

(169 Cal. 53)

#### PEOPLE v. HARRIS. (Cr. 1848.)

(Supreme Court of California. Dec. 18, 1914.)

##### 1. HOMICIDE (§ 179\*)—EVIDENCE—INSANITY.

Where insanity is a defense, the mental condition of any of the relatives of accused is material, and on that subject a reasonable latitude should be allowed.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 380; Dec. Dig. § 179.\*]

##### 2. CRIMINAL LAW (§ 452\*)—COMPETENCY OF WITNESSES—OPINION AS TO SANITY.

A witness cannot give his opinion as to the sanity of relatives of accused, relying on insanity, without preliminarily showing that he is qualified to express an opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.\*]

##### 3. CRIMINAL LAW (§ 452\*)—COMPETENCY OF WITNESSES—OPINION AS TO SANITY.

The mother of accused, who was charged with murder and relied on insanity as a defense may not express her opinion as to whether, on one occasion, when the father of accused fell to the floor at home and frothing at the mouth, his condition resulted from intoxication or temporary insanity in the absence of a preliminary showing that she is qualified to express an opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.\*]

##### 4. HOMICIDE (§ 339\*)—APPEAL—EVIDENCE—HARMLESS ERROR.

Where the mother of one charged with murder and relying on the defense of insanity testified fully as to the circumstances of the birth of accused and as to his health, conduct, habits, peculiar temperament, and the physical and mental defects of his infancy and manhood, as she observed him, the refusal to permit her to testify whether she, before his birth, suffered inconvenience or pain, and whether at his birth a physician had not difficulty in causing the child to breathe, was not prejudicial to accused.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 714; Dec. Dig. § 339.\*]

##### 5. HOMICIDE (§ 170\*)—EVIDENCE—ADMISSIBILITY.

Where accused, defending a charge of murder on the ground of insanity, had spent a great

deal of his time in attempting to perfect inventions, refusal to permit him to show what the inventions were, with a view of having them introduced in evidence to show that a systematic defect ran through all of them, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.\*]

**6. HOMICIDE (§ 339\*)—EVIDENCE—ADMISSIBILITY.**

Where accused admitted the killing of decedent and taking her money, and his mother testified that she had given him money when he wanted it and had never refused to do so, and an uncle testified that he had given him money, and there was evidence that accused was usually occupied and in the receipt of wages, refusal to permit the mother to testify whether, at the time of the killing, she had money and whether accused knew it, and the refusal to permit the uncle to testify whether he had ever refused to give accused money, was not an unreasonable curtailment of the right of accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.\*]

**7. HOMICIDE (§ 179\*)—INSANITY—EVIDENCE—ADMISSIBILITY.**

The acts and declarations of accused, relying on insanity, made a reasonable time before and after the crime, may be shown on the question of insanity at the time of the criminal act, where they appear to have any tendency to show his mental condition at that time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.\*]

**8. CRIMINAL LAW (§ 670\*)—EVIDENCE—OFFER OF EVIDENCE—NECESSITY.**

Refusal to allow the mother of one accused of murder and relying on insanity as a defense, to state a conversation which she had with him at supper the evening of the crime was not erroneous, in the absence of any offer of what was intended to be shown by it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593-1596; Dec. Dig. § 670.\*]

**9. CRIMINAL LAW (§ 1141\*)—APPEAL—REVERSIBLE ERROR.**

Error warranting a reversal of a conviction must affirmatively appear in the record, so as to permit the court on appeal to determine whether a substantial right of accused was prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. § 1141.\*]

**10. CRIMINAL LAW (§ 449\*)—EVIDENCE—GOOD CHARACTER OF ACCUSED—ADMISSIBILITY.**

Accused may not show the opinion of witnesses as to his truthfulness and honesty, but he is limited to evidence of general good character, and the rule is not different where insanity is a defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034-1037, 1040-1057; Dec. Dig. § 449.\*]

**11. CRIMINAL LAW (§ 667\*)—TRIAL—READING OF EVIDENCE TO JURY.**

Denial of a motion of accused to have the testimony given by him and his mother read to the jury on the ground that much of the testimony was given in so low a tone of voice as not to be heard by the jury was not erroneous, where their answers, when inaudible, were either read by the reporter or repeated by them and where the jury, though hearing the motion, did not express any desire to hear the testimony read though asked if they desired it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1599, 1601; Dec. Dig. § 667.\*]

**12. HOMICIDE (§ 340\*)—INSTRUCTIONS—MALICE.**

The giving by the court, in its instructions, of the general definition of malice in Pen. Code, § 7, subd. 4, was not prejudicial error, where the definition in section 188 of malice essential to constitute homicide was also given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

**13. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.**

Where the court in its main charge correctly stated the law on the burden of proving insanity and on other issues raised, accused could not complain because the court gave, at his request, a conflicting erroneous instruction that where accused was charged with homicide, and offered evidence to show that the condition of his mind, through predisposition, was such that he was incapable of deliberation, the reasonable doubt as to capacity for deliberation should be resolved in his favor to the extent of acquitting him of the higher grade and convicting him of the lower grade.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**14. HOMICIDE (§ 237\*)—INSANITY—PREPONDERANCE OF EVIDENCE.**

Accused, charged with murder in the first degree, must sustain his defense of insanity by a preponderance of the evidence where the facts of the killing leave no other rational inference than that it was done with deliberate intention if he was sane.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 237.\*]

**15. HOMICIDE (§ 144\*)—BURDEN OF PROOF—INSANITY.**

The burden is on the prosecution to prove the elements of the crime, which involves proof of a mind sufficiently sane to be capable of committing the crime or any degree thereof, but affirmative proof of sanity is not required.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 261; Dec. Dig. § 144.\*]

**16. CRIMINAL LAW (§ 311\*)—BURDEN OF PROOF—INSANITY—PRESUMPTIONS.**

The presumption of sanity of accused is equivalent to proof of sanity as a fact, until the contrary is shown, and the presumption is conclusive in the absence of evidence of accused contravening it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 311.\*]

**17. CRIMINAL LAW (§ 939\*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

A new trial on the ground of newly discovered evidence is properly denied in the absence of any showing of any diligence to discover or produce it at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Wells, Judge.

Burr L. Harris was convicted of murder in the first degree, and he appeals. Affirmed.

E. Burton Ceruti, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

LORIGAN, J. Defendant was tried for the crime of murder, convicted of murder of the first degree, and sentenced to death. He



appeals from the judgment and an order denying his motion for a new trial.

Upon the trial the homicide by defendant was admitted. The sole defense was insanity. As there was no dispute on the trial respecting the circumstances attending the killing of deceased by defendant and no question is raised on this appeal as to the sufficiency of the evidence to sustain the finding of the jury (necessarily implied from their verdict) against the defense of insanity interposed by defendant or the verdict returned against him, a general statement of these matters need only be made.

The victim was a Mrs. Rebecca P. Gay, a Christian Science practitioner having her office in the H. W. Hellman building in the city of Los Angeles. Defendant visited her office on the afternoon of September 26, 1913. He was not acquainted with her nor had he ever seen her before. He told her that he was seeking a Mrs. Wallace, whom he expected to meet at the office. He was told by Mrs. Gay that she knew no one by that name nor expected a visit from such a party. Defendant, however, insisted that this Mrs. Wallace would call there, and was permitted to sit in the reception room of the office and wait her expected arrival. He waited there about an hour—until nearly 5 o'clock—when a patient whom Mrs. Gay had been attending in the inner office departed, leaving defendant and Mrs. Gay alone in the reception room. That was the last seen of the latter alive. Next morning her dead body was, by a janitress of the building, found lying in the office. Letters and papers were scattered over her body. A handbag and purse in which Mrs. Gay carried her money was found in the office, the latter empty. An autopsy showed—to state it briefly—that Mrs. Gay had been killed by repeated blows from some blunt instrument on her face and head which had fractured the skull in numerous places. Defendant was suspected of the homicide, and arrested in the city of San Diego on October 5, 1913, and confessed that he had done the killing. He also testified as a witness on the trial and detailed the circumstances of Mrs. Gay's death at his hands. He testified that for some three years previous to the homicide he had at occasional times suffered from fits resulting in a loss of consciousness; that at those times, covering a period of from days to several weeks, he would have spells of sickness accompanied by lapses of memory; that sometimes also during these spells he would hear voices of unknown and unseen persons telling him that he was threatened with great injury or death by some person, and urging him to seek and kill such person to protect himself, and the voices kept constantly urging him to do the things they said; that he was made angry and fearful at these times by these suggestions and promptings; that a feeling or impulse to do as the voices urged would come over him, which he would try

to resist, but which he could not succeed in doing; that for a week previous to his killing of Mrs. Gay, he was suffering under one of these spells, during which the voices kept constantly telling him that a Mrs. Wallace (a person he did not know) intended to kill him and that he must seek and kill her; that he would find her somewhere in the Hellman building; that when he called at Mrs. Gay's office he thought he would find this Mrs. Wallace there or that she would come in during that afternoon; that after he had been sitting in the reception room for about half an hour he heard these voices again, and they kept telling him that Mrs. Gay was this Mrs. Wallace he was seeking and that he must kill her; that when a patient on whom Mrs. Gay was attending left the office he and Mrs. Gay were alone; that immediately the telephone in the office rang, and as Mrs. Gay was seated at the desk answering it he approached and struck her on the head with a piece of iron pipe which he had brought with him wrapped in newspaper and with which the voices had directed him to kill Mrs. Wallace; that when struck Mrs. Gay fell to the floor, and as she lay there he struck her again with the iron pipe about the head four or five violent blows. Satisfied that she was dead, he looked through her desk and scattered the papers therefrom on the floor; that while so engaged, hearing some one approaching towards the outer door of the office, he sprang the inner lock of it to prevent entrance. He took the contents of Mrs. Gay's purse—amounting to \$25—and left the office, departing from the Hellman building by the back stairs. He left the piece of gas pipe used in killing the deceased by the side of her body. That night he buried the clothes he wore at the time he killed the deceased, which were spattered with blood, in a field near the residence of his mother, where he was living. The next day he departed on an early train for San Diego. At the time of his confession and on the trial he claimed that he had no remembrance of killing deceased until after his arrest by the officers when they told him of his visit to the office of Mrs. Gay, the apparent circumstances under which she was killed, the wounds inflicted, and the weapon found beside her body; that he then for the first time remembered that he had done the killing and recalled all the circumstances under which it was done.

As to the defense of insanity: It was not claimed that appellant was insane at the time of the trial, but only that he was insane when he committed the homicide. Testimony on this subject was presented to the jury quite fully on both sides. The claim on behalf of the appellant was that he was subject to intermittent attacks of a particular phase of epileptic insanity defined by the medical experts called in his behalf as psychic epileptic equivalent, a condition where instead of the usual convulsive phenomena



ordinarily known as epileptic fits, there are substituted from time to time certain disturbances of mentality during which the consciousness of the individual afflicted is so altered that he is deprived of the full possession of his usual faculties; he acts in a manner wholly foreign to his usual conduct, habits, and mode of thought, and thinks things are true that are not and acts upon them because he believes they are true; that a characteristic of this phase of insanity is that while suffering under it the individual may become dominated with an idea entirely imaginary that he is being persecuted or threatened with injury from some source, and will make a sudden and violent attack on some person his diseased mind suggests is the one persecuting or intending to injure him.

These medical experts gave it as their opinion from the evidence in the case and personal examination of the defendant that he was suffering from a spell of this phase of insanity when he killed deceased and was insane when he did so; that by reason thereof he was incapable of having a malicious intent to kill and incapable of deliberating upon the act of killing which he committed. The court permitted these experts to testify that from the nature of his insanity when defendant killed the deceased he was incapable of resisting an impulse to do it, but the court at the same time stated that nevertheless it would instruct the jury that in this state the doctrine of irresistible impulse as an excuse for crime did not exist, and did subsequently so instruct the jury.

On the part of the prosecution the opinion of medical experts based also on the evidence in the case and personal examination of the defendant was that he was not suffering from epileptic insanity when he killed the deceased; that he was entirely sane at the time, having mental capacity to know and understand the nature and character of the act he was committing.

As we have said, the appellant raises no question but that the evidence was sufficient to sustain the finding of the jury that he was sane or to sustain the verdict of murder of the first degree. His claim on this appeal is only that certain rulings of the court prejudicially prevented him from fully presenting to the jury all the testimony which he was entitled to present for their consideration on the issue of insanity; that the court also erred in other of its rulings and in the matter of the instructions given by it to the jury.

As to the rulings on the admission of testimony: Many errors on that ground are assigned by appellant, but we deem it necessary only to consider some of them. The assignments as to the others are clearly without merit.

[1, 2] In the course of the trial defendant introduced testimony which it was claimed

had a tendency to show that his maternal uncle had at one period of his life become temporarily insane, and that in the infancy of the defendant his father had on one occasion fallen to the floor at home and frothed at the mouth. The mother of the defendant was asked by counsel for appellant what phase of insanity the uncle was afflicted with at that time, and a Dr. Nelson, a physician who knew the uncle, was asked whether it appeared to him that the latter was possessed of an insane delusion. These questions were objected to and the objection sustained on the ground that no foundation for the inquiries had been laid. Undoubtedly, where insanity is a defense, the mental condition of any of the relatives of the defendant is material, and on that subject, as on all inquiries relating to insanity, a reasonable latitude should be allowed. But this does not mean that the rules as to the admissibility of evidence should be relaxed. The rule is that before the opinion of witnesses as to sanity of a person or a particular phase of it can be given—and the inquiries here were simply calling for the opinion of the witnesses on that subject—it must be preliminarily shown that the witness is qualified to express it, and clearly this was not shown here.

[3] Nor can error be predicated on the ruling of the court refusing to allow the mother of the defendant to express her opinion as to whether on one occasion in their early married life, when the father of the defendant fell down and frothed at the mouth after returning home in an intoxicated condition (referred to above), this resulted from the drunken spell or was not from the cause of drink. Not only was there no showing that she was qualified to give her opinion on the subject, but it further appears that she testified that she did not know what led up to that condition.

[4] The mother of the defendant was not permitted to answer whether while he was en ventre sa mere she suffered inconvenience or pain, and whether at the birth of the defendant a physician had not difficulty in causing him to breathe. Without any infringement on the rights of the prosecution, the court might have let this testimony in. But as it is not suggested how this circumstance could have been important, particularly in view of the fact that the mother testified fully regarding the circumstances attending the birth of defendant, her long period of labor and necessarily resulting pains, and the use of instruments to effect her delivery, and, further, as to the health, conduct, habits, peculiar temperament, and physical and mental defects in infancy and manhood of the defendant as she observed him, we cannot say that this particular ruling worked such prejudice to the rights of the defendant as would make a sufficient showing to warrant a reversal.

[5] There was testimony tending to show that the defendant was employed a great deal of his time in attempting to perfect certain inventions, and it was sought to show what these inventions were, with a view to having them—some half dozen or more—introduced in evidence. The testimony respecting their character and the right to offer them was rejected by the court. Counsel for appellant claims this was error; that, if he had been permitted to introduce the inventions, it would have shown that a systematic defect ran through all of them; that, as an invention is a creation of the mind, if it be shown that the same defect is found in each of them this would have a tendency to show that there was a corresponding defect in the mind of defendant. But this evidence would have no tendency to show insanity unless as a rule it may be said—which, of course, it cannot—that unsuccessful inventors are in a measure insane. These prevailing defects would only show that the appellant was not successful in perfecting the idea contemplated in his inventions. They would have no tendency to show he was insane.

[6] The mother of the defendant, and also his uncle Lafayette Taylor, were not allowed to answer whether at the time of the killing of Mrs. Gay the mother had money and whether defendant knew it, and the uncle whether he had ever refused to give the defendant money. Counsel for appellant insists that he had a right to show that the defendant could have gotten money from his relatives if he had wanted it in opposition to the theory of the prosecution that the defendant killed Mrs. Gay for the purpose of getting money. But as the testimony of the mother in the case was that she had given the defendant money when he wanted it and had never refused to do so, and that the uncle had also given it to him, and, further, that defendant was usually occupied and in the receipt of wages, there was no unreasonable curtailment of the right of defendant in sustaining the objections to these particular inquiries.

[7-9] The court refused to allow the mother to state a conversation which she had with the defendant at supper time the evening of the homicide; or to permit her to answer whether she had "ever known him to steal anything"; or had she "always known him to be truthful"; or to permit another witness, from his association with appellant, to answer how the defendant impressed him "as to his honesty and truthfulness," and whether he observed "that he was truthful and honest." As to the inquiry of the mother concerning any conversation with the defendant, she testified that she had a conversation with him, and was asked, "What was it?" It is the rule, as claimed by appellant, that when the insanity of an accused is interposed as a defense, his acts and conduct and de-

larations, made a reasonable time before and after the alleged criminal act is committed may be given to the jury on the question of his insanity at the time the criminal act was committed, if they appear to have any tendency to show his mental condition at that time. *People v. Willard*, 150 Cal. 544, 89 Pac. 124. But here the question proposed did not indicate in the slightest that the conversation sought to be elicited would have any such tendency. Before the exclusion of a conversation which may or may not be pertinent on the question of insanity can be assigned as error it is the duty of counsel to state the nature of the statements claimed to have been made by defendant, because unless this is done the trial court cannot intelligently determine whether the matter sought to be elicited could have any bearing on the question of insanity or not. Nor can this court, in the absence of such showing, determine whether the right of the defendant had been prejudicially affected by the ruling of the court. All conversations are not admissible, but only those which have a tendency to prove the insanity of the accused. Counsel in this case, if he deemed the matter of sufficient importance, should have made a formal statement or offer of what he intended to prove. Such a proceeding is in harmony with the rule governing appeals that error warranting a reversal must affirmatively appear in the record and to also permit this court to determine whether a substantial right of a defendant has been prejudiced by a ruling assigned. *People v. Brotherton*, 47 Cal. 388; *People v. Brent*, 11 Cal. App. 674, 106 Pac. 110.

[10] As to the inquiry directed to the truthfulness and honesty of the defendant: What was sought was only the individual opinion of the witnesses respecting these traits of character of the defendant from observation or association with him. But such evidence is not admissible. The rule is that, where good character of an accused for certain traits is proper to go before a jury, it is only evidence of general good character which must be shown. There is no difference in the rule when insanity is a defense than of other defenses in which good character may be shown.

[11] Error is assigned in the refusal of the court on the motion of counsel for appellant to direct that the testimony given by the defendant and his mother during the trial be read to the jury at the close of the case. The claim of counsel was that much of their testimony was given by these witnesses in so low a tone of voice as to be inaudible to the jury. It is true, as it is not unusual during trials, that these witnesses sometimes answered questions in such a low tone of voice that some of the jury, the court, and counsel requested them to speak louder. But the record shows that whenever their answers were inaudible this was called to their attention by either

court or counsel, and their answers either read by the reporter or repeated by the witnesses. This motion was made in the presence of the jury and they were told that if they desired the testimony of these witnesses read the court would have it done; that if they were satisfied that they had heard it no purpose could be subserved by reading it again. None of the jury expressed any desire to hear it re-read, and it must be assumed that they heard it all and did not need to have any part of it re-read to them.

[12] As to the instructions complained of: The court in its instructions on "malice," which is an element of the crime of murder, gave the general definition of that word as found in subdivision 4 of section 7 of the Penal Code. Appellant claims that the giving of this definition of malice in a case where the crime charged is murder was erroneous. It is true that the malice defined in that section of the Code is not the malice which is essential to constitute the crime of murder. The malice essential to constitute it is something distinct from the malice defined by the section referred to, and is particularly defined by section 188 of the Penal Code, a definition which was also given by the court. Prejudicial error, however, did not follow because both definitions were given. In giving the definition from section 7 the court only gave the general import of the word "malice." When it came to defining the crime of murder, with its essential elements, it correctly defined the "malice" constituting one of such elements as it is particularly defined in section 188. Under similar circumstances, it is held that the giving of the general definition, where the special definition as found in section 188 is also given, is no ground of substantial complaint. *People v. Dice*, 120 Cal. 201, 52 Pac. 477.

The principal contention, however, of appellant with reference to the instructions is that in its charge to the jury the court gave contradictory, confusing, and misleading instructions with reference to the defense of insanity, the burden of proof, and weight of evidence, and sets out in his brief the particular instructions which he asserts present this condition. He does not discuss particularly the instructions which he claims present it. He simply sets forth a number of them, makes the point, and cites authorities which he claims sustain his contentions.

The court gave full and clear instructions on the defense of insanity; announcing the well-established rule that, in order to be available for that purpose, it must appear that the defendant was suffering from such a diseased and deranged condition of his mental faculties as to render him incapable of distinguishing between right and wrong with reference to the particular act with which he was charged. It also instructed as to partial insanity, and further told the jury that the doctrine that under some forms

of insanity a person may know the nature of the act fully, and at the same time cannot prevent it through paralysis of the will power, and which is sometimes known as uncontrollable or irresistible impulse, has no legal standing in this state and is not a legal defense to crime.

It further gave the instruction common to all criminal cases, that the burden of proof was on the prosecution to prove every fact essential to a conviction; defined reasonable doubt, and gave the usual instruction, in connection therewith, that if, after a full and fair consideration of all the evidence, the jury were satisfied there was such reasonable doubt of the guilt of the defendant they should acquit him. As to the burden of proof, it charged, further, that while such burden was generally upon the prosecution this was subject to the exception that when insanity is relied on as a defense to crime the burden of proving his insanity was upon the defendant and he must show by a preponderance of the evidence the existence of such insanity; that it was not proven by raising a doubt whether it existed or not. The legal accuracy of these instructions, as announcing correct principles of law for consideration by the jury as to all the matters to which they related, is not questioned by the appellant.

[13] But in addition to these instructions the court at the request of the appellant, gave the following instruction to the jury: "It is logical to hold that where the accused is charged with deliberate homicide, and offers evidence to show that the condition of his mind through predisposition was such that he was incapable of deliberation, the reasonable doubt as to such capacity for deliberation should be resolved in favor of the accused to the extent that it acquits him of the higher grade and convicts him of the lower grade of the offense." The "predisposition" referred to in the instruction doubtless was a predisposition to insanity.

It is this quoted instruction, considered in connection with the general instructions just referred to, which counsel for appellant contends created the condition of contradictory, confusing, and misleading rules given to the jury respecting the subject of insanity, the burden of proof, and the weight and sufficiency of the evidence. There is an apparent condition of conflict in these instructions, though what its effect is, as far as being prejudicial to the appellant, is a matter for subsequent consideration. While the court in its main charge correctly instructed the jury that the rule in this state is that the defense of insanity, when interposed by a defendant, must be made out by a preponderance of the evidence on his part (*People v. Myers*, 20 Cal. 518; *People v. Allender*, 117 Cal. 83, 48 Pac. 1014; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Wells*, 145 Cal. 138, 78 Pac. 470), in this quoted instruction it nevertheless

informed them that if from the evidence introduced of a predisposition to insanity they should entertain a reasonable doubt of the capacity of the defendant to deliberate in killing deceased (deliberation being essential to constitute murder of the first degree), the defendant should be given the benefit of it and acquitted of that higher degree of murder.

[14] There is no warrant in the law of this state for any such doctrine as declared in the quoted instruction. Counsel for appellant defends it as properly applicable to the degrees of murder on the theory that while a charge of murder is established by proof simply of the killing by defendant, that such a showing constitutes only murder of the second degree; that in order to constitute murder of the first degree, it is incumbent on the prosecution to prove something more than the killing itself, namely, that the killing was committed with a deliberate intention to kill; that this deliberate purpose to kill is an essential fact necessary to be proven to constitute murder of the first degree, and the burden of proving it beyond a reasonable doubt is on the prosecution; that if a reasonable doubt of such deliberate purpose arises from the evidence, whether produced from the evidence on the issue of insanity or otherwise, the accused is entitled to the benefit of it and to an acquittal of the higher offense. All that counsel contends for as to the degrees of murder, the necessity of proving deliberation to constitute murder of the first degree, and as to the burden of proof being on the prosecution is undoubtedly true. But the fact that the defendant is accused of murder which involves degrees, and that his guilt of the higher degree can only result from proof of a deliberate intent on his part to kill, does not differentiate the rule in this state that the burden is on the defendant where the facts and circumstances of the killing leave no other rational inference than that it was done with deliberate intention if he was sane, and he asserts incapacity to have entertained such intent by reason of his insanity to sustain this defense by a preponderance of the evidence.

[15] The burden of proof is always on the prosecution to prove all the elements necessary to constitute the guilt of the defendant, and this involves proof of a mind sufficiently sane to be capable of committing crime or any degree of crime involved in the offense charged. But the law presumes all men are sane; not some degree of sanity, but that they have full mental capacity to commit any crime or degree of crime which the facts in the case establish. Express or affirmative proof of the sanity of a defendant is not required to be made by the prosecution.

[16] The presumption which the law raises is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proven the

sanity of the defendant beyond a reasonable doubt. This presumption is conclusive in the absence of any evidence on the part of the defendant contravening it. If none is introduced by him the presumption prevails, and the burden on the prosecution of proving beyond a reasonable doubt the capacity of the defendant to commit the crime charged which the facts and circumstances otherwise show beyond such doubt was committed by him is sustained. The rule prevailing in this state, and in the majority of jurisdictions elsewhere, requiring the defendant, where insanity is interposed as a defense by him, to prove it by a preponderance of the evidence, does not affect the rule that the burden of proving sanity is on the prosecution. That burden is always on it, and it is met in the first instance by the presumption which the law raises of sanity and which must prevail until it is overcome. The rule casting upon the defendant the burden of establishing his insanity by a preponderance of the evidence does not shift this burden of proof from the prosecution to him, but only shifts the burden of introducing evidence, and declares the amount or quantum of evidence which he must produce to overthrow the presumption and show his insanity. Now, in this case, the claim of the prosecution was that the defendant was guilty of murder of the first degree from the facts and circumstances shown of the killing. There was no dispute as to the facts and circumstances under which the killing of deceased by defendant was done. They were conceded, and show that the killing was committed by defendant under circumstances of peculiar atrocity and in a manner which could leave no rational inference but that it was done with deliberate purpose and intent to kill if the defendant was sane. Unless he was insane, no other verdict than that of murder of the first degree could have been returned against him. His sole defense was that he was insane to a degree that he was incapable of entertaining the deliberate intent essential to constitute first-degree murder. But the law presumed him sane, which involved the mental capacity of entertaining the deliberate intent which the conceded facts surrounding the killing rationally showed. By reason of the presumption the jury must remain convinced of his sanity or they must be convinced by a preponderance of the evidence that he was insane. There is no middle ground or intermediate rule or any rule of reasonable doubt as to insanity recognized in this state, and hence no warrant for the giving of this quoted instruction by the trial court. It had otherwise correctly instructed the jury on all matters respecting insanity as a defense and the rules under which it must be considered by the jury. As is apparent from our discussion of the subject, it was not exactly correct for the court to tell the jury that there was an exception to the rule as to the burden of

proof being on the prosecution where insanity is interposed as a defense, but this does not affect the matter under consideration. It may be said that in giving the usual general instructions in criminal cases as to the right of a defendant to an acquittal if the jury, from a consideration of all the facts and circumstances, are not satisfied that the state has established every fact essential to a conviction, the court should, with regard to the defense of insanity set up by a defendant, specifically inform them of the qualification in such cases to this general rule, namely, that such defense must be established to their satisfaction by a preponderance of the evidence in his favor, and that the rule of reasonable doubt does not apply as to such a defense.

But while generally the giving of conflicting or misleading instructions will warrant a reversal, this rule is subject to the exception that when this condition is not only invited by the defendant, but that its result is solely to his advantage, he has no ground of complaint. This was the situation created here. Of course, no prejudice was worked the appellant through the correct instructions given by the court. The giving of conflicting and misleading rules proceeded from the quoted instruction. But obviously the giving of this quoted instruction was decidedly to the advantage of appellant. It submitted his only defense of insanity for the consideration of the jury under the rule of reasonable doubt (to say nothing of a predisposition to insanity being any defense at all) much more favorably than he was entitled to, and hence no prejudice resulted to him nor any valid ground of complaint.

The court gave the jury an instruction with respect to the discretion vested in them should they find the defendant guilty of murder of the first degree as to whether he should be hanged or suffer life imprisonment. It is unnecessary to set forth the instruction here. It is the same instruction as was given word for word by the trial court in *People v. Rogers*, and the correctness of which was the subject of consideration on an appeal to this court in that case. *People v. Rogers*, 163 Cal. 476, 126 Pac. 143. We held there that the giving of such an instruction was not erroneous.

[17] It was not error for the court to deny the motion for a new trial on the ground of newly discovered evidence. There was no showing whatever of reasonable or any diligence to discover or produce at the trial the single item of evidence bearing upon the insanity of appellant which was claimed subsequently to have been discovered, and which is referred to in the affidavit of the mother filed in support of defendant's motion.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

HENSHAW, J. (concurring). I concur in the foregoing opinion and judgment. The condition of our law touching instructions to the jury in the matters above discussed I take it briefly to be this: In general, if, after their review of all of the evidence, the jury entertain a reasonable doubt of the guilt of the defendant, it is the jury's duty to give the defendant the benefit of that doubt and to acquit him. This doctrine of reasonable doubt goes not only to the whole evidence, but equally to every material issue in the case. Thus, if upon any one material issue the jury entertain such a doubt, their verdict must be acquittal. When, however, our law says, as it does with equal positiveness, that when insanity is relied upon as a defense it must be proved to the satisfaction of the jury by a preponderance of evidence, there is presented an apparent conflict between the two doctrines. But this conflict is only apparent. When insanity is interposed as a defense, that one particular issue is removed from the operation of the rule of reasonable doubt. It forms an exception to it. Our law is this: If the jury entertain a reasonable doubt concerning the proof of any material issue in a criminal case, it must give the defendant the benefit of that doubt and acquit him, unless the particular issue be that of insanity. As to this issue a reasonable doubt is not sufficient to justify an acquittal at the hands of the jury, but they must be convinced that the defense of insanity is established by a preponderance of evidence. It would tend to clarify our criminal law if trial judges, where the occasion arises, would define this matter to the jury in some such way as that above indicated.

I concur: SHAW, J.

(168 Cal. 790)

LONG v. HAMMOND. (Sac. 2170.)

(Supreme Court of California. Dec. 15, 1914.)

1. LANDLORD AND TENANT (§ 322\*)—LEASE—CONSTRUCTION—RIGHTS OF LESSEE.

A lessee may not sell or otherwise dispose of the lessor's property, unless expressly or impliedly authorized so to do by the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. § 322.\*]

2. LANDLORD AND TENANT (§ 322\*)—LEASE—CONSTRUCTION—RIGHTS OF LESSEE.

A lease of a farm and enumerated live stock for a rental of half of the increase of the stock, which provides that at the end of the term the lessee shall surrender the premises and make the number of stock good and one-half of all increase, does not authorize the lessee to sell any of the demised stock, but means that at the end of the term he must de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

liver up that stock and replace any portion lost during the term.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. § 322.\*]

### 8. APPEAL AND ERROR (§ 909\*)—DISPOSITION OF CASE ON APPEAL—PRESUMPTIONS.

Where a lease sued on by the lessor was unambiguous and clearly sustained his claim, the court, on appeal from a judgment for the lessee on the judgment roll alone, could not, to sustain the judgment, presume that the trial court received parol evidence to justify it to construe the lease so as to support the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3875; Dec. Dig. § 909.\*]

In Bank. Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge. Action by J. O. Long against S. P. Hammond. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Cornish & Robnett, of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

ANGELLOTTI, J. This is an appeal on the judgment roll by plaintiff from a judgment given in favor of defendant. The only question presented by the appeal is whether, under the terms of a certain lease made by plaintiff to defendant, defendant had the right to sell any of the live stock constituting a part of the demised property. If he had no such right, the judgment must be reversed.

By the lease, executed May 22, 1911, plaintiff leased to defendant a tract of land containing 160 acres, together with all farming implements and machinery on the premises, a wagon, a cart, and certain harness, and "4 cows, 12 yearlings, 7 of which are heifers and 5 steers and one bull, \* \* \* 7 head of horses, consisting of 3 work horses, 1 three year old filly, 2 two year old geldings and one yearling filly," for the term of five years "for the rental value of one-half the increase of said stock; i. e., that is to say, that, at the end of said term of five years, the said lessee shall surrender to the lessor the said premises in good condition, wear, tear, and the elements excepted, make the number of stock herein contained good, and one-half of all increase, together with all personal effects, herein described as going with the land such as wagons, harness, farming implements, etc."

Defendant, having entered into possession of the demised property some time prior to the commencement of this action (April 13, 1912), sold the bull, three head of two year old steers, and four horses for the sum "of about \$240," and, as admitted by the pleadings, appropriated the proceeds to his own use. The lower court concluded that, under the terms of the lease which we have substantially set forth, defendant was authorized to sell such property.

[1, 2] We are unable to find in the provisions

of the lease any authorization to defendant to sell any of the demised property belonging to plaintiff. We have here a lease of certain specified real and personal property, including certain live stock, for the term of five years, the rental prescribed being "one-half of the increase of said stock," with covenants relative to the return of the property at the expiration of the term. No authority rests in a lessee to sell or otherwise dispose of the lessor's property, unless there be express provision therefor in the lease, or unless, by fair implication from the terms of the lease, such authority may be inferred. Certainly no such express provision was here contained, and there is no basis at all for any claim that such authorization may be inferred, except in so far as such claim may be based on the provision that at the end of the term the lessee shall surrender the premises, farming implements, etc., and "make the number of stock herein contained good." To our minds this provision furnishes no sufficient basis for any such claim. Obviously it was inserted for the purpose of requiring the lessee to replace such of the stock as might die or in some way be lost during the term. He must bear the loss and return all of the stock leased, together with one-half of the increase thereof, making good by replacing the same any portion of the stock that may have been lost during the term. This, in our opinion, is the only reasonable construction to be given to the language of the lease. It is to be observed that the only rental prescribed is one-half of the increase of the live stock that was demised. This necessarily contemplates a retention of the very live stock demised. Under defendant's theory, he might sell all of the live stock, for if he can sell any he can sell all, and refrain from replacing any of the same until the termination of the lease, thus practically depriving the lessor of rental altogether. We see no warrant in the language of the lease for the construction placed upon it by defendant.

[3] There is nothing in this case warranting the assumption that the trial court may have received parol evidence sufficient to justify it in construing the lease as authorizing the lessee to sell any of the stock demised. To our minds there is no such ambiguity in the language used with regard to any matter involved in this appeal as to have justified a resort to parol evidence to show that it was intended to give the lessee authority to sell any of the demised property. There is no question in the case as to the meaning of any or all of the words used in the provision requiring the lessee to "make the number of stock herein contained good," and neither party disputes that the words were used "in their primary and general acceptation." Code Civ. Proc. § 1861. The question is whether, when taken as so used, they can be held to imply a power of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sale in the lessee. The finding of fact of the trial court, taken in connection with its conclusions of law, are consistent only with the theory that it concluded purely as a matter of law from the provisions of the lease alone, which to our minds are plain and unambiguous, that the lessee had the right under the lease to sell the property that he has disposed of.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

(168 Cal. 733)

#### HIGUERA v. COREA. (S. F. 6384.)

(Supreme Court of California. Dec. 15, 1914.)

#### 1. JUDGMENT (§ 743\*)—RES JUDICATA—RIGHT TO EASEMENT—ACTION TO QUIET TITLE.

In an action to quiet title to a strip of land over which defendant claimed an easement for a roadway, a judgment in a previous action between the same parties, declaring that defendant was entitled to such easement, which judgment was affirmed on appeal, was conclusive as to the rights of the parties in the present action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.\*]

#### 2. QUIETING TITLE (§ 44\*)—EVIDENCE—FORMER JUDGMENT.

In an action to quiet title to land over which defendant claimed an easement for a roadway, a judgment rendered in a previous action between the same parties, and declaring that defendant was entitled to such easement, was admissible in evidence as proof of defendant's right to the easement.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

Department 1. Appeal from Superior Court, Santa Clara County, John E. Richards, Judge.

Action by Bernardo Higuera against Frank Corea. From judgment for defendant, denial of new trial, and denial of motion to set aside the judgment as contrary to the findings, plaintiff appeals. Affirmed.

William B. Hardy, of San Jose, for appellant. William H. Johnson, of San Jose, for respondent.

SHAW, J. The complaint of the plaintiff states a cause of action to quiet plaintiff's title to a tract of land. The prayer is that the defendant be required to set forth the interest he claims therein, and that the same be adjudged void. The defendant answered, alleging that he was the owner of an easement over the land claimed by the plaintiff, consisting of a roadway leading from the defendant's land across the plaintiff's land to a public highway. Judgment was given for the defendant, declaring him to be the owner of said easement. Plaintiff appeals from the judgment, also from an order denying his

motion for a new trial, and from an order denying his motion to set aside the judgment as contrary to the findings.

On the trial the defendant introduced in evidence the record of a previous action by Frank Corea against Bernardo Higuera, wherein judgment was given in favor of Corea, declaring that he was entitled to the identical easement over Higuera's land that is here in controversy. An appeal was taken in that case to this court and the judgment therein was affirmed on April 29, 1908. 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018. The amended complaint in the present action was filed September 29, 1911, and the trial was had in the following December. The description of the roadway in the judgment in the former action was in somewhat general terms. The court here, however, found that the roadway therein described was identical with that described in the defendant's answer herein.

[1, 2] The plaintiff claims that the evidence is insufficient to show that defendant had title to the easement in question. We do not think it necessary to set out the evidence in full. While it is somewhat conflicting, there is ample evidence to show the defendant's right thereto, as adjudged by the court, and that without aid from the probative effect of the former judgment. That judgment is, in itself, conclusive of the rights of the parties in this action. The finding that the description of the roadway in the former action is identical with the description in this action is not attacked by the plaintiff in his briefs. As we understand his argument, it is that the former judgment is inadmissible in evidence in this action in proof of the defense alleged, because that matter had been adjudicated and cannot be introduced in evidence in another action involving the same right. No discussion is necessary to dispose of this argument. Practically the sole purpose of resorting to courts for a judgment establishing a right is to furnish the party with a record on which he can rely as conclusive proof of his right whenever it is again disputed. It was not necessary to set up the judgment in the previous action as a former adjudication. It could be introduced in evidence as proof of the right of the defendant to the easement alleged in his answer.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(168 Cal. 733)

#### SCOTT v. McPHERSON. (L. A. 8336.)

(Supreme Court of California. Dec. 14, 1914.)

#### 1. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—PLEADING—VARIANCE.

Under a complaint, in a servant's action for personal injury, alleging negligence in failing to provide a safe place to work, proof of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—34

negligence of a fellow servant was a material variance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

## 2. PLEADING (§ 237\*)—AMENDMENT—SAME CAUSE OF ACTION.

Under Code Civ. Proc. § 469, providing that no variance is material unless it has actually misled the adverse party, and that even then the court may order the pleadings to be amended on terms, where the complaint, in a servant's action for injury, was based on negligence in not furnishing a safe place to work, and the only proof was negligence of a fellow servant, in view of St. 1911, p. 796, § 1, declaring negligence of a fellow servant to be no defense to a servant's action for injury, the court could allow an amendment by adding allegations of negligence of a fellow servant, since the cause of action was not changed thereby; St. 1911, p. 796, § 1, having taken away the defense of fellow servant's negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

## 3. PLEADING (§ 239\*)—AMENDMENT—TERMS—CONTINUANCE.

In a servant's action for personal injury, where he pleaded failure to supply a safe place to work, and he was allowed to amend to conform to proof by charging negligence of a fellow servant, the defendant was entitled to meet the new allegations by demurrer and answer and to any time reasonably necessary to enable him to obtain available evidence material to them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626-635; Dec. Dig. § 239.\*]

## 4. MASTER AND SERVANT (§ 281\*)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injury from a piece of steel dropped by a fellow servant working on an upper story, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

## 5. DAMAGES (§ 173\*)—IMPAIRMENT OF EARNING CAPACITY—EVIDENCE.

In a servant's action for personal injury, evidence whether he had any means by which he could support himself and family other than his daily labor was incompetent to show that he did not have some other occupation which he might follow if his shoulder was lame.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.\*]

## 6. APPEAL AND ERROR (§ 1054\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Such error was harmless, where the court, trying the case without a jury, did not consider the plaintiff's financial condition or his obligation to support others in fixing the amount of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.\*]

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by James H. Scott against W. E. McPherson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lewis R. Kirby and J. T. Reed, both of San Diego, for appellant. Young C. Burkhardt, of San Diego, for respondent.

ANGELLOTTI, J. Plaintiff brought this action to recover damages alleged to have been suffered by him by reason of injuries received while working for defendant in the construction of a building. The case was tried by the court without a jury. Judgment was given in favor of plaintiff for the sum of \$400. Defendant appeals from such judgment and from an order denying his motion for a new trial.

On November 6, 1911, plaintiff was working for defendant as a carpenter and laborer in the construction of this building, and at the time of the accident was working in an air well about 3½ feet deep and 9½ feet wide. The building had been constructed one story above the street level, and on the upper floor several men employed by defendant in the construction of this building were working. One of these men, T. B. Thompson, was engaged in cutting off the ends of projecting steel. He was using a saw for this purpose. Having used the saw on an end projecting over the air well, and not being able to detach it with his hand, he struck it with a hand axe, thereby breaking it off and causing it to fall some 20 feet to where plaintiff was working in the air well. The piece thus detached was from 5 to 8 inches in length and from one-half to five-eighths of an inch in thickness. It struck plaintiff on the left shoulder, causing a fracture of the acromion. There was testimony sufficient to support a conclusion that the plaintiff was thereby prevented from following his avocation for a short time, and that use of the arm would be permanently impaired to a slight degree.

[1, 2] 1. The only negligence on the part of the defendant alleged in the original complaint, which was unverified, was that defendant had failed to provide plaintiff with a safe and proper place in which to work. The answer contained a general denial of all the allegations in the complaint, and set up as defense contributory negligence on the part of plaintiff, and that the injury was caused by the negligence of a fellow servant of plaintiff. At the close of plaintiff's case, defendant moved for a nonsuit, upon the ground, among others, that plaintiff had shown no such negligence on the part of defendant as was alleged in the complaint. The trial judge very correctly took this view of the matter, saying substantially that the only negligence shown by the evidence introduced by plaintiff was that of Thompson, a fellow servant of plaintiff. He further stated substantially that, if such negligence on the part of Thompson was alleged in the complaint as the cause of plaintiff's injury, defendant would be liable therefor to plaintiff, if the proof sustained the allegation. In this the trial judge correctly stated the law, in view of the provisions of the act relative to liability of employers for injuries or death sustained by their employes, etc., approved



April 8, 1911 (Stats. 1911, p. 796), which was in force at the time of the accident. That act provided, in section 1, that it shall not be a defense that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. He therefore permitted plaintiff to amend his complaint by adding allegations in this behalf, and denied the motion for a nonsuit. A demurrer to the complaint as amended was overruled, and the original answer was allowed to stand as an answer to the complaint as amended. A continuance asked for by defendant in view of the amendment was refused, but the court expressly stated to defendant's counsel that, if it was made to appear that a continuance was necessary to enable defendant to obtain the attendance of witnesses to meet the allegations thus added to the complaint, a continuance would be granted.

There was no error on the part of the court as to any of these matters. The cause of action was in no way changed by the amendment. The action was one for damages for a personal injury suffered because of the negligence of defendant. There was a variance between the allegations and the proof as to what the negligence of the defendant was in the matter. Instead of being his failure to provide a safe and suitable place for plaintiff to work in, it was his negligence in the matter of detaching the end of the steel rod and allowing it to fall upon plaintiff in the place where he was working, for, under the act to which we have referred, Thompson's negligence was his negligence. The trial court had the right to order the complaint to be amended upon such terms as might be just. Section 469, Code Civ. Proc.

[3] Of course defendant was entitled to meet the new allegations by demurrer and answer, which he did, and also to any time reasonably necessary to enable him to obtain available evidence material to the issue of Thompson's negligence. No showing of the necessity for any continuance was attempted to be made, although the trial judge expressly stated that the continuance would be granted, if such a showing were made. It is to be borne in mind that defendant had alleged in his answer as a defense substantially the matters set up by the amendment. It is not suggested even now that defendant was not able to procure or did not procure and introduce all the evidence that he desired to introduce on this issue.

[4] 2. It does not appear to be disputed in appellant's brief that the evidence introduced by plaintiff was sufficient to support a conclusion that Thompson was negligent in the matter of detaching the end of the steel rod. We are of the opinion that it was sufficient for this purpose. It is urged, however, that plaintiff was guilty of contributory negligence in that, by the exercise of reasonable care for his own safety, he would

have perceived the danger of his situation and guarded himself from injury. We are of the opinion that the conclusion of the trial court that plaintiff was not guilty of contributory negligence at all is fully sustained by the evidence. Apparently he had no reason whatever to imagine that any workman above him would negligently allow a substance capable of injuring him to fall upon him. He had the right to assume that the workmen above would exercise reasonable care for the safety of those below from injury at their hands. It did not follow from the fact that Thompson was engaged in sawing off the ends of these steel rods that he would allow the portion detached to fall to the ground, and plaintiff had no notice or means of notice of any threatened danger.

[5, 6] 3. On the examination of plaintiff, he was asked by his counsel as follows:

"I will ask you if you have any support otherwise, for yourself and those dependent upon you, than your daily labor?"

This was objected to, and plaintiff's counsel explained his question as follows:

"I ask if he had any other means of revenue by which he could support himself and family other than that of his daily labor."

The objection was overruled, and the witness answered: "No, sir." The trial judge expressed the view, in regard to another question of somewhat like nature immediately following this, that the testimony was competent for the purpose of showing that he did not have some other occupation that he might follow if his shoulder was lame. This appears to have been the sole reason of the judge in admitting such evidence. He had just previously sustained objections to such questions as, "How large is your family?" and "Have you any children residing with you in San Diego?" We think the objection to the question above set forth should have been sustained. It had no bearing on the matter suggested by the judge and was irrelevant and immaterial to any issue in the case. But we think it is manifest from the record that the trial judge did not consider the financial condition of plaintiff or the obligation of support of others incumbent on him as matters to be considered in fixing the amount of damage. It is to be borne in mind that the action was tried by the court without a jury. The cases cited by appellant are cases in which the jury was substantially instructed by the court that it could consider the financial condition of the plaintiff as an element in determining the amount of damages. We cannot conceive that any injury resulted to defendant by reason of the admission of this evidence, and must hold that the error was without prejudice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

(169 Cal. 46)

**GALE v. TUOLUMNE COUNTY WATER CO. (Sac. 2232.)**

(Supreme Court of California. Dec. 18, 1914.)

**1. CONTEMPT (§ 66\*)—JUDGMENT OF CONTEMPT—APPEALABILITY.**

Under Code Civ. Proc. § 1222, declaring that judgments and orders of the court or judge made in cases of contempt are final, a judgment adjudging one guilty of contempt for violating a perpetual injunction is not reviewable by appeal, though the court acted without jurisdiction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**2. JUDGMENT (§ 678\*)—CONCLUSIVENESS—PARTIES BOUND—SUCCESSORS IN INTEREST.**

Under Code Civ. Proc. § 1908, providing that a judgment is conclusive between the parties and their successors in interest by title subsequent to the judgment, a successor in interest of the original defendant in a suit involving water rights is bound by the judgment rendered prior to the transfer of the interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195-1199, 1221; Dec. Dig. § 678.\*]

**3. COURTS (§ 52\*)—JURISDICTION—ESTABLISHMENT OF SUPERIOR COURTS.**

Under Const. art. 22, § 3, abolishing district courts and providing for the transfer of records, books, papers, and proceedings to the superior courts created, and declaring that the superior courts shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein, a violation in 1914 of a perpetual injunction granted by the district court in 1870 is a contempt of the superior court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 184-192; Dec. Dig. § 52.\*]

**4. CONTEMPT (§ 43\*)—VIOLATION OF INJUNCTION—PROCEEDINGS—PARTY ENTITLED TO INITIATE.**

One who acquires property of a plaintiff who has obtained a judgment establishing water rights thereby acquires the rights established by the judgment, and may initiate contempt proceedings for a violation of a perpetual injunction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 125-127; Dec. Dig. § 43.\*]

**5. CONTEMPT (§ 66\*)—VIOLATION OF PERPETUAL INJUNCTION—APPEALABILITY OF JUDGMENT—CONSTITUTIONAL PROVISIONS—"INDEPENDENT PROCEEDING"—"CASE IN EQUITY."**

A contempt proceeding, though arising in a case in equity based on a violation of a perpetual injunction, is an "independent proceeding," and is not a "case in equity," within Const. art. 6, § 4, providing for an appeal in all cases in equity.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**6. CONTEMPT (§ 66\*)—JUDGMENT—APPEALABILITY—STATUTORY PROVISIONS.**

Code Civ. Proc. § 963, providing for an appeal from a special order after final judgment, is general, and is controlled by section 1222, providing that judgments and orders in contempt cases are final, and does not authorize an appeal from a judgment of contempt for a violation of an injunction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**7. CONTEMPT (§ 66\*)—JUDGMENT—APPEALABILITY—STATUTORY PROVISIONS.**

Code Civ. Proc. § 1222, making judgments and orders in cases of contempt final, makes no distinction between direct and constructive contempts as to the right of appeal.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**8. CONTEMPT (§ 66\*)—APPEAL—STATUTORY PROVISIONS—VALIDITY.**

Code Civ. Proc. § 1222, making judgments in contempt cases final, construed to deny a right of appeal in cases of constructive contempt, is not unconstitutional, for the Constitution does not expressly or impliedly give a right of appeal in such cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**9. CONTEMPT (§ 66\*)—JUDGMENT—APPEALABILITY.**

A judgment adjudging one guilty of contempt for violating an injunction against diverting waters, granted in a suit determining title to the waters diverted, does not determine title to the waters, and is not appealable on the ground that the judgment determined title.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Proceedings by Anna A. Freitas, as successor to O. P. Gale, for the punishment of the Sierra & San Francisco Power Company as successor to Tuolumne County Water Company, for contempt of court for violating an injunction. From a judgment adjudging defendant guilty of contempt, it appeals. Dismissed.

Chickering & Gregory and Donald Y. Lamont, all of San Francisco, for appellant. J. P. O'Brien, of San Francisco, for respondent.

SULLIVAN, O. J. Motion to dismiss appeal from judgment adjudging appellant guilty of contempt.

In February, 1870, O. P. Gale, the owner of a certain water ditch and water rights in Tuolumne county, commenced an action in the district court of the Fifth judicial district of this state in and for the county of Tuolumne, against the Tuolumne County Water Company (hereinafter called the "Water Company") to enjoin the company from diverting waters from Mormon creek. In September, 1870, a judgment in favor of plaintiff was entered in the district court, by the terms of which the defendant and its agents, employes, and servants were perpetually "enjoined, inhibited, and restrained from interfering with the natural waters of Mormon creek and its tributaries above the head of plaintiff's ditch, so as to prevent said water from coming to the head of plaintiff's ditch, unless defendant turned out to plaintiff an amount of water equivalent to the natural water of said Mormon creek." On appeal the judgment was affirmed. Subsequently Anna A. Freitas ac-

quired from Gale his ditch and water rights involved in the action, and the Sierra & San Francisco Power Company (hereinafter called the "Power Company") succeeded to all of the property rights and business of the water company. The defendant at the time the action was commenced and determined was engaged in collecting waters in the vicinity of Mormon creek and selling the same, and using said creek and its tributaries and the waters thereof in the conduct of its business.

On September 28, 1913, Anna A. Freitas filed in the superior court of Tuolumne county her affidavit, in which she alleged that the power company had, at divers times in 1912 and 1913, "wrongfully violated the terms, conditions, and provisions of said judgment and decree and perpetual injunction, with the intent then and there to violate the same, etc.," by diverting the waters of Mormon creek and its tributaries. She also alleged that she had suffered great and irreparable injury by the diversion of the waters to which she was entitled, to her damage in the sum of \$5,000. Upon her affidavit an order was issued and served upon the power company, requiring it to show cause why it should not be punished for contempt for violating the injunction. On the hearing of the order to show cause, the charging affidavit was amended in some respects; the most important amendment being that at all times in 1912 and 1913 the power company "had notice of and was bound by said judgment and decree and perpetual injunction."

In its answer to the amended affidavit the power company did not deny this allegation, but denied that it had in any manner violated the injunction, and also denied that Anna A. Freitas had suffered any injury or damage. On the hearing of the order to show cause, oral and documentary evidence was introduced. Upon the conclusion of the hearing the court adjudged that the power company had at divers times in August and September, 1913, "willfully and intentionally disobeyed and violated the terms, provisions, and mandates of the judgment and decree and perpetual injunction made, given, and entered in said district court on September 15, 1870, as aforesaid, and that by reason thereof the said Sierra & San Francisco Power Company, a corporation, is guilty of contempt of the authority of said district court and of this court, the successor thereof, as charged." As punishment for its contempt the court fined the power company \$500. It appears from the evidence and judgment in the contempt proceeding that the Springfield Tunnel & Development Company (hereinafter called the "Springfield Company") carried on mining operations in close proximity to Mormon creek, at a point above the head of the Freitas ditch; that in its operations it sunk shafts, ran tunnels, and made other underground workings and excavations, which extended below the bed of Mormon creek and

its tributaries. The judgment of contempt recites:

"That during the month of August and the first ten days of the month of September, 1913, the said underground workings and excavations tapped the natural waters of Mormon creek and its tributaries and diverted them into the underground workings of the said mining properties operated by the said Springfield Tunnel & Development Company. That the said company pumped the said waters to the surface of its said property, and during the month of August, 1913, and the first ten days of September, 1913, delivered a substantial part thereof to the Sierra & San Francisco Power Company, who received the same through its weir situate upon Mormon creek, and the said Sierra & San Francisco Power Company, during said time, conveyed the same through its ditches in Mormon creek, and appropriated the water so received to its own use. That the waters so pumped by the Springfield Tunnel & Development Company from its mining property, and the portion thereof delivered to, and received by, the Sierra & San Francisco Power Company, as aforesaid, were a portion of the natural waters of Mormon creek and its tributaries, and the same were wrongfully and in violation of the terms and provisions of said judgment and decree, and perpetual injunction, appropriated by the said Sierra & San Francisco Power Company to its own use."

[1] From the judgment of contempt the power company has attempted to appeal to this court. We say attempted to appeal, because no appeal lies from the judgment. "The judgments and orders of the court or judge made in cases of contempt, are final and conclusive." Section 1222, Code Civ. Proc. Necessarily a judgment, which by the Code is made final and conclusive, is not appealable. This court has repeatedly held that by reason of its finality and conclusiveness the judgment in a contempt case is not appealable. *Tyler v. Connolly*, 65 Cal. 28, 2 Pac. 414; *In re Vance*, 88 Cal. 262, 26 Pac. 101; *People v. Kuhlman*, 118 Cal. 140, 50 Pac. 382; *Estate of Wittmeier*, 118 Cal. 255, 50 Pac. 393. An appeal does not lie from such a judgment, even though it appear that the court adjudging one guilty of contempt has acted without jurisdiction. The party aggrieved in such a case must resort to other remedies. *People v. Kuhlman*, *supra*.

[2, 3] The power company, successor in interest of the original defendant water company, was bound by the judgment rendered in 1870, and to the same extent as was the water company before the latter transferred its property. Section 1908, Code Civ. Proc. The Constitution of 1879 abolished the district courts, but in so doing it provided for the transfer on the 1st of January, 1880, to their successors—the superior courts—of all records, books, papers, and proceedings of the district courts and gave the superior courts "the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein." Const. art. 22, § 3. Therefore a violation in 1914 of the perpetual injunction granted by the district court in 1870 constituted contempt of the superior court of Tuolumne county.

[4] Anna A. Freitas, having acquired from the original plaintiff the properties, the subject of dispute in the case of *Gale v. The Water Co.*, became entitled to all the benefits which Gale acquired under the judgment of the district court, and she had the same right to initiate contempt proceedings which Gale would have had if he had never disposed of his properties. The power company being bound by the judgment and injunction, as the successor of the water company, its violation of the injunction, with notice thereof, constituted contempt of court. *Lake v. Superior Court*, 165 Cal. 192, 131 Pac. 371; *Ahlers v. Thomas*, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820; *Merriam Co. v. Saalfeld*, 190 Fed. 927, 111 C. C. A. 517.

[5] The power company claims that, inasmuch as the action of *Gale v. Water Company* was a case in equity, it has a right of appeal by virtue of section 4, art. 6, of the Constitution, which provides for an appeal from the superior court to the Supreme Court "in all cases in equity except such as arise in justices' courts." A sufficient answer to this contention, in addition to the authority of the cases cited supra, is that a contempt proceeding, though it may arise in a case in equity, is an independent proceeding between the contemner and the court, criminal or quasi criminal in its nature, and is not itself a "case in equity."

[6] To sustain its appeal, the power company further claims that, as the judgment adjudging it guilty of contempt was made after final judgment in the case of *Gale v. Water Company*, it has the right of appeal therefrom under section 963, Code of Civil Procedure, which provides that an appeal lies "from any special order made after final judgment"; but, as this provision is general in character, it is controlled by the special law contained in section 1222, Code of Civil Procedure, which makes a judgment of contempt final and conclusive and therefore non-appealable.

[7] Appellant asserts that section 1222, Code of Civil Procedure, making judgments and orders in cases of contempt final and conclusive, does not apply to constructive contempts. For certain purposes the law recognizes a difference between a direct contempt, or that committed in the immediate view and presence of the court, and constructive contempt, or that committed elsewhere. But our Code makes no distinction whatever as far as the right of appeal in either case is concerned, and we can make none.

[8] Appellant further claims that section 1222, Code of Civil Procedure, if applicable to cases of constructive contempt, is unconstitutional. The right of appeal is derived from our Constitution or statutes. The Constitution nowhere, expressly or impliedly, gives a right of appeal in cases of contempt. Therefore section 1222 cannot be unconstitutional.

[9] The main contention of the power com-

pany is that in the contempt proceeding "there was a distinct question of title both heard and determined; that this injunction has either taken the form of an order made after final judgment, and is therefore appealable, or it is in itself a judgment, which is also appealable." The appellant is in error in claiming that the judgment of contempt determined title. The judgment against the defendant is nothing more nor less than one adjudging it guilty of contempt of court. Title to the waters which it diverted was determined by the district court, in the case of *Gale v. Water Company*, to be in Gale. The same title was in his successor in interest at the time of the wrongful diversion. By reason of the judgment of the district court, concluding alike the defendant and its successors in interest, the lower court was bound to recognize the title of Anna A. Freitas to the waters of Mormon creek and its tributaries. No question of title to these waters was raised in the contempt proceeding, and none was determined. If the original defendant water company, after the judgment rendered against it by the district court, had by underground workings and excavations under the bed of Mormon creek and its tributaries tapped the waters thereof and wrongfully diverted the same to its own use, it would have been guilty of contempt, as much so as if the diversion had taken place on the surface. If the original defendant, instead of directly appropriating the waters in question, had obtained them through the Springfield Company, or some other agency which had diverted the waters by underground methods or surface connections, it likewise would have been guilty of contempt of court. As the power company occupies in relation to the case the same position exactly that the water company would have occupied if it had not transferred its properties, the power company was guilty of contempt if directly or indirectly, by underground methods or otherwise, it wrongfully diverted the waters of Mormon creek and its tributaries, title to which waters was in Anna A. Freitas. The issue before the lower court was: Did the power company take waters from Mormon creek and its tributaries in violation of the injunction granted by the district court? That issue was decided adversely to the appellant. The lower court may have been egregiously mistaken in its judgment, but, whether mistaken or not, its judgment must stand. It cannot be reviewed on appeal or otherwise.

It follows that the attempted appeal taken by the Sierra & San Francisco Power Company from the judgment of the superior court of Tuolumne county adjudging it guilty of contempt must be, and the same is hereby, dismissed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.

(189 Cal. 28)

**DOUGLAS v. BERLIN DYE WORKS & LAUNDRY CO. (L. A. 3791.)**

(Supreme Court of California. Dec. 17, 1914.)

**1. EVIDENCE (§ 556\*)—EXAMINATION OF EXPERTS—MEDICAL AUTHORITIES.**

Where a physician stated on cross-examination that he based an opinion partly on experience, without stating that he relied on any medical authority, the cross-examining party, desiring to know what medical authority, if any, he relied on, should ask him directly on that point, and not erroneously assume that he relied on medical authority, as indicated by the question, "What authority do you rely on in regard to that?" and the sustaining of an objection thereto was not erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2377; Dec. Dig. § 556.\*]

**2. TRIAL (§ 236\*)—INSTRUCTIONS—WEIGHT AND CREDIBILITY OF EVIDENCE.**

A requested charge by defendant that, in determining the weight and credibility of the evidence of a party to the contest, the jury may consider his interest in the result of the verdict, was properly refused, because intended to particularly caution the jury, based on plaintiff's interest in the result.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

**3. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A person 54 years old, in good health, received an injury causing a fracture of the base of the skull, accompanied by concussion of the brain and hemorrhage, producing permanent traumatic diabetes, and impairing his hearing and eyesight. His left knee was injured: the ligaments holding the kneecap being torn entirely across. He also received injury to the spinal column and displacement of several of the vertebrae. The injury to the knee caused a permanent displacement of the kneecap, so as to make it impossible for him to walk without the use of crutches or a cane, and then only with care and constant liability to danger of the kneejoint slipping out. The injury to the spine produced physical sexual inability. *Held*, that a verdict for \$10,000 would not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

**4. APPEAL AND ERROR (§ 1004\*)—EFFECT OF VERDICT—EXCESSIVE DAMAGES.**

It is the province of the jury to determine the damages for a personal injury, subject, if excessive, to the control of the trial court, and a verdict approved by that court will not be disturbed on appeal, unless it is wholly disproportionate to the injuries received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by C. K. Douglas against the Berlin Dye Works & Laundry Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Hickcox & Crenshaw, of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sus-

tained by plaintiff in a collision on a public thoroughfare between an automobile in which he was riding and an automobile delivery wagon operated by defendant; the claim being that the accident occurred through the negligence of the latter. Plaintiff had a verdict and judgment thereon for \$10,000. A motion for a new trial was denied and defendant appeals from the order of denial and the judgment.

On the trial of the action defendant admitted that its negligence, as charged, caused the injury to plaintiff, and its liability therefor; the only issue presented to the jury being as to the amount of damages sustained by the plaintiff.

At the time of the accident plaintiff was 54 years of age, in good health, free from mental or physical trouble. In the head-on collision between the vehicles he was thrown violently to the ground. As the result thereof, aside from cuts and bruises about his face and body, there was a fracture of the base of the skull, accompanied by concussion of the brain and hemorrhage from the ear and nose; his left knee was injured, a deep gash being cut in it and the ligament that held the cap of the knee to the large bone had been torn entirely across; there was also injury to his spinal column and displacement of several of the vertebrae. The evidence shows that the plaintiff became affected with permanent traumatic diabetes as a result of the injury at the base of his brain, and that his hearing and vision had become permanently and seriously impaired therefrom; that the injury to the ligament at the kneejoint occasioned a permanent displacement of the kneecap, so as to make it impossible for plaintiff to walk without the use of crutches or a cane, and then only with great care and caution and constant liability to danger of the kneejoint slipping out; and that the injury to the spine had produced physical sexual inability in the plaintiff. In addition to these particular results of the injury, and aside from the great pain and suffering which resulted therefrom, there was a general impairment of the mental and physical condition of plaintiff. His nervous condition has become very low; there has been a failure of memory; and he still suffers, and will continue to suffer, from the injuries inflicted on him.

Appellant bases its right to a reversal upon three grounds only: That the court erred in sustaining an objection of plaintiff to an inquiry made by defendant on cross-examination of one of the witnesses produced by the plaintiff; that it erred in refusing to give an instruction to the jury requested by defendant; and it is further claimed that the verdict of the jury is excessive in the award of damages.

As to the first point: Dr. H. M. Coulter, the attending physician of the plaintiff, in the course of his direct examination, testi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fied that plaintiff was permanently affected with traumatic diabetes, which, in his opinion, was the result of the fracture of the base of the skull received in the accident. As a final question on cross-examination of the doctor by the attorney for defendant, the following took place:

"Q. Isn't from 50 to 60 the most common period of life, that the percentage of diabetes among people of that age is much greater than at any other period of life? A. I should say from 30 to 50, partly from my own experience. Q. What authority do you rely on in regard to that?"

"Mr. Drake (Attorney for Plaintiff): I object to that, as it is not cross-examination. He does not claim to base it on anything but his experience.

"Mr. Hickcox (Attorney for Defendant): He has testified as to his professional—

"Mr. Drake. He has made the statement that it was from 30 to 50, on his experience.

"Mr. Hickcox. He said he based his statement on Keene and Osler.

"The Court. Sustained."

[1] It is claimed by counsel for appellant that it was error on the part of the court not to permit an answer to the question above quoted. It is insisted that when an expert, called on behalf of one of the parties, gives his opinion on a scientific question, opposing counsel have a right on cross-examination to inquire upon what the opinion of the expert is based, whether upon his own experience, or upon accredited authorities of his profession, or both; so that, if the witness asserts that his opinion is based on standard authorities, counsel may, if such authorities relied on do not sustain his claim, show that fact to the jury for the purpose of discrediting his opinion or statement on the subject. As a legal proposition, this may be conceded. Rogers on Expert Testimony (2d Ed.) § 37; Gallagher v. Market St. Ry. Co., 67 Cal. 17, 6 Pac. 869, 51 Am. Rep. 680, note. But we hardly think that there was either such a clear violation of the rule or a denial of a substantial right of appellant thereby in sustaining the objection to the inquiry as would warrant this court in reversing the cause for such alleged error, the only one claimed to have occurred on the trial, where a considerable number of witnesses testified. At most, what appellant insists it had a right to do was to find out whether, in fact, the witness relied on any medical authority in support of his opinion, with a possible chance that, if he did so rely, an examination of the authority referred to might show that it did not agree with him. But, strictly speaking, there was no error committed by the court in its ruling. Counsel for appellant asserted his right to ask the question not upon any suggestion of the rule, but upon the assumption that the witness had "based his statement on Keene and Osler"—medical authorities, we assume. If he had so testified, then

the question had already been answered. As matter of fact, however, the witness had not testified that he based his opinion on such authority or any authorities at all. All he said was he based it "partly upon my own experience." It is evident from what was said in discussing the objection to the question that this part of the answer had escaped the attention of the attorneys on both sides and the court. Counsel for respondent and the court were of the opinion that the witness had testified that he based his opinion on his own experience, and counsel for appellant was of the impression that he had mentioned certain authorities. All of them were mistaken in the matter. In this situation of misunderstanding there was nothing to prevent appellant from asking the witness directly whether he relied on any medical authority in support of his opinion, which was the proper inquiry to have made, instead of erroneously assuming, as his inquiry did, that the witness had testified to that effect.

[2] The next complaint of appellant is the refusal of the court to give an instruction to the jury asked by defendant as follows:

"In determining the weight and credibility of the evidence of a party to the contest, you may take into consideration his interest in the result of the verdict."

Coming from the appellant, and as is evident from its phraseology, this instruction was intended to particularly caution the jury as to its consideration of the evidence of the plaintiff because of "his interest in the result of the verdict." An instruction of this character has been so often condemned that there is no necessity of discussing it. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; People v. Wardrip, 141 Cal. 231, 74 Pac. 744; People v. Maughs, 149 Cal. 253, 86 Pac. 187; People v. Ryan, 152 Cal. 364, 92 Pac. 853; Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197.

[3, 4] As to the last claim of appellant that the verdict is excessive: We have set forth in main the mental and physical results to plaintiff consequent on the injuries he had sustained. It was the province of the jury to determine the amount that he should receive as compensation therefor, subject, if it was excessive, to consideration and control by the trial court. That court on the motion for a new trial made before it, in which this same ground was urged, has approved the verdict. Under these circumstances we could not disturb it, unless it appear that it was wholly disproportionate to the injuries received by the plaintiff, and this we cannot say.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(168 Cal. 777)

## PEOPLE v. BUNDY. (Cr. 1880.)

(Supreme Court of California. Dec. 14, 1914.)

**1. CRIMINAL LAW (§§ 1023, 1134\*)—ORDER DENYING MOTION IN ARREST OF JUDGMENT—REVIEW.**

An order denying a motion in arrest of judgment is not directly appealable, but is reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. §§ 1023, 1184.\*]

**2. CRIMINAL LAW (§ 331\*)—INSANITY—EVIDENCE.**

Accused, relying on insanity, must show that he was deranged mentally when committing the criminal act, and that he was not conscious of its wrongful nature, and did not know that it was criminal; but if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act, if he has knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he is responsible for his act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 331.\*]

**3. CRIMINAL LAW (§ 769\*)—INSTRUCTIONS—GIVING REQUESTED INSTRUCTIONS.**

Omission to state which instructions are given at the request of the prosecution, and which at the request of accused, is not blameworthy, but commendable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803-1806; Dec. Dig. § 769.\*]

**4. CRIMINAL LAW (§ 773\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

An instruction, which states that while the defense of insanity must be weighed fairly, and when established commends itself to the sense of humanity, yet the jury must examine it with care, lest a counterfeit of mental infirmity may furnish immunity to guilt, given before requested instructions of accused on the subject, is not objectionable as nullifying the effect of accused's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828; Dec. Dig. § 773.\*]

**5. CRIMINAL LAW (§ 311\*)—INSANITY—EVIDENCE—ABSENCE OF APPARENT MOTIVE.**

The jury may not safely infer the existence of an irresistible influence controlling accused solely from lack of apparent motive for the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 311.\*]

**6. HOMICIDE (§ 340\*)—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.**

Where accused admitted that he killed decedent because he was afraid that decedent would inform against him for robbing him, an instruction, that the jury could not safely infer the existence of an irresistible influence of a homicidal tendency from lack of apparent motive alone, was not prejudicial, though it might have been omitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

**7. WITNESSES (§ 305\*)—COMPELLING ACCUSED TO TESTIFY—WAIVER OF PRIVILEGE.**

The provision of Const. art. 1, § 13, that no person shall be compelled to be a witness against himself in any criminal case, does not prevent accused from voluntarily disclosing

facts implicating him, and the prosecution may then prove his statements and admissions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.\*]

**8. WITNESSES (§ 305\*)—COMPELLING ACCUSED TO TESTIFY—WAIVER OF PRIVILEGE.**

Where physicians examined accused to determine his sanity, and he made no objections thereto, but conversed freely with them, and no fraud was perpetrated by any one, the disclosures made by him were not within Const. art. 1, § 13, declaring that no person shall be compelled in any criminal case to be a witness against himself, though his counsel were not notified of the proposed examination and had no knowledge thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.\*]

**9. HOMICIDE (§ 347\*)—PUNISHMENT—REVIEW—MODIFICATION OF SENTENCE.**

The Supreme Court may not set aside or modify a judgment imposing the death penalty for murder in the first degree, merely on the ground that accused at the time of the homicide was not 18 years of age.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 725; Dec. Dig. § 347.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Louis Bundy was convicted of murder in the first degree, and from an order denying a motion in arrest, and from the judgment of conviction, he appeals. Appeal from order dismissed, and judgment affirmed.

Earl Rogers and Frank E. Dominguez, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of murder in the first degree and adjudged to suffer death. He appeals from the judgment, and also from orders denying his motion for a new trial and his motion in arrest of judgment.

[1] As we have often pointed out, no appeal lies from an order denying a motion in arrest of judgment, but the order may be reviewed on the appeal from the judgment. It is not claimed that the order was erroneous in this case, and manifestly the motion was entirely without merit.

[2] It is not claimed that the evidence was in any way insufficient to warrant the verdict that was rendered, and in view of the facts shown by the record no such claim could reasonably be made. Unless defendant was insane at the time he killed Harold Ziesche, which admittedly he did, he was clearly and indisputably guilty of murder in the first degree. The defense interposed was insanity. The evidence was sufficient to sustain the verdict on this issue. It is to be remembered that, in order that insanity may be available as a defense, it must appear that the defendant was so deranged mentally when the act with which he is charged was done by him that he was not conscious of the wrongful nature of the act and did not know that it was wrong and criminal. As

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said by the trial judge in his instructions to the jury:

"If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct."

[3] Certain suggestions were made on the oral argument as to the instructions given by the trial judge to the jury. We find nothing therein that would warrant a reversal. The omission of the judge to state which instructions were given at the request of the prosecution and which at the request of the defendant was commendable, rather than blameworthy. No reason appears to us why the jury should be told which of the parties requested a requested instruction given by the court, or that it was requested by either party.

[4] The judge gave certain instructions cautioning the jury substantially that while the defense of insanity was to be weighed fully, fairly, and justly, and when satisfactorily established is one that must commend itself to the sense of humanity and justice of the jury, they must examine it with great care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt. It is admitted that no instruction was given in this connection that would warrant a reversal, in view of previous decisions of this court; but if it is suggested that the giving of such cautionary instructions prior to the giving of any of defendant's instructions on insanity "practically nullifies the effect of defendant's instructions." We see no force whatever in this claim. The instructions given in regard to what the court called "moral insanity" were correct, and the evidence was such as to make the giving of these instructions advisable and proper. The same is true as to the instructions as to "partial insanity." There was no conflict in the instructions given upon this subject.

[5, 6] The instruction upon the subject of lack of apparent motive and the supposed claim of defendant's counsel, based thereon, that defendant must have been acting under a powerful and irresistible influence of homicidal tendency, was not happily worded in all respects, and probably should not have been given at all. But we are unable to see that any prejudice could have been caused defendant by the giving of this instruction. The jury could not reasonably have understood this instruction otherwise than as telling them substantially that they could not safely infer the existence of such an influence from the lack of apparent motive alone, which is entirely true. A reading of the evidence on the trial discloses no case of lack of apparent motive. According to his own admissions made before the trial, defendant killed young Ziesche, because, having just violently assaulted and robbed him, he was afraid that Ziesche would inform against him. As we have said, the instruction might

well have been omitted, but it was not prejudicial.

[7, 8] The ground mainly urged for reversal is that the trial court improperly allowed two doctors called as witnesses by the district attorney to give their opinions on the question of defendant's sanity. The opinion of each of these witnesses, who were sufficiently shown to be experts on the subject, was based upon examinations, both physical and mental, of the defendant by the witness. Dr. Reynolds examined him twice and Dr. Orbison once. Dr. Reynolds' second examination was had three days before he testified, and Dr. Orbison's two days before the trial commenced. At the time of the second examination by Dr. Reynolds and the examination by Dr. Orbison, defendant had counsel, and they were not notified that any examination was to be had and had no knowledge thereof. Defendant was in custody, confined in the county jail, where the examinations were had. He was informed by Dr. Orbison prior to his examination that he (Orbison) was employed by the district attorney to make an examination. Dr. Reynolds had first examined him the day after his arrest, and when asked by the doctor if he objected to being examined, said, "No, sir." Dr. Reynolds examined him very thoroughly on this occasion, and on the second examination simply made a few tests, tested his sense of smell, his sense of taste, and his eyesight. The first examination by Dr. Reynolds was not made at the instance of the authorities, but at the request of a newspaper editor. Defendant made no objection whatever to being examined at any time, and conversed very freely with each of the doctors. The claim of counsel is that, by allowing the doctors to give their opinions based upon their examinations, defendant was compelled to be a witness against himself, in violation of section 13, art. 1, of the Constitution, which provides that "No person shall \* \* \* be compelled, in any criminal case, to be a witness against himself. \* \* \*". See, also, section 1323, Pen. Code. It may freely be admitted that, in view of this provision, one accused of crime may not be compelled to divulge to another, to be used by that other as basis for his testimony on the trial, facts which he has a right to hold secret. Whether one accused of crime can properly be compelled to submit to an examination by medical experts for the purpose of determining whether or not he is of sound mind is a question that it is not necessary to discuss here. There is nothing in the constitutional provision relied on that prohibits such a person from furnishing evidence against himself if he chooses to do so. He shall not be compelled to do so, but whatever fact he may disclose without force or compulsion of any kind, or whatever testimony he may voluntarily give, is not within the inhibition. Jones on Ev. § 400. No decision brought to our attention



holds to the contrary. And with special reference to examinations for the purpose of ascertaining whether an accused is of unsound mind, it is said in 4 Wigmore on Evidence, § 2265, that:

"The use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to."

Perhaps utterances induced by fraud might likewise fall within the dubitable cases. In the case at bar an appellate court would certainly not be warranted by the record in holding that any force or compulsion was used, or that the accused did not voluntarily submit to the examinations. There was nothing in the nature of fraud on the part of the medical men, the authorities, or anybody else. The fact that defendant's counsel were not notified of the proposed examinations and had no knowledge thereof in no way affects the question of the admissibility of the evidence complained of. There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person. Nor does the fact that the defendant was only just 18 years of age materially affect the question. For the purpose of a determination of the question whether the trial court erred in the admission of this evidence, that court must be assumed here to have held upon the testimony that no force or compulsion was used and that the defendant voluntarily submitted to the examinations. The testimony was such as to fully support such a conclusion.

[9] A careful examination of the record discloses no reason to doubt that defendant had a fair and impartial trial. No error was committed that can be held to have prejudiced him. Of course, learned counsel for defendant, by his suggestion that the penalty of death should not be inflicted for a crime committed by one who at the time of such commission was not quite 18 years of age, does not mean to intimate that this court has power to set aside or modify the judgment on any such ground. It is needless to say that this court has no such power.

The appeal from the order denying the motion in arrest of judgment is dismissed. The judgment and order denying a new trial are affirmed.

We concur: SULLIVAN, C. J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(25 Cal. A. 746)

PEOPLE v. ALLISON. (Cr. 335.)

(District Court of Appeal, Second District, California. Nov. 13, 1914.)

1. SODOMY (§ 5\*) — INDICTMENT — "CARNAL KNOWLEDGE."

An indictment accusing defendant of the infamous crime against nature, and alleging that he committed the crime on one "Frank B.

Love" by "having carnal knowledge of the body of said Frank B. Love," is insufficient to charge the crime against nature, since, if "Frank B. Love" was a female, as the court must assume, it merely charged defendant with sexual intercourse with a female; "carnal knowledge" meaning sexual intercourse.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, First and Second Series, Carnal Knowledge.]

2. CRIMINAL LAW (§ 304\*) — EVIDENCE — JUDICIAL NOTICE.

The court cannot take judicial knowledge of the sex of a person on whom a crime is alleged to have been committed from the name alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. § 304.\*]

3. INDICTMENT AND INFORMATION (§ 117\*) — STATUTORY OFFENSES—SUFFICIENCY OF INDICTMENT.

Though an indictment is sufficient where the crime is substantially alleged in the words of the statute or their equivalent, yet, where the facts stated are capable of two constructions, on one of which the facts may be true and not constitute a crime, the indictment is insufficient, and cannot be aided by presumptions.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 310; Dec. Dig. § 117.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

James F. Allison was convicted of crime, and he appeals. Reversed.

Thomas Rhodes, of San Luis Obispo, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was prosecuted under section 286 of the Penal Code, which provides that:

"Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

Defendant appeals from the judgment of conviction and attacks the indictment, to which he interposed a demurrer upon the ground that the facts stated in the indictment did not constitute a public offense, which was overruled. The indictment is as follows:

"James F. Allison is accused by the grand jury \* \* \* of the infamous crime against nature, committed as follows, to wit: The said James F. Allison \* \* \* did willfully, unlawfully, and feloniously commit the infamous crime against nature with and upon one Frank B. Love, by then and there having carnal knowledge of the body of said Frank B. Love. \* \* \*"

[1] Whether Frank B. Love was a male or female person is not made to appear, other than by the statement that defendant had carnal knowledge of the body of said person, an act which could not have occurred save and except upon the theory that Frank B. Love was a female. Carnal knowledge is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defined in Bouvier's Law Dictionary as sexual connection. This definition is approved in *Commonwealth v. Squires*, 97 Mass. 61, *Noble v. State*, 22 Ohio St. 541, and *Maxey v. State*, 66 Ark. 523, 52 S. W. 2, which hold that carnal knowledge is synonymous with and means sexual intercourse. While, therefore, the indictment accuses defendant of committing the infamous crime against nature, it states facts which preclude the idea of the commission of such crime by showing the act of defendant was sexual connection with Frank B. Love. If, therefore, Frank B. Love was a female, which we must assume, since the contrary does not appear, then the defendant is merely charged with having sexual intercourse with a female, which does not constitute a crime.

[2] As said in *People v. Carroll*, 1 Cal. App. 4, 81 Pac. 681, which is almost identical with the case at bar:

"We cannot take judicial knowledge of the sex of a party upon whom the crime is alleged to have been committed from the name alone. The name Frank is generally given to males, but it is sometimes given to females."

It follows that the facts stated in the indictment might be true and yet the defendant be innocent of any crime.

[3] While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged. *People v. Terrill*, 127 Cal. 99, 59 Pac. 836. As stated, the facts of the case are practically identical with those involved in *People v. Carroll*, supra, and upon the authority thereof, as well as for the reasons given, we are constrained to hold that the indictment is insufficient, in that it fails to charge defendant with the commission of a public offense.

Since, under our views, the judgment must, for the reasons given, be reversed, it is unnecessary to discuss other alleged errors.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; JAMES, J.

(25 Cal. A. 749)

COLBURN v. PARRETT. (Civ. 1648.)

(District Court of Appeal, Second District, California. Nov. 18, 1914.)

# 1. APPEAL AND ERROR (§ 392\*)—DISMISSAL—WAIVER OF GROUND.

The giving of an undertaking for appeal, required by Code Civ. Proc. § 940, is waived by the statement of respondent's counsel that he

relied only upon another ground stated in his motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2089-2094; Dec. Dig. § 392.\*]

## 2. APPEAL AND ERROR (§ 417\*)—NOTICE—SUFFICIENCY.

A notice of appeal from a judgment and order overruling a motion for new trial, made upon a bill of exceptions duly settled by the trial court, which states that notice is given that the appellant appeals to the appellate court from that order of the superior court denying motion for the new trial and also from the judgment therein, is sufficient under Code Civ. Proc. § 940, providing that the appeal may be taken by filing, with the clerk of court in which the judgment or order appealed from is entered, a notice stating the appeal from the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.\*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by John E. Colburn against F. B. Parrett, executor of the estate of Rosa Page, deceased. Judgment for the plaintiff, and defendant appeals. Motion to dismiss the appeal denied.

Porter, Morgan & Parrot, of Los Angeles, for appellant. W. C. Shelton, of Los Angeles, for respondent.

SHAW, J. [1] The grounds of the motion as stated in the notice thereof are the insufficiency of the notice of appeal and the fact that appellant failed to file an "adequate bond on appeal" within five days after service of notice thereof. At the hearing of the motion this last ground was not specified as a ground for dismissal; on the contrary, respondent's counsel expressly stated that "there is but one point, and that is the question of the sufficiency of the notice of appeal."

The giving of the undertaking on appeal prescribed in section 940, Code of Civil Procedure, may be waived, and respondent's statement in open court, in connection with the fact that in making the motion the failure to give the undertaking was not specified as ground for dismissal, renders it unnecessary to consider the same.

[2] There are two methods of taking an appeal (*Mitchell v. Steamship Co.*, 154 Cal. 731, 99 Pac. 202): One as prescribed in section 940, Code of Civil Procedure; the other as prescribed in section 941b. The appeal under consideration was had and taken from the judgment and an order denying appellant's motion for a new trial made upon a bill of exceptions duly settled by the trial court; the notice of appeal being as follows: "Notice is hereby given that T. D. Parrett, through his attorneys, Porter, Morgan & Parrot, appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein"—signed by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attorneys for appellant, which notice was duly served upon the attorney for respondent. Section 940, Code of Civil Procedure, provides that an appeal may be taken "by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, \* \* \* and serving a similar notice on the adverse party, or his attorney." Statutes making provisions in aid of appeals should be liberally interpreted, and, thus construed, it was a sufficient notice of appeal as provided in section 940, *supra*. The appeal does not purport to have been taken pursuant to section 941b; hence it is unnecessary to determine whether or not the notice was sufficient if tested by the provisions of that section.

The motion to dismiss is denied.

We concur: CONREY, P. J.; JAMES, J.

(25 Cal. A. 740)

PEOPLE v. TRENT. (Cr. 542.)

(District Court of Appeal, First District, California. Nov. 13, 1914. Rehearing denied by Supreme Court, Jan. 11, 1915.)

1. CRIMINAL LAW (§ 543\*)—EVIDENCE—DEPOSITION OF PROSECUTING WITNESS—ADMISSIBILITY—FOUNDATION.

That a proper foundation had been laid for the admission in evidence of the deposition of the prosecuting witness taken at the preliminary hearing was within the discretion of the trial court, where the people showed returns of sheriffs of quite a number of counties of the state, including the county which was the last known residence of the witness, in which each sheriff certified that after due search and diligent inquiry the witness had not been found, and where it was further shown that a diligent search had been made for the witness in the county where the crime occurred and where the witness had been staying and had directed his letters sent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.\*]

2. CRIMINAL LAW (§ 1043\*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

Objections by accused to the admission in evidence of the deposition of the prosecuting witness taken at the preliminary hearing, on the ground that the proper foundation had not been laid, made during a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the witness, did not refer directly to the failure to produce the reporter's certificate; and, where the certificate was in court at the trial and could have been produced had specific objection directing attention to its omission been made, accused could not complain of the admission of the deposition without the proper certificate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.\*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Leslie R. Trent, alias James Riley, was convicted of grand larceny, and from a judgment of conviction and from an order denying a new trial he appeals. Affirmed.

Frank J. Murphy and Melvin E. Van Dine, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant of grand larceny and from an order denying a new trial. The appellant urges two points upon this appeal, both of which relate to the regularity of the court's action in admitting in evidence the deposition of the prosecuting witness taken upon the preliminary examination and without the presence of which in evidence it is conceded the defendant could not have been convicted of the alleged crime.

[1] The first contention of the appellant is that the court erred in admitting the deposition in evidence without having the proper foundation therefor laid in a sufficient showing that the prosecuting witness could not, after due diligence, be found within the state. The people relied for such showing upon returns of the sheriffs of quite a number of counties of the state, including the county which was the last known place of residence of the desired witness, in which these officials each certified that after due search and diligent inquiry, they had been unable to find the witness. It was further shown that a diligent search had been made for the witness in San Francisco, where the crime occurred and where the witness had been staying and had directed his letters sent. We think that the question as to whether these constituted a showing of due diligence lay largely in the discretion of the trial court; and we are unable to say from this record that the court has in any way abused that discretion. *People v. Dene*, 20 Cal. App. 137, 128 Pac. 339; *People v. Lederer*, 17 Cal. App. 369, 119 Pac. 949.

[2] The next and final contention of the appellant is that the deposition was improperly admitted in evidence for the reason that the amended record shows that the certificate of the official reporter of the magistrate upon the preliminary examination, who took and transcribed such deposition, was not presented or admitted in evidence, and hence that the proper foundation for the admission of the deposition itself was not laid. Our examination of the record, however, discloses that the objection of defendant's counsel to the introduction of the deposition was couched in the general form, "that the proper foundation had not been laid," without in any way directing the attention of the court or of opposing counsel to the specific defect upon which he now relies. The record further discloses that the foregoing general objection was made during the course of a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the missing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witness, and did not refer directly to the defect in the omission to produce the reporter's certificate, which is now sought to be taken advantage of. It is further disclosed by the amended record that the said certificate of the reporter was in fact in court at the time of the trial, and could easily have been produced and offered had the specific objection directing attention to its omission in evidence been made. Under these circumstances, we think the objection of the defendant to the admission of the deposition without this preliminary proof was too general to be relied on here. *People v. Buckley*, 143 Cal. 375, 383, 77 Pac. 169.

No other error appearing in the record, the judgment and order denying a new trial are affirmed.

(25 Cal. A. 771)

**MINAKER v. SUNSET BUILDING & REAL ESTATE CO. et al.** (Civ. 1392.)

(District Court of Appeal, First District, California, Nov. 16, 1914.)

**1. SPECIFIC PERFORMANCE (§ 114\*) — COMPLAINT — SUFFICIENCY — FAIRNESS OF CONTRACT.**

A complaint for specific performance which sets out a contract whose terms were fair and reasonable, and which states that the purchase price was the fair and reasonable value of the property at the time, satisfies the statutory requirement that a complaint for specific performance shall show that the contract is fair and equitable.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.\*]

**2. SPECIFIC PERFORMANCE (§ 114\*) — COMPLAINT — SUFFICIENCY — WAIVER BY VENDOR.**

A complaint for specific performance is not demurrable because it alleged that the vendor waived a requirement for payment upon specific dates, where it appeared that such variations from the contract had been fully executed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.\*]

**3. PLEADING (§ 34\*) — PRESUMPTIONS IN AID OF PLEADING.**

Where a complaint for a specific performance alleged that the vendor had duly waived the requirement of the contract for certain payments, it will be presumed on demurrer that the waiver was in writing if a writing was required therefor.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 51½, 66-74; Dec. Dig. § 34.\*]

**4. VENDOR AND PURCHASER (§ 212\*) — SUBSEQUENT PURCHASER — RIGHT TO PAYMENTS — NOTICE.**

A subsequent purchaser is not entitled to have the payments, made under a prior contract for the purchase of the land of which he had notice, made to him, unless he definitely notifies the prior purchaser of his purchase and his claim to such payments.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 436-439; Dec. Dig. § 212.\*]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by A. J. Minaker against the Sunset Building & Real Estate Company, Interurban Real Estate Company, and others. Judgment for the plaintiff, and defendants Interurban Real Estate Company and others appeal. Affirmed.

H. D. Newhouse and Abram M. Marks, both of San Francisco, for appellants. J. W. Henderson and Frank D. Macbeth, both of San Francisco, for respondent.

**PER CURIAM.** This is an action brought by A. J. Minaker against the Sunset Building & Real Estate Company, Interurban Real Estate Company, and Hugo D. Newhouse, for the specific performance of a contract alleged and shown to have been entered into between A. J. Minaker and the Sunset Building & Real Estate Company (or that corporation under another name), for the purchase of certain lots, a portion of a larger subdivided tract of land for the sum of \$1,075, plaintiff alleging that he had completed and complied with the terms of that contract and that he was entitled to have his contract specifically enforced, not only against the immediate vendor named in that contract, but also against the subsequent incumbents and purchasers, named also as defendants in this action.

[1] The first point made by the appellants is that the complaint is defective in that it does appear sufficiently from the face of the complaint that the contract is a fair and equitable contract, or, in other words, such a contract as a court of equity will enforce. The complaint sets up in *hæc verba* the contract itself, and further states that the purchase price of the property stipulated in that contract was the fair and reasonable value of the property at the time the contract was made. We think the allegation that the purchase price of the property was fair and reasonable, taken in connection with the terms of the contract and set out fully in the complaint, suffices to satisfy the statute in that respect, and that the first point urged by the appellant is not well taken. *Reese Co. v. House*, 162 Cal. 740, 124 Pac. 442.

[2, 3] The point is also made upon the demurrer in the briefs of counsel that the allegation in the complaint that a strict compliance with that part of the contract requiring all payments of the purchase price to be made upon certain days and in certain amounts was duly waived by the defendant and the Sunset Building & Real Estate Company would cause a variation in the rule which has just been announced by the court, and that, further, since a contract in writing can only be modified by a contract in writing, the alleged waiver set forth in the complaint would be void. To this there are two answers: First, that it appears from the face of the complaint that whatever change in the contract was made in this respect, whatever vari-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

ation was accomplished, was a fully executed variation as between the original parties to the contract; but the second and better answer is that upon the face of the complaint it does not appear as to whether the waiver of this particular provision of the contract was or was not in writing, the only allegation being that the terms of the contract in that respect were duly waived by the respective parties thereto. The Supreme Court has held in a number of cases that whenever it is necessary that a contract or modification of a contract should be in writing, and the complaint alleges that the contract or modification of the contract was actually made and entered into between the parties, the presumption will be that the contract or modification was in writing, in the absence of an averment to the contrary.

It is admitted that the contract between the plaintiff and the Sunset Building & Real Estate Company was duly recorded, and that thereafter and while the plaintiff was proceeding to execute the same, the Sunset Building & Real Estate Company made two deeds of trust to certain parties named Newhouse, and later on that Hugo D. Newhouse, one of the defendants, became the purchaser of the property upon the sale thereof under these deeds of trust. The original contracts being recorded, it follows that whatever rights the defendant Newhouse or his successors in interest, the Interurban Real Estate Company, obtained by virtue of those deeds of trust or by virtue of the sale of property thereunder, or the subsequent conveyance to the Interurban Real Estate Company, they took subject to the contract made with the plaintiff, and to their knowledge and notice of said contract, imparted by the fact of its recordation. The plaintiff continued to make payments due under his original contract to his original vendor, the Sunset Building & Real Estate Company; and, with the exception of one payment of \$50 made to Newhouse, completed payment of his installments under his contract, and thereupon demanded a deed of the property, which, being refused, he brought this action for specific performance, making all the aforesaid parties defendants to the action.

[4] The appellants contend that the defendant Newhouse, having taken a subsequent deed of trust to the property, and having later become the owner thereof through sale under that deed, was entitled to have the subsequent payments after the date of the latter deed made to himself rather than to the original vendor; and the appellant also contends that the evidence sufficiently shows that the plaintiff Minaker had knowledge of the rights acquired by Newhouse under these deeds of trust, under the deed of grant made in pursuance thereof, and that, having such knowledge, he was not entitled to continue to make his payments to the original vendor. An

examination of the record, however, will show that there is a failure of proof on the part of the defendants in this respect, and that the defendant Newhouse does not seem to have brought clearly home to the notice of the plaintiff the fact of his succession to the title of the property and the claim which he now makes that he was entitled to the subsequent payment upon the installments of the purchase price.

We think that the subsequent purchaser of property, with notice of the existence of a previous contract for its sale to the original vendee, before he can claim that the payments which such vendee is to make under his contract should be made to himself, must definitely advise the original vendee of the fact of his ownership of the property and his claim to such payment, and this the defendant Newhouse does not appear from the evidence to have done. We think, therefore, that the original vendee was entitled to continue to make his payments to the Sunset Building & Real Estate Company, his original vendor, and, having done so, he was entitled to demand the specific performance of the contract, not only from the original vendor, but from all those that had succeeded in interest with notice of his contract, and in this respect we think that the point made by the appellant is not well taken—that the plaintiff was not entitled in this action to the specific performance of his contract against the subsequent purchasers with notice of his rights.

Upon the whole, we are satisfied that the evidence of the case sustains the findings of the trial court, and that there is no error in the record justifying the reversal of the case and for these reasons the judgment and order denying a new trial are affirmed.

(25 Cal. A. 775.)

WESTERGREEN et al. v. BEER et al.  
(Civ. 1891.)

(District Court of Appeal, First District, California. Nov. 17, 1914.)

1. TENANCY IN COMMON (§ 19\*)—PURCHASE AT JUDICIAL SALE.

A tenant in common may purchase at a judicial sale the interests of the cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55-59; Dec. Dig. § 19.\*]

2. TENANCY IN COMMON (§ 19\*)—PURCHASE AT JUDICIAL SALE.

Where a will devised real estate to infants and an adult, share and share alike, a sale of the interests of the infants under order of court, on petition of their guardian, is a judicial sale, and the adult is not disqualified from becoming a purchaser.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55-59; Dec. Dig. § 19.\*]

3. INFANTS (§ 40\*)—PURCHASE OF PROPERTY—FIDUCIARY RELATIONSHIP.

The relationship of sister and brother, standing alone, does not create a fiduciary relation, and the sister, who is an adult, may

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purchase the interest of the infant brother at a sale ordered by the court.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 90, 91; Dec. Dig. § 40.\*]

Appeal from Superior Court, San Mateo County; James M. Troutt, Judge.

Action by Carl A. Westergreen and another against Alice E. C. Beer and another. From a judgment for defendants, rendered on sustaining a demurrer to the amended complaint without leave to amend, plaintiffs appeal. Affirmed.

William F. Herron, of San Francisco, for appellants. Ross & Ross, of San Mateo, for respondents.

**PER CURIAM.** In this action the defendants' demurrer to the plaintiffs' second amended complaint was sustained by the court below without leave to amend. Judgment was thereupon entered in favor of the defendants, from which the plaintiffs have appealed.

The grounds of the demurrer were that the complaint did not state a cause of action and that the plaintiffs did not have legal capacity to sue. The action was one to declare a resulting trust in certain real property, and to compel a conveyance to plaintiffs of their alleged respective interests therein, and is founded upon the following alleged facts:

Ida Danielson, the mother of the plaintiffs and of the defendant Alice E. C. Beer, died, leaving an estate consisting of certain real property in the county of San Mateo. She left a will, which was duly admitted to probate, and in accordance with the terms of the will the property which is the subject of the action was distributed share and share alike, to her children, namely, the defendant Alice E. C. Beer, one Lizzie M. Westergreen, and Carl A. and John A. Westergreen, the plaintiffs. Both of the plaintiffs were then minors, and shortly after the decree of distribution was made one Crow, the public administrator of San Mateo county, was appointed their guardian by the superior court. On or about December 1, 1902, Crow, as the guardian of the estates of the said minors, filed in the superior court of San Mateo county a petition for an order of sale of the minors' interests in said property, alleging that a sale was necessary in order to prevent the state and county taxes thereon from becoming delinquent and to prevent the same from being sold for taxes. The petition was granted by the court, and the order of sale made, pursuant to which the interests of the plaintiffs in the property were sold, and at said sale were purchased for the defendant Alice E. C. Beer by her husband, who acted as her agent in the matter, and who afterwards conveyed the property to her by deed of gift. The sale was confirmed by the superior court, and Crow, as the guardian of the plaintiffs,

executed a deed to the property to the purchaser. At the time of the sale the plaintiffs were minors, and the defendant Alice E. C. Beer was an adult. The complaint further alleges that at the time of the sale and for some time prior thereto Alice E. C. Beer was occupying and residing upon the property in question.

[1] It is the contention of the plaintiffs that inasmuch as said defendant, their adult sister, was a joint devisee with the plaintiffs, and had acquired her interest in the property under the terms of their mother's will (which left it to the four children, share and share alike), she was therefore a tenant in common with them. This may be conceded; and likewise it may be conceded, as is contended, that the law prohibits a tenant in common from purchasing for his own benefit an outstanding incumbrance upon the common property. The rule of law in this behalf, however, has no application in our opinion to the facts pleaded in the plaintiffs' complaint. The law does not prohibit one cotenant from purchasing the interest of another tenant in common at a judicial sale. In the early case of *Gunter v. Laffan*, 7 Cal. 589, our Supreme Court said that:

"Tenants in common, or partners, have a right to acquire their cotenants' or copartners' interests, by purchase under an execution sale; there being nothing in their relations to forbid it."

And in *Freeman on Cotenants and Partition*, § 165, it is said:

"The reasons which prevent a cotenant from purchasing and asserting an outstanding title do not apply with equal, and generally not with any, force against his purchasing the title of his cotenants, whether the sale be voluntary or involuntary. Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase at an execution or judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired as fully as though he was a stranger to the judgment defendant."

[2] The sale complained of in the present case was undoubtedly a judicial sale. That a cotenant, irrespective of the origin or mode of creating the cotenancy, is not disqualified from purchasing the interest of any of his cotenants at such a sale is supported by the following authorities: *Credle v. Baugham*, 152 N. C. 18, 67 S. E. 46, 136 Am. St. Rep. 787; *Snell v. Harrison*, 104 Mo. 158, 16 S. W. 152; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246; *Hopper v. Hopper*, 79 Md. 400, 29 Atl. 611; *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1187; *Gunter v. Laffan*, supra.

[3] There is no merit in the contention that Mrs. Beer stood in a fiduciary relation to the plaintiffs because of her blood relationship to them. The mere relationship of sister and brother, standing alone and by itself, does not create a fiduciary relationship. *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384. It will be noted that the complaint does not aver any fraud, undue influence, collusion, inadequacy of consideration, or any other fact tending to show that defendant Alice E. O. Beer took advantage of her situation with reference to the property or her relationship to the plaintiffs.

We are of the opinion that the demurrer was properly sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is therefore unnecessary for us to decide the question as to whether or not the demurrer is well taken upon the ground that the plaintiffs did not have legal capacity to sue.

The judgment appealed from is affirmed.

(25 Cal. A. 751)

PEOPLE v. WARNER. (Cr. 273.)

(District Court of Appeal, Third District, California. Nov. 13, 1914.)

1. BURGLARY (§ 20\*)—INDICTMENT—IDENTIFICATION OF BUILDING.

An indictment for burglary, charging that defendant did willfully, etc., enter that certain building in the town of G. in which the United States post office was then located, which building was then and there owned by D., etc., sufficiently described the building burglarized.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51-54; Dec. Dig. § 20.\*]

2. BURGLARY (§ 41\*)—EVIDENCE.

In a prosecution for burglary, evidence held sufficient to identify defendant as a participant in the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.\*]

3. WITNESSES (§ 268\*)—CROSS-EXAMINATION—IDENTITY OF COINS.

Where an incriminating circumstance in a prosecution for burglary was a smooth quarter found on defendant, defendant's counsel having first shown to a witness on cross-examination another smooth quarter and asked him to point out any differences between the two coins, the court did not err in limiting the cross-examination, as to the witness' ability to identify the coin in question, to testimony as to the means or method whereby he assumed to be able to distinguish the coin from other like coins.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

4. CRIMINAL LAW (§ 345\*)—EVIDENCE—RELEVANCY.

Where the prosecution claimed that the alleged burglary was committed jointly by defendant and M., evidence that witness saw defendant in company with M. at a certain hotel on the day of the burglary was admissible, though there had been no direct evidence of the commission of the burglary by more than one person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 765, 777; Dec. Dig. § 345.\*]

5. CRIMINAL LAW (§ 1169\*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

In a prosecution for burglarizing a post office, accused was not prejudiced by the erroneous admission of evidence of the finding of two five-cent postage stamps on a railroad track near the town where the burglary was committed, without evidence connecting the stamps with accused, where there was other ample evi-

dence to establish defendant's connection with the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3083, 3130, 3137-3143; Dec. Dig. § 1169.\*]

6. CRIMINAL LAW (§ 448\*)—EVIDENCE—RELEVANCY.

Defendants having been arrested for burglary after they had alighted from a railroad train, evidence of the deputy sheriff who accomplished the arrest that while standing in the baggage car he opened the door slightly, peeped through into the passenger coach, and "located the two gentlemen that I was looking for," was not objectionable as equivalent to a statement that defendant and his companion had committed the burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.\*]

7. CRIMINAL LAW (§ 693\*)—TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

Where a question was answered before an objection was made thereto, a subsequent objection is unavailable; the only remedy being by motion to strike.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.\*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Henry Warner was convicted of burglary, and he appeals. Affirmed.

T. J. Butts, of Santa Rosa, and Charles Peery, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant and one Joe Malone were jointly charged by an information filed in the superior court of Sonoma county with the crime of burglary. The accused demanded and were given separate trials, and the defendant was convicted of the crime charged. This appeal, supported by a transcript of the testimony duly prepared under section 1247 of the Penal Code, is presented by the defendant from the judgment.

[1] The first point made by the defendant is that the building in which the burglary is alleged to have been committed is not so described in the information as to identify it with that definiteness necessary to the protection of the accused against a second prosecution for the identical offense which it was the intention to charge. The information alleges that the defendants "did willfully, unlawfully, feloniously, and burglariously enter that certain building in the town of Guerneville, in said county, in which the United States post office was then and there located, and which building was then and there owned by Mrs. R. S. Drake, with felonious intent then and there to commit larceny." We think the building was thus so described in the information as to have fully informed the defendant of the particular building which he was charged with having burglariously entered and to render available a plea of once in jeopardy and former conviction or acquittal in case a second prose-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—35

cution for the same offense should be inaugurated against him. Indeed, the statement that the building entered was the one in which the United States post office at Guerneville is located would have been a sufficient description, since there is but one post office in said town. But the description goes further by declaring that said building was owned by Mrs. R. S. Drake. The evidence confirms this allegation and further shows that the post office was in the building owned by her. The description was clearly sufficient for all purposes. See *People v. Edwards*, 59 Cal. 359; *People v. Bitancourt*, 74 Cal. 188, 190, 15 Pac. 744; *People v. Main*, 114 Cal. 634, 46 Pac. 612; *People v. Parker*, 91 Cal. 91, 27 Pac. 537; *People v. Price*, 143 Cal. 351, 77 Pac. 73.

[2] The next point urged for a reversal is that the evidence is insufficient to support the verdict.

The evidence upon which the defendant was convicted was purely circumstantial, and, while it is to be conceded that it does not appear at first blush to be very strong, still, after a careful analysis of the circumstances thus developed, we are persuaded that the conclusion reached by the jury is well supported. The facts, narratively stated, are as follows: Between the hours of 5:35 p. m. of the 20th and 5:25 a. m. of the 21st day of May, 1913, the post office at Guerneville was entered, the safe therein blown open by dynamite, and its contents rifed; there having been taken therefrom \$171.07 in cash and \$1,151.75 in postage stamps. The money so taken consisted of two or three \$20 pieces, a considerable lot of \$5 pieces, and a quantity of dimes and nickels. Among this money was a quarter of a dollar which had worn perfectly smooth and which had been in the possession of the postmaster for several weeks prior and up to the time of the burglary. An inspection of the post office premises early on the morning of May 21st, after the postmaster had discovered that the office had been burglarized, revealed the fact that the door of the building had been pried open by means of picks, which had been taken from the tool-house of the railroad company. The safe was badly shattered from the effect of the concussion. In the post office there was picked up from the floor something over \$11 in money, which had evidently been dropped by the burglars, perhaps because of their haste in getting away from the scene of their crime.

It appears that the defendant and Malone, his codefendant, were first seen in the neighborhood of Guerneville on the 18th day of May, 1913—two or three days previously to the commission of the crime. On that day they ate dinner at a hotel at Occidental, a small town situated several miles from Guerneville. By various persons they were thereafter seen either at Guerneville or at points near that town both before and on

the day that the building was entered. On the morning of the 20th of May, at about the hour of 10 o'clock, they were seen lying under a tree on the roadside near a place called Rio Nido, which place is located about a mile from Guerneville. At 12 o'clock noon of the 20th of May they were seen sitting in front of one of the places of business at Guerneville about a block distant from the post office. At about 15 minutes to 6 o'clock of the morning of the 21st day of May, the defendant and his companion appeared at the hotel at Occidental and there and at that time had breakfast. At about 6:40 a. m., the conductor on a narrow gauge railroad whose trains carry passengers from Occidental to Sausalito, where the road connects with the boats for San Francisco, saw the defendant and Malone, just as the train was about to move, running from behind the depot at Occidental to catch said train. The two men boarded the train without having first purchased tickets at the depot, paying their fares to Camp Meeker, a station on the line of said road a short distance from Occidental, to the conductor. When the train reached Camp Meeker, both men alighted, one going down the track in the direction in which the train was then going. The other went in the opposite direction. The train remained at Camp Meeker for upwards of 35 minutes and then resumed its journey south. Both the defendant and Malone had boarded the train, the former having purchased a ticket to Fairfax and the latter a ticket to Pacheco, a small flag station, at which, the conductor testified, the train rarely ever stopped or had occasion to stop. On entering the passenger coach, the defendant took the rear seat and Malone a seat in the front part of the car, and thus they traveled until Fairfax was reached. It appears that, the sheriff's office of Marin county having previously been apprised of the burglary by the authorities of Sonoma county, a deputy sheriff of the first-named county boarded the train before it arrived at Fairfax; he having been given information that two persons who were suspected of having perpetrated the crime were aboard of said train. The deputy took a position in the baggage car and, peeping "through the crack of the door," saw the two men seated in the passenger coach, as above indicated. When the train reached the Fairfax depot, the officer, having stepped into the passenger coach just before the train came to a standstill, followed the two men out of the car. Before they got off the car, the defendant, in a whisper, but so that the officer heard it, directed Malone to walk down the track. As Malone started down the track, the defendant started towards the town. Before either had taken many steps in the respective directions in which they had started, the officer halted and proceeded to question them, asking them their names, where they came from, etc. The defendant gave his name as Lawson and at a subse-



quent interview with the two men Malone declared that his name was Murray.

"I asked them," testified the officer, "where they boarded the train—I asked the gentleman (the defendant) where he boarded the train, and he would not answer me. I asked him the second time, and he pulled a card out of his pocket—that is, a time-table, and was looking over the time-table. He seemed to be quite nervous. Well, he was nervous. He would not answer me at all. I asked him the second time. I says, 'How far are you going?' He says, 'I am going to San Francisco.' I says, 'What made you get off here?' He says, 'You tell me something and I will tell you something'—that is the remark he made. He did not tell me why he got off at Fairfax. \* \* \* That train runs through to connect with the boat for San Francisco—it runs to Sausalito, which is a transfer station to San Francisco."

The officer then placed the two men under arrest and conveyed them to the sheriff's office at San Rafael. There the two men were searched, and from the person of the defendant the sum of \$78.70 was taken, and upon that of Malone the sum of \$78.60 was und. Among the pieces of coin found on the defendant was a quarter of a dollar which had become perfectly smooth. No postage stamps were found in the possession of either of the two men.

Thus we have detailed all the circumstances disclosed by the evidence purporting to fasten guilt upon the defendant and upon which the jury founded their verdict of conviction. Readily it will be observed that the strongest circumstance developed at the trial against the defendant was the fact of his possession, at the time of his arrest, which occurred within a few hours after the robbery, of the smooth two-bit piece referred to above. Mr. Duncan, the postmaster, having been shown the smooth two-bit piece taken from the defendant, testified, upon an examination of the coin, that it "was the two-bit piece that was in the safe the night of the robbery, after I locked it up. I received it from Mr. Johnson that runs the mercantile store there. He brought it in one morning and asked me if I thought it was good for stamps. I was in a hurry and told him I thought it was." He said that he placed the quarter in the post office receipts till, where he left the stamp money, but that, because it was "so slick," he took occasion to examine it several times while it was in his possession. He observed on the coin a little depression below the right side of the eagle, and from that mark, which was perhaps made in the milling of the piece, he felt satisfied that the coin taken from the defendant was the same smooth two-bit piece which he received from Johnson and which was in the post office safe on the night of the robbery.

C. D. Johnson, from whom the postmaster received, under the circumstances as explained by the latter, a smooth 25-cent piece, testified, in part, as follows:

"Q. Mr. Johnson, I show you a quarter marked People's Exhibit 1 for identification, People

v. Warner. Did you ever see that quarter before? A. Yes. Q. When did you first see that? A. Oh, after the 1st of September a year ago \* \* \* in the safe of the Guerneville Rochdale Company. (The witness was connected with said company.) \* \* \* It remained in the safe in a little box until about January and I took it out. There were four quarters. I took the four of them out and put them in my pocket. \* \* \* Two of them I still have. \* \* \* This particular quarter I gave when I went to the post office. I asked Mr. Duncan (the postmaster) if he would take it for stamps. This occurred in February or March, perhaps February (1913). \* \* \* I had it in my pocket over a month or six weeks. \* \* \* I took the four quarters out (of the safe). Two of the quarters were marked. \* \* \* Two of the coins had no mark on them. \* \* \* This is the coin I turned over to the postmaster for postage stamps."

The witness proceeded to testify that, after the robbery of the post office, the quarter taken from the defendant's possession at the time of his arrest was exhibited to him (witness) by the sheriff of Sonoma county, and that he identified the coin as the one delivered by him to the postmaster. He said he was able to identify the coin from the fact that on its date side it was perfectly smooth, the date and the "Goddess of Liberty" being wholly obliterated, and from the further fact that on the reverse side thereof the eagle, while considerably worn, was plainly visible, and that to the right and under the eagle there was a peculiar depression.

The defendant did not take the stand in his own behalf. One Robert Wall, however, testifying for him, said that he was engaged in the business of selling newspapers at a news stand at the ferry building, in San Francisco; that he was acquainted with the defendant, who had, during the recent Portola festival in San Francisco, worked for the witness; that on the 17th day of May, 1913—about four days prior to the time of the commission of the crime charged—the defendant bought a newspaper from him and in payment therefor handed the witness a \$5 gold piece; that he (witness) in returning to the defendant the change gave the latter, among other denominations of coin, a quarter of a dollar which had been so worn that it was perfectly smooth. The witness inspected and examined the quarter taken from the defendant and declared that he was "pretty sure that was the quarter that I gave him at that time."

Thus it is to be noted that a conflict arises in the evidence upon the question whether the "smooth quarter" found in the possession of the accused at the time of his arrest was the one which the postmaster declared was in the safe of the post office. While it may be conceded that the identification of a particular piece of coin is, as a general proposition, an act most difficult of accomplishment, still, in this case, it is made to appear that the particular coin whose identification was singularly vital to the determination of the ultimate issue was so peculiarly marked that in that respect it was plainly different and so

removed from the ordinary coins of its denomination that the witnesses for the people, having frequently examined it, could identify it as one which they had seen and handled previously to the time at which it was found in the possession of the accused. It was therefore with no less propriety than as to any other question of fact in the case, with the jury to decide the truth of the controversy and so determine whether the identification of the coin by the witnesses Duncan and Johnson was to be accepted as correct or erroneous or of so doubtful a character as to justify its rejection. The jury evidently accredited the identification of the coin by said witnesses, and thus the fact of the possession by the defendant, so soon after the burglary, of the 25-cent piece in question became and constituted a circumstance which, unexplained, although not of itself sufficient to warrant a conviction, the jury were nevertheless authorized to consider, in connection with the other circumstances, such as they were, in passing upon the question of the guilt or innocence of the accused. And whether the circumstance of the possession of stolen property has been satisfactorily explained is a question solely for the jury's determination.

The case, then, as to the facts, stands thus: That the defendant and his companion, Malone, strangers in and around the town of Guerneville, were engaged in loitering about that and neighboring places for several days before and on the day of or preceding that on which the burglary was committed; that neither of the men appeared to have any special business, at least of a legitimate nature, in that locality; that early in the morning of the 21st day of May, and within a few hours after the burglary, they, at the town of Occidental, were seen running from behind the depot to catch a train which was about to start; that they boarded said train, without first procuring tickets, paid their fares to the conductor to Camp Meeker, a short distance from Occidental, and then alighted and departed, one going in one direction and the other in the opposite; that they again took that train and occupied seats in the coach far apart from each other, going to Fairfax, where they alighted, the defendant directing his companion to walk on down the track, while he himself started in an opposite direction and towards the business part of said town; that, upon being accosted by the officer and questioned by him as to their names, where they came from, and where they were going, the defendant betrayed nervousness, refused to answer the officer's questions as to the point at which they boarded the train and where they had been, and both gave the officer fictitious names; that the two men each had in his possession approximately the same amount of money; and that in the defendant's possession was a piece of coin which was identified as the one in the safe at the time that it was rifled.

That the circumstances, as thus recapitulated, strongly point to the defendant's guilt, no reasonable person will for a moment deny or even attempt to controvert. And, while the defendant was at liberty to remain mute at the trial and his silence not to be considered against him, yet the fact conspicuously stands out that none of those circumstances was controverted or its incriminatory force impeached or impaired by adverse testimony, except the single circumstance (as to which, as shown, there is some conflict in the testimony) of the finding in the possession of the defendant of a two-bit piece which corresponded in certain respects, unusual to coin, with a piece of money of the same denomination which was shown to have been in the post office safe at the time of the burglary. In the absence of satisfactory or any explanation of those circumstances, the jury were required to answer for themselves, by a consideration of all the circumstances together, these questions: (1) Why did the defendant and his companion conceal themselves behind the depot at Occidental, at an early hour in the morning, and then hastily take the train, as it was about to move, without first providing themselves with tickets in the usual way? (2) Why did they separate when arriving at Camp Meeker and alighting from the train and then again take the same train for Fairfax? (3) Why did they separate themselves in the coach, one taking a seat in the extreme rear of the coach and the other seating himself in the extreme forward end of the car? (4) Why, upon reaching Fairfax, did the defendant request Malone to walk on down the track and he start to go toward the business part of the town? (5) Why did they give assumed or false names to the deputy sheriff? (6) Why, if, as the defendant declared was true, they were bound for San Francisco, did they leave at Fairfax the train on which they were riding and which would have given them direct connection with the ferry boats at Sausalito for San Francisco? (7) Why did they refuse to answer the deputy sheriff when he questioned them as to the place at which they boarded the train and as to where they had been? (8) What was the occasion of the betrayal of nervousness by the defendant when first accosted and questioned by the officer? (9) What was the purpose of the two men in loitering around the neighborhood of Guerneville? Men traveling together as companions may, with perfectly righteous motives, act as the defendant and Malone acted, yet such conduct in men who, as friends, are journeying together over the country, is so peculiar and unusual or so far the reverse of the ordinary demeanor of men traveling together that it is open to very serious suspicion that there is some sinister or questionable motive behind it, and, when viewed by the light of other connected circumstances tending in some measure to fasten guilt of crime upon persons so

demeaning themselves, it may well be expected to lead the mind from the grade of mere suspicion to that of conviction that it is actuated by a criminal purpose. And so the jury could with sound reason have viewed, and presumptively did view, the actions of the defendant and his companion as thus shown by the testimony, and, as before declared, we cannot see how a court of review can justly say that their interpretation of all the circumstances, considered together and in connection with each other, as represented by their verdict, is, as a matter of law, erroneous.

It is next contended that numerous prejudicial errors were committed in rulings upon the evidence. Some of these will be noticed.

[3] Counsel for the defendant, having first shown to the witness Duncan another smooth quarter of a dollar than the one found on the defendant, asked him to point out the distinguishing difference, if any, between the two pieces of coin. The obvious purpose of such examination of the witness was to show, if thus it could be done, that there was nothing in the coin taken from the defendant which would enable a person to distinguish it from any other equally smooth two-bit piece. The court interrupted counsel to say that, as far as he could go in the matter of testing the ability of the witness to identify the coin in question was to question, by proper cross-examination, the means or method whereby he assumed to be able to identify or distinguish said coin from any other like coin. The court's course in this regard is assigned as error.

While we think that the court could, without serious legal impropriety, have allowed the witness to compare the two pieces of coin and point out or, as counsel for the defendant undoubtedly expected would be the result, fail to point out, any difference between the two that would facilitate a ready distinction between them, it is clear that, strictly speaking, the ruling was not erroneous, for, after all, the question whether the two-bit piece, the identification of which was of vital importance in this case, was or was not in any respect different from any other smooth quarter of a dollar was one whose solution was for the jury and not for the witness. As a matter of defense, it would have been proper and competent for counsel for the defendant to have put in evidence another or other quarters of the same general appearance as that of the one taken from the defendant and thus have submitted to the determination of the jury the proposition whether the piece of coin found on the defendant could by any means or for any reason be differentiated or distinguished from the ordinary coin of like denomination, worn smooth by use. This course counsel did not adopt.

[4] It is urged that, inasmuch as there was presented no direct evidence of the commission of the burglary by more than one person, it was error for the court to permit a

witness to testify that he saw the defendant in the company of Malone at the Monte Rio Hotel on the afternoon of May 20th. The theory of the prosecution was that the crime was committed jointly by the defendant and Malone, and upon that theory the testimony objected to was peculiarly pertinent. But even if the prosecution had proceeded upon the theory that the defendant alone committed the deed, testimony of the fact that, just prior to the burglary, he had been seen near the scene thereof in the company of another party, who was not accused or even suspected of complicity in the commission of the crime, could not possibly prejudice his rights.

[5] It appears that, at about 6 o'clock of the morning of the 21st of May, one Lincoln Stewart, while on his way to his place of employment, found two 5-cent postage stamps on the railroad track between Guerneville and Monte Rio, and a short distance from the former place, and over objection by defendant, Stewart was permitted to testify to the fact of finding said stamps, and objection was also likewise but unavailing made to the admission of the stamps in evidence. The defendant was not shown to have had any connection with said stamps, and therefore the testimony disclosing the fact that they were found as indicated could have no tendency to establish his guilt. We can conceive of no legal reason justifying the admission of the testimony. We are of the opinion, however, that the other circumstances were, unaided by the circumstance of the finding of the stamps, amply sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged. In other words, we are convinced that, had the circumstance of the finding of the stamps been eliminated from or not brought into the record, the jury could have justly concluded from the other circumstances that the defendant was guilty. In this view of the record, the testimony objected to cannot well be held to have operated prejudicially against the accused.

[6] The witness Emerald, the deputy sheriff who arrested the defendant and Malone, testified that, upon going into the baggage car, he opened the door thereof slightly, peeped through and into the passenger coach, and "located the two gentlemen that I was looking for." Counsel for the defendant moved to strike out the words "I was looking for," contending that the statement of the witness as phrased by the latter "was equivalent to telling the jury that the defendant and the other man, Malone, had committed the robbery at Guerneville." The court refused to order said words stricken out. The statement could not have been so understood by the jury, since the testimony of the officer did not show that he had such knowledge of the two men or their connection with the crime as would induce the jury to attach any

significance to any statement by him which might be so construed as to involve a declaration or the expression of an opinion by him that they were guilty of the charge. His testimony clearly disclosed that all that he knew about the defendant and Malone or their connection with the commission of the crime for which he arrested them was what he might have acquired through his interpretation of their actions or conduct when he placed them under arrest, and it is only reasonable to say that intelligent men would not, in the face of such testimony, pay any attention to what might be viewed, by possible construction, as an opinion of the witness that the accused were the guilty persons.

[7] It is complained that the ruling permitting the deputy sheriff who arrested the defendant to testify that he found, among other articles, a "skeleton key" in the possession of the latter, when arrested, was erroneous and prejudicial. It may perhaps be unnecessary to explain that a "skeleton key" is a burglar's implement and is commonly known to be habitually carried by professional burglars, it being capable of opening door locks to which it had not been specially fitted. The specific objection to this testimony is, however, that, inasmuch as it was quite clearly shown that entrance into the building was effected by the prying open of the door by means of a pick and not by the use of a key, the fact that the defendant had upon his person a skeleton or burglar's key could have no pertinency to any issue in the case. But it appears that counsel for the defendant first opened up the matter objected to by asking the witness, on cross-examination, if he found any burglar's tools of any kind in the possession of the accused. On redirect, the following question was asked by the district attorney: "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key." Counsel for the defendant then interposed: "We object to that as leading, 'Did he find a key?' Answer, by witness: 'Yes, a skeleton key.'" Subsequently, and after the question had been answered, counsel for the defendant objected to the testimony upon the ground that it was "incompetent, irrelevant, and immaterial." These objections having been made after the question was answered, there was nothing before the court upon which to predicate a ruling, and therefore no ruling was made. Counsel's remaining remedy was in a motion to strike the testimony from the record, and, having failed to make such a motion, there is no warrant for a review by this court of the error in admitting the testimony, if error it was.

We have now considered herein all the assignments of error in the rulings of the court upon the evidence that we have thought merited special notice. We can see no just reason for interference with the jury's conclu-

sion upon the ultimate question in this case, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(25 Cal. A. 764)

PEOPLE v. MALONE. (Cr. 274.)

(District Court of Appeal, Third District, California. Nov. 13, 1914.)

1. BURGLARY (§ 41\*)—EVIDENCE.

In a prosecution for burglary, evidence held to sustain a finding of defendant's complicity in the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.\*]

2. BURGLARY (§ 36\*)—EVIDENCE—RELEVANCY.

Evidence that defendant when arrested for burglary gave a fictitious name to the officer, that he had in his possession a certain amount of money, which with that found on his codefendant equaled the sum stolen from the building burglarized, that a 25-cent piece found in the codefendant's possession was worn and like one kept by complainant in the office burglarized, together with the moneys taken from both defendant and his codefendant, was relevant and admissible against accused.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 90; Dec. Dig. § 36.\*]

3. CRIMINAL LAW (§ 339\*)—EVIDENCE—IDENTITY.

In a prosecution for burglary, a sheriff having testified to having taken accused and his codefendant to the store of C. for identification, it was not error for the court to exclude on cross-examination a question intended to show that the persons at such store could not identify them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 767-772; Dec. Dig. § 339.\*]

4. CRIMINAL LAW (§ 359\*)—EVIDENCE—RELEVANCY.

In a prosecution for burglary, evidence that the sheriff of the county, on first learning of the burglary, entertained a suspicion that another person was the author of the crime, was irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.\*]

5. CRIMINAL LAW (§ 829\*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

A request to charge that, when all the evidence is before the jury, the burden of proof remains where it started, with the prosecution, was covered by instructions that the state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror beyond a reasonable doubt, and that the law presumes every man innocent until his guilt is established beyond a reasonable doubt, which presumption attaches at every stage of the case and to every fact essential to a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

6. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

A request to charge that if the jury in considering the evidence can reasonably account for any fact in the case on a theory which will admit of defendant's innocence, and if they have a reasonable doubt of his guilt they should acquit, was covered by an instruction given that, when circumstantial evidence is relied on for a conviction, it is not only necessary that the circumstances all concur to show that defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant committed the crime, but that all are inconsistent with any other rational theory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Superior Court, Sonoma County; Henry C. Gesford, Judge.

Joe Malone was convicted of burglary, and he appeals. Affirmed.

T. J. Butts, of Santa Rosa, and Charles Peery, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against, jointly with one Henry Warner, by the district attorney of Sonoma county, for the crime of burglary, and, having been convicted of the crime so charged, prosecutes this appeal from the judgment of conviction.

An opinion in the case of the defendant's codefendant, Henry Warner (Crim. No. 273), affirming the judgment therein, was this day handed down by and filed in this court. 145 Pac. 545. As the charge against both Warner and the defendant grew out of precisely the same transaction, the general facts are, of course, the same in both cases, and, having fully stated the facts in the Warner Case, supra, it is not considered necessary to repeat them here.

The defendant in the present case makes the points that the information is fatally defective in that the description of the building alleged to have been burglarized is not sufficiently definite to apprise him of the particular building thus referred to and that the evidence is so wanting in probative power that it is incapable of upholding the verdict. Upon both these points our views are expressed in the Warner Case, supra, and we have discovered no reason for holding them to be any less untenable in this than in that case. We therefore hold, upon the authority of the Warner Case, that the information is not amenable to the criticism to which it was there and is here subjected and that the evidence is amply sufficient to support the verdict in this case.

[1] It is argued in this case, however, that, inasmuch as none of the stolen property was found in the personal possession of Malone, as was true in the case of Warner, the evidence here discloses no circumstance whatever tending to connect the defendant with complicity in the commission of the crime. But the fact that a certain part of the stolen property was found in the possession of Warner, the defendant's alleged companion in the commission of the crime, was shown in this case, and, under all the circumstances developed against both men through the evidence in both cases, that fact, unexplained, constituted a material inculpatory circumstance against Malone. And in this case no attempt was made, as was done in the case

of Warner, to explain the latter's possession of certain of the stolen property.

As shown in the opinion in the Warner Case, the two men, when seen at all, were in the company of each other from the time they were first observed in the immediate neighborhood of Guerneville up to and including the time at which they were apprehended by the deputy sheriff of Marin county. Moreover, in addition to that circumstance and the other circumstances detailed in the opinion in the Warner Case, the more or less significant circumstance was developed in this case that Malone carried his money in different parts of his clothing—"some in his coat pocket, some in his pants pocket, and some pinned in his clothes in the band of his trousers," so testified the deputy sheriff who arrested the two men. In brief, all the circumstances, independent of that of the possession by Warner of a smooth two-bit piece, identified as the same piece of coin of that description that was in the safe at the time of the burglary, indicated the guilt of Malone no less than that of Warner, or, in other words, indicated, if anything at all of an incriminatory nature, so far as Malone and Warner were concerned, that the crime was the consummation of their combined or joint action. Therefore, we say, the fact of the finding of a part of the property stolen from the safe by one of the two men, within a few hours after the property was so taken, constituted a relevant and material circumstance against the other, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case.

[2] Complaint is made of the rulings whereby the following testimony was allowed to go to the jury, the defendant having objected to the same on the usual general grounds, claiming as the specific ground of his objections that no showing was made that the burglary was committed by more than one person, viz.: (1) That Warner, when arrested, gave his name as "Lawson" to the officer making the arrest; (2) that the defendant had in his possession a certain amount of money; (3) admitting in evidence the smooth quarter of a dollar found in the possession of Warner and above referred to; (4) admitting in evidence the moneys taken from both the defendant and Warner. But the very purpose of all this testimony was to disclose to the jury circumstances tending to show that the defendant, who had all along been the companion of Warner, was implicated with the latter in the commission of the crime. Clearly, all those circumstances were relevant and competent as against the defendant. Their weight or evidentiary value was, of course, a matter whose determination was solely with the jury.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] It appears that, after the arrest of the two men and prior to their trial, the sheriff took them to Guerneville to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the crime was committed, and that among the places in Guerneville to which the two men were so taken was the store of a Mr. Cobb. Counsel for the defendant asked the sheriff the following question on cross-examination, "And they could not identify them there at Cobb's?" to which question the court sustained an objection by the district attorney. It is here contended that said ruling was erroneous and prejudicial, but the contention is clearly untenable. Doubtless the sheriff could have brought the men into the presence of many of the residents of Guerneville that had never seen them prior to the time they were so brought before them, but that fact itself would not constitute proof that they were not in Guerneville on the day that the burglary was committed or the day preceding that day. The fact is that the uncontradicted testimony of several witnesses shows that the two men were seen in Guerneville and the immediate neighborhood thereof on the afternoon of the 20th day of May, only a few hours before the crime with which they were charged was perpetrated.

[4] Nor was it error for the court to refuse to allow the defendant to show that the sheriff of Sonoma county, upon learning of the burglary, entertained a suspicion that a character known to him as "Big Otto" was the author of the crime. It is not conceivable that the fact, if it was a fact, that the sheriff suspected some other person than the accused of having committed the crime could shed any light upon the question of the guilt or innocence of the defendant. As independent or substantive proof, such testimony would obviously be incompetent in that it would involve the expression of the mere opinion of the sheriff, and there was nothing testified to by the sheriff in his direct examination which seemed to justify, on cross-examination, inquiry into the question whether he had conceived and entertained such a suspicion.

[5] It is insisted that the court made a mistake to the serious disadvantage of the accused by rejecting the following instruction requested by him:

"The court instructs you that, when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution."

The principle thus stated was sufficiently covered by the court in its general charge to the jury. Therein the court declared to the jury, among other statements of the law pertinent to the case, that:

"The state must prove by competent evidence every essential element of the crime charged,

to the satisfaction of each and every juror, beyond a reasonable doubt."

Thus the jury were plainly told where the burden of proof lay. Again, the court instructed them that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt," and that "this presumption attaches at every stage of the case, and to every fact essential to a conviction." Very clearly, by the foregoing language, the jury were in effect instructed, not only that the burden of proof rested upon the people, but that such burden there remained throughout the entire case and until a verdict was arrived at.

Instruction No. 7, proposed by the defendant and rejected by the court, merely contained, in effect, a statement of the rule as to reasonable doubt, which rule was fully and clearly amplified by the court in its general charge. Besides, the rejected instruction was not in proper form, so far as this case is concerned, inasmuch as it would, as proposed, have told the jury that "Henry Warner is the only person on trial before you for this alleged offense," which, obviously, was not true. However, as stated, the fact that the court did submit to the jury the principle therein declared is a sufficient answer to the complaint that its rejection was erroneous.

[6] Error is assigned in the action of the court in rejecting the following instruction, requested by the defendant:

"In considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, and if you have a reasonable doubt of his guilt, you should acquit him."

The principle thus declared was substantially stated in the following given instruction:

"When circumstantial evidence is relied upon to obtain a conviction, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all are inconsistent with any other rational theory."

See, also, given instructions Nos. 11, *supra*, 14 and 15, Clerk's Trans.

In a number of instructions given to the jury at the request of the defendant, the court fully and correctly stated the rules of law relating to the recent possession of stolen property by one accused of stealing the same, etc., and therefore the rejection of instruction No. 16 (page 39, Clerk's Trans.), proposed by the defendant, and covering precisely the same proposition, was not prejudicial.

Instruction No. 19, proposed by the defendant and refused by the court, is literally in the language of one of the given instructions, and its rejection was therefore proper.

There are no other points calling for special notice in this opinion.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(35 Cal. A. 743)

HAYES et al. v. BUTLER, County Clerk.  
(Civ. 1649.)

(District Court of Appeal, Second District,  
California. Nov. 13, 1914.)

**1. PLEADING (§ 85\*)—ALLOWANCE AFTER TIME  
—TERMS—STATUTORY PROVISIONS.**

Under Code Civ. Proc. §§ 472, 473, providing that when a demurrer to a complaint is overruled and there is no answer filed, the court may, on terms, allow an answer, and empowering the court to allow on terms an answer after the time limited by the Code, the court in the exercise of its discretion may impose terms, as a condition of answering, after expiration of the statutory time on overruling a demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

**2. PLEADING (§ 85\*)—ALLOWANCE AFTER TIME  
—TERMS—STATUTORY PROVISIONS—“ALLOWED BY LAW.”**

The inhibition in Code Civ. Proc. § 129, as amended by St. 1913, p. 90, empowering every court of record to make rules not inconsistent with the laws, but such rules shall not impose any tax, charge, or penalty on any legal proceeding, or for filing any pleading “allowed by law,” is against the making of rules imposing a charge for the filing of a pleading allowed by law, but an answer after the expiration of the time fixed therefor can only be filed under an order made by the court in the exercise of discretion vested in it by sections 472, 473, and is not a pleading, the filing of which is “allowed by law,” and courts may not make an arbitrary rule applicable alike to all cases whereby terms are imposed as a precedent condition to filing an answer after time allowed therefor by law has expired and after overruling a demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

For other definitions, see Words and Phrases, First and Second Series, Allowed by Law.]

**3. PLEADING (§ 85\*)—OVERRULING DEMURRER  
WITH LEAVE TO ANSWER — CONDITIONS —  
CONSTRUCTION.**

An order, granting to defendant the right to answer on terms after the expiration of the time for answer and on the overruling of his demurrer to the complaint, must be considered in its entirety, and without compliance with the terms, the order must be construed as one denying the right to answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

Petition for writ of mandate by J. Chauncey Hayes and others against J. T. Butler, County Clerk and ex-officio Clerk of the Superior Court of the County of San Diego, to compel the clerk to file an answer of the petitioners. Writ denied.

Wright & Winnek, of San Diego, for petitioners. A. J. Lee, of San Diego, for respondent.

SHAW, J. Joseph C. Hunter instituted an action in the superior court of San Diego county against petitioners, who interposed a demurrer to the complaint. This demurrer, submitted without argument, was overruled, at which time the court made an order as follows:

“Defendant is permitted to answer within 10 days upon terms of payment of \$10 to plaintiff or his attorneys.”

Defendants (petitioners here), without paying to plaintiff or his attorneys the sum imposed as a condition of answering, presented to the county clerk, with request that he file the same, their answer to the complaint. The clerk refused to file the answer, alleging as a reason for his refusal the fact that defendants had failed to comply with the condition prescribed in the order. Petitioners ask for a writ of mandate directed to the clerk of the court requiring him to file the answer.

[1] Section 472, Code of Civil Procedure, provides, among other things, that:

“When the demurrer to a complaint is overruled, and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed.”

Section 473 contains a like provision. Under this provision no question exists as to the power of the court, in the exercise of its discretion, to impose terms as a condition of answering after the expiration of the time given by law therefor. In the absence of an order granting leave so to do, defendants had no legal right to answer.

[2] Section 129, Code of Civil Procedure, as amended in 1913 (St. 1913, p. 90) provides:

“Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules shall neither impose any tax, charge or penalty upon any legal proceeding, or for filing any pleading allowed by law, nor give any allowance to any officer for services.”

Petitioners contend that by virtue of this section as amended, and notwithstanding the provisions of section 472, the court was without power to impose terms as a condition of permitting the answer to be filed. This contention can only be sustained upon the theory that the provisions of sections 472 and 473 cannot be reconciled with section 129, and hence the later statute works a repeal by implication of the provisions of the former. We cannot assent to this view. In addition to the provision of 472, under which the court may, after the overruling of a demurrer and the expiration of the time to answer, permit an answer to be filed upon terms, section 473, among other things, provides that the court may allow, upon such terms as may be just, an amendment to any pleading or proceeding—

“and may upon like terms allow an answer to be made after the time limited by this Code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.”

The imposition of terms as a condition of doing any of these things could not be imposed if petitioners are right in their con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tention. Clearly it was not the intention of the Legislature to repeal such provisions.

The inhibition contained in section 129 is against the making of rules imposing a charge for the filing of a pleading *allowed by law*. An answer, after the expiration of the time fixed therefor, can only be filed by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of said sections 472 and 473 (Billesbach v. Larkey, 161 Cal. 653, 120 Pac. 31); hence, it is not a pleading the filing of which is *allowed by law*, and therefore does not fall within the provisions of section 129, under which the court is empowered to make rules not inconsistent with the laws of this state. Sections 472 and 473 provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit certain things to be done which *under the law* the party has no right as of course to do. Courts cannot make an arbitrary rule applicable alike to all cases, whereby terms are imposed as a precedent condition of filing an answer after demurrer overruled and time allowed therefor by law has expired. To do so would be to divest themselves of the exercise of that discretion in each particular case which the law in express terms enjoins upon them.

[3] Moreover, since the right of defendant to answer is by virtue of an order made, such order must be considered in its entirety, and without compliance with the terms thereof it must be construed, in our opinion, as an order of denial of the right to answer unless the condition imposed therein be complied with.

The writ prayed for is denied.

We concur: CONREY, P. J.; JAMES, J.

(93 Kan. 760)

CUSTER v. OLIVER et al. (No. 19130.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 30\*)—EXECUTION OF CONTRACT—FAILURE TO ASCERTAIN CONTENTS.

A bond for a deed conditioned for the performance of a real estate contract had written therein a clause that the bond should be void as soon as court should sit and clear the title to the land. Two of the obligors testified in substance, that they thought the instrument was to guarantee that the title should be cleared, and one of them who prepared the bond did not remember to have read the printed part. There was no lack of opportunity to know fully the contents of the instrument, and it is held that, having voluntarily signed it, they are bound for the fulfillment of all its conditions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 34; Dec. Dig. § 30.\*]

Appeal from District Court, Ness County. Action by H. A. Custer against L. M. Oliver and others. From judgment for defend-

ants, plaintiff appeals. Reversed and remanded.

A. W. Wilson, of Ness City, and J. E. Brooks, of Sedan, for appellant. V. T. Miller, of Ness City, for appellees.

WEST, J. The plaintiff made a contract with L. M. Oliver and Charles Rutherford to exchange certain real estate in Peru, Kan., for a farm in Lane county, plaintiff to give a mortgage back on the farm for \$1,400. After the property in Peru had been examined, the contract was changed so that the mortgage on the farm was to be \$1,600, instead of \$1,400, and a bond for a deed was executed to plaintiff by Oliver and Rutherford, and also J. E. Atwood and W. E. Traylor, by which the obligors undertook, in the sum of \$3,200, that a deed should be executed on or before April 1, 1911, upon payment of the sums called for by the contract, and just before the clause setting forth the obligation this sentence was inserted: "This bond to be null and void as soon as court sets and clears title to this land." The plaintiff, who appears to have performed his part of the contract, sued to recover on the bond, and judgment was rendered in his favor for \$1,880 against the defendants Oliver and Rutherford, and the trial court found that Atwood and Traylor were not liable on the bond, and rendered judgment in their favor for costs. The plaintiff appeals, and insists that he was entitled to judgment against all the obligors.

It is stated in the brief of the defendants that the clause quoted was typewritten; the rest of the bond being a printed form. The question of the two formerly successful defendants' liability depends upon the effect of their testimony. Mr. Atwood testified that Mr. Rutherford asked him to sign the instrument, which he understood "was a guarantee that they would quiet title to a certain piece of property, and it was stated that as soon as the court quieted the title that the bond would be null and void." On motion the court struck out "that part which recites what the bond recites," and allowed the rest to stand. Mr. Traylor testified:

"A. I wrote the bond and signed it under the conditions that seemed to be stated on the face of it. Q. Now, are there any other conditions under which you signed the bond other than what appears on the face of it? A. I did not read all the bond carefully. I was in a hurry, and I signed it for one reason because I thought Dr. Atwood had read it, and it was to a certain extent on his judgment as well as on mine— By the Court: You say you wrote the bond yourself, do you? A. I wrote the typewritten part; all the other part—the printed part—I had not studied it. Q. Do you remember whether or not you read the printed part on the bottom? A. No, sir; that is not my understanding."

This is substantially all the evidence on this point, and, instead of showing lack of liability, it shows that the two successful defendants signed the bond with knowledge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



or with full opportunity of knowledge touching its contents, and, construing the provisions of the instrument so as to give each fair effect, as the rule requires, it is clear that, even if the title had been quieted, the conveyance had not been executed, and the one without the other would be of no value to the plaintiff. The four obligors were bound for the fulfillment of the obligations, and neither of them is entitled to release merely because he carelessly signed without fully investigating and understanding what the instrument contained.

The judgment as to the two defendants J. E. Atwood and W. E. Traylor is reversed, and the cause remanded to include them with the other judgment debtors. All the Justices concurring.

(94 Kan. 101)

**BOARD OF COM'RS OF WYANDOTTE  
COUNTY v. DAVIS, State Auditor.**  
(No. 19809.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**BRIDGES (§ 20\*)—LETTING OF CONTRACT—FREE  
COMPETITIVE BIDDING—COUNTIES.**

The county commissioners let a contract for the building of a bridge which was decided to be invalid because of an irregularity in the estimate of the cost of the bridge. Before the decision was announced, work had been begun on the bridge under the invalid contract. The county commissioners began anew and advertised for bids for the entire bridge upon the condition that the successful bidder should settle with the former contractor for the work done and material furnished towards the building of the bridge and also hold the county harmless for double liability for such work and material. A number of bids were submitted, and the former contractor became the successful bidder at the second letting. *Held*, that the terms and conditions of the letting did not substantially defeat free competitive bidding nor invalidate the contract made with the successful bidder.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 37-44, 46, 47; Dec. Dig. § 20.\*]

Original mandamus by the Board of County Commissioners of Wyandotte County against W. E. Davis, as State Auditor, etc. Peremptory writ allowed.

Keplinger & Trickett, of Kansas City, Kan., for plaintiff. J. S. Dawson, Atty. Gen., and A. M. Seddon, of Kansas City, Mo., for defendant.

JOHNSTON, C. J. In this proceeding the board of county commissioners of Wyandotte county asks the issuance of a writ of mandamus to compel the auditor of state to register certain county bonds issued to pay for the construction of a county bridge. A former application to register the bonds of the county for that purpose was denied because of a noncompliance with a particular statutory requirement as to the making of an estimate of the cost of the bridge. *Wyandotte County v. Davis*, 92 Kan. 872, 141 Pac. 555.

It appears that a portion of the work had

been done under the first contract before the decision holding it to be invalid was announced. Following that decision, the commissioners began anew, and the detailed estimate of the county surveyor lacking in the first instance was obtained and approved. Plans and specifications were prepared, and notice of the letting of a contract was made as if no work had been done under the invalid contract and upon the theory that the work done and material furnished by the first contractor and for which no payment had been made was owned by that company. In the second letting, notice was given to each bidder that, if successful, he must settle with the former contractor for the unfinished abutment and piers placed there by it, and which, it is agreed, were of the value of \$25,000, and must also hold the county harmless from any double liability therefor. It was further stipulated that the commissioners had no money to pay for what had been done and furnished under the invalid contract, nor any means for paying for the bridge to be built except by the issue of bonds, and that under the law bonds could only be issued to the extent of the contract price of the bridge, and, further, that the purpose of the commissioners in asking that bids for the bridge be submitted as though nothing had been done towards its construction and requiring the successful bidder to settle with the former contractor and hold the county harmless from double liability was to enable the county to issue bonds and pay for the bridge by the only means that they found to be available.

Parties appearing as *amici curiæ* are contesting the right of the commissioners to issue the bonds or of the auditor to register them, upon the ground that there was no fair and reasonable opportunity for competition in the letting of the contract, because all the bidders were not put upon an equality and permitted to bid on the same terms and conditions. This contention is based mainly on the fact that the former contractor, which had begun the work on an abutment and two of the piers and owned the structure so far as it had been built, was itself a bidder. It appears that the structure was in place and its condition and extent was open to all alike for inspection and valuation. It conformed with the plans and specifications that had been approved and met all the requirements of the commissioners. The terms and conditions were well known, and all bids were to be made upon the conditions as they existed at the place where the bridge was to be built when the contract was let. Every bidder had the opportunity to obtain from the owner so much of the structure as had been erected at its value or to build the entire bridge after the material that had been placed in the stream had been removed. It is true the owner of the material in the unfin-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ished abutment and piers may have been able to make a lower bid than the others in order to avoid a loss which would result from the failure to dispose of the material which it had placed in the stream to a contractor and to be obliged to remove it from the place where the bridge was to be built. That company may have had the advantage of one who has material on hand suitable for the structure and which might not be so valuable for use elsewhere. Such an advantage, however, does not militate against the public interest nor violate any statutory provision. It provided a way in which the former contractor could obtain payment for work and material honestly done and furnished and at the same time secure to the county a bridge for the amount of the bid made in the first instance, and about the fairness of that letting there is no question, nor is there complaint by any of those who were bidders at the second letting. The only complaint comes from members of the company which was unsuccessful in the first letting, and which, according to the findings of the commissioners, was not responsible within the meaning of the statutes. The letting in controversy here was open, and the terms and conditions were brought to the notice of all who wished to bid. There appears to have been no favoritism nor deceit in the action of the commissioners, and, although there was the unusual condition that the bidders should settle with the contractor who had started the work, it did not, in the opinion of the court, interfere with free competition in the bidding nor invalidate the contract which was made with the successful bidder.

The bonds being valid, they should be registered, and therefore the peremptory writ will be issued in accordance with the prayer of plaintiff's petition. All the Justices concurring.

(86 Kan. 723)

BAILEY et al. v. KELLY. (No. 19099.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**1. LANDLORD AND TENANT (§ 165\*)—NUISANCE—DEATH OF TENANT'S SERVANT.**

A landlord leased vacant property upon which there was a cistern covered by a loose lid lying upon a slightly raised platform. The lease was without warranty or covenant to repair on the landlord's part. The covering of the cistern was exposed to plain view, and its character was observed by the tenant when he entered. The tenant used the cistern for nearly two years in this condition when on a laundry day the lid was not carefully replaced after a drawing of water, and a servant of the tenant stepped on a corner of the lid lying over the opening into the cistern, was precipitated into the cistern, and was drowned. The cistern was located in a shed in the rear of the kitchen of a building used by the tenant for a restaurant. When the deceased commenced working for the tenant he pointed out to her the location of the cistern, but in six weeks' service which occasionally brought her in proximity to the cistern

the fact that the lid was loose was not brought to her attention. It is held:

The landlord is not liable in damages for the death of the servant upon the theory that the cistern was a nuisance, or upon the theory that he was guilty of actionable negligence, or upon any other theory sustained by existing law.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630, 631, 633-637, 640, 641; Dec. Dig. § 165.\*]

**2. LIABILITY OF LANDLORD.**

The decision of this court rendered upon the occasion of a former appeal (*Bailey v. Kelly*, 86 Kan. 911, 122 Pac. 1027, 39 L. R. A. [N. S.] 378), holding the landlord liable, is overruled.

Johnston, C. J., and Mason and Benson, JJ., dissenting.

(Additional Syllabus by Editorial Staff.)

**3. NUISANCE (§ 1\*)—WHAT CONSTITUTES.**

The characteristic of a "nuisance" is that it must or will injure that portion of the public who may be compelled to come in contact with it. The term is applied to that class of wrongs arising from the unreasonable, unwarranted, or unlawful use by a person of his own property producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Unless prejudice or damage threaten or result as a necessary consequence of the act, there is no nuisance. While a nuisance may result from negligence, negligence is not involved in nuisance actions, either as essential to the cause of action, or as a ground of defense.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Nuisance*.]

Appeal from District Court, Cloud County.

Action by Milton E. Bailey and another against John Kelly. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions.

Kagey & Anderson, of Beloit, and Theo. Laing and Sturges & Sturges, all of Concordia, for appellant. A. L. Wilmoth, A. M. French, and Pulsifer & Hunt, all of Concordia, for appellees.

BURCH, J. [2] This case was before the court on the occasion of a former appeal. *Bailey v. Kelly*, 86 Kan. 911, 122 Pac. 1027, 39 L. R. A. (N. S.) 378. The action was commenced against a landlord to recover damages resulting from the death of his tenant's servant, who fell into a defectively covered cistern on the leased premises. The cistern was in a shed in the rear of the kitchen of a building used as a restaurant. The defect in the covering of the cistern existed at the time the premises were leased, was open to view, and the character of the covering was observed by the tenant when he took possession. The lease was without warranty and without covenant to repair, on the landlord's part. At the first trial the court sustained a demurrer to the plaintiffs' evidence on the ground that the landlord rested under no liability. The court held otherwise, as indicated in paragraph 1 of the syllabus of the first opinion:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to any person who is rightfully upon the premises, and who, without fault, is injured by reason of such nuisance; and this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for any injury suffered by himself."

At the second trial the court, after it had overruled a demurrer to the plaintiffs' evidence, instructed the jury in accordance with this decision, and a verdict was returned for the plaintiff. The defendant appeals, and renews his contention that the law does not authorize the recovery of damages from him. A majority of the members of the court are convinced that the former decision was wrong. That the former decision was substantially unsupported by authority and was rendered against the settled law of this country is clear. 34 L. R. A. 824, note; 34 L. R. A. (N. S.) 798, note; 39 L. R. A. (N. S.) 378, note; 48 L. R. A. (N. S.) 917, note; 49 L. R. A. (N. S.) 1120; 50 L. R. A. (N. S.) 286, note. The notes cited refer to others, and present a comprehensive view of the case law on the subject.

The court was conscious of the fact that it was extending the liability of the landlord, as that liability had been previously understood, but believed the extension to be justifiable. The distinction between the undefined body known as the public and a group of persons comprising a restaurant keeper, his family, and his employes becomes quite shadowy. That such a group, composed in part of persons drawn from the general public, would be assembled on the premises by the tenant was fairly within the landlord's contemplation. When the landlord takes rent for premises containing a public nuisance, he is liable. In this case the landlord took rent for the use of premises containing a pitfall which a portion of the public selected by the tenant was obliged to encounter. Consequently the court applied the nuisance theory, and held the defendant liable. The difficulty with this decision is that it is not closely discriminative with respect to facts, ignores ideas of legal duty which experience has demonstrated to be well-founded and fair, and involves the law in confusion concerning some of its fundamental principles.

[1] A description of the leased premises appears in the former opinion (86 Kan. 912, 122 Pac. 1027, 39 L. R. A. [N. S.] 378), and need not be repeated in full. The cistern was covered by a wooden platform about four feet square, raised four inches from the ground, upon which the lid or covering lay. The structure was in plain view, and the lid was adequate as a covering. Its only defect consisted in the fact that it might be displaced, and the casualty oc-

curred in the most fortuitous way. Laundry work for the restaurant was done twice a week, the washing machine being operated by a gasoline engine. Water for this work was drawn from the cistern by means of a bucket and rope. The covering would usually be laid back against the coalhouse when water was being procured. At other times it was kept over the opening. On this occasion laundry work was in progress. The tenant had just drawn some water from the cistern and had gone back to the washing machine. The covering was not replaced carefully and was lying so that one corner was over the opening into the cistern. The deceased stepped on this corner of the covering, which allowed her to fall into the cistern, and the covering then righted itself and fell into place over the opening. For almost two years the tenant had used the cistern in safety in exactly the same condition, and if the covering had been used according to its purpose and design the accident would not have occurred.

[3] Under the foregoing circumstances it smacks somewhat of hyperbole to call the cistern a nuisance, the characteristic of which is that it must or will injure that portion of the public who may be compelled to come in contact with it. Black's Law Dictionary, title, "Nuisance." Broadly speaking, "nuisance, no cumentum, or annoyance, signifies anything that worketh hurt, inconvenience or damage." 3 Blackstone's Commentaries, p. 216. But in legal phraseology the term is applied to that class of wrongs that arises "from the unreasonable, unwarrantable, or unlawful use by a person of his own property \* \* \* producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." 1 Wood on Nuisances (3d Ed.) § 1. Unless prejudice or damage threaten or result as a necessary consequence of the act done there is no nuisance. "It is a nuisance \* \* \* to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbor." 3 Blackstone's Commentaries, p. 218. "In order to create a nuisance from the use of property a material, substantial and appreciable injury must be occasioned to the person or property of another." Joyce, Law of Nuisances, § 22. "Injury and damage must concur as results of an act or thing in order to make it a nuisance." 1 Wood on Nuisance (3d Ed.) § 5. A nuisance may result from negligence. But negligence is not involved in nuisance actions either as essential to the cause of action or as a ground of defense. 29 Cyc. 1155.

In this case the evidence indicates that before the lease was made the building was locked, and prospective tenants procured the key from the landlord in order to inspect the premises. In any event the property did not threaten the public or any portion of the

public. The cistern was occasioning no injury or damage to any one, rendering its maintenance intolerable. The change of possession from the landlord to the tenant did not change the lawful character of the landlord's conduct. When the deceased came upon the premises and commenced to work for the tenant, she acquired no cause of action against either the landlord or the tenant for injuries suffered or threatened on account of the cistern, or for the abatement of the cistern as a nuisance, under any known principle of law. If a master negligently furnish his servant an unsafe place in which to work, nothing is gained, and confusion results from calling the place a "nuisance." The vehemence of the term adds nothing to the situation and relations of the parties, and cannot justify a departure from the law of negligence applicable to them. The present case is one of that character, and the nuisance theory, when applied to it, breaks down. The fact that the front room of the building was open to such portion of the public as desired to patronize the restaurant has no relevancy to the subject under consideration. The situation at the rear of the building was precisely the same as that of any private family employing servants to perform various household functions. The result is that the facts fail to bring the case within the category of those nuisance cases in which the lessor has been held to be liable for injuries sustained by third persons.

It is admitted that the ordinary inspection which a landlord has the right to expect a tenant will make did, in fact, disclose to the tenant the condition of the cistern. He could not have recovered if he had been injured. There is no contention that the lease was not made in perfect good faith, and there is no justification for speaking of the landlord's conduct as gross or wanton. The deceased was 16 years old, large for her age, healthy, intelligent, and in possession of all her faculties. When she commenced working for the tenant he pointed out to her the location of the cistern, but the jury found that in some 6 weeks' service, which occasionally brought her in proximity to the cistern, the fact the cover was loose was not brought to her attention. Only upon this narrow margin could recovery be had even from the tenant, and, notwithstanding the shocking character of the accident, reckless indifference to the safety of others does not appear on the part of anybody responsible for the condition of the premises. If however, it once be conceded that the law of negligence governs the case, want of privity between the landlord and the tenant's servant defeats the action, however indefensible the conduct of the tenant in placing the servant at work in proximity to the cistern.

The undertaking of the landlord is not to furnish premises to be used as a place or in-

strumentality for the accomplishment of certain purposes by others, which he is bound to make fit for the contemplated use, like staging, scaffolding, hoisting apparatus, and other appliances, within the rule of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503. See *Aaron v. Telephone Co.*, 89 Kan. 186, 131 Pac. 582, 45 L. R. A. (N. S.) 309. The lessor grants an estate in the premises to the lessee, and surrenders dominion over them to the lessee under conditions as definitely understood as if expressed in a written instrument of lease. "The mere letting without additional stipulations by the lessor simply implies that he holds the title, and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state of repair, or that they are suitable for the purpose for which they were let." 2 Cooley on Torts (3d Ed.) p. 1276.

The tenant may or may not invite third persons, servants, patrons, guests, and others upon the premises, as he pleases, but the landlord extends, and can extend, no such invitation, either expressly or by implication. He cannot himself enter upon the tenant's possession, even to repair, unless the right be reserved or permission obtained, much less grant licenses to others. The result is the negligence theory of liability, suggested in the syllabus of the former opinion, breaks down for lack of any legal duty on the landlord's part to sustain it.

The principle upon which the lessor of premises is held liable to third persons for nuisances existing at the time the tenancy was created is this: The landlord having possession and control of his land, or the right to possess and control it, owes the public, who are suffering or must suffer from the nuisance, the duty to abate it, and must respond in damages for a breach of the duty. The duty and the liability are not satisfied by the simple act of leasing the premises and continue until the nuisance is abated.

Much is said in the decisions concerning a presumption that the landlord contemplates a continuance of the nuisance while the tenant is in possession. The presumption is gratuitous and fictional as often as otherwise. The rent reserved is frequently reduced because of the condition of the premises and with the expectation that the tenant will put them in order. Frequently the landlord takes from the tenant a covenant that the tenant will repair. The majority of courts hold that the liability of the landlord is not ended because of a lease containing such a covenant, and it seems sufficient to say that, the landlord's obligation having once arisen, he cannot shift or evade or discharge it by leasing to another, but that the obligation continues until the public peril is actually removed.

When the condition of property is such that it does not impair the public safety, the landlord owes no duty to the public or to any member of the public to change the condition. When he comes to deal with a specific individual as a prospective tenant, he owes that individual no duty, except not to entrap him by concealing facts which ordinary inspection would not reveal, and he owes no other individual any duty at all. The landlord may in perfect good conscience offer his property, such as it is, to a tenant who takes it, such as it is, on satisfactory terms, just as the landlord and tenant did in this case. This is true, although buildings may be in tumble-down condition, excavations may be unguarded, or the premises may be otherwise uninhabitable or in unsafe condition for use. The only exception is that of property devoted to public use such as wharves, railroads, elevators, public halls, and the like. Negotiations having been fairly concluded, and possession having been given to the tenant, no obligation on the part of the landlord to safeguard or to repair remains unfulfilled. After that no obligation to repair arises during the tenancy, unless the landlord has contracted to do so. This is true, even although the tenant create a nuisance on the premises dangerous to the public. "It is a rule of the common law, applicable here, that 'the occupier, and not the landlord, is bound as between himself and the public so far to keep the premises in repair that they may be safe for the public.'" *De Tarr v. Heim*, 62 Kan. 188, 192, 61 Pac. 689, 690.

The principles just stated govern the present controversy. It is unsound in morals or otherwise contrary to public policy to rest the duty of making and keeping premises fit for occupation and use upon occupation and use, and not upon title, the existing law should be abrogated, and a new set of rules should be adopted. The court does not have before it the result of any social survey of the subject, and it is not perceived that the established usage is so offensive to the sense of justice that the court should anticipate legislation by proper authority, or, if it does, leap at once to the unconditional remedy of downright damages. To ingraft an exception upon the law for this particular case is to recognize the first of a wilderness of single instances. To cistern cases must soon be added cases involving defective railings about steps, stairways, porches, and areas, whereby the tenant's servants are injured. If after the fact of a distressing accident a jury should conclude to find negligence in maintaining some structure or place where the tenant's children invited some friends to play, the landlord must respond in damages. The list is certain to grow until it may be impossible to say what is the rule and what an exception. If the

property law of the state is to be changed, and a general duty is to be imposed upon the landlord to make his premises secure for use by tenants and whomsoever a tenant may invite there, the Legislature should create the obligation, and not the courts.

[2] Instead of being genuinely progressive, the former decision was merely arbitrary, and it is overruled.

The judgment of the district court is reversed, and the cause is remanded, with direction to sustain the demurrer to the plaintiffs' evidence.

SMITH, PORTER, and WEST, JJ., concur. JOHNSTON, C. J., and MASON and BENSON, JJ., dissent.

(94 Kan. 42)

BOAM et al v. COHEN et al. (No. 19188.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. CHATTEL MORTGAGES (§ 38\*)—ABSOLUTE BILL OF SALE—PAROL EVIDENCE.

An instrument in form a bill of unconditional sale of personal property, but intended as security for the payment of debts, is in effect a chattel mortgage, and the true character of the instrument may be shown by parol evidence.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 44; Dec. Dig. § 38.\*]

2. CHATTEL MORTGAGES (§§ 169, 176\*)—CONVERSION BY MORTGAGEE—MEASURE OF DAMAGES.

A bill of sale of a stock of goods and fixtures was given by a firm to one of its creditors, who agreed to dispose of the property, pay the firm debts, and return the surplus, if any. The creditor mingled the goods with his own, sold them, and sold the fixtures without keeping an account of the proceeds, paid some of the firm debts, and then denied liability for other debts and liability to account to the firm. *Held*, the firm had the right to treat the goods and fixtures as converted, and the measure of damages was the market value of the property when converted less the amount of firm debts the mortgagee had discharged.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 302-304, 335, 337-339; Dec. Dig. §§ 169, 176.\*]

3. JURY (§ 13\*)—RIGHT TO JURY TRIAL—PLEADINGS.

The court must determine whether or not a case shall be tried by a jury from the pleadings. In doing so it should disregard mere characterizations and look to the facts stated. In this case the cause was properly submitted to a jury as one for damages for conversion, although the petition described the bill of sale as given for security, as an assignment for the benefit of creditors, and as creating a trust.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 13.\*]

4. TROVER AND CONVERSION (§ 40\*)—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

The evidence examined, and *held* to sustain the verdict.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Reno County.  
Action by Nathan Boam and others against Barnett Cohen and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Fairchild & Lewis, of Hutchinson, for appellants. Carr W. Taylor, of Hutchinson, for appellees.

BURCH, J. The plaintiffs were partners conducting a cleaning, repairing, and tailoring business, and owning a stock of merchandise, show cases, shelving, hat blocks, electric irons, electric fixtures, and other property, classified apart from the stock of merchandise as fixtures. The firm was indebted on account to Barnett Cohen and to a number of other creditors. Cohen had guaranteed the accounts of two of these creditors. After some preliminary negotiations with Cohen, the plaintiffs executed and delivered to Cohen's son, A. R. Cohen, a bill of sale of the stock and fixtures which recited a consideration of \$1 and other valuable considerations and authorized immediate possession of the property to be taken. Barnett Cohen, who was himself a merchant, took possession of the stock of merchandise, removed it to his own store, mingled it with his own goods, and sold it without keeping a separate account of either the proceeds or the expenses of sale. He also took possession of the fixtures and disposed of them. He canceled his own claim and satisfied the creditors whose claims he had guaranteed. The plaintiffs sued the defendants for the value of the property covered by the bill of sale, for an accounting and for other relief. The petition alleged that the bill of sale was made under a verbal agreement that Cohen would take possession of the goods and fixtures, sell them, pay all the plaintiffs' creditors, and if any surplus remained return it to the plaintiffs; and it was alleged that the defendants had refused to carry out the terms of this agreement, had converted the property to their own use, and had refused to account to the plaintiff. The answer alleged that Cohen acquired title to the goods and fixtures by the bill of sale on the consideration that he would satisfy his own claim and the claims which he had guaranteed, which he had done. The petition characterized the transaction as one for the security of debts, as an assignment for the benefit of creditors, and as creating a trust. The answer maintained the theory of an absolute and unconditional sale. The facts were stated, however, as each party understood them, and the court, disregarding characterizations, submitted the cause to a jury as one for damages for misappropriation of chattel securities. The plaintiffs recovered, and the defendants appeal.

[1-3] The defendants objected to oral testimony tending to establish the nature of the disposition of the plaintiffs' property alleged in the petition. It is said that such testimony

defeated a written instrument into which all the negotiations and agreements of the parties merged. If the testimony were true, the instrument, in form a bill of sale, was nothing more and nothing less than a chattel mortgage to secure the plaintiffs' various creditors. A bill of sale absolute in form but intended as security stands on the same footing as a deed of real estate absolute in form but intended as security, and the true character of the transaction may be shown by parol evidence, under the well-known exception to the rule forbidding the impeachment of written instruments. *Butts v. Privett, Sheriff*, 36 Kan. 711, 14 Pac. 247; *Gray v. Delay*, 53 Kan. 177, 35 Pac. 1106. It may be observed that the defendants were obliged to resort to oral testimony regarding the consideration of the bill of sale to present their defense and the testimony on behalf of the plaintiffs went but little beyond the same subject.

The court instructed the jury substantially to the effect that if the claim stated in the answer were true the verdict should be for the defendants; that is, if the agreement were that the defendants should take the property and satisfy the Cohen debt and those debts which Cohen had guaranteed, and that this had been done, the plaintiffs were not entitled to recover. It was conceded that the debts just referred to had been satisfied. On the other hand, the jury were instructed that, if the claim stated in the petition were true, the plaintiffs were entitled to recover the difference between the market value of the property at the date of the transfer, less the amount of the plaintiffs' debts which the defendants had satisfied. The defendants complain of this measure of damages and insist that the plaintiff should be allowed to recover no more than the debts which the defendants had failed to satisfy.

The evidence of both parties was that after the defendants had obtained possession of the property claims other than those for which Barnett Cohen became responsible were presented for payment, and that the defendants denied liability for them and denied liability to account to the plaintiffs. The defendants held the property for a specific purpose and could make no use or disposition of it for any other purpose. Conduct inconsistent with or in denial of the plaintiffs' rights not only amounted to a breach of contract, but also amounted to a breach of faith in accepting and dealing with the security. This being true, the plaintiffs were at liberty to treat the property as converted, and they were damaged to the extent of the value of the property, less whatever debts the defendants had canceled.

[4] The defendants insist that the verdict for \$650 in favor of the plaintiffs is not sustained by the evidence.

The bill of sale was executed and the property was surrendered to the defendants about

May 7, 1913. The plaintiffs showed that their stock of goods invoiced \$1,082.22 on January 1, 1913. Between January 1st and May 7th new goods were put into the store to the amount of \$1,204.44, and goods were sold from the store to the amount of \$663.25. This left goods in the store on the latter date of the book value of \$1,623.33. There was evidence that the goods had a sale value much greater than this book valuation, and that the defendants in fact sold a portion of the goods at a profit of from 25 to 30 per cent. The defendants kept no account of their sales and testified that the goods were sold at a loss. The debts paid by the defendants amounted to \$1,368.93, leaving a surplus of goods over debts, according to the plaintiffs' proof, of \$254.40, or more. There was some proof that the fixtures cost in the neighborhood of \$550. There was other testimony that they were worth considerably more than that sum. The defendants testified that they sold the fixtures for \$111. Assuming that the jury accepted the book value of the goods as the fair market value, they found the value of the fixtures to be \$395.60, or approximately 28 per cent. less than cost. An invoice taken by the defendants, after goods to the amount of \$258 had been returned to a guaranteed creditor, showed goods remaining in the store to the amount of \$1,111.70. The good faith of a portion of this invoice, taken in the absence of the plaintiffs, was questioned. The jury, as they had a right to do, seem to have relied on the testimony favorable to the plaintiffs, and, accepting this testimony as true, it cannot be said that the verdict is unsupported.

The defendants say the petition alleged an assignment for the benefit of creditors, the defendants proceeded on the theory that the action was one for breach of trust, and that the court, disregarding both these theories, submitted the cause to the jury as a simple action for damages for conversion. The plaintiffs could no more make the bill of sale an assignment for the benefit of creditors by declaring it to be such, than the defendants could make it an instrument of unconditional sale by declaring it to be such. The court determined the method of trial from the facts stated in the pleadings. The facts stated in the petition indicated that the bill of sale was intended for security, that the property delivered as security had been converted, and that, notwithstanding the plaintiffs' prayers for other relief, they were entitled to damages. The answer simply gave a different version of the transaction. Therefore the action was in fact one for the recovery of money and a jury was properly called. Civ. Code, § 279 (Gen. St. 1909, § 5873).

Whatever legal theories of the case the parties may have held, the record indicates that they produced all the testimony they had concerning the origin and nature of the

original transaction, the quantity and value of the goods, the disposition made of the goods, and all collateral facts incident to the controversy. The petition was not attacked by motion. No request was made for instructions upon the theory of a trust, or for instructions different from those the court gave. The only objection made to the instructions which were given has been considered. No new or additional evidence was tendered at the hearing of the motion for a new trial, and consequently it is too late to claim prejudice on account of the form of the proceedings. Indeed, the only substantial grievance the defendants have is that the jury leaned not upon their evidence but upon the evidence of the plaintiffs. For such a grievance this court has no remedy.

The judgment of the district court is affirmed. All the Justices concurring.

(93 Kan. 787)

BROWN v. NICHOLS et al. (No. 19107.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 703\*) —  
STREETS—ORDINANCE—VALIDITY.

A city ordinance which, in effect, prohibits one who owns and operates a machine shop from using the streets in bringing and taking traction engines and heavy vehicles to and from his shop, and thereby arbitrarily deprives him of an opportunity to carry on his business, is unreasonable and void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.\*]

2. INJUNCTION (§ 105\*)—RIGHT TO REMEDY—  
CRIMINAL PROCEEDING — INVALID ORDINANCE.

Ordinarily a court will not enjoin the prosecution of a criminal proceeding, but the remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.\*]

Appeal from District Court, Dickinson County.

Injunction by Oscar W. Brown against Walter Nichols and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

David Ritchie, of Salina, for appellant.  
S. S. Smith, of Abilene, for appellees.

JOHNSTON, C. J. In an injunction proceeding, Oscar W. Brown attacked the validity of an ordinance of the city of Abilene which purports to prohibit the driving of "any engine or heavy machinery upon the paved streets of the city of Abilene," and prescribes a fine not exceeding \$50 for its violation. He also asked a recovery of damages for the loss sustained by reason of being deprived of the use of the streets. In his petition he alleged that he was conducting a machine shop in the city which was so situated

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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ed that he is unable to reach the railway stations with engines or heavy machinery, except by passing over paved streets, and that, unless patrons are permitted to use these streets in order to bring in and take from the shop traction engines and other heavy machinery, he will be unable to carry on his business; that his machine shop will be a total loss for the purposes for which it was acquired; and that it has already resulted in damage to him to the extent of \$1,000. There was an allegation that since the passage of the ordinance in June, 1913, the officers of the city had forcibly prevented him from taking machinery from the shop across Third street, and that it is impossible for him to reach the depot of the railways in carrying on his business without crossing that street. A demurrer to his petition was sustained by the trial court, and the main question presented on his appeal is whether the ordinance is so unreasonable as to be invalid.

[1] Power is not expressly conferred on cities of the second class to prohibit the use of the streets for any particular kinds of travel and transportation, but under the general welfare clause it is doubtless within the power of the city to make reasonable regulations as to the use of streets, and thus provide for the safety and convenience of travel and against unnecessary injury to the streets used. It is competent for the city to regulate the weight of loads that shall pass over the paved streets and to prescribe the width of tires of vehicles carrying heavy loads. It has been determined that municipalities may confine the passage of heavily loaded traffic to certain streets and exclude it from others, but the regulation must not be such as will deprive a citizen of access to his home or business house nor from all use of the streets for any of the recognized means of travel. Notes, 31 L. R. A. (N. S.) 682, 45 L. R. A. (N. S.) 1152, and 51 L. R. A. (N. S.) 1203. In *Bogue v. Bennett*, 156 Ind. 478, 60 N. E. 143, 83 Am. St. Rep. 212, it was held that a city ordinance prohibiting the running of traction engines or other vehicles not propelled by animal power over the streets and alleys of a city was unreasonable, and therefore void. In *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750, the validity of an ordinance which provided that teams with loaded wagons should be confined to a certain part of a street was challenged. The court held that a traveler is not entitled to the whole width of a street for his accommodation, but "is entitled to a reasonably safe, convenient, and practicable opportunity for travel and passage." 93 Me. 78, 44 Atl. 120, 46 L. R. A. 750. It was there decided that a regulation restricting the travel of heavily loaded vehicles to a part of the street would, in many cases, be both reasonable and salutary, but that, if the part of the street open to travel for such vehicles was out of repair

or in such a condition as to be impassable for loaded vehicles, it would operate to deprive those who had occasion to use the street of their right to use it for the purpose of travel. It was said that:

"For such a by-law, then, to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose; and the by-law will be valid or invalid, depending upon whether that portion of the way, to which such vehicles are restricted, is or is not reasonably suitable for the purpose." 93 Me. 79, 44 Atl. 120, 46 L. R. A. 750.

The streets are provided for the public in general for purposes of travel and transportation, and the appellant, who is engaged in a legitimate business, is entitled to a reasonable use of the streets in taking traction engines and heavy machinery to and from his shop. Traction and other motor wagons are not illegal vehicles, and an ordinance which deprives him of the use of the streets for such vehicles, in order that he and his patrons may reach his shop, is not reasonable. Undoubtedly a regulating ordinance may be framed under which appellant may use some of the streets or parts of them for the necessary traffic to and from his shop, and under such restrictions as will protect the streets and prevent interference with the rights of others traveling over them. Under the allegations of the petition the ordinance operates, not as a regulation, but as an absolute prohibition, of a recognized use of the public streets. A class of traffic which is legal, and which ordinarily passes over highways, is prohibited, so far as appellant's business is concerned, and he is not only deprived of the use of the streets of the city in conducting a legitimate business, but the result is the destruction of the value of his property for the purposes for which it was acquired. The ordinance is therefore unreasonable, and must be held to be void.

[2] It is next contended that the equitable remedy sought by appellant is not available to him, as the invalidity of the ordinance in question could be presented as a defense in a criminal prosecution for the violation of the ordinance. Ordinarily injunction will not lie to prevent the prosecution of criminal actions, but this proceeding is not brought for that purpose, and in his prayer the appellant does not ask for such relief. He asks for damages resulting to him and his business from the deprivation of the use of the streets, and also asks that the city and its officers be enjoined from interfering with the traffic to and from his business. The proceeding does challenge the validity of the ordinance because the officers, who are preventing him from using the streets leading to his machine shop, justify their action under the ordinance, but it does not appear that any prosecutions have been begun, and the appellant does not ask that prosecutions be enjoined. An exception is made to the rule



invoked by appellee, where the restraint of the criminal prosecution is only incidental to the protection of personal and property rights. *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Dobbins v. Los Angeles*, 195 U. S. 228, 25 Sup. Ct. 18, 49 L. Ed. 169; *Railway Co. v. Conley & Avis*, 67 W. Va. 129, 87 S. E. 613; *Improvement Co. v. City of Bluefield*, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; *City of Atlanta et al. v. Gate City Gas Light Co.*, 71 Ga. 106; *Town of Cuba v. Mississippi Cotton Oil Co. (Eagle Cotton Oil Co.; Meridian Fertilizer Factory)* 150 Ala. 259, 43 South. 706; *City of Austin v. Cemetery Association*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; note, 25 L. R. A. (N. S.) 193.

In this action the appellant is seeking to protect his personal and property rights and to prevent the destruction of his business. The deprivation of which he complains shuts him out from carrying on his business, and he is not required to wait for a prosecution to be commenced nor to provoke an arrest in order to obtain relief from the interference with and destruction of his business. Indeed, the defenses that he might make in possible prosecutions following unsuccessful attempts to conduct his business would not have been an adequate remedy. However, as we have seen, the principal purpose of the action is not the injunction of criminal proceedings.

The decision of the district court sustaining the demurrer to appellant's petition will be reversed, and the cause remanded for further proceedings. All the Justices concur.

(47 Okl. 35)

STATE ex rel. BAUMLE v. DISTRICT COURT of TENTH JUDICIAL DIST. et al. (No. 5424.)

(Supreme Court of Oklahoma. Oct. 13, 1914.  
Rehearing Denied March 2, 1915.)

(*Syllabus by the Court.*)

PROHIBITION (§ 3\*)—RIGHT TO RELIEF—REMEDY AT LAW—APPOINTMENT OF RECEIVER.

Where a receiver is appointed in a cause pending in the district court to take charge of certain property and is also appointed in a cause pending in the superior court to take charge of the same property, the same being courts of co-ordinate jurisdiction, as a motion to vacate the order appointing the receiver in the cause pending in the district court will raise the question whether the court had jurisdiction to appoint the receiver, and, if so, which of the two conflicting jurisdictions first attached, relator, plaintiff in the cause pending in the superior court, had a plain, adequate, and complete remedy at law, and prohibition will not lie to compel the district judge to desist from proceeding in the premises.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-10; Dec. Dig. § 3.\*]

Original proceeding for writ of prohibition by the State, on the relation of Louis Baumle, against the District Court of the

Tenth Judicial District of the State of Oklahoma, sitting in and for Pottawatomie County, Charles B. Wilson, Jr., Judge thereof, and another. Writ denied.

Chas. E. Wells, of Shawnee, for relator.  
T. G. Cutlip and Geo. A. Outcalt, both of Tecumseh, for respondents.

TURNER, J. This is an application for a writ of prohibition. The record discloses that on February 21, 1912, the relator, Louis Baumle, brought suit in the superior court of Pottawatomie county against the Anchor Steam Bottling Works, a corporation, on a certain promissory note executed to him by defendant and to foreclose a chattel mortgage to secure the same; that on the same day he applied for the appointment of a receiver which was, on March 2d, done after notice. On the same day summons was issued, and on February 26, 1912, served on defendant. After answer filed and issue joined by reply, there was trial, and on April 21, 1912, a judgment was rendered and entered in favor of plaintiff for the amount of said note, with interest, and the chattel mortgage was ordered foreclosed and the property sold to satisfy the debt. No supersedeas bond was filed by defendant, and the time given so to do has expired. On the same day said suit was filed Alice McNary, Wm. Felshalb, and S. H. Lester, alleging to sue on behalf of the defendant corporation, Anchor Steam Bottling Works, and for its use and benefit, filed their petition in the district court of said county against W. H. McNary, the relator Louis Baumle, and Albertina Baumle, alleging, among other things, that said corporation was solvent and able to pay its debts, but was being mismanaged by one of its directors and contrary to the wishes of a majority of the board; that said note and chattel mortgage executed and sought to be foreclosed by Louis Baumle, as stated, was fraudulent and void, as was also a certain conveyance to him of certain real estate by said corporation; and prayed for a receiver to take charge of the corporate property and an order restraining the lienholders from interfering with his possession until such time as it might be determined, among other things, whether those instruments were void. On this application, on February 26, 1912, after service of summons on defendants, but before answer and without notice to relator or Albertina Baumle, the court appointed one Fisher receiver, as prayed, who immediately gave bond and took charge of the property covered by relator's chattel mortgage, also the real estate set forth in the bill which, at that time, the corporation was occupying as a tenant of relator. This cause was numbered 5339. Thereafter plaintiffs filed an amended petition in said cause, which the court struck from the files as to

all defendants except McNary, for the reason that the same stated a cause of action as to him only. On the same day a motion was heard, filed by relator, to vacate the appointment of the receiver which was not passed upon, but said Fisher, "receiver heretofore appointed for said corporation, is continued in full force and effect, and the property is ordered continued in the care and custody of the receiver," pursuant to the prayer of the bottling works, which said receiver thereafter qualified and gave bond and continued to remain in possession of relator's property, as stated. On April 16, 1912, relator as plaintiff filed in the superior court of Pottawatomie county another suit, in which he made the Anchor Steam Bottling Works and Alexander Fisher, said receiver, parties defendant, who were brought into court and answered. Trial was had and judgment rendered in favor of relator, in which the court held that the bottling works was estopped to deny the validity of its deed conveying its real estate to relator and its promissory note and chattel mortgage, and that he was entitled to have his title to said real estate quieted, which was done. No supersedeas bond was filed in that case by defendants, and the time to do so has expired.

On April 16, 1912, said Fisher, as receiver, presumably pursuant to the order of court appointing him, brought suit in the district court of Pottawatomie county, the object of which seems to have been to set aside and hold for naught relator's said chattel mortgage. It is sufficient to say of this suit that the same was numbered 5382 and was consolidated with No. 5339 and proceeded as No. 5382; that, after amended petition filed, a demurrer was sustained thereto, whereupon the plaintiff stood upon his demurrer; that his appeal was allowed, no supersedeas bond was required, and nothing further was done to perfect said appeal. On July 24, 1913, came relator, Louis Baumle, and, in the causes thus consolidated and numbered 5382, filed a motion to require said Fisher, as receiver therein, to turn over to the sheriff of said county the property in his possession covered by relator's chattel mortgage, in order that the judgment of the superior court might be executed, and also to require the said receiver to deliver possession of said real estate pursuant to the judgment of the superior court aforesaid, clearing his title thereto. This motion was overruled on the ground that the cause had been dismissed as to said Baumle. It would be unprofitable to recite further from the record. It is sufficient to say that when, on July 26, 1913, Alice McNary, one of the parties plaintiff in the first suit (No. 5339) filed in the district court her petition against the Anchor Steam Bottling Works, W. H. McNary, Louis Baumle, and Albertina Baumle, the object of which and suit No. 5339 were identical, and prayed that said Fisher be reappointed by the court

as receiver of the property already in his possession as receiver, until the controversy between the stockholders of the bottling works could be settled, this suit was brought, and it is charged that, should the court reappoint him as prayed, it would exceed its jurisdiction, as it had already done in appointing him at all.

It is urged by relator that he is entitled to the writ because, he says, among other things, the bottling works was not a part to cause No. 5339 in the district court, and, besides, there is no allegation in the petition which could authorize a court of equity to appoint a receiver under our statute, and for that and various other reasons, he says, said court was without jurisdiction to appoint Fisher as receiver. On the other hand, it is contended that if for any reason said court was without jurisdiction, or if for any reason said receiver should not have been appointed, relator could, in the consolidated cause, have raised the point by a motion to vacate the order appointing him and, in case of an adverse ruling, could have appealed to this court, or, in other words, that a motion to vacate was the proper procedure, and hence the relator had a plain, adequate, and complete remedy at law. The point is well taken. The record discloses this to be a conflict of jurisdiction between the superior court and the district court of Pottawatomie county, two courts of co-ordinate jurisdiction. It is well settled that if two actions between the same parties, involving the same subject-matter, are brought in two such courts, the court that first acquires jurisdiction shall dispose of the case. In order to raise this question, Baumle, or the receiver appointed in the case in the superior court to foreclose his chattel mortgage, should have gone into the district court in case No. 5339, and moved the court to vacate the order appointing the receiver in that case.

In *McCarthy v. Peake*, 9 Abb. Prac. (N. Y.) 164, the parties were partners. Peake, the defendant in the case, declared the partnership dissolved, and, claiming the right under the copartnership of closing up the affairs of the firm on September 14th went into the New York superior court and brought suit against McCarthy for the purpose of restraining him from interfering with the partnership property. On the same day he obtained a temporary injunction, which together with summons was served on McCarthy the next day about 8 o'clock in the afternoon. On that day McCarthy commenced action in the case under comment against Peake for the same purpose and, without notice, obtained an injunction and an order for a receiver of the partnership property. Thereupon the receiver took possession, and the same day, about 8 o'clock, the injunction and order appointing the receiver was served on defendant Peake. In the latter action Peake came into court and moved for an

order vacating the order of injunction and the order appointing a receiver and to stay plaintiff's action. The motion was sustained and the receiver discharged; the court holding, in effect, that his appointment was not void, although the court whose jurisdiction Peake had invoked had first acquired jurisdiction, and granted the motion on condition that Peake pay the receiver's expenses and compensation for services rendered. In passing the court said:

"The subject of the action, viz., the partnership effects, and the parties, viz., the two partners, are the same in both actions, and, under the decisions which have repeatedly been made in this court and the superior court, the court which first acquires jurisdiction of the case shall dispose of the whole matter; and, after such jurisdiction is obtained, any other court in which subsequent proceedings are taken for the same purpose should, as well from feeling of amity, as from a desire to avoid a conflict of jurisdiction, restrain the further prosecution of the second action."

In *Northwestern Iron Co. v. Land, etc.*, Co., 92 Wis. 487, 66 N. W. 515, there was a sequestration of the property of an insolvent corporation and the appointment of a receiver. This was held to be an equitable levy and subjected the property to the control of the court appointing him, although there was no manual seizure by its officers. It was further held that the subsequent appointment of a receiver for the property by another court of co-ordinate jurisdiction, while unauthorized and irregular, was not void, and that the appointment should have been vacated upon motion therefor upon proper showing. The court said:

"In connection with the application of this rule governing cases of conflicting jurisdiction, the term 'jurisdiction' is not used in its absolute sense. It is a rule of comity and discretion. It does not operate so radically as to render the orders and proceedings of the superior court of Milwaukee county necessarily mere nullities. Its jurisdiction would have been perfect and unquestioned, but that it was anticipated and prevented by an earlier jurisdiction. It had jurisdiction in a general sense, both of the parties and the subject-matter. Its orders are irregular, because of the circumstances unauthorized—not void. The receiver should be deemed a receiver de facto at least. His lawful acts and contracts are to be recognized as binding in the further administration of the assets, and he should receive just compensation for his services."

And reversed the cause and remanded it with directions to revoke the order of the superior court of Milwaukee county appointing the receiver complained of. See, also, *Gaylord v. Ft. W., M. & C. Ry. Co.*, 6 Biss. 286, Fed. Cas. No. 5284; *People, etc., v. Central City Bank*, 53 Barb. (N. Y.) 412; 23 Am. & Eng. Enc. of Law, p. 1112, and cases cited.

We are therefore of opinion that inasmuch as the district court had a right, in considering such motion, to pass upon the question of its jurisdiction to appoint Fisher as receiver, and also upon the question of which

of the two conflicting jurisdictions first attached and should therefore prevail in the matter of the appointment of a receiver, relator thereby had a plain, adequate, and complete remedy at law, and that a writ of prohibition commanding the judge of the district court to desist, as prayed, should not issue. It is so ordered. All the Justices concur.

(93 Kan. 714)

MARTIN v. MARTIN. (No. 19087.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 4\*)—WHAT LAW GOVERNS—REAL ESTATE.

The laws of Kansas determine the descent and distribution of real estate situated in this state.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 13; Dec. Dig. § 4.\*]

2. WILLS (§ 435\*)—CONSTRUCTION—ENFORCEMENT.

When there is no ambiguity or uncertainty in the language used in the making of a will, no construction of the will is necessary, and it will be enforced in accordance with the provisions thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 946; Dec. Dig. § 435.\*]

Appeal from District Court, Chautauqua County.

Action by Loyal M. Martin against Loyal J. Martin, as executor of the last will and testament of D. D. Martin, deceased. From judgment for defendant, plaintiff appeals. Affirmed.

G. A. Chappell, of Newkirk, for appellant. J. A. Ferrell and W. H. Sprowl, both of Sedan, for appellee.

SMITH, J. One D. D. Martin, of Newkirk, Okl., on October 12, 1909, executed his will at that place, and it was duly attested by subscribing witnesses. He died February 5, 1911.

The will, omitting the certification, reads as follows:

"Newkirk, Okla., Oct. 12th, 1909.

"I, David D. Martin, of the city of Newkirk, county of Kay, state of Oklahoma, do hereby make, publish and declare this my last will and testament in the manner and form following:

"First. I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

"Second. I give, devise and bequeath unto my wife, Caroline H. Martin, should she survive me, a one-third ( $\frac{1}{3}$ ) part of all property, both real and personal, of which I may die possessed.

"Third. All the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situate, of which I may die seized or possess, or to which I may be entitled at the time of my decease, I give, devise and bequeath unto my three children, Watson J. S. Martin, of Chicago, Illinois, Evaline B. Rouse of Newkirk, Oklahoma, and Loyal J. Martin, of Tulsa, Oklahoma, share and share alike, and should my wife, Caroline H. Martin, die before me, then all of the property of which I may die seized or possessed, both real and personal, to be di-

vided equally between my three living children, Watson J. S. Martin, Evaline B. Rouse and Loyal J. Martin, share and share alike; and should any of my said three children die before me, the share which they would receive under this will to go to the lawful issue of said child or children so dying.

"Fifth. I name, constitute and appoint my son, Loyal J. Martin, of Tulsa, Oklahoma, executor of this my last will and testament.

"In witness whereof, I have hereunto subscribed my name and affixed my seal, at Newkirk, Kay county, Oklahoma, in the presence of J. F. King and W. S. Cline, whom I have requested to become attesting witnesses thereto. "D. D. Martin."

George Martin, the father of the appellant and son of the testator, died in March preceding the making of the will, and it will be observed that neither George Martin nor the appellant was mentioned in the will, but that all of the property of the testator was devised to the wife and other children of the testator by the terms of the will.

On March 25, 1911, a hearing was had in the probate court of Kay county, Okl., on the petition of Loyal J. Martin to have the will admitted to probate to which the appellant, Loyal M. Martin, had filed objections. At the hearing, however, the appellant made no appearance. The order of the court was as follows:

"\* \* \* That the instrument propounded herein for probate was duly executed by the decedent, and that, at the time of the execution thereof, said testator was of full age and of sound mind and memory and was not acting under duress, menace, fraud, or undue influence, and that said will was executed in all particulars as required by law. And the said Loyal M. Martin not having offered any evidence in support of his objections filed herein, on the 11th day of March, 1911, it is by the court ordered that said objections so filed by Loyal M. Martin be, and the same are hereby, overruled, except as to those matters contained therein which were, by stipulations filed herein, \* \* \* agreed by the parties herein to be true."

It was further ordered that the will be admitted to probate, and that the same is established as a valid will, passing both real and personal estate, in such manner as may be hereafter defined by the court's decree of distribution. It was also ordered that Loyal J. Martin, named as executor of the will, be appointed executor by the court. An order was made for bond, which was given.

It appears that a petition of appellant in the probate court of Kay county, Okl., for distribution of the estate, and that it be adjudged that he was entitled to one-sixth thereof, was denied by that court. The case was then taken to the district court of Kay county, wherein the following findings were made on January 9, 1913:

"The court, after being fully advised in the premises, and the evidence having been heretofore introduced in this case, finds that D. D. Martin departed this life on the 5th day of February, 1911; that George Martin was a son of D. D. Martin and departed this life on the 23d day of March, 1909, leaving Loyal M. Martin as his only issue, and as such is a grandchild of D. D. Martin, deceased, and entitled to one-sixth of the estate of D. D. Martin, deceased, as under the law of the state of

Oklahoma. The court further finds that D. D. Martin, deceased, in making his will, did not mention the petitioner, Loyal M. Martin, in said will, and the court further finds as a fact, from the evidence in this case, that he unintentionally omitted him, and the court further finds, under the law and evidence in this case, that the petitioner, Loyal M. Martin, is entitled to one-sixth of the estate of D. D. Martin, deceased."

The appellant was adjudged and decreed to be entitled to one-sixth of the estate of D. D. Martin, deceased. The decision was based upon the following statute of Oklahoma.

"Provisions for children unintentionally omitted. When any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section. Revised Laws of Oklahoma 1910, § 8372."

Thereafter the executor of the will filed a petition for the probating thereof as a foreign will in the probate court of Chautauqua county, Kan. The deceased at his death left real estate in Kay county, Okl., and also 240 acres in Chautauqua county, Kan. The will was admitted to probate in Chautauqua county, and the appellant filed his petition therein to share in the distribution of the estate in Kansas. The facts were stipulated as follows:

"\* \* \* D. D. Martin, departed this life on the 5th day of February, 1911; that his son George Martin, departed this life on the 23d day of March, 1909, leaving Loyal M. Martin, as his only child, and that the deceased, D. D. Martin, both at the time of making and publishing his will and at the time of his death, was domiciled in the county of Kay and state of Oklahoma."

On the hearing of the petition, it was denied by the probate court of Chautauqua county, an appeal was then taken to the district court of that county, where the petition was also denied, and the case is brought here for review.

[1, 2] It is contended by appellant that the will has been construed by a court of competent jurisdiction and judgment awarded thereon in Oklahoma, which state was the domicile of the testator at the time of his death and when the will was made; that the courts of this state should adopt and follow such construction.

The language of the will is not ambiguous, but is plain, and no construction thereof is necessary. The only question for consideration here is whether the district court should have determined the case in accordance with the law of the domicile of the testator or by the law of Kansas.

In the recent Case of McLean, 92 Kan. 326, 140 Pac. 847, it was said:

"The rights of the parties depend, first, on whether the laws of Kansas or of Kentucky or Oklahoma are to be applied. It is believed to be a universal rule that the descent of real property is governed by the law of the state or nation within which it is situated. 14 Cyc. 21. In accordance with the general rule, we hold

that the law of Kansas determines the descent of the property in dispute, and that it is entirely immaterial what the law of Kentucky or Oklahoma may be."

It is also said in the syllabus in the same case:

"Upon the death of the owner, the descent of his real property situated in this state is governed solely by chapter 33 of the General Statutes of 1909."

In chapter 33 of the General Statutes of 1909, 2935-2967, the provisions seem to refer to the distribution of property where no will of the deceased has been probated. The right, however, of disposing of property by will is, of course, fully recognized in this state, as provided in section 9776 of the General Statutes of 1909.

There is no law in this state for the emendation or correction of a will as there is in Oklahoma upon which the decision of the district court of Kay county, Okl., was based. No contest of the will was instituted, and the effect of the judgment is that the land in this state descends to the beneficiaries named therein.

We find no error in the decision of the district court, and the judgment is affirmed. All the Justices concur.

(93 Kan. 769)

**BERNER v. WHITTELSEY MERCANTILE CO. et al.** (No. 19147.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**RELEASE (§ 34\*)—CLAIM FOR PERSONAL INJURY—RIGHT TO SUE FOR DEATH.**

Where the plaintiff dies during the pendency of an action for personal injury, and a revivor is had in the name of an administrator, who accepts a payment in full satisfaction of all claims, no further recovery can be had for the benefit of the next of kin, upon the theory that the death was due to the injury which was the basis of the original action.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 82; Dec. Dig. § 34.\*]

Appeal from District Court, Shawnee County.

Action by Charles L. Berner, administrator, against the Whittelsey Mercantile Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. I. Jamison, of Topeka, for appellant.  
Matt Campbell, of Topeka, for appellees.

MASON, J. Martha L. Schmidt brought an action against several defendants for injuries caused by the bite of a dog. While the case was pending the plaintiff died, and the action was revived in the name of her administrator. The matter was then settled by the defendants' paying \$1,000, in consideration of which the administrator executed a release in these words:

"Before the completion of the trial of the above-entitled action I agree with said defendants, with the consent of the probate court, to accept the sum of \$1,000, in full of all dam-

ages claimed in said action and to dismiss the same at their costs. And thereupon I dismissed said action with prejudice, and hereby acknowledge the receipt from said defendants of said sum of \$1,000, which I accept as payment in full of all claims for damages against said defendants, or any of them, this 9th day of March, 1911."

Thereafter the administrator began a new action against the same defendants, for the benefit of the next of kin, alleging that the death of Martha L. Schmidt resulted from the effects of the dog's bite. A demurrer to the evidence was sustained, upon the ground that the proceedings already referred to constituted a bar. The plaintiff appeals. Our statute provides that:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission." Civ. Code, § 419 (Gen. St. 1909, § 6014).

By the great weight of authority an action cannot be maintained under such a statute, where the injured person in his lifetime has made a settlement and released his claim for the loss occasioned to him. Such is the law in this state. The conflict in the cases is noted, and the reasons for the rule stated, in *Sewell v. Railway Co.*, 78 Kan. 1, 11-16, 96 Pac. 1007. See, also, note, 27 L. R. A. (N. S.) 176; note, 1 Ann. Cas. 232; 1 C. J. 526; *Perry v. P., B. & W. R. R.*, 1 Boyce (Del.) 399, 77 Atl. 725; *Mooney v. City of Chicago*, 239 Ill. 414, 88 N. E. 194; *Melitch v. United Rwy. & E. Co.*, 121 Md. 457, 88 Atl. 229.

Upon the death of Mrs. Schmidt her cause of action survived, and could be prosecuted by the administrator (Civ. Code, § 417; Gen. St. 1909, § 6012), unless her death was the result of the bite of the dog, in which case no action could be maintained, except under the death claim statute (*City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Martin v. Railway Co.*, 58 Kan. 475, 49 Pac. 605). Inasmuch as the administrator elected to prosecute the original action—a course open to him only if the death was not due to the bite—and received a substantial sum on that theory, he cannot be permitted to assert the contrary and so obtain a second recovery. This result is a necessary consequence of the view that no cause of action for the benefit of the next of kin can exist where the claim of the injured person has been released or satisfied. In a situation entirely similar to that here presented it was said:

"If \* \* \* by settlement or recovery in or as of his lifetime no right of action existed or remained in the intestate, none survived to his executor or administrator. So, also, if by settlement or recovery by the intestate in or as of his lifetime no liability rested upon the wrongdoer at his decease, none survived his death against the wrongdoer. Although such recovery should be by an executor or administrator in a suit commenced by the intestate, or com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

menced by such executor or administrator, if the recovery be in the right of the intestate while living, such recovery, in legal effect, would antedate the death of the intestate, exhaust his right of action, and nothing would remain to survive for a subsequent action. It would also exhaust the liability of the wrongdoer, and no liability would remain to be enforced in a subsequent suit." *James Legg, Jr., Adm'r, v. Henry S. Britton*, 64 Vt. 652, 658, 24 Atl. 1016, 1017.

See, also, *McGahey v. Nassau Electric R. Co.*, 51 App. Div. 281, 64 N. Y. Supp. 965, affirmed in 166 N. Y. 617, 59 N. E. 1126.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 671)

**WHITELEY et al. v. WATSON et al.†**  
(No. 18891.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**1. TRUSTS (§ 44\*)—TRUST DEED—ACTION TO SET ASIDE—FRAUD AND UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.**

In this action commenced by heirs at law to set aside a trust deed made by their ancestor for the benefit of other heirs and their children, on the ground of undue influence and fraudulent conduct of the grantee in obtaining the deed, and upon the ground also that it had never been delivered, it is held, that the findings of the district court upon these issues are sustained by competent evidence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

**2. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Objections to the admissibility of certain evidence are considered and found to be immaterial because the findings of fact are supported by competent evidence, aside from the testimony objected to which does not appear to have prejudicially affected the substantial rights of the parties objecting thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

**3. COMPROMISE AND SETTLEMENT (§ 4\*)—STIPULATION—VALIDITY.**

The ruling upon a stipulation for settlement, made upon certain conditions not fulfilled, is considered and approved.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 7-9; Dec. Dig. § 4.\*]

Appeal from District Court, Leavenworth County.

Action by William A. Whiteley and others against Gertie Watson and others. From judgment for defendants, plaintiffs appeal. Affirmed.

Lathrop, Morrow, Fox & Moore, of Kansas City, Mo., and M. N. McNaughton, of Leavenworth, for appellants. McCune, Harding, Brown & Murphy, of Kansas City, Mo., Crane & Woodburn Bros., of Holton, and Platt & Marks and Spencer Harris, all of Kansas City, Mo., for appellees.

**BENSON, J.** This is an action to set aside a conveyance of 815 acres of land in Leavenworth county, made by Abner Whiteley to

his granddaughter Gertie Watson, in trust to pay the net annual income to the grantor during his life, then to herself and her brother George in equal shares during their respective lives, upon the death of either, his or her share of the income to be paid to the children of the one deceased, and upon the death of both the property to be deeded by the successor in trust to their children.

The plaintiffs are William A. Whiteley, a brother, and Goldie Cole, a sister, of Gertie Watson and George Whitely, joined with the Convention City Investment Company, which claims an interest under William and Goldie. The action is based upon two grounds alleged in the petition, viz., fraudulent conduct and undue influence of Gertie Watson in procuring the execution of the deed, and the failure of the grantor to deliver it. A like trust deed of the same date, having the same parties, conveying 800 acres of land in Platte county, Mo., is the subject of a similar action in that state. Both deeds are dated February 25, 1907.

[1] The evidence is very voluminous, and covers many transactions, some bearing only remotely upon the questions to be decided. Four abstracts—two by each of the parties—are presented, comprising over 840 printed pages. Much of the evidence is repeated in lengthy briefs and supplemental briefs. The issues, however, are simple, viz., Was the deed procured through fraud? and was it delivered? The district court found against the plaintiffs upon both questions; our duty is to determine whether these findings are sustained by competent evidence.

To show undue influence, evidence was allowed of a trust deed made by Abner Whiteley to the same granddaughter in the year 1895, conveying 700 acres of land in Carroll county, Mo., and subsequent transactions extending over several years. Mr. Whiteley, the ancestor, was born in the year 1816. He was successful in the accumulation of property. He had two sons, Bennett and Franklin, and a daughter, Mary, now Mrs. Snyder. Bennett died in the year 1893, having conveyed the land in Carroll county, Mo., which had previously belonged to him, to his father. He was ill with tuberculosis for some time before his death, which caused him to live alone for a time in a cabin near the western boundary of this state, where he died, attended at the time only by his daughter Gertie, then less than 20 years of age and unmarried. The evidence tends to show that Bennett and his wife had not lived happily together for some time before his death. Besides his widow, he left his sons, George and William, and his daughters, Gertie and Goldie, then seven years of age, his only heirs. Abner Whiteley conveyed the Carroll county land to Gertie, who was then Mrs. Watson, in trust for the benefit of all of Bennett's children during their lives, with remainder to their children. Gertie appears

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied March 12, 1915.

to have been capable and energetic, and her grandfather had confidence in her business ability and integrity. Some friction ensued between the brothers and Goldie and Mrs. Watson concerning the trust estate, but she continued to execute the trust under the deed, and its validity is not drawn in question. Mr. Whiteley, who at that time was vigorous and possessed of great business capacity, counseled freely with Mrs. Watson concerning the trust estate, visiting the property two or three times a year, usually stopping with her. He lived at different places with his children, in Leavenworth and in Platte and Jackson counties, Mo., but not with Mrs. Watson until the last year of his life. In the year 1902 he purchased the land in controversy in this action, and for some years before that time had owned the Platte county land. He also owned a section of land in Wyandotte county and considerable land in California. Beside the conveyance in trust, assailed in this action, Abner Whiteley conveyed his land in California to his daughter, Mrs. Snyder, as her prospective share, and the section in Wyandotte county to C. W. Babcock in trust for the benefit of the children of his deceased son, Franklin, to have the net income during minority and the fee when the youngest reaches majority. William and Goldie, the two of Bennett's children not provided for in the final disposition of the grandfather's land made under the trust deeds to the Leavenworth and Platte county lands, contend that they were excluded through the malign influence and fraud of their sister, Mrs. Watson, while her contention is that the deeds were the product of his own free, voluntary, and deliberate purpose. Evidence was given in support of both theories, covering much family history and many details of individual conduct, which it is useless to review, since the testimony is conflicting and the findings of the trial court determine the facts. The plaintiffs, however, insist that notwithstanding this elementary rule, the undue influence of Mrs. Watson is established by the application of well-settled principles of law to one or more of the findings of fact. The findings which it is deemed necessary to consider in determining this contention are:

"(5) The court finds that at the time of the date of the deed in issue, to wit, February 25, 1907, and at all times prior thereto, and at all times thereafter, up to the time of his last illness, Abner Whiteley was a man of strong mind and will power and unusual business capacity, and that from the time of the death of his son Bennett Whiteley in 1893, he managed and controlled all of his business affairs without the advice of any one, and that with the exception of the period of time from the death of his son Bennett, in 1893, until April 4, 1895, during which time Gertie Watson acted as his agent in the renting of the Carroll county farm, afterwards deeded to her in trust, Abner Whiteley, actively and alone, managed and controlled and attended to all business affairs connected with the running of all his farm lands, and personally attended to all his business affairs of every kind, and that he was not dependent up-

on Gertie Watson for advice as to the control or management of his property.

"(6) Abner Whiteley died aged 92 years and about 5 months, and that on February 25, 1907, and for several years prior thereto, and at all times thereafter up to his death, Abner Whiteley was feeble in body; his eyesight impaired by reason of old age; his hearing defective; he was afflicted with a bowel trouble that at times prevented the control of his bowels; and that subsequent to February 25, 1907, and prior to June 1, 1907, he met with an accident that crippled him and made it difficult for him to get about from that time to the date of his death.

"(7) On the 25th day of February, 1907, and for several years prior thereto, and from said date until the death of Abner Whiteley, there existed between the said Gertie Watson and the said Abner Whiteley a relation of friendship and confidence, but that the character of that relation of friendship and confidence was not such a relation of confidence and trust such as the law presumes and from which the court should find in this case that the deed of trust in question to the Leavenworth county land, dated February 25, 1907, and set out in finding two hereof, was signed and acknowledged, and that the said Abner Whiteley was induced to sign and acknowledge said deed in question through and on account of the undue influence of Gertie Watson.

"(8) Abner Whiteley never lived with defendant Gertie Watson prior to June 1, 1907, and that defendant Gertie Watson never lived in the same house or in the same city with Abner Whiteley, prior to June 1, 1907.

"(9) \* \* \* Gertie Watson only visited Abner Whiteley once from the time of the death of her father up to the time of her moving to Kansas City, Mo., in 1906, and that she only visited him after coming to Kansas City and prior to his coming to live with her on June 1, 1907, three or four times. That Abner Whiteley only visited at the home of defendant Gertie Watson in Carroll county, Mo., two or three times a year. That he only visited at her home in Kansas City, Mo., after 1906, and prior to June 1, 1907, except at infrequent intervals when on his way to the Babcock farm.

"(10) Gertie Watson was named by Abner Whiteley as trustee in the Carroll county deed, and in the Leavenworth county deed in question, without any solicitation on her part and against her own wishes.

"(11) Abner Whiteley, at various times and to various persons, stated prior to February 25, 1907, that he intended to deed the Havens or High Prairie farm (being the farm in question) to Gertie Watson as trustee for herself and George Whiteley, and their children.

"(12) The names of Goldie Cole and William A. Whiteley were not in the deed in question, and that Abner Whiteley, for several years prior to February 25, 1907, had intended to disinherit Goldie Cole and William A. Whiteley, on account of their own actions, and that his decision to omit their names as beneficiaries and grantees in the deed in question was occasioned by their own misconduct, and that Abner Whiteley himself, of his own knowledge, knew of this misconduct on their part, and that he was not induced to cut them out from the participation in this property in question by reason of any statements or influence of defendant Gertie Watson, and that the omission of their names from the deed in question was not occasioned by any undue influence of Gertie Watson.

"(13) Abner Whiteley, at the time of the execution of said deed in question, was of sufficient mental capacity to make a deed, and that he did, on February 25, 1907, execute and deliver said deed in question to the Leavenworth county land to Gertie Watson, defendant therein, and at the time of so doing was acting upon his own volition, and did not do so by reason of any undue or improper influence exercised by defendant, Gertie Watson, upon him."

In addition to the foregoing findings on the particular questions of undue influence and failure of delivery, the district court in express terms found all the issues in favor of Mrs. Watson. One of the conclusions of law is:

"That the evidence in this case of the relation between Abner Whiteley and Gertie Watson is not sufficient to raise a presumption that the execution or delivery of the deed in question was procured by the exercise of undue influence of Gertie Watson over Abner Whiteley."

The particular contention of the plaintiffs above referred to concerning these findings is that, upon the relation of friendship and confidence expressly found by the court, a prima facie case of undue influence was established, and that the conclusion to the contrary evinces a misapprehension of the law governing the case. If it should be conceded that a prima facie case is shown by that finding standing alone, it is rebutted by other findings copied above. It cannot be disputed that this is the inevitable result of all the facts found by the court when considered together, as they must be. It is not permissible to make one finding alone the ground for reversing a judgment disregarding all others.

The question of delivery will now be considered. Upon this issue the district court found:

"That on or about the 25th day of February, 1907, Abner Whiteley, without any undue influence of Gertie Watson, had the deed to the Leavenworth county land in question, as set out in finding 2, prepared; that on said February 25, 1907, Abner Whiteley signed and acknowledged the same and caused it to be delivered to the defendant Gertie Watson. \* \* \*"

"After the date of the execution of the deed in question, to wit, February 25, 1907, Abner Whiteley frequently stated to various persons that he had deeded the Havens or High Prairie farm to Gertie Watson as trustee for herself and George and their children, and that he had delivered such deed to defendant Gertie Watson, and that he continued to make such statements up to the time of his death. \* \* \*"

"The deed in question in this case, heretofore set out in the finding No. 2 hereof as the Leavenworth county deed, was duly signed, acknowledged, and delivered by Abner Whiteley to defendant Gertie Watson prior to his death, and that he was not induced so to do by reason of any improper or undue influence of said defendant Gertie Watson."

It appears, therefore, that the court not only found that the deed had been delivered, but also found that the grantor had stated that he had delivered it, continuing to make such statements at different times until his death. The plaintiffs insist that these repeated findings are not supported by the evidence. But, searching through the many voluminous abstracts, evidence appears of repeated statements of the grantor that he had deeded the property in trust to Gertie, that she had the deeds (referring to both the Leavenworth and Platte county deeds), and the testimony of two witnesses at least that he had said that he had delivered the deeds to her. One witness testified that Mr. Whiteley told him

that he had the attorney (naming him) who drew the deeds deliver them in his presence to Mrs. Watson. She testified that she received them at that time from the attorney so named and kept them in her possession all the time until her grandfather died. They were found in her possession when he died. Upon this and other evidence the finding of delivery must be sustained.

[2] Objections to testimony will be briefly considered. The plaintiffs offered testimony tending to show that George Whiteley and his wife called at Mrs. Watson's home a little before their grandfather's death, and asked to see the deed in question and the Platte county deed, and that she produced them by going first to a dresser and then to a closet and bringing them concealed, by throwing her apron over them as she passed near where her grandfather was sitting. In rebuttal Mrs. Watson's attention was called to this testimony, and she testified, in substance, that she took the deeds from a cupboard in the same room and showed them to her brother and sister making no effort at concealment. She was then asked whether her grandfather ever saw the deeds in her possession. An objection was made that an answer would "bring out transactions with a deceased person and would be a conclusion." The objection being overruled, she answered in the affirmative.

Mr. Babcock, trustee in the deed of the Jackson county lands for the benefit of Franklin Whiteley's children, was allowed to testify, over the plaintiff's objection, to a conversation with Abner Whiteley relating to the delivery of the deed in question. The objection was based upon the alleged incompetency of the witness under the statute, excluding conversations by a party in certain cases with a person since deceased. Arthur Watson, a defendant, a son of Mrs. Watson, the trustee, who will be entitled to a share in the land on the death of his mother and his uncle George, was permitted, over the same objection, to testify to a conversation in which Abner Whiteley told him, using the witness' language, "that he was leaving the deeds in care of my mother, and that it was to be ours at her death, and at my uncle's death his children was to receive his part." Objection on the same ground was made to the testimony of Mr. Watson, husband of the trustee. It should be observed that he does not have any interest in the property except an inchoate interest in one-half of the net rents and profits to be paid to his wife during her lifetime. The fee, it will be remembered, will vest in her children and William's children at her death, but not in him or his wife.

Without discussing the question whether the testimony, or any part of it, to which the objections were made should have been excluded, it is sufficient to say that there was ample evidence upon the matters to which



it related to sustain every finding it may have tended to prove, and its admission was therefore immaterial. The rule is settled in this jurisdiction that:

"The admission of incompetent evidence in a trial by the court where there is competent evidence to support the findings does not afford ground for reversal unless prejudice is affirmatively shown." *Gordon v. Gordon*, 92 Kan. 730, 142 Pac. 242.

See, also, Civil Code, § 581 (Gen. St. 1909, § 6176).

Some objection is made to the exclusion of testimony of a witness offered in rebuttal. The witness was an attorney for one of the plaintiffs, and had already been examined at length at different times when previously on the stand. The trial had been prolonged, the evidence sought does not appear to have been very important, and the court exercised a just discretion in declining to hear it.

[3] Pending an action between the same parties to set aside the trust deed to the Platte county, Mo., lands, a stipulation for settlement of both cases was signed by the attorneys for the adult parties. The stipulation provided that it was made upon condition that the heirs of Franklin Whiteley should agree to its terms within 60 days, and if not so agreed to, the stipulation should be void. That action was continued to make Franklin Whiteley's heirs (who are minors) parties to the action as their interests would be affected by the proposed settlement. This stipulation having been pleaded by the plaintiffs, the district court found that two minor defendants already impleaded were necessary parties to this action, whom the stipulation did not bind or purport to bind, and also that the action had been dismissed as to the heirs of Franklin Whiteley, which made it impossible to carry the stipulation into effect. This ruling is complained of, especially by the Convention City Investment Company, which claims an interest as grantee of George Whiteley and Goldie Cole, its coplaintiffs, but the complaint is without merit. No discussion of the question seems to be necessary.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 638)

SPADRA-CLARKSVILLE COAL CO. v.  
KANSAS ZINC CO. (No. 18669.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 579\*)—TRANSFER OF PROPERTY—DEBTS—LIABILITY OF NEW CORPORATION.

A manufacturing corporation, without having issued any shares of its authorized capital stock, gave a mortgage on all of its property to secure an issue of bonds, with a provision that, upon default in the payment of interest, the bondholders were authorized to take all the mortgaged property into their possession through the trustee, and operate and manage the business and property as a going concern, for the

purpose of preserving it as security. The company defaulted on its payments, and at the request of a majority of the bondholders the trustee took possession of all the property and business, making one of the principal bondholders its agent, and the business was continued for more than two years by the bondholders in the name of the mortgagor. Thereafter, at the request of the bondholders the trustee foreclosed the mortgage, and the property was sold under the decree and purchased by the bondholders, who thereupon organized a new company as a holding company to take the title to the property, and the sheriff's deeds were made conveying all the property to the new company, none of the authorized capital stock of which was issued. No consideration was paid for the purchase of the property by the new company, except the interest its incorporators owned as bondholders. In an action by plaintiff to recover for material and supplies furnished to the bondholders while in possession, and which were used for the purpose of preserving the property as security for the bonds, it is held that it would constitute a fraud on the rights of the plaintiff to permit the new company to acquire the title to the property freed from such obligations; that the circumstances surrounding the creation of the new corporation and its succession to the business and property of the old show that there was, in fact, no purchase, but merely a change in the capacity in which the business was conducted. The same persons who conducted the business as bondholders in possession as mortgagees, changed from partners or bondholders to incorporators of the new company, and therefore plaintiff was entitled to judgment against the new company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. § 579.\*]

2. NEW TRIAL (§§ 125, 130\*)—APPEAL AND ERROR—PRESENTATION BELOW—RULINGS ON EVIDENCE—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS—SUFFICIENCY.

In a motion for a new trial, it is sufficient to set forth the grounds in the language of the statute; and, where such a motion recites "erroneous rulings" as one of its grounds, appellant can have a review of any ruling made on the trial respecting the admission of evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 254, 255, 257-262; Dec. Dig. §§ 125, 130.\*]

Appeal from District Court, Allen County.

Action by the Spadra-Clarksville Coal Company against the Kansas Zinc Company. From judgment for plaintiff, defendant appeals. Modified.

Campbell & Goshorn, of Iola, for appellant. Ewing, Gard & Gard, of Iola, and E. D. Mikesell, of Fredonia, for appellee.

PORTER, J. In order better to understand the present case it will be necessary to refer to some facts involved in certain previous litigation.

[1] Many of the facts are recited in detail in the case of *Trust Co. v. Zinc Co.*, 86 Kan. 860, 122 Pac. 875. In that case the Commonwealth Trust Company as trustee foreclosed a mortgage or deed of trust, given by the Cockerill Zinc Company to secure an issue of 1,200 bonds, each for the face value of \$1,000. By the terms of the mortgage the maturity of the bonds was to be accelerated by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the default in interest upon the election of the majority of the bondholders, and there was a provision that upon demand of the trustee the mortgagor should surrender possession, and the trustee or such agents as it should appoint might take possession of all the property, which included three zinc smelting plants and other property located in Allen county and in Wilson county, and also the company's books and accounts. It also provided that the trustee or agent should operate and manage the plants, carry on the business, and make all needed repairs, alterations, additions, and improvements, and out of the incomes and profits pay all proper costs and expenses of such taking, holding, and managing the properties. There was a default in the payment of the interest on the bonds, and thereafter, on July 12, 1909, A. B. Cockerill, George E. Nicholson, and the National Bank of Commerce of St. Louis, who were the holders of 1084 of the bonds, made a written request to the Commonwealth Trust Company of St. Louis to act as substituted trustee and to take charge of the property through Mr. Nicholson and administer the trust for the bondholders. It was not deemed advisable to foreclose the mortgage at once. A. B. Cockerill, who was president of the Cockerill Zinc Company, continued for a time in charge of the properties, and one of the main questions involved in the present suit is whether during this time he was under the direction and control of Nicholson, and whether Nicholson represented himself and the other bondholders mentioned; in other words, whether the bondholders were in possession of the property, conducting it from the time of the making of the agreement until February 1, 1910, when the action to foreclose the mortgage was brought by the trust company. In the case of *Trust Co. v. Zinc Co.*, supra, the question involved the power of the district court in the foreclosure proceedings to create preferential liens upon the mortgaged property in favor of certain interpleaders who furnished labor or material for the benefit of the property and its preservation, and it was held that, notwithstanding the business of the corporation was one in which the public had no interest, it was proper for the court to make the claims for labor and material furnished to improve and preserve the property and increase its value as security, paramount liens to that of the mortgage, and the judgment was affirmed. Thereafter the action in the district court to foreclose the mortgage proceeded to a sale, and the property was purchased by a new corporation, the Kansas Zinc Company. In the present action the plaintiff, a coal company, sues to recover \$4,531.21 on account of coal which it claims to have furnished the bondholders in the operation and preservation of the property prior to and during the foreclosure proceedings. In addition to the claim for coal furnished, the

plaintiff sues upon several causes of action which have been assigned to it by other creditors and which embrace claims for material and supplies claimed to have been furnished in the same way to the bondholders while in possession and control of the property. The petition sets out the history of the organization of the Cockerill Zinc Company, the execution of the mortgage, the fact that upon the default in interest the bondholders, through the trustee and through Nicholson, and A. B. Cockerill acting for himself and for the agents of the other bondholders and trustee, took possession of all the property covered by the mortgage, and alleged that they had ever since held possession thereof, and that the coal sued for and the material represented by the other claims had been supplied for the purpose of operating and preserving the smelters, and had been contracted for by Cockerill and Nicholson as the agents and employes of the bondholders. George E. Nicholson and the Kansas Zinc Company were the only defendants who answered. The answer expressly denies that Cockerill and the Cockerill Zinc Company, or either of them, were the agents of the other defendants, or that either of them was the agent of the Commonwealth Company or any of the bondholders. The answer was verified and put in issue all allegations respecting the agency of any of the parties and their authority to bind the bondholders.

[2] One of the issues at the trial was whether the bondholders of the Cockerill Zinc Company had taken possession of the properties of that company and incidentally this involved the question of the authority of A. B. Cockerill and George E. Nicholson to bind the bondholders by their acts. One of the principal errors complained of is that the court was incompetent, and without which it is insisted the trial court could not have found this issue in favor of the plaintiff. On the other hand, the plaintiff claims that the admission of the evidence was not made a ground of the motion for a new trial, and relies upon *Washbon v. Bank*, 86 Kan. 468, 121 Pac. 515, where it was ruled as follows:

"Certain evidence was admitted over the objection of plaintiffs. No complaint of the ruling was made in the motion for a new trial. *Held*, that the question cannot be raised in this court." Syl. 1.

It is said in the brief that one of the grounds of the motion for a new trial in the *Washbon* Case was "error of law on the trial," and in the present case one of the grounds was stated to be "erroneous rulings." The foregoing quotation from the *Washbon* Case is a general statement to the effect that where the motion for a new trial does not complain of a ruling on the admission of evidence, the question cannot be raised in this court; but it was not intended in that case to decide that where a motion for a new trial recites as one of its grounds "error of law

on the trial," or "erroneous rulings," an appellant cannot have a review of any ruling made on the trial respecting the admission of evidence. It was assumed in that case that there was no complaint of such rulings in the motion for a new trial. Section 305 of the Code (section 5899, Gen. Stat. 1909) gives as one of the statutory grounds for a new trial "erroneous rulings," and it has always been held that to set forth the grounds of the motion in the language of the statute is sufficient. *Da Lee v. Blackburn*, 11 Kan. 190, 206; *Marbourg v. Smith*, 11 Kan. 554, 563. It was suggested in the latter case, however, that for the defeated party to point out the specific errors complained of is a practice which should be encouraged. A different rule obtains in some of the states. For additional authorities to the effect that it is sufficient to set forth the grounds in the language of the statute, see 29 Cyc. 944, and cases cited. It is quite clear that the defendant is entitled to raise the objection in this court.

Part of the evidence objected to consists of documents attached to the deposition of George L. Edwards on the ground that they were not properly identified, and because copies were used instead of the originals. It appears from a stipulation in the case that the originals had been used in evidence in certain actions still pending in the circuit court of St. Louis, Mo. They were therefore unavailable, and it became necessary to use copies. There were 97 of these documents, and the correctness of many of them was testified to by witnesses at the trial, and we are unable to find that any prejudice resulted from their introduction. The principal complaint respecting evidence is that the deposition of A. B. Cockerill, which was not taken in the case, was used as evidence. It was taken and used and became a part of the record in the foreclosure case of Trust Co. v. Zinc Co., *supra*. Cockerill's death occurred before the trial of the present case. The plaintiff contends that the deposition was admissible because Cockerill was the principal bondholder. It is insisted that the evidence, aside from the deposition, sustains the contention that Cockerill, who was a party to all the transactions, was authorized to act in behalf of himself and the other bondholders, and therefore that his deposition was competent as containing admissions and declarations of a party jointly interested in the transactions and as the agent of the others associated with him. We think it is of very little importance whether his deposition be regarded as competent evidence or not. The record, which is quite voluminous, is filled with what we consider sufficient evidence to sustain the judgment without reference to this deposition. The trust deed provided, among other things, that:

"The mortgagor, upon demand to the trustee, shall forthwith surrender to the trustee the actual possession of, and that it shall be lawful for the trustee or such officer or agent as it may ap-

point, to take possession of all the property hereby conveyed or intended to be, with the books, papers and accounts of the mortgagor, and to hold, operate and manage the same."

The evidence shows that after the Commonwealth Trust Company was substituted as trustee on the request of the majority of the bondholders, including George E. Nicholson and the Bank of Commerce, a resolution was adopted by the board of directors of the company, ordering the president to deliver to the substituted trustee possession of the properties covered by the mortgage because the company had defaulted in the payment of interest on the bonds. It is admitted that on July 12, 1909, George E. Nicholson and the National Bank of Commerce of St. Louis made a written request to the trust company to take charge of the property of the Cockerill Zinc Company "through Geo. E. Nicholson, as agent and trustee for the bondholders, and to administer upon the same according to the provisions of said deed of trust." While Cockerill remained in the active charge of the properties, we think the evidence shows that from that time he reported almost daily to George E. Nicholson, giving in detail the operation of the plants and the costs incurred. The evidence, beyond any question, shows that he was under the direction and control of Nicholson until the decree of foreclosure. George L. Edwards was the attorney for a majority of the bondholders, and Cockerill and Nicholson advised with him from time to time respecting the management and control of the properties while the plants were being operated. Further than that we think the evidence of Nicholson himself, and admissions and statements made by him, as testified to by numerous witnesses, including Mr. Northrup, a banker at Iola, show conclusively that the property had been taken into possession of the bondholders, and that Nicholson was in charge of the operation of these plants, and that Cockerill acted under him. In a letter to A. B. Cockerill, dated April 28, 1910, Edwards wrote as follows:

"Until better informed, I cannot direct payment of any bill for which it is claimed the bondholders are responsible until administration of the bondholders has been checked and their liability determined. \* \* \* It is a puzzle I cannot understand and which must be made clear why the bondholders, resulting from possession of these properties for the period they were operating them, have become liable to pay, as I understand, from thirty thousand to forty thousand dollars in the face of your reports that you were making money or breaking even."

Space will not permit a reference to the numerous exhibits and letters from Edwards to Cockerill and statements made by Nicholson himself, which were amply sufficient, in our opinion, to sustain a finding that the bondholders had taken possession of all the properties and were operating them through Nicholson and Cockerill. The trial was to the court, and it has been repeatedly held that the introduction of incompetent evidence under those circumstances will be presumed not to have influenced the court's

finding. See *Whiteley v. Watson*, 145 Pac. 568, just decided.

It is contended by the defendant that there was no evidence showing whether all or a majority of the bondholders ever became stockholders in the Kansas Zinc Company, or that the subscribers to the capital stock of that company ever owned any of the bonds, or that any of the stockholders, directors, or officers of the new company were ever stockholders of the Cockerill Zinc Company. George L. Edwards, counsel for the principal bondholders, was also vice president and manager of the Kansas Zinc Company, and in his deposition testified that there are no stockholders in the Kansas Zinc Company except the bondholders of the Cockerill Zinc Company; that the new company was organized for the purpose of buying in the properties of the other company at foreclosure sale on behalf of the bondholders, and that the property is held by this corporation for that purpose; that it was paid for in bonds of the old company, together with certain expense money which the bondholders advanced for the purpose of effecting a reorganization.

In the former case of *Trust Co. v. Zinc Co.*, 86 Kan. 860, 122 Pac. 875, it was held that the bondholders were mortgagees in possession, and that they had employed labor and purchased supplies which were used to improve and preserve the property and to increase its value as security. As observed, the trust deed authorized this, and the evidence in the present case shows that a majority of the bondholders acquiesced in the proceedings, and that the property was managed and controlled by the bondholders through their trustee and agents, and that they continued in the possession and control of the property until after its sale under the decree of foreclosure, when it was purchased by George L. Edwards and George E. Nicholson. Shortly thereafter they assigned the certificate of purchase to the Kansas Zinc Company, the assignment being dated March 11, 1911. On the 5th of February, 1913, the sheriff's deed was executed to the new company covering the property described in the order of sale. The new company was organized under a charter issued by the state of West Virginia. The authorized capital stock was fixed at \$500,000. The principal stockholders mentioned in the charter are Nicholson and Edwards. The evidence shows that the new company paid nothing for this property, except that it stood ready, doubtless, to issue to the bondholders its stock in proportion to their holdings, but it was shown that no stock was ever issued by the company.

The main question to be determined is whether the new company can be held liable for the indebtedness sued for by the plaintiff. The defendant's contention in this respect is that the new company cannot be made liable for the debts of the old unless

such liability was assumed as part of the consideration for the purchase of the property, or unless there is evidence to show that the transaction was a fraud on the creditors. It is insisted that the new company purchased the property at sheriff's sale, freed from all obligations on account of debts and liabilities of the former company. Of course, where a new company actually purchases from an old one, the rule is that there is no liability for the debts of the old, unless the new company assumes them as part of the consideration. We think it must be held, under the circumstances shown in evidence here, that the new company is responsible for the particular debts sued for by the plaintiff. The grounds upon which we reach this conclusion are these: In the first place, the Cockerill Zinc Company never issued any of its stock. There were no stockholders according to the evidence. From the time the property was taken into control by the bondholders, they were mortgagees in possession under a provision of the mortgage which authorized them, in case of default, to take all the property of the mortgagor into their possession through the trustee, and to operate the properties as a going concern for the purpose of preserving it as security, as was held in the former case. 86 Kan. 860, 122 Pac. 875. The indebtedness sued for was incurred while the mortgagees were in possession, and for the purpose of preserving the property as security for the bonds. The evidence shows that if the plant had been closed down absolutely, the value of the security would have been materially lessened. It was necessary to keep portions of some of the plants operating and to keep fires under some of the retorts for the reason that if the fires were drawn the property would depreciate. The new company was organized as a holding company for the bondholders. It paid no consideration whatever for the purchase of the property at the sheriff's sale. Edwards and Nicholson had already purchased it on behalf of the bondholders, and the new corporation was formed to take the title. In this situation it seems clear that it would constitute a fraud on the rights of the particular creditors who had furnished supplies for the purpose of keeping the plant in operation, and to protect and preserve the security, if it were held that the same persons who incurred the indebtedness, although in the name of the old company, and who controlled and practically owned the property, and who merely changed from holding it as partners or bondholders to holding it in the capacity of quasi stockholders in the new corporation, could thereby avoid liability for such indebtedness. The new company was in fact nothing more than a continuation or reorganization of the old company or of the interest in the old company acquired by the bondholders at the sale. In his testimony George L. Edwards speaks of the purpose of the new company

being "to effect reorganization." In another letter to Cockerill he says that he hopes "to close the administration of these properties by the bondholders and enter without complication the new administration through foreclosure and reorganization."

In the case of *Flemming v. Light & Power Co.*, 90 Kan. 763, 136 Pac. 228, a corporation was organized by the officers of an investment company for the purpose of purchasing property and franchises of a gas distributing company, purchased at a sale under a mortgage owned by the investment company. No consideration was paid for the purchase of the property by the new company, except the interest its incorporators might own in the mortgage as shareholders in the investment company, and it was held that the new company, in carrying on the business, first conducted by the mortgagor and afterwards by the mortgagee, should be considered as an agent of the parent company in the purchase and operation of the plant. In *City of Altoona v. Richardson*, 81 Kan. 717, 106 Pac. 1025, 26 L. R. A. (N. S.) 651, it was held:

"Where one corporation becomes practically extinct, transferring all its assets to another and receiving in return stock in the other corporation, which succeeds to its business, the new corporation is liable, to the extent of the value of the property acquired, for the debts of the old one." Syl.

To the same effect see *Thompson on Corporations*, § 6547. Sometimes in a like situation a court of equity considers the assets of the old company as a trust fund to be followed into the hands of one who is shown not to be a bona fide purchaser for a good consideration. The same question frequently arises over the liability of a consolidated company for the debts of its predecessor. *Berry v. K. C., Ft. S. & M. R. Co.*, 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371; *Chicago & Indiana Coal Railway Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

In *Condenser Co. v. Electric Co.*, 87 Kan. 843, 126 Pac. 1087, it was ruled:

"Where a newly organized corporation succeeds to the business, property, and assets of an established corporation without giving to the old corporation any means of discharging its obligation to a creditor, and all the circumstances of the transaction justify an inference that the new corporation is a mere continuance or reorganization of the former, with substantially the same stockholders, the new corporation is responsible for such debt of the former corporation." Syl. 2.

The opinion refers to *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543. In that case the Nebraska court criticizes the accuracy of the rule declared by Beach in his work, *The Law of Private Corporations*, § 360, to the effect that "where an old established corporation sells out to a newly organized one, and turns over all its property, the new company becomes liable upon the debts and contracts of the old," and the court classifies the cases where the new company will be

held liable, as follows: First, those in which the liability of the new corporation results, not from the operation of law, but from its contract relations with the old; second, cases in which the transfer of the property and franchises amounts to a fraud upon the creditors of the old corporation; and, third, cases where, as in *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168, 64 N. W. 701, the circumstances connected with the creation of the new company and the manner in which it succeeds to the business and property of the old "are such as to raise the presumption or warrant the finding that it is a mere continuation of the former, or that it is, in short, the same corporate body under a different name."

We think the ruling of the trial court should be affirmed on either one of two grounds: First, that the transaction by which the property was transferred to the new company amounts to a fraud in law upon the plaintiff under the particular facts in this case; and, second, that the circumstances surrounding the creation of the new corporation and its succession to the business and property of the old show conclusively that there was, in fact, no purchase, but simply a change in the capacity in which the business was conducted. The same persons who conducted the business as bondholders of the Cockerill Zinc Company in possession as mortgagees changed from partners or bondholders to incorporators of the new company. The principles which govern in such a situation are well expounded by the Supreme Court of Ohio in *Andres v. Morgan*, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712. There the change was from a partnership to a corporation which took all the property of the partnership, the partners transferring their individual interests to the new company in consideration for the transfer. It was held that such a transaction is not a sale of property from one to another, and the corporation could not retain the property and avoid the debts of the partnership. In the opinion it was said:

"All that the corporation paid for the property transferred to it was the stock issued in exchange—simply a metamorphosis of a partnership into a corporation, without any change of individuals, and unless it assumed the payment of the debts of the firm, there was no consideration for the transfer of the property—for the stock without the property represented nothing and was worth nothing. That a corporation could be formed and, with its capital, purchase a partnership and its business without being liable for its debts unless expressly assumed, is not doubted; but this is not such a case. This is like the case of *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168 [64 N. W. 701]. \* \* \* Where there is a purchase in fact by a new company from an old one, there is, as before observed, no liability of the new for the debts of the old company, unless assumed as a part of the consideration. But where a mere transformation is had, parties remaining the same, and the property is transferred by the members of the old company transferring their interest in it, for an equal interest in it as

property of the new, the transaction does not constitute a sale by the one and a purchase by the other—it is simply a change in the manner and form of carrying on the same business by the same persons—and, brushing aside the fiction of a legal entity, it is seen that no real change has taken place, and that in looking to the new formation for payment, the creditor looks to the same persons, possessed of the same property and rights, he contracted with in the first instance; and to construe the transaction as to creditors as a purchase tends to operate a fraud on their rights. Every purchase implies two distinct persons—a buyer and seller. It is a moral impossibility for one person to buy of, or sell to, himself. Modern decisions, as observed by Mr. Taylor (Taylor on Private Corporations, § 51), are tending to a disregard of the mental conception that a corporation is an entity separate from its corporators, as in many instances it is simply a 'stumbling block' in the way of doing justice between real persons."

Cases are cited by the defendant which hold to the contrary, but we think their reasoning is based upon a slavish adherence to the conception of the new corporation as an entirely separate entity from its incorporators, and by losing sight of the substantial facts and of the lawful rights of creditors. With much that is said in the opinion in *Armour v. E. Bement's Sons*, 123 Fed. 56, 59, 62 C. C. A. 142, 145, we agree. It was there said:

"The stockholders of an insolvent corporation are not bound to maintain the corporation in a hopeless struggle. The claims of the creditors do not impose such an obligation, and public policy requires that they should be free to engage in new enterprises."

It is also said in the opinion:

"They may do this, but they cannot gain profit from the assets of the corporation, to the detriment of the lawful rights of creditors, any more than any other person may."

The decisions of this court indicate a tendency to disregard the theory of a corporation as an entity separate from its corporators where justice between the real parties to the transaction require it. *Berry v. K. C., Ft. S. & M. R. Co.*, 52 Kan. 759, 34 Pac. 806, 39 Am. St. Rep. 371; *City of Altoona v. Richardson*, 81 Kan. 717, 106 Pac. 1025, 26 L. R. A. (N. S.) 651; *Trust Co. v. Zinc Co.*, 86 Kan. 860, 122 Pac. 875; *Condenser Co. v. Electric Co.*, 87 Kan. 843, 126 Pac. 1087; *Flemming v. Light & Power Co.*, 90 Kan. 763, 136 Pac. 228.

Nor do we agree with the cases cited which hold that actual fraud or collusion must be shown before the assets in the hands of the new corporation can be followed by particular creditors. The doctrine may be true as to creditors generally, but the defendant can-

not invoke it because of the very necessity of the case and the obligation courts are under to prevent the failure of justice where it can be avoided by the application of equitable rules. We see no basis for a rational distinction in the principles which should control in the situation here and those applicable to a case where a private individual holding a mortgage on business property takes possession under the terms of his mortgage, conducts the business in the name of the mortgagor for a period of a year or two, incurs obligations, though in the name of the mortgagor for material and supplies used for improvements which add to the value of the security, and then proceeds to foreclose his mortgage and purchase the property at foreclosure sale in the name of a third person who pays no consideration, credit being given upon the indebtedness for the price the property sells for. If in such a case he should seek to defeat the claims of creditors who furnished material and supplies used in the operation, management, and control of the property and business while conducted by him, the courts would have no hesitation in rendering personal judgment against him upon the claims, nor in holding the assets as a trust fund liable for the satisfaction of the judgment. In the present case the court gave personal judgment against Nicholson and the Kansas Zinc Company and ordered execution against the property of the new company. So much of the judgment must be affirmed.

There is a cross-appeal in which the plaintiff claims the court erred in rendering judgment in defendant's favor on several causes of action founded on promissory notes given by the Cockerill Zinc Company for royalties on gas leases held by that company, which it is claimed the bondholders received the benefit of. The terms of the leases required the payment of the royalties in order to keep the leases in force. The periods for which the notes extended the term of the leases covered the time in which the property was controlled by the bondholders. The mortgage covered the leases, and they were sold under the decree and were acquired by the new company. They constituted part of the assets of the old and of the new company. We think these claims cannot be distinguished in principle from those involved in the other causes of action, and the judgment will be modified, with directions to render judgment upon those causes of action in favor of the plaintiff. In all other respects the judgment is affirmed. All the Justices concurring.

(83 Wash. 534)

**MONDIOLI & STEWART v. AMERICAN BLDG. CO. (No. 12031.)**

(Supreme Court of Washington. Jan. 16, 1915.)

**1. APPEAL AND ERROR (§ 515\*)—RECORD—EVIDENCE.**

It is not necessary to bring up the evidence; appellant making no question on it, but relying wholly on the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.\*]

**2. APPEAL AND ERROR (§ 760\*) — BRIEFS — REFERENCE TO ABSTRACT.**

The findings relied on being quoted in full in the brief, it is not ground for dismissal that the brief does not refer to the pages of the abstract on which the findings appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.\*]

**3. JUDGMENT (§ 13\*)—MATURITY OF INDEBTEDNESS.**

Judgment may not be had, notwithstanding a provision for its stay, on a debt before the transpiring of an event, till the happening of which, by provision of the building contract under which the debt arose, the amount is not to become due.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 10; Dec. Dig. § 13.\*]

**4. CONTRACTS (§ 231\*)—BUILDING CONTRACTS — CONSTRUCTION — RETENTION OF FINAL PAYMENT.**

Under a building contract, fixing the amount to be paid, "subject to additions and deductions as hereinbefore provided," referring to alterations increasing or reducing the amount of work, providing, "Payments to be made to the amount of eighty per cent. of the work done on the building every two weeks," and that "the final twenty per cent. payment" shall be retained till the claim of a third person be receipted for or outlawed, the amount unpaid, though for extras only, being less than 20 per cent. of the contract price, may be so retained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1051, 1052; Dec. Dig. § 231.\*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Mondlioli & Stewart against the American Building Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Wakefield & Witherspoon and Harry T. Davenport, all of Spokane, for appellant. Edwin H. Flick, of Seattle, for respondents.

**MOUNT, J.** This action was brought to foreclose a lien against certain property belonging to the American Building Company. The cause was tried upon issues made by the pleadings and resulted in a judgment in favor of the plaintiffs and against the American Building Company for \$1,928.86. The American Building Company has appealed from that judgment.

[1, 2] The respondents move to dismiss the appeal for the reasons: First, that the testimony has not been brought up and has not been abstracted; second, because the abstract makes no reference to the evidence; and, third, because the brief of the appellant

makes no reference to the pages of the abstract. In answer to the first two grounds of this motion, it is sufficient to say that the appellant makes no question upon the evidence. It relies wholly upon the findings made by the trial court. It was therefore unnecessary to bring the evidence here. The appellant has not referred to the pages of the abstract in its brief. But the findings relied upon are in the abstract and are quoted in full in the brief; and we think the cause ought not to be dismissed because the pages of the abstract are not referred to in the brief. The motion is therefore denied.

It appears from the findings of the trial court that on the 5th day of May, 1910, the respondents and the appellant entered into a contract whereby the respondents agreed to do certain plastering upon a building being constructed by the appellant in the city of Spokane according to plans and specifications prepared for the work. The contract provided at article 3 as follows:

"No alterations shall be made in the work except upon written order of the architect, the amount to be paid by the owner, or allowed by the contractors by virtue of such alterations, to be stated in said order. \* \* \*

The contract also provides at article 9:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractors for said work and materials shall be \$14,710, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractors in current funds, and only upon certificates of the architect as follows: Payments to be made to the amount of eighty per cent. of the work done on the building every two weeks."

It seems that, before this contract was entered into, the American Building Company had some negotiations with a company, known as the Architectural Decorative Company, for doing the work, and there was some fear that that company might claim the contract under these negotiations. Before letting the contract in question to the respondents, the appellant required of the respondents a bond in the sum of \$2,950, to the effect that they would save the appellant from any liability to the Architectural Decorative Company in case that company should make a claim against the appellant. This bond was furnished by the respondents, and recited that:

"Whereas, the principals herein, to wit, the copartners of Mondlioli & Stewart, are desirous of obtaining the contract for the work mentioned on the building of the American Building Company and have agreed to indemnify and save harmless the American Building Company in the manner above mentioned: Now, therefore, the condition of this obligation is such that if the above bounden William Stewart and A. Mondlioli, copartners doing business as Mondlioli & Stewart, \* \* \* shall defend and keep harmless and indemnify said American Building Company, its successors or assigns, from all claims, demands, liabilities, or claims for damage or damages that the said Architectural Decorative Company might have or claim

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—37



against the said American Building Company, \* \* \* then the above written bond to be void, otherwise the same to remain in full force and effect. It is further agreed that the American Building Company may and shall retain the final twenty per cent. payment under its contract to be entered into with the principals herein, as additional indemnity against any costs, expenses, or damages or claims of the Architectural Decorative Co. against the American Building Co., said twenty per cent. to be retained until the principals herein shall have obtained a receipt in full of all claims and demands of the Architectural Decorative Co., or until any claims that said Architectural Decorative Co. might have shall have been outlawed by the statute of limitations."

This bond was given as a part of the contract. The court so found.

Upon the trial of the case the court found that this contract had been entered into between the parties; that the work upon the building had been done by the respondents; that the respondents had been paid by the appellant the full sum of the original contract price, with the exception of \$51; but that extras had been ordered and put into the building which amounted to \$1,863.46. The court also found as follows:

"The court further finds that, at the time of the entering into the contract between plaintiffs and defendant, plaintiffs entered into a bond of indemnity whereby they agreed that they would procure from the Architectural Decorative Company a receipt and release from any and all claims which said company might have against the American Building Company, and in addition thereto, as an additional indemnity, the defendant herein should retain 20 per cent. of the payment under the contract entered into with the plaintiffs as a guaranty against any cost, expense, damage, or claims of the Architectural Decorative Company against the American Building Company, and until such receipt and release was obtained by the plaintiffs from the Architectural Decorative Company, or until the claim of the Architectural Decorative Company, if any it had, was outlawed by the statute of limitations."

And as conclusions of law the court found:

"That the plaintiffs herein are entitled to judgment against the defendant for the several amounts found due, as set out in the foregoing findings, making a total amount of \$1,928.86, but that such judgment rendered herein shall be stayed until the plaintiffs have furnished to the defendant a release for any claims the Architectural Decorative Company might have as referred to in said bond, and as an indemnity and guaranty of the plaintiffs against any costs, expenses, damages, or claims of the Architectural Decorative Company against the defendant, American Building Company, or until such release and receipt is obtained by the plaintiffs from said Architectural Decorative Company, or until the claim of said Architectural Decorative Company, if any, is outlawed by the statute of limitations; and no interest shall be allowed on said judgment until the terms of said bond of indemnity have been fully complied with."

Thereupon a judgment in accordance with these conclusions of law was entered by the trial court. In short, the trial court found that the appellant was indebted to the respondents in the sum of \$1,928.86, but that this sum was not due at the time the action was brought, nor at the time the judgment was entered.

[3] It seems too plain to admit of serious discussion that where a debt is not due there is no right to a judgment. In the case of *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 132 Pac. 867, where an action was brought to foreclose a lien for money not due, we held that the lien could be foreclosed only for the payments which were past due. In that case we said:

"The right to a lien claimed for materials and labor not being waived, the question then arises as to the amount for which the lien may be foreclosed in the present action. From the facts above stated, it appears that, when the suit was instituted, four payments, totaling the sum of \$1,000, were past due. The action, however, sought to recover \$1,765, the total amount of the debt. It is argued that failure to meet the payments as they became due caused the entire debt to mature and become at once payable notwithstanding the specifications as to the times of payment, but this contention cannot be sustained. There is no clause in the note providing that, in the event the payments are not made at the time specified, the whole sum shall, or may at the election of the creditor, become due and payable, in the absence of which, delinquency as to certain payments, does not mature the entire debt. In *Foxell v. Fletcher*, 87 N. Y. 476, it is said: 'At the time this action was commenced, two of the monthly installments had become payable, but it does not follow that the whole debt had become due. The debt was, by the agreement and in consideration of the security given, changed from one payable immediately to one payable in monthly installments, and in the absence of a stipulation that, on default in the payment of any of these, the whole should become due, the plaintiffs were entitled only to recover the installments due at the time of the commencement of the action. They cannot now recover more, without taking the necessary steps to enable them to bring in installments accruing since the commencement of the action.'"

We know of no case, and certainly none is cited, to the effect that a judgment may be had for a debt not due. In this case it is plain from the findings of the trial court that, while the defendants are indebted to the plaintiffs in the sum of \$1,928.86, yet under the terms of their contract this amount was not to become due until the happening of an event which, so far as the record shows, has not yet transpired.

[4] It is apparently claimed by the respondents that the appellant was entitled to retain 20 per cent. of the original contract price, which it did not retain, but was not entitled to retain any part of the amount of the extras furnished; and that the amount for extras is now due. But we think the contract is not susceptible of this interpretation. As stated above, the contract provides for alterations to be made upon the order of the architect. This clearly refers to extra work to be done. In article 9 of the contract, as quoted above, it is stated that the sum to be paid by the owners for the work and material shall be \$14,710, "subject to additions and deductions as therein before provided." This, of course, refers to extras which may be added to, or which may be deducted from, the contract price. The 20 per cent. provided for refers to the whole work under the



contract. It is conceded that, at the time this action was brought, the defendants were holding less than 20 per cent. of the contract price with extras. The court properly found, therefore, under the contract, and under the conceded facts in the case, that this \$1,928.86 was not due; and, not being due, it follows, as a matter of course, that judgment should not have been entered therefor. This being true, there was nothing for which the court could enter a judgment. The case is like one where a building has not been completed and a party seeks to obtain a judgment for the contract price when the work has not been done. Where the parties have by their agreement made some act or condition precedent to payment, that act or condition must be fulfilled before the payment is due. *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657; *Harmon v. Ashmead*, 60 Cal. 439. We are satisfied that the trial court, upon the findings made, should have dismissed the action.

The judgment is therefore reversed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 508)

**CRANFORD v. O'SHEA. (No. 12357.)**

(Supreme Court of Washington. Jan. 11, 1915.)

**1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

There being other independent evidence of negligence, any error in admission of evidence thereof, which would in all probability go only to the quantum of damages, is not sufficiently prejudicial to require reversal; affirmance being, because of excessive damages, conditioned on remission of part of recovery.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**2. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—FAILURE TO INSTRUCT.**

Failure, in submitting the issues, in a malpractice case for not seasonably discovering and setting a fracture of the femur just above the knee, to state defendant's contention that he knew of the fracture, but could not heal it, because of synovitis of the knee joint and fractures just above the ankle, is harmless; every feature of the defense, as well as plaintiff's case, having been prominently and skillfully brought out during a long trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**3. PHYSICIANS AND SURGEONS (§ 18\*)—MALPRACTICE—EXTENT OF LIABILITY.**

For malpractice in treating an injury, a surgeon is liable only for results from his negligence, and not for those from the original injury.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

**4. PHYSICIANS AND SURGEONS (§ 18\*)—MALPRACTICE—EXCESSIVE DAMAGES.**

A verdict of \$7,385 for malpractice in not seasonably setting a fracture of a femur held excessive to the extent of \$2,000.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.\*]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Clara E. Cranford against John H. O'Shea. Judgment for plaintiff, and defendant appeals. Affirmed conditionally.

See, also, 75 Wash. 33, 134 Pac. 486.

Lloyd E. Gandy and Graves, Kizer & Graves, all of Spokane, for appellant. Attwood A. Kirby and H. M. Stephens, both of Spokane, for respondent.

CHADWICK, J. Appellant is a surgeon, engaged in the practice of his profession. He is sued for malpractice. On January 17, 1910, respondent was injured in a coasting accident. Both bones of one of her lower limbs were fractured just above the ankle. The fracture is denominated by the medical witnesses as a compound comminuted fracture. The flesh was torn and the bone protruded. There was also a simple fracture or a nearly square breaking of the femur a short distance above the knee joint. Appellant was, at the time of the accident, surgeon at the emergency hospital, and gave respondent first aid, and thereafter treated her for 4 or 5 weeks, when she was passed to the care of the county physician, who cared for her until Dr. Phy, a surgeon of her own choosing, took charge of the case.

So far as we can see, the fracture of the two bones in the lower limb was treated surgically, and but for an infection that appeared 2 or 3 days after the accident, and for which appellant is not shown to be responsible, respondent would have recovered of that fracture in from 6 to 12 weeks. The malpractice is alleged to lie in the fact that appellant did not make timely discovery of the fracture of the femur, and did not, after discovery, render proper and skilled service. On February 2d or 3d X-ray photographs were taken. Thereafter respondent's limb was set and put in a cast. It so continued until after the case passed to the charge of the succeeding doctors. After several months Dr. Phy had X-ray pictures made, and it was found that the fractured femur had slipped out of place, and being held by the contracted muscles, had knit or formed a union. This union was broken up by Dr. Phy, who cut the two ends, slightly shortening the length of the two pieces, which he held in place by plates riveted into the bones. The limb is now straight, instead of bowed out, as it had been, and, but for the shortening and a slight probability of future trouble, is what is called a good recovery. Appellant insists, that he knew of the fracture of the femur; that he discovered it at the time he first examined the patient; that he could not have failed to see it as it was "laid out before him." In this he is corroborated by the assisting surgeon and by the surgical nurse who was present. But the jury believed the respondent and her mother, who tes-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tified that appellant did not examine or give any attention to the upper fracture, although respondent continuously complained of the pain and suffering she endured at the place of the fracture. Appellant's version is that the lower fracture was the important thing; that the knee became immediately swollen, and that a synovitis of the knee joint developed; that, because of the swelling and synovitis, he could not set the bone at the time by ordinary methods, nor could he attach a weight to the limb to hold the fractured bones in place because of the fracture and lacerations below the knee. Respondent's present condition is: The upper fracture has made a good recovery; the lower fracture, after an operation in which the bones were cut and reunited, has healed; the limb is shorter than the other from  $1\frac{1}{2}$  to  $2\frac{1}{2}$  inches, as variously estimated by the witnesses; she walks with, and bears most of her weight on, a cane which she carries at her hip; she can walk without help, though she can walk better with assistance; she was bedridden for many months, and has suffered and still suffers acute pain; her knee is slightly larger than its companion, and she cannot bend her ankle up, although she can bend it down, so that when going upstairs she has to carry the injured limb after the other. Respondent asks for damages for pain and suffering. It is not shown that she lost any earning time or wages on account of the injury. The case was here on defendant's appeal, 75 Wash. 33, 134 Pac. 486, and was reversed and remanded for a new trial, with the same result, except that the jury substituted the sum of \$7,385 for the \$5,000 allowed on the former trial.

[1, 2] It is urged that the court erred in allowing evidence to be received tending to show that appellant was negligent in that he did not have X-ray pictures taken at the time or shortly after the case came under his notice; that the court did not properly instruct upon this feature of the case, and that the court erred in submitting the issues to the jury, in that he failed to state appellant's contention that he knew of the fractured femur, but could not heal it, because of the synovitis of the knee joint and the condition of the lower fracture. As for the first contention, we think it would have been better if the court had sustained appellant's objections and had given his requested instructions, but, as there is independent evidence of negligence, and the testimony would in all human probability go only to the quantum of damages, we have decided, in view of the conclusion we have reached, to treat the act and refusal of the court as not sufficiently prejudicial to justify a third trial of the case. As for the last contention, the case went to the jury after a long trial. Every feature of respondent's case, as well as the defense, was prominently and skillfully brought out. We cannot believe the jury

were unmindful of, or failed to consider, appellant's case. In this respect we find no error.

[3, 4] This brings us to the real contention: Are the damages awarded excessive? It is fundamental that a doctor who is called to treat an injured person cannot be held to answer for the suffering caused by the original injury, but only for the suffering caused by his own negligent acts. *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406; *Rice v. Puget Sound, etc., Co.*, 141 Pac. 191. The theory being evident, the original injury, in so far as the attending surgeon is concerned, is as if it were self-inflicted. All hurts requiring surgical care are presumptively painful and tormenting. It can be judicially noticed that a compound fracture of the lower limb and a fracture of the femur are painful hurts, and will occasion long suffering, although treated with the best of surgical skill. In the instant case appellant is not responsible for the original injury, or the infection which prolonged the healing of the lower fracture indefinitely and which made a surgical operation upon it necessary, or for the 6 to 12 weeks of confinement during which the bones might have knit under the most skillful treatment had there been no infection. In fact, the negligence of which the jury found appellant guilty cannot be made to extend beyond his treatment, or, as it is found, his lack of treatment, of the fractured femur, which, barring the slight shortening of the limb made necessary to square the bones, is a fair recovery, and the added pain and suffering. Considering recoveries in cases where the injuries were of like nature, and for which the party charged was solely responsible, we are constrained to believe that the jury, in pity for the respondent, visited the whole consequence of her hurts and suffering upon the appellant, without appreciating the demand of the law that respondent bear her share of the misfortune which angry chance threw over the unlucky parties to this action. *Mueller v. Washington Water Power Co.*, 56 Wash. 560, 106 Pac. 476, is, in so far as the consequences of the injury are concerned—an injury for which defendant was responsible—most like this case. We there allowed a recovery of \$5,000. It has seemed to us that a recovery of more than \$5,385 is not justified by the record in this case.

A motion for a new trial was taken under advisement by the trial judge, after saying: "To tell you the truth, Mr. Stephens, the girl is fortunate to be alive with any kind of a leg." After reading the case of *Froman v. Ayars*, 42 Wash. 385, 85 Pac. 14, in connection with the *Mueller Case*, the court allowed the verdict to stand. The opinion in the *Froman Case* admits that a verdict "manifestly too large" should be reduced. The surgeon was there charged, and the jury found, that but for the malpractice the plaintiff would not have lost his foot by amputation. A life ex-

pectancy and the earning power of a common laborer were proved. The holding of this court was rested on that circumstance. "To pass through 26 years of life without a foot is a condition that we may assume no man, however humble his occupation, would be willing to accept for \$5,000," said the court.

We have not overlooked the contention that, when the trial judge has refused to reduce the verdict, we will not, and the cases cited to sustain it. In the cases relied on the party charged was primarily responsible, the testimony conflicting, and we could not say, nor would we say if this case were against one responsible for the original hurt, that the verdict is too large; but bearing, as she must, her own share of the attendant and consequent suffering, we think respondent, who can claim no more than compensation, should remit \$2,000 of her recovery or take a new trial. It is our judgment that the jury was moved by the passion of sympathy for respondent, and possibly by the passion of prejudice against appellant.

If the respondent will, within 30 days after the remittitur in this case goes down, remit \$2,000 of her judgment, and consent to the entry of a judgment for \$5,385, the judgment will be affirmed; otherwise a new trial will be awarded.

CROW, C. J., and PARKER, GOSE, and MORRIS, JJ., concur.

(83 Wash. 470)

#### STATE v. STEELE. (No. 12177.)

(Supreme Court of Washington. Jan. 9, 1915.)

#### 1. RAPE (§ 34\*)—INDICTMENT—SUFFICIENCY—"ASSAULT IN THE SECOND DEGREE."

Rem. & Bal. Code, § 2414, declares that an assault under circumstances not amounting to an assault in the first degree, if made with intent to commit a felony, is an assault in the second degree. An indictment charged that accused assaulted prosecutrix with intent to rape, which offense is made a felony by section 2435. *Held*, that the indictment was sufficient to charge an assault in the second degree.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 37-41; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, First and Second Series, Assault in the Second Degree.]

#### 2. INDICTMENT AND INFORMATION (§ 189\*)—INCLUDED OFFENSES—DEGREES—"ASSAULT IN THE THIRD DEGREE."

An indictment charging assault with intent to commit a felony, which is one in the second degree, will sustain a conviction of assault in the third degree, under Rem. & Bal. Code, § 2415, defining an "assault in the third degree" as one not amounting to an assault in either the first or second degrees.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

For other definitions, see Words and Phrases, Second Series, Assault in the Third Degree.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Stewart Steele was convicted of assault in the third degree, and he appeals. Affirmed.

John Stringer and George F. Hannan, both of Seattle, for appellant. John F. Murphy and Robt. H. Evans, both of Seattle, for the State.

MAIN, J. The defendant in this case was charged by the information with the crime of assault in the second degree. By the verdict of the jury he was found guilty of assault in the third degree. From the judgment entered upon this verdict, the appeal is prosecuted.

[1] The information, after reciting that the defendant was accused of the crime of assault in the second degree, continued as follows:

"He, said Stewart Steele, in the county of King, state of Washington, on the 19th day of February, 1914, did then and there willfully, unlawfully, and feloniously make an assault upon the person of one Camilla Casaleri, a female person, with intent then and there to commit a felony, to wit, rape, upon said Camilla Casaleri. Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The only question here for determination is whether the information charges a crime.

Section 2413, Rem. & Bal. Code, provides what shall constitute an assault in the first degree. Section 2414 defines the crime of assault in the second degree. Section 2415 provides that every person who shall commit an assault, without amounting to an assault in either the first or the second degrees, shall be guilty of an assault in the third degree. The information is laid under subdivision 6 of section 2414, which provides that:

"Every person who, under circumstances not amounting to assault in the first degree, \* \* \* shall assault another with intent to commit a felony \* \* \* shall be guilty of assault in the second degree. \* \* \*"

The section concludes by fixing the penalty. Under section 2435, Rem. & Bal. Code, the crime of rape is a felony. That the information was sufficient to charge an assault in the second degree is a question hardly open to debate. While this is not formally admitted, it does not seem to be seriously controverted.

[2] But it is contended that since the appellant was convicted of assault in the third degree, and the information does not charge that degree of crime, it is insufficient. In this we cannot concur. The information, being sufficient to charge an assault in the second degree, would sustain a conviction for the lesser crime of assault in the third degree.

It is argued, however, that under the doctrine announced in *State v. Heath*, 57 Wash. 246, 106 Pac. 758, the information is insufficient. In that case the defendant was charged with the crime of assault with a deadly weapon with intent to inflict bodily injury. Upon motion of the prosecuting at-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

torney, the charge was reduced to that of an assault. No change, however, was made in the complaint. Neither was a subsequent complaint or information filed. The defendant was convicted in the justice court by a jury, and appealed to the superior court, where he was again convicted. That case is distinguishable from the present in this: There the gravamen of the offense for which the defendant was tried in both courts was that of an assault. Here the gravamen of the offense was the "intent to commit a felony," to wit, the crime of rape. As already stated, the information being sufficient to charge the crime of assault in the second degree, it would sustain a conviction for the lesser crime of assault in the third degree. To hold that it was necessary to define the crime of assault in the third degree in the information charging an assault with intent to commit a felony, in order to sustain a conviction of simple assault, would be to extend the doctrine of the Heath Case. This we think should not be done.

The judgment will be affirmed.

CROW, C. J., and MOUNT, FULLERTON, and ELLIS, JJ., concur.

(83 Wash. 596)

HARBICAN v. SKINNER et ux. (No. 12134.)

(Supreme Court of Washington. Jan. 16, 1915.)

**1. EVIDENCE (§ 419\*)—PAROL EVIDENCE—WRITTEN CONTRACT—MORTGAGES—PART CONSIDERATION.**

Where a mortgage on real property bound the mortgagor to pay taxes and assessments, together with premiums for insurance for the benefit of the mortgagee, and declared that on a failure to perform the mortgagee might declare the whole debt due and foreclose, parol evidence was admissible to show that at the time the mortgage and note were executed it was orally agreed that the mortgagee should pay a certain street assessment and the premiums on certain policies as a part of the consideration for the mortgage, and that such sum should be repaid by the mortgagors when the first interest note matured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

**2. MORTGAGES (§ 401\*)—FORECLOSURE—MATURITY OF DEBT.**

Where a mortgage provided that the mortgagor should pay assessments, taxes, and premiums on policies, but the mortgagee orally agreed to pay an existing street assessment and the premiums on certain policies due when the mortgage was executed, he could not declare the whole debt due and foreclose under an option contained in the mortgage because of the mortgagor's failure to pay such assessment and premiums.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1160-1165, 1208, 1209; Dec. Dig. § 401.\*]

Department 2. Appeal from Superior Court, Spokane County; W. H. Jackson, Judge.

Action by Henry Harbican against William

N. Skinner and wife. Judgment for plaintiff, and defendants appeal. Reversed and dismissed.

Belden & Losey, of Spokane, for appellants. Cordiner & Cordiner, of Spokane, for respondent.

**MOUNT, J.** This is an action to foreclose a mortgage for \$5,000 upon certain real estate in Spokane county. Upon a trial of the issues made by the pleadings the court entered a decree of foreclosure. The defendants have appealed.

It appears that on April 29, 1913, the note and mortgage in this case were executed by the appellants. The mortgage provides:

"The mortgagors agree, during the continuance of this mortgage, to pay all taxes and assessments levied and assessed upon said premises and upon this mortgage or upon the debt hereby secured at least ten days before delinquency; to keep the premises free from all incumbrances; not to commit or suffer waste thereon; to complete all buildings in course of construction or about to be constructed thereon within six months from date hereof; to keep all buildings thereon in good repair and continuously insured in a company to be named by the mortgagee in a sum not less than \$5,000, loss payable to mortgagee, and to deliver all policies of insurance to the mortgagee. Should the mortgagors fail to keep any of the foregoing covenants, then the mortgagee may at his option carry out the same, and all expenditures therefor shall draw interest until repaid at the rate of twelve per cent. per annum, be repayable by the mortgagors on demand, and shall be secured by this mortgage. Time is material and of the essence hereof, and if default be made in the payment of any of the sums hereby secured, or in any of the covenants herein contained, then, in such or either of said cases, the balance of unpaid principal with accrued interest, and all other indebtedness hereby secured, shall at the election of the mortgagee become immediately due, without notice, and this mortgage may be foreclosed."

The note which was secured by the mortgage was a coupon note, to which were attached ten coupons for \$200 each, all dated April 29, 1913. The first coupon by its terms became due and payable on October 29, 1913. The note provided that:

"In case of the failure to perform any of the covenants contained in the mortgage securing this note, thereupon the said principal sum and coupons shall immediately become wholly due and payable without further notice."

The complaint alleged that the mortgagors had failed to pay an assessment levied against the premises, and had failed to pay the premiums upon an insurance policy, and, for that reason, the respondent declared the principal sum together with interest thereon due. The action was begun on August 18, 1913, less than four months after the making of the note and mortgage. The principal defense was, in substance, that at the time the notes and mortgage were executed it was agreed between the parties that the respondent would pay a street grade assessment and the taxes then due upon the property, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would pay the necessary premiums upon insurance policies which were to be transferred to the respondent. Those were the items which the respondent claimed should have been paid by the appellants, and because of their nonpayment the respondent claimed the right to declare the whole debt due. Upon the trial of the case, when the appellants attempted to prove this defense, an objection was made upon the ground that this was an attempt to contradict the terms of the mortgage. The trial judge expressed the opinion that this objection was well taken, but overruled the objection and heard the evidence. At the conclusion of the case the court disregarded this testimony for the reason that in his opinion it tended to vary and contradict the terms of the mortgage, and for that reason refused to consider it or make any finding thereon. The only question in this case is whether this defense can be proved.

The testimony is clearly sufficient to show that the oral agreement was entered into at the time the mortgage was made, as contended for by the appellants. We think the evidence very clearly shows that there was a street assessment due upon the property at the time the mortgage was made, and the evidence very clearly shows that the parties to the mortgage discussed this fact. They also discussed the payment of the necessary premiums for the insurance policies. The plaintiff testified that no other agreement was made than that contained in the mortgage. The great weight of the evidence is to the effect that at the time the mortgage and note were executed the respondent agreed to pay this street assessment, and also the premiums upon the insurance policies, and that these sums should be repaid by the mortgagors at the time the first coupon note matured. We are satisfied from the whole evidence that this was a part of the consideration for the execution of the note and mortgage.

[1] The rule is well settled in this state that the real consideration for a mortgage or for a deed may be proved by parol testimony. In the case of *Windsor v. St. Paul, etc., R. Co.*, 37 Wash. 156, 79 Pac. 613, 3 Ann. Cas. 62, we held that, while the terms of a written contract may not be varied by parol, it is competent to show that at the time of making a contract there was a collateral oral agreement to the effect that certain fences and guards were to be built and maintained by the company as a part of the consideration for the sale, and that oral testimony is competent to show a consideration additional to that expressed in the contract. At page 161 of 37 Wash., at page 614 of 79 Pac. (3 Ann. Cas. 62), quoting from *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831, we said:

"It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid,

though not thereby to impeach the title conveyed by the deed."

And in quoting from *Shepherd v. Little*, 14 Johns. (N. Y.) 210, we said:

"Although you cannot, by parol, substantially vary or contradict a written contract, yet these principles are inapplicable \* \* \* where the payment or amount of the consideration becomes a material inquiry."

And in *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435, we said, quoting from *Quarles v. Quarles*, 4 Mass. 680:

"The principle is, I think, most clearly established that, when one consideration is expressed in a deed, any other consideration consistent with it may be averred and proved."

And in *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892, we said, quoting from *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161:

"The consideration recited in the deed is 'for the purpose merely of giving it effect as a conveyance, and that for any other purpose parol evidence may be given to show that the real consideration was greater or less than the sum named'—per Cooley, J., in *Strohauer v. Voltz*, supra. And that great judge adds that the cases holding this view 'are not \* \* \* out of harmony with the general rule which excludes parol evidence to control writings.'"

See, also, *Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720.

[2] We are satisfied that this is the correct rule. It is plain from the evidence in this case that at the time this note and mortgage were made the fact was discussed that the street assessment against part of the property was then due if not delinquent; it was agreed that it would be necessary to have certain insurance policies which were then upon the property transferred to the mortgagee; and we think the evidence is sufficient to justify the conclusion that the mortgagee agreed that he would pay these items as a part of the consideration for the note and mortgage, and that the amount of these items should draw interest at the rate of 12 per cent. per annum until the first coupon note became due six months thereafter. As stated above, the mortgage provides that:

"Should the mortgagors fail to keep any of the foregoing covenants, then the mortgagee may at his option carry out the same, and all expenditures therefor shall draw interest until repaid at the rate of twelve per cent. per annum."

Instead of contradicting the terms of the mortgage, we think it is plain that this was not only a part consideration for the note and mortgage, but that the clause last quoted authorized the mortgagee at that time to exercise the option of paying these items. If he agreed to do so as a part of the consideration, he could not before the date the first coupon became due claim that the mortgagors had violated any of the terms of the mortgage or of the note by not paying these items.

We are satisfied therefore that at the time the mortgage foreclosure suit was instituted, the debt was not due and the mortgagee was not authorized to declare the whole debt due,

or any part of it. This being true, the court should have dismissed the action.

The judgment of the trial court is therefore reversed, and the cause dismissed.

CROW, C. J., and MAIN, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 580)

**LE CLAIRE v. WASHINGTON WATER POWER CO. (No. 11256.)**

(Supreme Court of Washington. Jan. 12, 1915.)

**1. MASTER AND SERVANT (§ 280\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.**

Evidence, in an action against master for death of servant, *held* to show that the danger in the work of using a boat above a dam was open and apparent to the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.\*]

**2. MASTER AND SERVANT (§ 219\*)—DUTY OF MASTER—SAFE PLACE TO WORK—ASSUMPTION OF RISK.**

A master is under the duty to furnish his servant a safe place to work, subject to the qualification that if the place is evidently and patently unsafe, the servant assumes the risk by working there, if he is of mature years.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**3. MASTER AND SERVANT (§ 280\*)—INJURY TO SERVANT—DANGER OF EMPLOYMENT—EVIDENCE.**

Evidence *held* insufficient to show that an employé was unfamiliar with the dangers of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.\*]

**4. MASTER AND SERVANT (§ 219\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

Where an employé of mature years undertakes to work about a dam, obviously and openly a work of some danger, he represents, even in absence of express words to the effect, that he is sufficiently skilled in such service, and the employer is not liable for his death or injury occurring in the natural course of such dangerous employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**5. MASTER AND SERVANT (§ 276\*)—DUTY OF MASTER—SAFE TOOLS—EVIDENCE.**

Evidence *held* insufficient to show that a boat furnished servant by his employer was a dangerous instrument wherewith to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**6. MASTER AND SERVANT (§§ 101, 102\*)—DUTY OF MASTER—SAFE TOOLS.**

An employer complies with his duty to furnish his servants with safe tools to work with, when he exercises reasonable and ordinary care in their selection, or furnishes such tools as are in common use and without radical defects peculiar to themselves.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**7. MASTER AND SERVANT (§ 107\*)—DUTY OF MASTER—SAFE TOOLS.**

No negligence can be imputed to employer, simply because the boat, furnished his serv-

ant to work with about a dam, has not its oarlocks fastened in their sockets, where his boat in that regard is equipped in the usual and ordinary manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

**8. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—PROXIMATE CAUSE—EVIDENCE.**

Evidence, in a suit by servant's widow against his employer, *held* totally insufficient to show that the accident was caused by the rapid flow of a river, making an oarlock come out of its socket.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

Department 2. Appeal from Superior Court, Lincoln County; F. K. P. Baske, Judge.

Action by Bertha Le Claire against the Washington Water Power Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss.

Post, Avery & Higgins, of Spokane, for appellant. Martin & Wilson, of Davenport, and Harry A. Rhodes and Arthur W. Davis, both of Spokane, for respondent.

FULLERTON, J. On July 19, 1910, the appellant, the Washington Water Power Company, was engaged in constructing a dam for a power site across the Spokane river at a place thereon called Little Falls. The dam as constructed extended from the east bank of the stream westerly for a distance of some 180 feet, whence it turned at a right angle to the south for a distance of about 1,000 feet to the west bank of the river where the power house was situated. The main current of the stream struck the dam at its shorter arm, from whence it was diverted around the corner of the dam to the longer arm, where a channel had been formed of practically uniform width and depth, partly from the natural bed of the river and partly by excavation from the bed and the adjoining bank. In constructing the dam three spillways had been left therein, one in the shorter arm about midway across the stream and the other two on the longer arm, but comparatively close to the angle in the dam. As the dam neared completion it became necessary to close these spillways. To do this the appellant stopped the flow of water by using timbers, some 12 inches square and 14 feet long, which it forced down over the openings and on them placed a canvas to prevent leakage. This stopped the flow of water and enabled it to fill the aperture with concrete. After the concrete was put in place the pressure on the timbers was relieved and the timbers floated to the surface by reason of their own buoyancy. After the middle one of these spillways had been filled in the manner described, the company next proceeded to fill the one across the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shorter arm of the dam, and it was necessary to move the timbers to that place. To prevent the timbers from floating away after they came to the surface of the water, ropes had been fastened to them and to some fixture on top of the completed portion of the dam. After the filling of the first spillway some four of these timbers had drifted towards the remaining spillway on that arm of the dam, and it became necessary to float them around the angle in the dam to a point from which they could be drifted to the spillway next desired to be filled. It was the opinion of the foreman that this could best be done with the aid of a boat. The appellant had in its employ at that time a man, 26 years of age, by the name of Edward Le Claire. He was working in what was known as "the rigging gang," whose duty it was to construct and keep in repair the necessary falsework and rigging to enable the work on the dam to proceed. This rigging gang put in place the timbers to stop the flow of water through the spillways while they were being permanently filled with concrete. After the work of filling the first spillway had been completed, the foreman in charge of the rigging gang directed Le Claire and a man by the name of Peterson to go to the company's warehouse, which was situated some distance from the dam up the stream, and get a rowboat belonging to the company, bring it down to the dam and tow the four logs before mentioned around the corner of the dam. It was testified that Peterson was an experienced boatman, and that Le Claire had also represented himself so to be to the foreman, and it is the foreman's testimony that these two were chosen to perform the work because of these facts. He nevertheless cautioned them to be careful in performing the work and not to approach too near the spillways. No direction was given as to which of the two men should handle the oars. The men proceeded to the warehouse, procured and launched the boat, and brought it down the river to the face of the dam, Le Claire using the oars. The men towed with safety three of the timbers around the point of the dam, taking one of them at one trip and two at another. The fourth timber was somewhat nearer the spillway than the others, and was below a plank which projected from the dam into the water near its surface for a distance of some  $3\frac{1}{2}$  or 4 feet. In removing this timber to get it around the projection Le Claire chose to tow it directly out from the dam towards the middle of the stream. He had proceeded but a short distance when one of the oarlocks of the boat lifted out of its socket. Le Claire called to Peterson, who was sitting in the back of the boat holding the rope with which the timber was towed, to replace it. Peterson came forward and made two attempts to do so, but failed, owing to the fact that a leather

strap or string with which the oarlock was fastened to the boat got in his way. The boat was then drifting toward the spillway, and Peterson attempted to save himself by jumping overboard and swimming to the shore. Le Claire stayed in the boat and was carried down to and through the spillway and drowned. The respondent, who is the widow of Edward Le Claire, conceived that her husband's death was due to the negligence of his employer, and brought this action to recover therefor. In her complaint the respondent set forth a number of acts which she claimed constituted negligence on the part of the employer, all of which were put in issue by the answer of the appellant, who also set forth the pleas of contributory negligence and assumption of risk. The trial judge, however, submitted to the jury but four propositions, which he stated in the following language:

"(1) That defendant was negligent in that the place they ordered said Le Claire to work was hazardous and unsafe; (2) that the defendant was negligent in that Le Claire was unfamiliar with the work he was ordered to do on July 19, 1910, and was unaware of the dangers of the river, its rapid flow and undercurrent at the place he was ordered to work, and that he was not informed in relation to these things; (3) that the defendant was negligent in providing a Mullins steel boat in which to work on said river, and that the same was too frail and light, and so insufficiently braced that, rowing in the current of the river, this caused the oarlock to come out; (4) that the oarlocks in said boat were not securely tied so as to prevent the same from raising in their sockets and coming out, and plaintiff, also alleging, states that the defendant's negligence in all of these respects was the cause of her husband's death, and that there was no negligence on the part of E. L. Le Claire."

The jury returned a verdict for the respondent, and from the judgment entered thereon this appeal is prosecuted.

[1] The appellant at the close of the case challenged the sufficiency of the evidence to sustain a verdict against it, and the overruling of this challenge constitutes the first error assigned. It is our opinion that the challenge should have been sustained. After a careful study of the entire evidence we are unable to conclude that it shows actionable negligence on the part of the appellant. The first claim of neglect of duty on the part of the appellant is that it did not furnish Le Claire with a safe place in which to work. In the sense that there was some danger attending the rowing of a boat in the vicinity of the spillways, this claim has foundation in fact. But this alone is not the measure of an employer's liability. Such a rule would make the employer an insurer and liable in every case of injury, as there is hardly any employment in which a person can engage that has not some attendant dangers. Particularly is this true where the employé is engaged to work about a dam across flowing water, or about machinery, or in work requiring the use of edged tools, or in work in which the instrumentalities used in its performance necessi-

tate the use of skill or care. But in none of these cases is the master liable for an injury to his employé merely because he suffers him to work about such places or with such instrumentalities. The employer's liability arises in such cases only where the dangers are hidden or obscure and the employé is ignorant of them, or of such a degree of immaturity that he cannot be expected to appreciate or understand them. Where the employé is of mature understanding, and the dangers of the employment are open to his observation, and can be avoided by the exercise of reasonable care on his part, the employer is not responsible for an injury arising therefrom. In other words, every employment has its own peculiar hazards, and the law does not hold the employer liable for such hazards as are ordinarily apparent and usually and naturally belong to the employment. These principles have been repeatedly laid down by this court, and, indeed, we think are not questioned anywhere. *Anderson v. Inland Telephone, etc., Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615, 47 L. R. A. (N. S.) 266; *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36; *Hanson v. Shipley*, 71 Wash. 632, 129 Pac. 377.

[2] In the case before us there was nothing concealed about the place of work. The water of the river had been impounded by a dam in which two spillways had been left open. Through these spillways the water rushed with great force, and for some space back of them the current of the stream was unsafe for a rowboat. But where the employes were required to work was attendant with no special dangers. They had but to exercise ordinary care to be safe. Furthermore, the dangers were open and apparent, as obvious to the employes as they were to the employer. We cannot think, therefore, that there is any room for the claim of negligence made in this regard.

[3, 4] Again, it is said that Le Claire was unfamiliar with the work he was ordered to do, was unaware of the dangers of the river, its rapid flow and undercurrent, and was not informed of these things by his employer. But here again we think the evidence fails. The evidence thought to show his unfamiliarity with the dangers attendant on rowing a boat upon a flowing stream was that of his relatives, who testified that he had had no great experience in these matters. But their testimony, remote as it was from the real question, showed that his experience was much greater than that of the average person. But the direct testimony, as we have before stated, was to the contrary. He represented himself as having such experience, and was selected for the work because of this fact; he took control of the oars himself, notwithstanding an experienced boatman was sent with him; and he handled the boat

with sufficient skill until he met with the mishap that caused his death. These were representations on which his employer had a right to rely, and it cannot be held liable for his death if he in fact misrepresented his ability to perform the particular work. Where an employé of mature years undertakes to perform a service, the dangers of which are open and apparent, he impliedly represents that he has sufficient skill to perform the service, and the employer is not liable to him for an injury caused thereby merely because he overestimated his qualifications. *Labatt's Master & Servant* (2d Ed.) § 1148. But the case here is even stronger than the rule requires; there were the positive representations of the deceased as to his necessary skill.

[5, 6] Another contention is that the boat furnished by the appellant was unsuitable for the purposes for which it was directed to be used, that it was too fragile and light and insufficiently braced, and that these defects caused the oarlock to come out of its socket. Certain of the respondent's witnesses did testify that in their opinion the boat used was not as suitable for the purpose as another form of boat would have been. But clearly this does not fix liability upon the employer. The evidence was all to the effect that the boat was a standard boat, comparatively new, with no structural defects not common to its class, and of a kind in common use throughout the several states, upon streams and bodies of water of all kinds where rowboats are usually in use. In fact it was the only boat mentioned in the testimony that was recognized by the witnesses by the mere mention of its name. Nor was there any testimony to the effect that the oarlock came out of its socket because of the insufficient strength of the boat to stand the strain of rowing. On the contrary the evidence is to the effect that it was lifted out in a natural manner, and could have been replaced but for the interference of the strap with which it was fastened to the boat to prevent its loss overboard in case of the very accident that did happen to it. But more than this, the boat was before the employé. He knew the waters over which he was expected to row it. Its strength or frailty was apparent to him, and whether it was suitable for the purpose was as much within his knowledge as it was within the knowledge of his employer. It is not a case where a defective tool or instrumentality has been furnished an employé by his employer, causing an accident, but a case where a standard and approved instrumentality was furnished, and an accident caused by faulty manipulation of the instrument furnished. An employer complies with his duty in this respect to his employé when he exercises reasonable and ordinary care in the selection of instrumentalities destined for his use; when he furnishes him with such as are in common use, without radical defects in itself, even



though it may be shown that there were better appliances for the particular purpose.

[7, 8] But it is said the oarlocks should have been fastened in their sockets so as not to come out even by faulty manipulation of the oar. Doubtless, had these oarlocks been so fastened, this particular accident would not have happened. But here again the evidence is all to the effect that such a process is unusual and not according to custom; that it was usual and customary to leave them unfastened. The evidence in so far as it bore upon the question tended to show that there were advantages and disadvantages attendant upon both, but it is clear that no negligence can be imputed to the employer when he furnished a boat equipped in this regard in the ordinary manner.

Much was said in the evidence concerning the velocity of the current of the stream, its undercurrents, and the like. These matters we shall not discuss, as we do not find that they in any manner caused the unfortunate accident. Whatever may have been the velocity of the current it could be traversed with safety by the use of ordinary care, and it is not even to be surmised from the evidence, much less was it shown, that any of these conditions caused the oarlock to come out from its socket. That the current of the river caused the boat to drift to a place of danger after the oar was rendered useless is of course not to be questioned, but this was not the primary nor proximate cause of the accident. The cause of the accident was the faulty manipulation of the oar by Le Claire, and for this no recovery can be had of his employer.

The judgment is reversed and the cause remanded, with instructions to dismiss the action.

MORRIS, C. J., and MAIN, ELLIS, and CROW, JJ., concur.

(83 Wash. 472)

ZINDORF et al. v. TILLOTSON et al.  
(No. 12069.)

(Supreme Court of Washington. Jan. 11, 1915.)

1. APPEAL AND ERROR (§ 194\*) — REVIEW — PLEADING—OBJECTION NOT MADE BELOW.

Objection for the first time on appeal, that an affirmative defense cannot be treated as a counterclaim or cross-complaint, because of failure to so designate it and pray for separate relief, is too late, there having been a trial on the merits on issue joined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.\*]

2. APPEAL AND ERROR (§ 1170\*)—PLEADING—REVERSAL—FORMAL DEFECTS.

Within Rem. & Bal. Code, § 307, requiring errors not affecting the substantial rights of the complaining party to be disregarded on appeal, such rights of plaintiff were not imperiled by failure of defendant to designate an affirmative defense, a counterclaim, or cross-complaint, and pray for separate relief, defend-

ant having pleaded two affirmative defenses and prayed for the aggregate of compensation and damages claimed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

3. CONTRACTS (§ 237\*)—MODIFICATION—CONSIDERATION.

There is consideration for modification of a contract for doing work, by agreement to pay more, on the party who had agreed to do it, claiming there had been fraudulent representations as to the amount of work, and demanding that arrangement be made for doing the excess.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.\*]

4. CONTRACTS (§ 244\*)—NEW CONTRACT—EVIDENCE.

A new contract to pay a reasonable price per acre for the excess grubbing is created where T., having contracted to do work for Z., including grubbing of land, claimed there had been fraudulent representations as to the number of acres to be grubbed, and after a controversy over the excess grubbing, Z. said to him: "There is no use rowing about this thing. You go ahead and do the grubbing, and we will adjust it."

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1128; Dec. Dig. § 244.\*]

Department 1. Appeal from Superior Court, Pacific County; R. H. Back, Judge.

Action by M. P. Zindorf and another, partners as Zindorf & Elliott, against J. B. Tillotson and others, copartners as Broughton & Wiggins Company. From a judgment in favor of said defendant, plaintiffs appeal. Remanded, with directions to modify.

O'Phelan & Murray, of Raymond, and McClure & McClure, of Seattle, for appellants. Welsh, Welsh & Richardson, of South Bend, and Stapleton & Sleight, of Portland, Or., for respondents.

GOSE, J. This controversy arose between the plaintiffs as contractors, Pacific county, certain Men claimants, and the defendant J. B. Tillotson, a subcontractor. The plaintiffs were dissatisfied with the judgment, and have appealed.

The following are the facts: On July 3, 1911, the appellants entered into a contract with Pacific county, whereby they agreed to construct a section of state road No. 5. On July 18th they made a subcontract with the respondent, wherein he agreed to supply the labor, material, and equipment for the construction of the road, excepting piling, cedar posts, sills, culverts, curbing, planking, and bridges. The respondent did not pay all his bills for labor and material, and claims were filed with the board of county commissioners against the contract and bond. The commissioners thereupon refused to make the final payment to the appellants, and they commenced this action against the respondent, the surety on his bond, Pacific county, and all persons who had filed claims against the work. After putting in issue certain mat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ters alleged in the complaint, the respondent for a further and separate answer and defense alleged, among other things, that he contracted to do the excavating, including grubbing, at an agreed price of 23¼ cents per cubic yard, believing and relying upon the express representation of the appellants that the grubbing would not exceed 10 acres; that it comprised 35 acres, a fact known to the appellants prior to and at the time of the execution of the subcontract; that the respondent had no personal knowledge of the amount of grubbing; that the appellants' representation as to the number of acres to be grubbed was made for the purpose of deceiving the respondent and inducing him to enter into the contract; that as soon as the respondent learned that there was more than 10 acres of grubbing, he notified the appellants, and demanded that they arrange for doing the excess grubbing; that the appellants thereupon requested the respondent to complete the grubbing, and agreed to pay him the reasonable value thereof; that he completed the grubbing, and that the excess, amounting to 25 acres, was reasonably worth \$8,000. The appellants joined issue upon these allegations. They made no objections to the pleadings in the lower court, by motion, demurrer, or otherwise.

[1, 2] They now contend that the affirmative defense cannot be treated as a counterclaim or cross-complaint, and have cited authorities from other jurisdictions to sustain their view. The case was tried upon the merits after the appellants had joined issue upon the affirmative matter pleaded, and the objection comes too late to merit serious consideration. Our statute, Rem. & Bal. Code, § 307, requires us to disregard all errors which do not affect the substantial rights of the complaining party. *Maxwell v. Dimond*, 145 Pac. 77.

The failure of the respondent to designate the affirmative defense as a counterclaim or cross-complaint, and to pray for separate relief, in no way imperiled the substantial rights of the appellants. The two affirmative defenses were pleaded, and the prayer was for the aggregate of the compensation and damages claimed.

[3] It is argued that the respondent had contracted to do the grubbing as a part of the excavation, and that the appellants' promise to pay for the excess grubbing was without consideration. This question is no longer a debatable one in this state. We held to the contrary in *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 108 Pac. 1093, 28 L. R. A. (N. S.) 455. A like view was announced in *Blodgett v. Foster*, 120 Mich. 392, 79 N. W. 625; *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 493; *Linz v. Schuck*, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. Rep. 481, 14 Ann. Cas. 495; *Domenico v. Alaska Packers' Ass'n* (D. C.) 112 Fed. 554.

We will consider the questions of fraudulent representations and the appellants' promise to pay for the excess grubbing together. The appellants' contract with the county was upon a unit basis. The county agreed to pay them, for clearing \$125 per acre; for grubbing \$110 per acre; for easy excavation 31 cents per cubic yard; for rock work \$1.20 per cubic yard. The appellants agreed to pay the respondent as follows: For clearing \$65 per acre; for excavation, which included grubbing except solid rock, 23¼ cents per cubic yard; solid rock 85 cents per cubic yard. The court found that the appellant Zindorf is a capable, experienced road builder; that he knew the nature of the clearing and grubbing to be done in the construction of the road; that he knew the prices for which such work could be profitably done by experienced contractors; that the respondent had but slight experience in such work, "and was much less capable and experienced" therein than the appellants; that Zindorf represented to respondent that he had personally examined the road, and that there would be about 9 or 9½ acres of grubbing; that he requested the respondent to make his bid so that the work of excavation would include grubbing; that Zindorf then knew that there was more than twice the amount of grubbing he had represented; that he misrepresented the amount of grubbing purposely and with the intention of deceiving the respondent and of inducing him to enter into the subcontract; that the respondent relied upon his representations, and contracted upon the belief that they were true; that respondent made a casual examination of the route of the road from the platform of a railroad train which ran parallel with the road, but that he did not examine the work with a view to estimating the quantity of grubbing. The court further found that, after respondent had completed grubbing 9½ acres and had found that there was much more grubbing to be done, he notified the appellants that he had completed the grubbing which he had agreed to do, and told them that if he did any more grubbing it would be done at the cost of the work, plus 10 per cent.; that otherwise he would do no more grubbing, and that it was then mutually agreed between them that the respondent should complete the grubbing and the appellants would pay him for all grubbing in excess of 9½ acres, and that the excess was 20½ acres.

A discussion of the evidence upon which these findings were based would be profitless. We have read both abstracts of the testimony. The appellant Zindorf knew before the subcontract was made that the county engineer of Pacific county had estimated the grubbing at 20 acres. Despite this knowledge, he wrote the respondent before the subcontract was made that it was between 9 and 10 acres. Zindorf knew that the re-

spondent's time for making his bid was so limited that he could not go over the work and estimate the quantity of grubbing to be done with any degree of accuracy. The parol testimony is in direct conflict, but, viewed in the light of all the attending circumstances, we cannot say that the court did not correctly interpret the evidence.

The court found that the subcontract provides that the respondent shall be paid, for all extra work on forced account, the actual cost of the work, plus 5 per cent.; that the actual cost of the grubbing was \$263.97 per acre, which with 5 per cent. added makes \$277.17 per acre, which is "a reasonable sum" for the appellants to pay for the excess grubbing.

[4] Upon this subject the appellant Zindorf testified that the reasonable cost of the grubbing was \$50 an acre. The county engineer of Pacific county said that the reasonable value of the grubbing "for the average" was \$75 per acre. Another witness, whose qualifications were admitted, and who knew the character of the timber, testified that the reasonable cost of the grubbing would average about \$65 per acre. Another witness, whose qualifications were admitted and who was also familiar with the road, and who said that he took particular notice of the soil and the timber, placed the reasonable cost of the grubbing at \$75 to \$80 per acre. The respondent and one or two witnesses fixed the value of the grubbing in harmony with the finding of the court. It may have cost the respondent that price per acre. It will be remembered that the court found that the appellant Zindorf is a capable, experienced road builder; that the respondent had had limited experience in road-work through timber, that Zindorf knew the nature of the clearing and grubbing to be done in the construction of the road, and that he knew the prices at which such work could be profitably done. He had contracted to do the grubbing at \$110 per acre. The respondent testified that at the termination of a heated controversy over the excess grubbing, Zindorf said to him: "There is no use rowing about this thing. You go ahead and do the grubbing and we will adjust it." This language we have construed as creating a new contract. In effect Zindorf said to the respondent, We will pay you a reasonable price per acre for the excess grubbing. It will be remembered that the respondent under the subcontract received \$65 per acre for clearing. In the light of all the evidence and the finding of the court, which we have adopted, as to the knowledge and experience of Zindorf of the nature and character of such work and the reasonable price at which it could have been performed, we think \$110 per acre is a reasonable price for the excess of 20% acres.

The cause is remanded, with directions to modify the judgment accordingly.

CROW, C. J., and CHADWICK, MORRIS, and PARKEB, JJ., concur.

(83 Wash. 479)

DIBERT et al. v. PETERSON. (No. 11211.) (Supreme Court of Washington. Jan. 11, 1915.)

1. DEEDS (§ 211\*)—JUDGMENT (§ 841\*)—EVIDENCE—SUFFICIENCY—FRAUD.

Evidence in a suit to set aside a conveyance of land and an assignment of a judgment held to warrant a rescission on the ground of fraud or undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211;\* Judgment, Cent. Dig. § 1537; Dec. Dig. § 841.\*]

2. CANCELLATION OF INSTRUMENTS (§ 25\*)—RIGHT TO CANCELLATION—DEFENSES.

That defendant offered to rescind does not deprive plaintiffs of the right to subsequently demand a cancellation of their deed and assignment to defendant, where plaintiffs by reason of ignorance were unable to understand the offer.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 25;\* Deeds, Cent. Dig. § 210.]

3. APPEAL AND ERROR (§ 417\*)—BONDS—SUFFICIENCY.

Where the notice of appeal was signed by all of the parties appellant, the fact that the bond was not signed by one of them does not deprive the court of jurisdiction and warrant the granting of a motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.\*]

Department 1. Appeal from Superior Court, Spokane County; F. K. P. Baske, Judge.

Action by John Dibert and others against Moritz Peterson. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

Perkins & Honefinger, of Spokane, for appellants. Geo. W. Belt, of Spokane, for respondent.

CHADWICK, J. Plaintiffs brought this action against defendant for the purpose of securing the reassignment of a judgment which they had obtained against Ernest Dibert and wife which had been assigned to defendant, to cancel a deed made by them to defendant, dated April 13, 1911, and for the sum of \$370, money received by defendant from the sale of horses belonging to plaintiffs and retained by defendant. A lis pendens was filed against the real property involved, which is described as that part of the southwest quarter of section 2, township 21, north of range 43, east Willamette Meridian, Spokane county, Wash., lying and being west of what is known as the Pine Creek Road; also, the south half of the southeast quarter of section 2, aforesaid; also, the southeast quarter of the southwest quarter of section 2 aforesaid; also, that part of the northeast quarter of section 11, township 21, north of range 43, east of the Willamette Meridian

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lying and being north of what is known as the Plaza Road, in Spokane county, Wash.

All parties to the action are Germans, and, while defendant lays some claim to an understanding of the English language and of business as transacted in this country, plaintiffs are almost entirely lacking in this respect. We feel justified in saying that they are extremely ignorant, and we cannot but doubt that they ever understood any material part of the facts and proceedings in this action. The judge in the court below, who understood German, was impelled to repeat in German questions asked by counsel and in turn attempted to interpret their answers. It has been difficult for us to arrive at a definite conclusion.

[1, 2] Plaintiffs contend that defendant, through misrepresentations, fraud, and deceit, induced them to assign the judgment which they held against Ernest Dibert to him, promising to reassign it and deed their property back if a new trial was not granted in a case waged by them against Ernest Dibert. Plaintiffs allege that both the assignment of the judgment and the conveyance of the property was without any consideration whatever and was made solely for the purpose of securing protection, as they supposed from their creditors; that for the same reason they gave defendant a bill of sale of their horses, eight in number; and that defendant afterwards sold the horses for the sum of \$370. They allege that defendant still retains possession of this money. All of the material allegations are denied by defendant, who asserts that plaintiffs requested him to take a bill of sale of the horses to keep Ernest Dibert from taking them away from him; that plaintiffs consented to the sale of the horses; and that they also gave their consent to the payment of \$150 of the purchase money to Belt & Powell, attorneys in their suit against Ernest Dibert; that plaintiffs proposed to sell him the land in question for \$1,000 subject to a mortgage thereon of \$1,625 (one-half of which sum defendant had already assumed when he purchased an adjoining piece of land from Ernest Dibert which was also covered by mortgage; that on the 13th day of April, 1911, defendant accepted said offer, and plaintiffs thereupon conveyed said land to defendant, subject to said mortgage; that defendant gave plaintiffs two notes, one for \$400, payable November 1, 1911, and the other for \$600, payable November 1, 1912; that the \$400 note was transferred to Belt & Powell in payment of attorneys' fees in the suit against Ernest Dibert; that plaintiffs were indebted to defendant for money loaned and other advancements in the sum of \$307.50; that this sum was indorsed as paid on the \$600 note; that, at the time plaintiffs conveyed said land to defendant, they assigned to him the judgment of \$1,625 which they held against Ernest Dibert, they believing he would be able to

collect it for them; that defendant, at the request of plaintiffs, made a bill of sale to the purchaser of the horses and offered the purchase money to plaintiffs, but that they requested him to pay \$150 of said \$370 to Belt & Powell, which he did, and that they requested him to hold the balance, \$220, subject to their demand; that they have never called for it; that he paid interest amounting to \$54 on the mortgage of \$1,625 which was placed on the property when it was originally purchased, and taxes in the sum of \$51 after he purchased the property from plaintiffs. Defendant also claims that plaintiffs are not prosecuting the action in good faith. At the time of the trial defendant tendered \$220, the balance of the purchase money remaining from the sale of the horses, and also tendered the judgment. Both of these tenders were accepted. The lower court found that plaintiffs had failed to sustain the allegations of their complaint and dismissed the action without cost to either party.

Respondent makes claim to an unselfish interest in plaintiffs' affairs, but it must be remembered that he already owned adjoining land and in one instance, if not more, stated that he needed the Dibert land so as to make his holding complete, "altogether." Different witnesses testified that the land was worth from \$5,000 to \$6,000.

The lower court defined the issue of the case to be: (1) Did fraud and deceit enter into the transfer of the property? (2) were fraudulent representations made to the plaintiffs with reference to the return or reconveyance of the property? (3) was there any consideration?

Respondent claims that, as a part of the consideration for the sale of the land by appellants to him, they were to have the crop for the year 1911, he to have the pasture, and in support of this contention sets up certain conversations and admissions of plaintiff John Dibert during the trial:

"Q. Now, you had a crop in there at that time, didn't you? A. Yes. Q. Well, he gave you permission to take that off, didn't he? He said 'You could take it off.' A. Well, he said, 'No, take that off,' but he said: 'I will leave you that; I no want that.' Q. Oh, he said he would leave you that? Mr. Perkins: On whose land was this? Mr. Belt: On this land. Q. The crop was on this land, wasn't it? A. Yes. Q. Yes, and he said he would leave you that? A. Yes. Q. You could take it off? A. Yes."

Looking to the whole case, we are not disposed to hold this testimony to be destructive of appellants' case. They admit they knew that Peterson held the deed to the land, but they insist that he held it for the purpose of protecting their interests and would deed it back at any time they desired. If their belief was sustained by their understanding of their relation to respondent, they were entitled to the crop in any event.

Counsel for defendant further says:

"The complaint alleges, and John and Herman Dibert both testify, that respondent got them to give him the deed and the bill of sale by

telling them that Ernest would take the land and horses away from them if he got a new trial, yet Herman says: 'Q. Didn't I (counsel) tell you that Ernest, after the trial of the case and after Ernest had made a motion for a new trial, if he were to get a new trial, he couldn't possibly get the horses back, and he couldn't possibly get the land back, because he had never claimed them? A. Yes.'"

But counsel is perhaps unconsciously assuming the ability of the witness to reason and to comprehend the transaction. Nor should appellants be held to have lost their right to assert an interest in the land, if any they have, because they were told by counsel for respondent, at a time when respondent offered to deed the land back, that "this was their opportunity," and because they did not do so their conduct should stand as a bar to their present assertion of title to the land; but when it is understood that the plaintiffs could hardly make themselves understood in the English language, and that whatever counsel said to them must have been talked over in German with the respondents, we are not satisfied that they had any understanding other than that the respondent was holding the land for them. Then, too, the consideration seems inadequate. If a new trial had been granted in the case of appellants against Ernest Dibert, he could not have taken the land because he did not claim it. There was no excuse—certainly none is shown—for the transfer of the judgment or for the bill of sale of the horses. We cannot believe, with the whole record before us, that appellants would have so acted if they had not been led without understanding into the transaction by the respondent. At the time the transfer was made, they had won a lawsuit against Ernest Dibert; a motion for a new trial was pending; respondent was their faithful and steadfast friend; he owned land adjoining; it was to his interest to put fear into the hearts and minds of these plaintiffs so that he might involve the title in a way that he could eventually claim the land.

We confess our inability to say that we are positive that these things are so; but the probability is so overwhelming we think that, if there ever was a case where the parties should be relegated to their original positions and made to deal with each other under the broad principles of equity, this is the case. Respondent offered at one time to deed the land back to plaintiffs. If he is given his money and his interest, he should not now complain.

Neither are we impressed by the argument made by counsel for respondent that the testimony of the plaintiffs is contradictory. As we have said, plaintiffs, especially the witness John Dibert, had little comprehension of what was going on in the courtroom owing to his lack of understanding of the English language. He does not even write his name and is possibly of a lower order of mentality than the average man.

We believe that equity will be done in this case if respondent is given that which he put into the transaction. We have therefore decided to remand this case, with instructions to the lower court to take an account of the affairs of the parties to this action and to order a reconveyance of the land upon the payment to the respondent of his money with interest, and all sums paid in the way of taxes and for betterments, and the sums paid to Belt & Powell as attorneys' fees.

We have not overlooked respondent's motion to dismiss the appeal in this case.

[3] A notice of appeal was given by all of the parties plaintiff. The bond was not signed by Anna Dibert, the wife of Herman Dibert, although it was signed by John Dibert, Caroline Dibert, and Herman Dibert. It is in form a supersedeas. No objection was made to the form of the bond in the court below.

The motion is denied under the authority of *Thomas v. Lee*, 74 Wash. 286, 133 Pac. 446, 134 Pac. 510. The jurisdiction of this court depends upon the notice of appeal, and not upon the form of the bond.

Each party will pay their own costs on appeal.

CROW, C. J., and ELLIS and GOSE, JJ., concur.

(83 Wash. 528)

#### IN RE BROWN'S ESTATE.

GODFREY et al. v. WATERHOUSE et al.  
(No. 11202.)

(Supreme Court of Washington. Jan. 11, 1915.)  
WILLS (§ 302\*)—EXECUTION—FORGERY OF SIGNATURE—EVIDENCE.

Evidence in a will contest held to justify a finding that the signature of testatrix to her will was genuine.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.\*]

Chadwick and Fullerton, JJ., dissenting.

En Banc. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Contest, by George H. Godfrey and others against Nellie Waterhouse and others, of the will of Sarah J. Brown, deceased. From a decree sustaining the will, contestants appeal. Affirmed.

Scott & Campbell, of Spokane, for appellants. Ira Honefinger and Hamblen & Gilbert, all of Spokane, for respondents.

MAIN, J. This action was instituted for the purpose of contesting the will of Sarah J. Brown, deceased. After the issues had been framed the cause was tried before the court sitting without a jury. Findings of fact and conclusions of law were made, and a judgment entered sustaining the validity of the will. From this judgment an appeal is prosecuted.

The will purports to have been executed on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the 14th day of January, 1910. On January 16, 1911, Sarah J. Brown, the testatrix, died. The will was found and produced on or about the 15th day of December, 1911. Subsequent to the death of Mrs. Brown, and prior to the date of the finding of the will, the estate was being administered upon. After the will was found and produced, it was admitted to probate on January 23, 1912. Thereafter, and on January 30, 1912, the present action was instituted.

The will, after making certain specific bequests and devises, gives the residue of the property to two adopted sons, and the nieces and nephews of the testatrix, share and share alike. The two adopted sons, who by their guardian ad litem are the contestants in this proceeding, were adopted during the year 1902 when they were five and six years old, respectively. They were sons of Mrs. Brown's brother, Clarence B. Godfrey and his wife. After their adoption they continued to reside with their parents as before.

The statement of facts in this case covers a little more than 650 pages. Also there are many exhibits. Most of these, however, are documents containing the admitted signatures of Mrs. Brown, offered in evidence for the purpose of comparison with the signature upon the will. There is no question in the case other than one of fact. In none of the briefs is there a single law book cited. The ultimate question is whether the signature upon the will is that of Mrs. Brown. The testimony, not only upon this primary question, but upon the collateral questions, is in conflict. Every page of the statement of facts has been carefully read, and the exhibits have all been examined. The signature upon the will has been compared with the admitted signatures, under a hand glass, and also under a microscope. Taking into consideration all the evidence in the case, we are of the opinion that there is not only insufficient evidence to justify the reversal of the trial court upon a finding of fact, but that the evidence affirmatively shows that the judgment of the trial court was right. To enter upon a review and discussion of the evidence would unduly extend this opinion, and would serve no useful purpose. Where the question is solely one of fact, the opinion is not valuable as a precedent.

The judgment will be affirmed.

CROW, C. J., and MOUNT, PARKER, MORRIS, and GOSE, JJ., concur. ELLIS, J., did not participate.

CHADWICK, J. I dissent. This case was originally assigned to me. I believe I took it with an open mind. I have given it more care, more thought, and more study than any case ever submitted to me for my judicial opinion. I took the case primarily to affirm. I could not put an affirmance on paper, nor do I believe that it would be possible to make a detailed statement of the case and draw the

conclusion that the court has drawn. The only way to affirm the case is to pass it without argument, saying that taking the case by its four corners we find there is a conflict of evidence, and the court is not prepared to say that the evidence preponderates against the decree of the lower court.

Judge MAIN has read the record with conscientious care and zeal, and he has drawn the conclusion that upon the whole case the decree should be affirmed. I, too, have read every page of the statement of facts, and re-read the greater part of it. I, too, have examined the exhibits and put the disputed signatures under a reading glass and a high-power microscope. I have done my work and shall avail myself of the privilege of giving reasons which, in my judgment, sustain my opinion that the purported will of Sarah J. Brown is a forgery.

Sarah J. Brown went to the city of Spokane about the year 1889. She engaged in dressmaking and made some investments in real estate which proved profitable, so that at the time of her death, which occurred on the 16th day of January, 1911, she had accumulated an estate which was appraised at about \$40,000. Mrs. Brown possessed an unusual aptitude for business and was careful and methodical in all of her business habits. She had transacted her business through an attorney for more than 20 years. During that time Mr. D. W. Henley, Messrs. Henley & Scott, and Mr. Scott, now of counsel for the contestants, did her legal business. She kept her valuable papers in a tin box, which she deposited in her lawyer's vault. Judge Prather, an attorney of respected standing, had done some little business for Mrs. Brown many years ago. He has an indistinct recollection of drawing a will, but no showing is made that would warrant us in holding that Mrs. Brown, during the 20 years of her active life in Spokane, ever consulted, except in the most remote instances, any lawyer other than Mr. Henley or Mr. Scott for guidance or advice. In the years 1891-1893, Mrs. Brown acted as administratrix of the estate of Benjamin F. Whipple, deceased. This is noted for two reasons: To show that Mrs. Brown was familiar with the ways of the law and of law offices, and because many of her signatures have been gathered from the files of that case and have been offered as evidence in this one.

Clarence B. Godfrey, a brother of Mrs. Brown, and his wife, Etta B. Godfrey, have two sons, George H. Godfrey and Frank B. Godfrey. Mrs. Brown seems to have had an affection for these children, and in October, 1902, at a time when they were five and six years old, respectively, she adopted them as her own, with the consent of their parents. She attended to and met the expense of their schooling. When not in boarding school the boys remained with their parents. It seems to be proven beyond the peradventure of a

doubt that the only object Mrs. Brown had in adopting the boys was to see to it that they had proper instruction and to make them her lawful heirs. Her relationship to the boys was not changed during her lifetime, and they were her legally adopted children at the time of her death. Mrs. Brown was of the age of about 64 or 65 years at the time of her death. She had ever been of sound mind and alert to her business interests. After the death of Mrs. Brown search was made for a will. None was found in her tin box where inquiry was first and most naturally directed, nor was any found at her home. Mrs. Etta B. Godfrey, the natural mother of the adopted sons of Mrs. Brown, was appointed administratrix, and proceeded to administer the estate until the purported will was admitted to probate. A contest was thereafter instituted by the natural father of the adopted sons, who are also parties contestant, and by their guardian ad litem. The trial judge found that contestants had failed to sustain their petition, and decreed the proposed will to be the last will and testament of Sarah J. Brown, deceased. An appeal to this court is prosecuted.

Contestants assert the will to be a forgery because: First, the direct testimony shows that she had no will; second, concomitant circumstances show the proffered document to be false; and third, the paper (a) shows forgery upon its face, and (b), by a preponderance of the credible testimony of the opinion witnesses and of the experts in handwriting, it is shown to be such.

Mrs. Nellie Waterhouse and Mrs. May Pixlee are daughters of Lucinda L. McFarlane, a sister of Mrs. Brown. Mrs. McFarlane died about two months before Mrs. Brown passed away. Certain real property which Mrs. Waterhouse claimed as her own, but for which Mrs. Brown had probably furnished the whole consideration, was in Mrs. Brown's name when she died. She also held the note of Mrs. Pixlee for about \$800. A brother of these women, George L. McFarlane, also owed a note to the estate. Mrs. Waterhouse and Mrs. Pixlee expected that Mrs. Brown would devise the property and absolve the note in her will. It seems fairly certain from the testimony that Mrs. Waterhouse and Mrs. Pixlee were bitterly and even angrily disappointed because their aunt had not released their obligations and had not distributed her property, especially some diamonds, by will, in the way they thought she should have done. They seem to have entertained the idea that if the adoption of the boys were set aside they would obtain no advantage over the other heirs, and they talked with Mrs. Godfrey, and a lawyer was consulted with reference to vacating the order of adoption. The testimony is very conflicting upon this item as to which one of the parties was the mover. Mrs. Waterhouse and Mrs. Pixlee say that Mrs. Godfrey suggested it. She de-

nies it and insists that the other women suggested it. But it is certain that the matter was discussed, and that Mrs. Waterhouse and Mrs. Pixlee were extremely anxious that it be done. The Godfreys were not unwilling that Mrs. Waterhouse should have the property claimed by her, and a friendly suit was begun by Mrs. Waterhouse against the administrator, and a decree so holding was entered. There seems to be no doubt of the fact that Mrs. Brown had often said that she intended that "Nellie" should have the property, and it seems to be about as certain that she held the property in her own name in order to protect it from the consequences of habits less thrifty than she knew herself to possess. Mrs. Pixlee was insistent that she should be given her note without payment. She made at least one, and possibly more, trips from her home at Ephrata with the avowed purpose of demanding the note. A final demand was made on the administrator about December 8, 1911. At this time Mrs. Pixlee suggested to Mrs. Godfrey, the administratrix, that it had been Mrs. Brown's intention to put the name of a deceased brother on Mrs. McFarlane's tombstone. Neither Mrs. Godfrey nor Mrs. Pixlee knew the date of his death, and Mrs. Pixlee assumed to look for it among her mother's old papers. About December 15th, at the home of Mrs. Waterhouse, in the presence of Mrs. Olson, a neighbor, and Miss Jenkins, who say they were asked to "come over" and hear some music on the phonograph (one of these witnesses also testifies to an anxiety on the part of the sisters to have another lady present), Mrs. Waterhouse and Mrs. Pixlee brought out an old red wallet stuffed full of old papers belonging to their mother. The papers number 111 and are wholly irrelevant to any issue in this case. The wallet was tied in an old newspaper, stained with the mark of a coffee cup. Mrs. Waterhouse testified that on the Saturday before Mrs. Brown's death she took the old red wallet from Mrs. Brown's house, where Mrs. Brown had had it for the purpose of looking through her deceased sister's papers; that the papers were scattered over a small center table and over Mrs. Brown's desk; that she gathered them up and wrapped them and the wallet in an old newspaper which Mrs. Brown had laid upon the small table upon which she was accustomed to eat her meals; that there was a stain of coffee upon it. Her theory is that in gathering up this wallet and wrapping it in the newspaper, she picked up the envelope containing the will. Resuming now our narrative, Mrs. Pixlee started to look through the papers, and "all at once" she dropped them on the floor. In picking them up she or Mrs. Waterhouse "happened," out of the whole number of papers, to pick up an envelope, blank with the exception of the words "my will" written dimly across one end in lead pencil. Mrs. Pixlee says she

said, "Why, mother had a will." Mrs. Olson took it out of her hand and examined and read it. Miss Jenkins testifies to the discovery of the will as follows:

"State to the court what was said and what was done in the finding of this will? \* \* \* A. Mrs. Pixlee said that, looking at some old pictures of people back East put her in mind of an address that Mrs. Godfrey wanted to find in some old letters, and she spoke to Mrs. Waterhouse about looking those old letters over, and she said, 'Should I look them over to-night or should I take them home with me?' and I think Mrs. Waterhouse said do just as she was a mind to; and she said—Mrs. Pixlee said again to Mrs. Olson, she said, 'What would you do?' and Mrs. Olson said, 'Why,' she said, 'I would look part of them over, and if I got tired I would take the rest of them home with me.' And so she was looking them over, and when she unwrapped them in this newspaper there was a mark where the cup had sat, a cup of tea or coffee had made a mark on the tablecloth, and so I had my attention drawn to it; she said, 'This is one of Auntie's tablecloths; you can see where the cup sat on it,' and I noticed it, and she drew Mrs. Olson's attention to it, and she noticed it, and I think then was when Mrs. Waterhouse said, 'I must burn those—them in the stove,' or something like that, she said, and she made a grab for them. She was sitting across the room, and she made a grab for them and knocked them out of Mrs. Pixlee's lap, and if I remember right the first letter, the first envelope, Mrs. Pixlee picked up it had across the end of it, 'My Will.' Mrs. Pixlee held it up, and she says, Mrs. Pixlee said: 'There is the lost will; auntie has made a will.' And she handed it to me, and I don't remember if I opened it or handed it back to her and she opened it, but I remember I was the first one to open the will inside the headings unfilled in, and I opened it and I said, 'The last will and testimony of Sarah J. Brown,' and I just dropped it on the floor. I said, 'I don't want nothing to do with it'; and I think Mrs. Pixlee picked it up and said, 'Maybe no one ought to read it; we ought to take it to a lawyer,' and Mrs. Olson says: 'Yes; we will read it; it won't do any hurt.' And she took it and started to read it, and I think one of them grabbed it away from her, and she grabbed it back again and read it, and she read it aloud a couple of times so we all heard it."

The will was carried to the attorneys for Mrs. Waterhouse and was afterwards offered for probate.

One of the witnesses to the will, George A. Griffith, had known Mrs. Brown for more than 20 years. He is a farmer living west of Spokane, and is the father-in-law of George McFarlane, one of the beneficiaries under the will. W. C. Lavender, the other witness, says that he did not know Mrs. Brown, although Griffith says he (Lavender) had met her on at least one occasion at his home. Lavender does not remember the circumstance. Lavender was a friend of Griffith of more than 20 years' standing. The two witnesses to the will substantially agree that they were met by Mrs. Brown (although Lavender says that, not knowing her, he does not swear that it was in fact Mrs. Brown) on Riverside avenue near McNabb's drug store, and were asked by her to step into the drug store and witness her will; that they went into the store, and in the

northeast corner, at a place provided for the convenience of customers, the three of them signed the document. Lavender says it took "just a minute, just long enough to sign it up." This is a significant fact to which we will refer later. Lavender further testifies that he remembers the signer of the will as a woman between "40 and 50," that she did not appear to be old, and that she acted like she was in good health. Griffith also says that she seemed to be in good health, although there can be no question that at about that time (the most of the month of January) she was laid up with rheumatism and unable to walk. Lavender says he never saw the woman after that time.

Another incident relied upon by proponents is testified to by Judge Prather, who says, in substance, that some time within the year or two then just past, some man, whom he does not now remember, came to him and exhibited a typewritten draft of a will, and asked him whether it was in legal form. He replied that it was, whereupon his visitor told him that he had been sent there by Judge Prather's old friend, Mrs. Sarah J. Brown, who thought that because of old friendship he would make no charge for his advice.

Testimony is also offered tending to show that Mrs. Brown had intended to square all debts and obligations owing by her nieces and nephew, but it is nowhere made to appear that she ever manifested, by word or deed, an intention to discharge their debts and at the same time make them residuary legatees of equal standing with her adopted sons. There is much testimony tending to show that Mrs. Brown had said that she had done all that she intended to do for her sister's children. On this feature of the case the testimony neutralizes itself.

Would a woman be apt to make a will under the circumstances, and act with reference to it as it is alleged Mrs. Brown did, in the light of the following facts? She was an accomplished business woman, "smart," of mature thought and careful business habits. She had been accustomed, both before and after the date of the alleged will, to do her business through her attorneys. The making of a will was no new thing to her—it seems to be agreed by all that she had made a will some years before. It was a subject that was often discussed by her. There was no reason why she should go about it in a mysterious way or work through the instrumentality of some man who appears on the scene and makes his exit from the stage without revealing his identity. To be called upon to act upon such a delicate mission the party must have been an old friend of Mrs. Brown, and, if so, he would probably have been known, either personally or by reputation, to Judge Prather. The record reveals no like instance where Mrs. Brown depended upon others to attend to



her affairs. She was on sufficient terms of intimacy with her own lawyer to loan him money, and if the plea be urged that she sought to save a fee by sending the draft of her will to an attorney by the hand of a stranger for approval, it may be answered by saying it is more probable that her own attorney would have answered her question without fee than one who had gained no profit from her in a business way. Mrs. Brown was not close or stingy. The record shows the contrary. She was generous, rather than grasping. She had been very liberal with her sister's children. The contested will was undoubtedly drawn by a lawyer, or from a legal form, and it seems improbable, in the light of all the other circumstances attending the execution of the will, that Mrs. Brown, the methodical business woman, would have had it drawn by a lawyer other than her own. If she desired the advice of another lawyer, it is more likely that she would have gone to him herself. It would be utterly contrary to her habit and her life history in Spokane to charge her with going to some lawyer who cannot now be found, and whose work she had not sufficient confidence to accept without further assurance, and then to resort to the unusual method of passing a matter of that magnitude through the hand of a third party to be assured of its validity.

Then again the case touches the doctrine of probabilities in this: Considering Mrs. Brown's business training, she would in all probability have executed and obtained witnesses at the time and place where the will was drawn, and there closed the transaction and put it away for safe-keeping, for if we say it is her will, the form of it must have been satisfactory to her; there are no corrections or interlineations; although her sister is called "Lydia" instead of Lucinda, by which name she was known, and her nephew and nieces are named without the initials which she ordinarily used. Instead of doing the usual, ordinary, and natural thing, we find that she went out on the highways with intent to call witnesses from the bystanders, and just happened to meet Mr. Griffith and his friend Lavender, and then went into a public drug store to execute the will at a desk, or place to write on the counter. The two witnesses are not at all clear which it was, but, whichever it was, it was not there, as is shown by several disinterested witnesses, employes in the drug store. It had been removed some months before the date of the purported will. The witnesses do not remember whether they or Mrs. Brown sat down or stood up to sign the document. A most striking circumstance is that instead of then going to the repository where her private papers were kept, a place safe from intrusion and fire, and where those interested would naturally look for such a document at the time of her death, she left it around her

home for nearly a year so carelessly that it found its way into a pile of rubbish. The old pouch is full of Sunday school cards, rewards of merit, clippings, business cards, advertisements, letters, etc., unimportant and inconsequential things such as youth gathers and sentiment retains with growing strength as age creeps on. Mrs. Waterhouse says her mother never destroyed anything.

The finding of the will under circumstances that were so unusual as to call for some explanation puts suspicion upon it. The women who happened in or were called in both agree that Mrs. Waterhouse and Mrs. Pixlee were urgent in their request that they tell the lawyers that they were not invited to be at Mrs. Waterhouse's at the time the will was found. One of them says that she was told that she would receive \$100 if they won the case and established the will. All of these things and others which might be mentioned, when coupled with the fact that Mrs. Brown had been generous with Mrs. Waterhouse and Mrs. Pixlee and George McFarlane, the children of her deceased sister; the fact that she adopted her brother's boys to make them her heirs, as is testified by many disinterested witnesses; the fact that she had had a will before the adoption, and thereafter and up to the time of her death had said frequently to many third parties who have no interest in the case, as well as her own attorney as late as November, 1910, that while she had had a will, she had destroyed it, fearing that a will might be broken; the fact that during her last sickness, when asked by the doctor, at the solicitation of Mrs. Waterhouse or the Godfreys (they are not agreed as to who suggested it), about her affairs and whether she had a will, she expressed her impatience and displeasure, saying she could attend to her own affairs; the fact that the greater number of the witnesses agree that Mrs. Brown was confined to her home about the time the will was executed, unable to walk about the house or to the toilet because of a swollen foot and rheumatism, and that it is improbable that she was able to be on Riverside avenue in apparent good health on the 14th day of January—brings me to a consideration of the signature of the will.

Having detailed the facts in a general way, and keeping in mind the interest of the proponents who discovered the will, I come to a consideration of the signature and date line of the will, resolved to weigh the testimony with unusual care and as independently of the circumstances just recited as I can, although probabilities and incredibilities must, of necessity, enter more or less actively into the consideration of the questioned signature.

The law of questioned documents, if it may be called a settled branch of the law, is an interesting subject. There may be signatures

which will pass the scrutiny of a careful eye, yet under the microscope, or when superimposed upon or juxtaposed with an authenticated signature, the most careless observer will admit to be bald, even clumsy forgeries. Where, after the usual tests of observance and microscopical examinations, the witnesses are of different mind, a judge to whom the issue is submitted must resort to his own judgment and, from the conflict of opinion, the maze of circumstance, and a comparison of the questioned signature with all the authenticated ones, endeavor to extract the truth. To accomplish this, we, like the experts who have disagreed, must go over the same ground, employ the same tests, and by processes of inclusion and exclusion come to some opinion. Our field broadens, for unlike many of the witnesses who hold an authenticated signature in one hand and the questioned document in the other and by mere comparison or reference to pictorial effect express an opinion, we are compelled to consider the disposition, the character and characteristics, the motives and purposes, the health, the very life history of the one whose writing is offered even to its minutest detail, to measure probabilities, and, finally, if there be a probability one way or the other, to consider it in the light of the opinions. We must measure the witnesses, their experience, their interest, their attitudes, their apparent candor or lack of candor, their ability to judge, their opportunities to know the signature offered, their mental characteristics, the extent of their examinations and comparisons. It is our duty to observe to what extent an opinion upon scientific subjects or questioned hypotheses may be influenced by that bias and partisanship which in many, if not in most all, such cases influence, possibly in an unconscious way, the opinions of those who testify or may have testified in pride of opinion or in considera-

tion of an unusual fee. We must give weight to the experts in proportion as we think the reasons given for their opinions are good reasons or bad reasons. Osborn, Questioned Documents, 258.

Waiving for the time the opinions of the experts and others, and approaching the question, as I believe, with an open mind and with a sincere purpose to try the case *de novo* (Hunt v. Phillips, 34 Wash. 362, 75 Pac. 970),

I first submit an enlarged copy of the questioned signature and the attendant writing "Jan 14th."

(2) The questioned signature and 28 signatures taken haphazard from checks written in the years 1909-1910.

(3) Three signatures written in 1891-1893. These were taken from the public files in the county courthouse in the case of Whipple, deceased, and are presented to illustrate two points which we shall presently make.

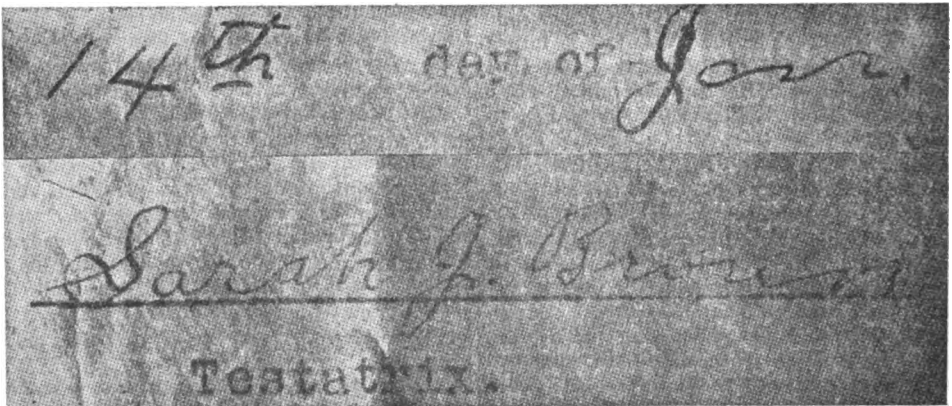
(4) A memorandum written by Mrs. Brown. This is offered to illustrate figures 1 and 4 and the figures 1 and 9.

(5) A letter showing the several characteristics of Mrs. Brown's handwriting. It is written on paper of about the same weight and texture as the paper upon which the questioned signature is found, and is valuable as a basis for comparison. Attention is called to the dots and punctuation marks, and the figures in the date line.

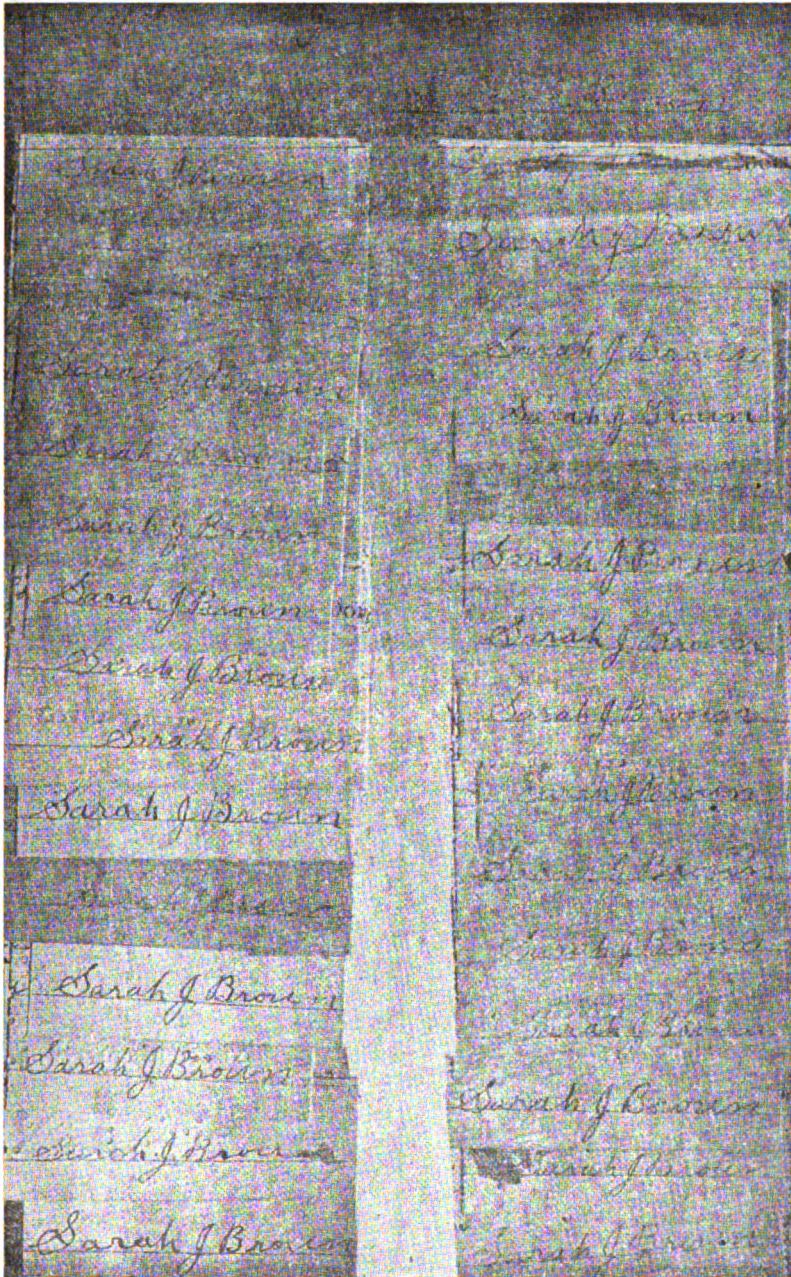
(6) A note made December 5, 1910, showing general characteristics and the signature of Mrs. Brown.

(7) A check, the last one drawn before the date of the will, also a check drawn August 13, 1909, showing ragged and heavy letters. The heaviness of the letters and figures in this check, apparently due to bad ink or pen, is submitted for comparison with the laying on or retouching of the letters in the questioned document.

# I



II





## III

day of Sept 1893  
Sarah G. Brown  
Adm'r  
 Allowed and approved for  
8110 into 18  
 day of Sept 1893  
Sarah G. Brown  
Sarah G. Brown  
 Allowed as above.  
Wm. A. D. H. H. B.

## IV

quit Claim  
 Lots 21, 22, 23, 24 Blk 3  
 5, 6, 13, 14, B. 4  
 Warrant Deed  
 to  
 Lots 1, 2, 3, 4, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24  
 sold to 18 Lots  
 Last lot quit claimed  
 to the same Co. was  
 Lots 15-22, 23, 24  
 To Scott Ls 23, 24, B. 4  
 O. Barton = 19 B. 4  
 m. Picee = 1, 2, 3 B. 3  
 L. McFarlane = 13, 14, 15 B. 3  
 Brandt = 7, 8, B. 5  
 To Hubert Barton  
 Lots 11 and 12, B. 4  
 To Hubert Barton  
 sold



## V

Spokane June 25, 1910  
Dear Cousin  
yours recd I was away from  
home so just got it now  
my Dear if you want to  
come out here and live  
with me I will give  
you and Baby a home  
and clothe you both and  
will send you a through  
ticket and it wont cost  
you any thing will pay  
your expences back if  
you want to go any  
time if you get homesick  
I dont think but you  
will like it I keep house  
by my self may have  
my Sister with me



## VI

20  
 Spokane Dec 5<sup>th</sup> 1910  
 Three months after date without  
 grace I promise to pay to  
 Otto Bossy the sum of seventy  
 five dollars with interest at  
 the rate of eight percent per annum  
 until paid for value received  
 Case 6482 Sarah J. Brown  
 Reporter E. J. B.

## VII

SPokane, Wash. Dec 31 1907 No. 42  
 EXCHANGE NATIONAL BANK  
 PAY TO THE ORDER OF Sarah J. Brown  
 Eighty eight and 00/100 DOLLARS  
 Sarah J. Brown

37  
 SPokane, Wash. Dec 31 1907 No. 42  
 EXCHANGE NATIONAL BANK  
 SPokane, Wash.  
 PAY TO THE ORDER OF Sarah J. Brown  
 Eighty eight and 00/100 DOLLARS  
 Sarah J. Brown

From these documents selected at random from the scores I have examined, I think it may be fairly set down that Mrs. Brown betrayed certain fixed characteristics:

(1) She wrote an angular hand. The principal experts for contestants say that the questioned signature was made by one who used the muscular movement. The principal expert witness for the proponents says that it is a combined muscular and finger movement. Both are right. The signature is a combination of the two, but is made by one who used the muscular movement. We find nothing in the writings of Mrs. Brown that even suggested that she ever wrote a free, full, muscular hand or a combination of the muscular and finger movement. Mr. Fearon, an important expert witness for the proponents, says Mrs. Brown's writing was wholly finger movement.

(2) She wrote a nervous hand. Her hand was at times "shaky." The letters "a-r-a" in the disputed signature betray neither of the two characteristics mentioned. They are full-fashioned, with perfect curves, and in themselves betray a familiarity with the Spencerian copy book hand of a generation ago.

(3) In writing her signature, Mrs. Brown stuck to the line or to a line, as writers using a finger movement almost invariably do. In the few instances in which we find either "Sarah" or "Brown" above the line, the name is on the line or a line. We find no signature describing the sweep of a circle from the letter "S" to the letter "n," as does the proffered signature. With her cramped-finger movement she could not have made such a sweep.

(4) Mrs. Brown made the letter "J" with two strokes of the pen. This is admitted by both principal experts. Her hand was not taken from the paper on either stroke. In the questioned document the "J" in "Jan" shows in the enlarged photograph, and under the microscope at least four primal movements and as many, if not more, patches. In the initial "J" there are at least three primal movements. The upper part of the true J's is narrow. The disputed J's are round or oval rather than long and sharp. They are neither characteristic, nor are they sustained by reference to any of the examples set before us.

(5) Mrs. Brown rarely closed the first "a" with the up and down stroke. She habitually left the second "a" open with a loop at the top of the first stroke. In the few instances where she closed the second "a," the first up and down strokes are made with the same loop movement, and not as it is in the questioned signature.

(6) The letter "r" is characteristic. I ask a comparison of the "r's" in the questioned signature and in the admitted signature shown on plate 2. The "r" in Sarah does not compare with any r in any of the writings. The "r" in Brown is more character-

istic, but when examined under a powerful microscope it so clearly shows a careful reconstruction that it is worthless as a basis of comparison.

(7) It was the habit of Mrs. Brown to close the "o" in Brown. Whether she did, or did not, do so, the first stroke of the "o" is habitually made with a loop or a loop movement. The "o" in the questioned signature is not characteristic. I submit a comparison of it with the "o's" to be found in other writings and pass it as needing no further reference.

(8) The first upstroke of the capital "S" describes an arc, whereas this movement in Mrs. Brown's signatures more nearly approaches a straight line. The loop is wider and does not resemble any made by her.

(9) Mrs. Brown carried the last stroke of the "w" in Brown; this she made like "u," or the first stroke of "n," as it may be, upward, and inclined to perpendicular. In the questioned document it is inclined to the horizontal so radically that it distinguishes the line from any that has been submitted for our inspection. The run from the "w" to the "n" is markedly greater than in any of the other signatures and greater than one would expect to find in the handwriting of one who is writing with a finger movement.

(10) She made the last stroke of her "a's" with a down or perpendicular stroke, a finger movement. This is found in every "a" we have examined. The "a" in "Jan" lacks this characteristic. Not only does it not return to the line, but goes on to the first movement in the letter "n" by a horizontal stroke. Compare this "a" with the full-fashioned perfect "a's" in the disputed Sarah and with the "a's" in the admitted signatures. If the several "a's" were written by the same person, it seems unlikely that they were written at the same time and under the same conditions, as testified by the witnesses to the will.

(11) The upstroke and the last movement in the letter "n" in "Jan" are clearly round and curved, and were written by one having a muscular movement.

(12) Mrs. Brown habitually made the horizontal stroke in the figure "4" with an upstroke or movement, and when she used it at all, which was not frequent, as habitually made the horizontal dash under the abbreviation "th" or "nd" with a downstroke. We cite the violation of these characteristics in the figure "14." Mrs. Brown made the perpendicular lines in "1" and "4" nearly straight up and down. In the questioned document they are less perpendicular than in any we have in the exhibits, and they show the easy, finished line of a Spencerian muscular movement.

Mr. Lavy in his little work on disputed handwriting, says:

"The little things are the ones that count most in making examinations and determining

a forgery, for the reason that they are no less characteristic than the more prominent peculiarities and are more likely to be overlooked by the person who tries to disguise his hand. The crossing of 't's' and the dotting of 'i's' become matters of large moment in making comparisons of disputed handwritings. There is probably no matter in conjunction with a man's ordinary writing to which he gives less thought than the way he makes these crosses and dots. For that reason they are in the highest degree characteristic. And it is precisely because of their apparently slight importance that the person who sets out to imitate another's handwriting or to disguise his own is likely to be careless about these little marks and to make slips which will be sufficient to prove his identity."

It seems to be admitted that a person will make his terminals and punctuations with less consciousness than other parts of his writings. Consequently we find in terminals and punctuation marks a greater fixity of habit than is ordinarily present in other parts of writings.

(13) Bearing this in mind, it will be noticed that, in addition to the constancy with which Mrs. Brown adhered to certain loops, angles, movements, and pen lifts, perhaps her most striking characteristic is found in the formation of periods and dots. Note the period following the initial "J." This period is a dot. Under the microscope it is slightly horizontal. I have examined the periods in the exhibits submitted and the dots over the "i's" and am prepared to say that Mrs. Brown invariably made them either by striking a slight perpendicular line or nearly so, or a slight curve to the right. Reference to the exhibits, especially the letter, which I have copied, illustrates this point. Moreover, no period is found after the initial "J" in any of Mrs. Brown's later signatures. So far as the record shows, a period had not been used by her after the initial for nearly 20 years. I am not unmindful of the fact that Prof. Blair says that a period appears in one of the checks, and that counsel for contestants, in putting a question to the witness, may or may not have admitted this to be true. My own judgment is that no such period appears. In a check of date April 23, 1910, there is a pen mark which might be taken for a period, but I am convinced that it was never so designed by the writer. A period appears in some of the signatures found in the Whipple estate, 1891-1893. See plate 3. These papers were public records and available to any interested party.

(14) In Mrs. Brown's writing there is a pen pressure from the beginning to the end of every word, with no hair lines or designed shadings. Her letters, and shadings if used, were made in a natural way. Under the microscope Mrs. Brown's writing is heavy. In the questioned document, the upstroke of the "S," the letters "a-r-a," and the letter "h," with the exception of the last part, which is patched, are easy and flowing, without pen pressure, and what may appear to be shadings are in the main retracings over a lighter line.

(15) It was not Mrs. Brown's habit to patch letters. In some instances there is a showing of a patch or retracing of some letter betraying a purpose to complete the letter and not to finish it so as to conform to her usual signature. There is a carelessness in it. There is no attempt to follow the lines of imperfect letters, whether made by bad ink or running out of ink. The many patches on the questioned writing follow with scrupulous care the original line, with the exception of the down stroke in the letter "J" in "Jan," where the ink seems to have run beyond the original border, and in the lower part of the same "J" where the first downstroke was carried lower and the point of the first line was abandoned.

(16) Mrs. Brown's "S's" and "J's" were as characteristic as the features on the face of a person. Whereas, the "J" in "Jan" and the "J" initial are so different from any of the authenticated "J's" and to each other as to make it extremely improbable that they were written by the deceased.

(17) Mrs. Brown had the habit of ending the downstroke of the figures "1," "4," "7," and "9," with a slight turn to the right or a slight hook turning to the right. These lines were invariably made with pen pressure. In the two downstrokes in the figure "14," neither of these characteristics are apparent.

(18) We note the fact that the witnesses to the will say that the signing was the work of but a moment. The purported signature bears indisputable evidence that it could not have been the work of a moment. Although Mrs. Brown wrote without hair lines or designed shadings, the retracings and building up of letters and lines betray a care and method that must necessarily have taken some considerable time and attention.

(19) I have not discussed the pen lifts or pen propulsions because it is difficult to do so without immediate resort to the microscope. It is enough to say that the disputed writing contains many more pen lifts than in any made by Mrs. Brown.

It is a fact that a person will never write his signature twice in the same way. Lavay says:

"It is more surprising, at first thought, to be told that no person ever signs his name even twice alike. Of course, theoretically, it cannot be said that it is impossible for a person to write his name twice in exactly the same manner. A person casting dice might throw double aces a hundred times consecutively. But who would not act on the practical certainty that the dice were loaded long before the hundredth throw was reached in such a case? The same reasoning applies to the matter of handwriting with added force, because the chance of two signatures being exactly alike is incomparably less than the chance of the supposed throws of the dice. Probably many persons will not believe that it is impossible for them to write their own name twice alike. For them it will be an interesting experiment to repeat their signatures, say, a hundred times, writing them on various occasions and under different circumstances, and then to compare the result. It is safe



to say that they will hardly find two of these which do not present some differences, even to their eyes, and under the examination of a trained observer aided by the microscope, these divergencies stand out tenfold more plainly." *Lavay, Disputed Handwriting*, 99, 100.

But it is also a fact that there are general characteristics, certain singularities, formations, features, proportions, and spacings, which are adhered to in greater or less degree which cannot be portrayed in words, but which nevertheless mark with unerring accuracy the penmanship of a certain individual. We are fortunate in this case in having many signatures for comparison, and equally fortunate, in finding that Mrs. Brown's writing was not a flaccid, characterless hand. It fairly breathes character—character so fixed that it is not concealed by a slight palsy of the fingers or the twinges of rheumatism, from which she suffered.

The books seem to agree that a person may lapse upon some of the characteristics of a fixed hand, and his signature could not, for that reason, be challenged, but just as an actor cannot simulate the voice, so a forger cannot simulate the sum of a writer's characteristics. It is the lack of these that may mark a forgery, however cleverly it may be executed. A person may omit some of his characteristics and his signature be real. A forger may make an accurate, or fairly accurate, copy or simulation of a signature and it may be as devoid of expression as a death mask or the face of a graven image. A person cannot simulate the characteristics of another's writing without betraying his own. There are strong characteristics in the proffered writing, which, under the microscope, are as noticeable as the features on a man's face. They are not Mrs. Brown's.

There is another element that is regarded by the writers on questioned documents as important. That is physical condition. The proffered signature is smoother, rounder, less nervous than any of the signatures of Mrs. Brown. It shows no evidence of infirmity. Compare it with the signature made December 31st, next before January 14, 1910, and with "Jan." Its fullness and its freedom, the delicate lines and fashioned curves, especially in the letters "ara," indicate health and self-possession. By the great weight of the evidence, Mrs. Brown was sick with rheumatism during the winter and almost, if not all, of the month of January. Her foot was so swollen that she could not walk. She was waited on by neighbors. Yet we are asked to hold that on January 14th she appeared to be a woman of 40 or 50 years, and was on the streets unattended, in apparent good health, capable of writing "ara" without a tremor, and, barring the Jan and the two "J's" the signature as a whole better than ninety-nine men in a hundred who are accustomed to writing could write it. Rheumatism is an erratic master, as we all know, but it is not probable that he prac-

ticed such deception in his harvest month of January.

It is the opinion of Mr. Henley, a lawyer of quick and accurate perceptions, who did business for Mrs. Brown for many years, that the signature is a forgery, and of Mr. Gardner, paying teller of the Exchange National Bank, where she had her account, that it is not. Of Mr. Tiffany, paying teller of the Traders' National Bank, where she formerly had an account, that the signature is spurious, and of Mr. Vincent, cashier of the Old National Bank, that he "believes" it to be genuine. Others differ in a like way. In passing upon the qualifications of the opinion witnesses it should be borne in mind that Messrs. Gardner, Seale, and Vincent, witnesses for the proponents, did not use any glass or express their opinions except upon general appearances. As one of the witnesses says "general impressions," and as Mr. Vincent says, "experience," "instinct," and "general character." This witness further says that it is the custom of banks to pay on sight without making an analysis, and he held his theory good by refusing upon the stand to draw a comparison between the questioned document and an authenticated signature.

"I cannot conceive of an opinion worthy of consideration, for which a reason cannot be given; yet we have often heard such opinions given in court, and they have been accepted as expert testimony. When asked for his reason, one witness, a bank cashier, replied: 'Oh! I am so impressed; I cannot tell why.' It is scarcely creditable to any witness to express opinions for which he can give no reasons, or to a court to permit such to be given as expert testimony. For how can court and jury place the proper value upon opinions unsupported by reasons? Indeed, the value of expert testimony consists mainly in the ability of the witness, by reason of his special training and experience, to point out to the court and jury such important facts as they might otherwise fail to observe; and in so doing, the court and jurors are enabled to exercise their own vision and judgment respecting the cogency of the reasons, and the consequent value of the opinion founded thereon." *Ames on Forgery*, 91.

It is only fair to say that Mr. Vincent disavows any of the qualifications of an expert.

It will be seen, therefore, that after all, the opinions of these witnesses are of no greater benefit to us than our own opinion would be when based on casual inspection and comparison of writings.

Two experts of local fame and of ability, a Mr. Thompson for the contestants, and Prof. H. C. Blair, for the proponents, are the important witnesses on this phase of the case. Mr. Thompson is attacked because of certain answers which it is said mark an egotism and conceit that makes his testimony incredible. Counsel for proponents express regret that the remarks of the trial judge when deciding the case are not in the record, so that we can understand just how this witness was regarded by him. It may be true that the manner of the witness overcame the trial judge, but it affords no legal ground for the

rejection of his testimony. Egotism, although always annoying, may be an asset or it may be a liability. It may be a vice or it may be virtue. It all depends upon what is behind it; whether the victim can sustain himself. If the work and opinions of egotists were to be rejected because of the sole quality of egotism, many chapters of our history, both ancient and modern, would have been unwritten. I have read and re-read Mr. Thompson's testimony. I have followed it through every letter and every exhibit referred to by him, and, having in mind that it is the writing and not the man that is on trial, and that no client should be scotched because he has an egotist for an expert, I find, notwithstanding that, his opinion is well sustained and its force is amply demonstrated. Mannerisms may sometimes invite prejudice, when the assurance is only confidence or faith in one's opinion and which the assertive one stands ready to prove. We believe Mr. Thompson sustains his opinion that the signature "Sarah J. Brown" is a forgery. To follow the thread of his testimony and that of Prof. Blair would run this opinion, not into pages, but into a volume, and we shall not undertake to do so. Suffice it to say that in our judgment Prof. Blair's opinion is not sustained. A reading and re-reading of his testimony makes it certain that he occupied the only vantage ground there is in this case for the proponents, that is to take the disputed signature, note the marked departures from fixed characteristics, and by search, find a verified letter here and there which corresponded in some degree with a questioned letter. By this test we fail utterly to get a perspective of the whole case and all the writings, and by reference to remote exceptions seek to establish a rule. We give no credit to fixed characteristics, and admit that they may all be violated within a range of two words, as they are in the proffered signatures. Mr. Blair has found a few and rejected the many in an effort to find something like, for instance, the wide loop in the "S," the Spencerian "a" and "r," the closed "a's," and the lack of the loop in the second "a." The fact that the wide loops and several pen strokes in the two "J's" are unlike anything that is acknowledged to be real does not, in any way, challenge Prof. Blair's interest, although he says Mrs. Brown made her "J's" with only two strokes. He admits that the number of pen lifts is an important test upon which the authorities are agreed, and that he was informed that there was evidence of 28 pen lifts in the disputed signature, whereas Mrs. Brown was accustomed to make less than 10 pen lifts, yet he did not count or compare them in any way. Mr. Blair did not examine for the loop in the letter "a," although he admits its importance. He admits that the photographic enlargement of the questioned signature has every evidence of being retouched, and that the "J's"

are retraced, yet he did not examine other "J's" for evidences of retracings and retouching, and he admits that he found no other "J" that "came anyways near like it." Mr. Blair used a glass of more than ordinary strength, but did not use the microscope, which he does not seem to favor in his examinations. Mr. Tiffany speaks of the use of a glass. Assuming that he did not use a microscope but pursued the same methods employed by Mr. Blair, he comes to an entirely different conclusion. In such cases resort to a microscope seems essential. We have used a glass and a high-powered microscope and have found both of these instruments to be of great assistance in leading us over the doubtful places.

" \* \* \* The ends of justice are always served when means are provided to show the facts more clearly. The microscope provides such means, and is simply indispensable if the facts in certain disputed document investigations are to be clearly shown; and a great variety of questions which it alone can answer arise in connection with a study of the various phases of forgery. In many instances its evidence is conclusive, and without such assistance as it gives we may indeed have eyes and see not." Osborn, Questioned Documents, p. 72.

Taking Prof. Blair's testimony as a whole, and without it the proponents' evidence on this phase of the case is weak indeed, I think the witness has looked only to the pictorial effect of the writing and has been deceived, for we may admit that the similarities pointed out by him may be found in the writings. No theory would be sound that depended upon a copper-plate duplication of a signature. In fact, it would be evidence of the highest character that the duplication is a forgery. We may frankly admit that a departure from characteristics may be found in every signature. But no signature is offered nor would any stand the test where all of the exceptions concur to the exclusion of all of the habitual characteristics of the writer. Similarity alone proves nothing. Proponents seem to have assumed that it was incumbent on the contestants to prove the signature to be different from the true signature of Mrs. Brown, and have apparently made their case upon that assumption, whereas we understand its similarity is admitted. The object of every forger—and this the court must keep in mind—is to make the signature seem true; to make it so as to deceive the eye. We expect to find form; otherwise the work of a forger would be futile. Forgeries are detected by other things. In this case the writer of the questioned signature was more accustomed to the use of a pen than was Mrs. Brown. In doing his work he wrote the name, especially the letters "arah" and the letter "r" in Brown, better than Mrs. Brown ever wrote them or could have written them. His skill is his undoing. Measured through and through Prof. Blair's testimony is no more than an opinion such as any of us might express. Mr. Thompson's

testimony goes further and, when aided by the scientific methods of photography and microscopy, amounts to a demonstration. He is fully supported by Mr. Tiffany.

On the whole the expert testimony preponderates in favor of contestants, and proves, with as much certainty as such testimony can, that the signature is false and forged, and this conclusion coincides with the impression made upon my own mind by an examination of the documents in the record. As said in *Sharon v. Hill* (C. C.) 26 Fed. 337:

"The signature to the declaration is a good general imitation of the plaintiff's, and without special observation might easily pass for his."

After noting the differences in the signature proposed in that case, the court continues:

"And besides, and over and above all these particulars, there is a difference in the general effect and appearance of the signatures that is more readily felt than expressed. One may see at a glance that two pictures, which have a general similarity, are not portraits of the same person, when it might be difficult to give a satisfactory reason for the conclusion. The disputed signature is evidently the work of a skillful penman. The lines are comparatively smooth and steady, while the exact contrary is characteristic of the plaintiff's writing. Indeed, I very much doubt if he could write such a signature as the one to the declaration."

I have passed, for the sake of brevity, many circumstances and comparisons that might have been made in support of our argument. In passing them it is not out of place to say that I have been impressed by the fact that among the great number of checks submitted by proponents for the purpose of comparing signatures, I find some written in every month of the year except January, for Mrs. Brown was a ready check writer. Inasmuch as she invariably used an abbreviation when writing the longer months of the year, and must have used the abbreviation "Jan," such checks would have been invaluable for comparison.

Neither have I referred to the showing made upon a motion for a new trial. This being a trial *de novo*, and certain letters there submitted being identified, I might have considered them, but have found enough to convince me without referring to the fact that, in answer to a letter written on January 14, 1910, by a relative in the East, Mrs. Brown replied on the 24th day of February, saying that she had received the letter in due time, which we may assume was about three days after the 14th, and that the letter "found me laid up with the rheumatiz, the first time for years—am better now but cant go out yet."

Counsel, in their zeal, have undertaken to fix responsibility for the forged will. The insinuations of counsel for contestants are met by proponents' counsel by suggestion of counter theories. It is not incumbent upon us to theorize or say who wrote the signature of Mrs. Brown to the will, nor is the

record sufficient to warrant us in doing so if we were so inclined. However, in justice to the witness Lavender, it is but right to say that it is my belief that he was deceived by some person assuming to be Mrs. Brown.

From all of the opinions, from an inspection and comparison of all of the exhibits, after nearly four weeks of closest application, looking at the whole case from all its angles, I am prepared to say that the proffered writing is not the signature of Sarah J. Brown. The decree of the lower court should be reversed.

FULLERTON, J. I concur in the opinion and conclusion of Judge CHADWICK.

(82 Wash. 374)

JETT v. OLD NAT. BANK CO. (No. 11751.)  
(Supreme Court of Washington. Nov. 27, 1915.)

APPEAL AND ERROR (§ 1140\*)—AFFIRMANCE—REMISSION OF DAMAGES—TIME.

On affirmance of an order granting a new trial unless plaintiff elect within a certain time to remit part of the damages awarded, the Supreme Court cannot grant further time for such election.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Gose, J., dissenting.

En Banc. On rehearing. Denied.

For former opinion, see 79 Wash. 562, 140 Pac. 554.

MAIN, J. The trial court, in ruling upon the motion for a new trial, entered an order granting the motion unless plaintiff within 10 days elected to accept a verdict for \$2,500. The plaintiff declined to make the election, and appealed from the order. In 79 Wash. 562, 140 Pac. 554, the judgment of the superior court is affirmed. The plaintiff has filed a petition for rehearing, in which he asks that, upon the going down of the remittitur, he be permitted to elect to take a judgment for \$2,500. In other words, that after the remittitur is filed in the superior court he have the right to elect then whether he will take the new trial or accept a judgment for the sum of \$2,500. This question was presented in *Kohler v. Fairhaven, etc., Ry. Co.*, 8 Wash. 452, 36 Pac. 253, 681, and it was there said:

"The appellant, in his petition for rehearing, asks this court to allow him the option of remitting such portion of the verdict as to it may seem just, and, upon his doing so, to reverse the order granting a new trial, and to direct a judgment in his favor for the amount of the verdict, less the sum so remitted. That an appellate court often makes its reversal of a judgment or order contingent upon the action of one or the other of the parties is beyond question. The reason for so doing is that error is found which justifies such reversal, but of such a nature that the party against whom the erroneous ruling was made can be compensated. But this principle cannot apply in the case at bar.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

for the reason that no error is found in the action of the lower court upon which to found a reversal of the order. This court has found that the lower court could not have done otherwise than to have entered the order which it did, and for it thus to find and then hold that such order should be reversed at the option of the appellant would be illogical and not in accord with our idea of a proper practice."

In *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144, it was said:

"Appellant requests that, in case we find 'that \$452 is ample compensation to the plaintiff,' we allow him the refusal of that sum for 30 days. We can make no such order. The only question we may determine upon this appeal is the alleged error of the court below in granting a new trial. Appellant had his opportunity to accept such sum and refused it. Having done so, the order for a new trial became absolute, and upon a review of that order, having found the court was without error and the order appealed from should be affirmed, we cannot substitute in its stead a new order, imposing other conditions than those fixed by the court below. To do so would, in effect, operate as a reversal of the order appealed from, and the entry of an original order with new conditions. The only thing we may do is to affirm or reverse the order appealed from" (citing *Kohler v. Fairhaven, etc., Co.*, supra).

In *Jones v. Spokane, Portland & Seattle Ry. Co.*, 69 Wash. 12, 124 Pac. 142, under similar facts, the court, although affirming the judgment, permitted the plaintiff to accept "a judgment for \$3,500 within 15 days after the filing of the remittitur in the lower court." The defendants, answering the petition for rehearing in the present case, seek to distinguish the *Jones* Case from the previous cases, but we think there can be made no substantial distinction. That the conclusion in the *Jones* Case is out of harmony with the rule stated in the two previous cases must be admitted. In the *Jones* Case, however, the question is not discussed. Neither is the *Kohler* or *Winningham* Case referred to. Apparently these cases were not in the mind of the court at the time of the preparation of the opinion in the *Jones* Case. It is obvious that it was not intended that they should be overruled, or they would have been referred to. This question is one of practice, and for the information of the bar it may be stated that the court adheres to the rule as stated in the *Kohler* and *Winningham* Cases.

The petition for rehearing is denied.

CROW, C. J., and ELLIS, PARKER, FULLERTON, CHADWICK, MORRIS, and MOUNT, JJ., concur.

GOSE, J. I agree with the majority that the question is one of practice. I think the case of *Jones v. Spokane, etc.*, 69 Wash. 12, announces the correct rule. This case has been twice tried. The jury found that the appellant was damaged in the sum of \$6,000. It returned a verdict for that amount. The trial court found that he was damaged in the sum of \$2,500. He now asks a judgment

for that amount. Why should he be required to try the case a third time when the extent of the damage has been legally fixed? He should, of course, pay the costs of the appeal and, if the appeal was taken for delay only (Rem. & Bal. Code, § 1738), the statutory penalty should be imposed against him. The time has come to treat this case as finished business. I, therefore, dissent.

(83 Wash. 465)

## LAUER v. NORTHERN PAC. RY. CO.

(No. 11950.)

(Supreme Court of Washington. Jan. 9, 1915.)

### 1. MASTER AND SERVANT (§§ 204, 228\*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—"ANY STATUTE."

The term "any statute" in federal Employers' Liability Act April 22, 1908, c. 149, §§ 3, 4, 35 Stat. 66 (U. S. Comp. St. 1913, §§ 8659, 8660), declaring that an employé shall not be held to have been guilty of contributory negligence, or to have assumed the risk where a violation by the carrier of any statute enacted for the safety of employes contributed to the injury, is limited to federal statutes, and does not include a state statute enacted for the safety of employes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.\*]

### 2. COURTS (§ 97\*)—FEDERAL QUESTIONS—CONTROLLING DECISIONS.

The state Supreme Court must follow the decision of the federal Supreme Court construing a federal statute.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

### 3. COMMERCE (§ 8\*)—FEDERAL EMPLOYERS' LIABILITY ACT—COMMON-LAW ACTION.

An employé who sues under the federal Employers' Liability Act (U. S. Comp. St. 1913, §§ 8657-8665), and who shows that the negligence complained of occurred in interstate commerce, may not recover in a common-law action.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.\*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Leo Lauer against the Northern Pacific Railway Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Govner Teats, Leo Teats and Ralph Teats, all of Tacoma, for appellant. Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for respondent. Cushing & Cushing and Erwin E. Richter, all of San Francisco, Cal., amicus curiae.

MAIN, J. This action was brought under the federal Employers' Liability Act of April 22, 1908, as subsequently amended. The complaint charges, that at the time of the injury the plaintiff was engaged in interstate commerce. This is denied by the answer; but upon argument in this court was admitted. At the conclusion of the plaintiff's evidence, a challenge was interposed to the sufficiency of the evidence, and a motion made that the action be dismissed.

From the judgment of the superior court dismissing the action an appeal is prosecuted.

The plaintiff, at the time of the injury which he sustained, was working for the defendant in its car shops at South Tacoma, Wash. The accident happened about four or five weeks after he entered the employment. When he was first employed he operated a single drill press for about 10 days and at times doing other work. After he had been at work operating the single drill press for the time mentioned, he began working on a gang drill. A gang drill is a machine capable of driving several individual drills at the same time. Above the drills is a revolving shaft, and the power from this is transmitted to the drills by means of cogwheels. At the time of the injury the plaintiff was operating one of the individual drill presses of the gang drill. This drill press, by means of a lever could be started or stopped independent of the others. The plaintiff was injured about three or four weeks after he went to work upon the drill press connected with the gang drill. On the morning of January 11, 1913, the plaintiff was boring holes by means of the drill through brake shafts which were to be placed upon cars engaged in interstate commerce. Without stopping his drill press, he took a small handful of waste, passed back of the machine, stepped upon a pile of iron, reached up and was wiping the oil off the framework of the machine. When his fingers were within two or three inches of the revolving cogwheels, the waste caught in the cogs and his hand by this means was injured by the cogs. The injury sustained was the loss of the end of the thumb, and the ends of the first and second fingers of the right hand.

The negligence complained of is the failure on the part of the defendant to have the cogwheels guarded. It is claimed that the failure to properly guard the cogwheels was a violation of the statute of this state generally known as the "factory act." Rem. & Bal. Code, §§ 6587 to 6598, inclusive.

In the briefs two questions are presented: First, when the action is brought under the federal Employers' Liability Act, can the failure of the defendant to conform to a state statute be taken into consideration in determining liability? And second, if the plaintiff cannot prevail under the federal act, can he maintain the suit as a common-law action?

[1] I. Section 3 of the federal Employers' Liability Act, after setting out that contributory negligence shall not bar recovery, provides that an employé shall not be held to have been guilty of contributory negligence in any case where the violation by the common carrier "of any statute enacted for the safety of employes contributed to the injury." Section 4 of the act provides that the "employé shall not be held to have assumed the risks of his employment in any case where

the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury." The question is whether the language, "any statute enacted for the safety of employes," as used in each of the sections mentioned, includes state statutes, or is limited to the acts of Congress. The plaintiff claims that the defendant violated the factory act of this state in failing to have the cogwheels guarded. If state statutes are included within the term "any statute" as used in sections 3 and 4 of the federal act, then the question would arise whether, under the factory act, the cogwheels should have been guarded. If the term "any statute" does not include a state statute, then the question does not arise whether, under the factory act of the state, the cogwheels should have been guarded. The phrase "any statute enacted for the safety of employes" was held in *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, to mean federal statutes and not state statutes. In the course of the opinion in that case, speaking upon the exact question, it was said:

"By the phrase 'any statute enacted for the safety of employes,' Congress evidently intended federal statutes, such as the Safety Appliance Acts (27 Stat. at L. 531, c. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, c. 976, U. S. Comp. Stat. Supp. 1911, p. 1314; 36 Stat. at L. 298, c. 160, U. S. Comp. Stat. Supp. 1911, p. 1327; *Id.*, 1913, c. 103, U. S. Comp. Stat. Supp. 1911, p. 1333), and the Hours of Service Act (34 Stat. at L. 1415, c. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employes in interstate commerce, Congress intended to permit the Legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employes, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

[2] It must be admitted that the decision in that case is out of harmony with the view expressed by this court in *Opsahl v. Northern Pac. Ry. Co.*, 78 Wash. 197, 138 Pac. 681. The question calls for the construction of an act of Congress, and, the federal Supreme Court having construed the statute, we think this court should follow the construction placed upon it by that court. The decision in the *Opsahl* Case was rendered some months prior to the decision in the *Seaboard A. L. R. Co. Case*. So far as these decisions are out of harmony, the *Opsahl* Case will be overruled.

[3] II. It is claimed, however, that if this court should be of the opinion that the factory act does not apply, then the case should have been submitted to the jury as a common-law action. The injury in this case occurred in interstate commerce. The action, as already indicated, was brought under the federal act. Can the plaintiff then, when his action falls under the federal act, pursue the action at common law? In *Wa-*

bash R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226, speaking upon this question, it was said:

"Had the injury occurred in interstate commerce, as was alleged, the federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the federal act would have been exclusive in its operation, not merely cumulative (citing authorities)."

Had it appeared upon the trial that the plaintiff at the time of the injury was not engaged in interstate commerce, and the complaint had stated an action at common law, a different question would be presented. *Baird v. Northern Pacific Ry. Co.*, 78 Wash. 67, 138 Pac. 325.

The judgment will be affirmed.

CROW, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 591)

ALLISON v. CHICAGO, M. & ST. P. RY. CO.  
(No. 12089.)

(Supreme Court of Washington. Jan. 16, 1915.)

RAILROADS (§ 324\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff approached defendant's railroad crossing in a city at night, driving an automobile at the rate of 15 miles an hour, and could have stopped within 15 feet. Plaintiff's headlights enabled him to see an object within the radius of 100 feet, and an arc light near the crossing was burning. Defendant was pushing a box car over the crossing at the rate of 3 or 4 miles per hour, and plaintiff, not seeing the car, though there was a red light on the northwest corner thereof and though there were two brakemen on top, each with a lantern, ran into it approximately 8 feet from the front thereof. *Held*, that plaintiff saw or should have seen the car in time to have avoided the collision, and was therefore negligent as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1020-1025; Dec. Dig. § 324.\*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by B. F. Allison against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff and defendant appeals. Reversed and remanded, with directions to dismiss.

Geo. W. Korte, of Seattle, and H. S. Griggs, of Tacoma, for appellant. Dunkleberger & Heinly, of Tacoma, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries and for damages to an automobile. The cause was tried to the court and a jury. The plaintiff obtained a verdict for \$575. From the judgment entered upon the verdict the defendant appeals. At appropriate times the appellant made motions for nonsuit, directed verdict, and judgment notwithstanding the verdict.

The accident occurred on Pacific avenue, in the city of Tacoma, Wash., at a point about 30 feet south of the intersection of Twenty-Sixth street with Pacific avenue. Almost opposite Twenty-Sixth street, Delin street intersects Pacific avenue. On Pacific avenue there are two street car tracks at the point of collision. The street at this point is 100 feet wide. The grade of the street at the point in question is 4 per cent. rising to the south. Crossing Pacific avenue from east to west, and about 30 feet south of the intersection of Twenty-Sixth street, is a spur track of the defendant company. This company has a franchise permitting the operation of trains over this track between 1 and 5 o'clock in the morning. At the intersection of Delin street with Pacific avenue there is an arc light. At the northwest corner of the intersection of Twenty-Seventh street with Pacific avenue there is an arc light; Twenty-Seventh street being the next street south of Twenty-Sixth street.

The plaintiff resides about 1½ miles east of Parkland, which is approximately 12 miles south of Tacoma. The plaintiff, in going to Tacoma from his ranch and in returning, passes in and out over Pacific avenue. On the evening of May 3d the plaintiff left his ranch in his pony tonneau Chalmers Detroit automobile. It was a 30 horse power car, built for four people. The plaintiff knew that the spur track crossed Pacific avenue, and had frequently passed over it, but testified that at no time had he ever seen cars upon the track. The respondent had driven an automobile for about 7 years. His eyesight and hearing were good. Some years before he had been in the railway service as a brakeman.

On the evening of the day mentioned he reached the city about 6:30 p. m., and from that time until 1:30 in the morning spent the time about the business section of the city, attended the Empress Theater, and started home about 1:30. The night was a little misty, dark, or cloudy. Some of the witnesses testified that it had been raining a little earlier in the evening. The pavement was wet. In going home he was proceeding up Pacific avenue. At some point before reaching Twenty-Sixth street he met a street car. At this time the defendant company was moving a train, consisting of one box car loaded with flour, an engine, and tender, over to Commerce street, which was to the west of Pacific avenue. Going west, the box car was in front, and between the box car and the engine was the tender. This train, when it approached Pacific avenue, stopped for the street car to pass. At this stop the end of the box car was about even with the sidewalk.

According to the appellant's evidence there were two brakemen on top of the box car, one near either end, each of whom had a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lantern. When the train approached Pacific avenue these brakemen signaled to stop, and the train was stopped until the street car had passed. After the street car had moved on, the brakeman, or one of them, then signaled for the train to start, and the signal was communicated by the fireman to the engineer. The train moved out into Pacific avenue at the rate of approximately 3 or 4 miles per hour. On the northwest corner of the box car was a red light. As the train came out upon the avenue, the plaintiff was approaching from the city. The brakemen testified that they saw him coming, and that one of them signaled to him with the lantern from the top of the car to stop. But he not heeding the signal, and it becoming apparent that a collision was imminent, a signal was given for the train to stop. The emergency brakes were set, and the train came to a standstill within about 4 feet. The plaintiff's automobile hit the box car about 8 feet from the west end, demolishing the automobile to such an extent that it was deemed inadvisable to have it repaired. When the collision occurred, the train had moved out into the street a distance of 60 or 70 feet. The plaintiff was injured in his stomach and short ribs.

As to the manner of the accident the plaintiff testified:

"The first indication I had of any obstruction in the street was I noticed a car move up in front of me. The first thing I noticed to be certain of was the white letters on the dark brown. When I saw it, I did all I could to stop. I slammed on the brakes for all I was worth, and tried to stop; but I was very close to them. The color of the street and the color of the box car are so very alike at night you could not tell the difference."

Also:

"I did not see them until I was right into them."

He also testified that the lights upon his automobile were burning—this was denied by other witnesses—and that by means of these lights an object could ordinarily be seen within a radius of 100 feet. He testified that there were no lanterns in sight, and that the arc light at the corner of Delin street and Pacific avenue was not burning.

Witnesses other than those who were members of the train crew, and who were disinterested, testified that the red light was on the northwest corner of the box car; that the two brakemen were on top of the car, each with a lantern. One witness testified that the arc light at the northwest corner of Twenty-Seventh street and Pacific avenue was burning. This does not appear to be denied. The headlights of the plaintiff's automobile would light a zone of the street 15 feet wide. The plaintiff testified that at the time of the collision he was going 15

miles an hour, in intermediate gear, with one cylinder missing, and that he could stop the car within a distance of 15 feet.

Whether the defendant's positive testimony that the red light was on the northwest corner of the box car, and that the two brakemen were on top of the car with lanterns, and that there was a headlight on the end of the tender next to the box car, is sufficient to overcome, as a matter of law, the negative testimony of the plaintiff that there were no lights or anything of that kind, we need not determine. Neither do we need to determine whether the defendant was negligent in failing to have a flagman on the ground to prevent the driver of an automobile from running his machine into the side of the box car. Aside from these questions there are certain uncontrovertible facts, and facts which are controverted, but which will be assumed to be in the plaintiff's favor, which bar a recovery. These facts are:

The automobile was traveling 15 miles an hour. It could be stopped within 15 feet. The headlights upon the automobile enabled the driver to see an object within a radius of 100 feet. The arc light at the northwest corner of Pacific avenue and Twenty-Seventh street was burning. The train was moving at a speed of about 4 miles an hour, and was practically at a standstill when the collision occurred. The automobile struck the box car approximately 8 feet from the west end thereof. If these facts are true, then the end of the box car came within the zone covered by the headlights on the automobile when the automobile was more than 30 feet distant. The box car, after coming within the zone of the lights, traveled 12 or 15 feet, going 3 or 4 miles per hour. While the box car was traveling this distance, the automobile, going 15 miles per hour, would travel approximately 40 feet. If, then, the automobile could be stopped within a distance of 15 feet, or even within a distance of 25 feet, it is vividly apparent that the plaintiff saw, or should have seen, the box car in time to have avoided the collision. The fact is that he did not see it until almost the instant of the impact. One of the plaintiff's witnesses testified that he was two blocks away, and heard the crash when the collision occurred. This seems to be one of those cases where the facts speak the law. The accident was plainly due to the respondent's contributory negligence.

The judgment will be reversed, and the cause remanded, with direction to dismiss the action.

CROW, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 569)

**RASMUSSEN v. NORTH COAST FIRE INS. CO.****SAME v. DUBUQUE FIRE & MARINE INS. CO.**

(No. 11679.)

(Supreme Court of Washington. Jan. 16, 1915.)

**1. INSURANCE (§ 665\*)—FIRE INSURANCE—DEFENSES—FRAUDULENT OVERVALUATION—EVIDENCE.**

In an action on fire policies, defended on the theory that insured fraudulently overstated the values and losses, to defraud insurers, evidence held to sustain a finding that there was no fraud, though the amount of loss fixed by the jury was less than that claimed by insured in his proofs of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

**2. INSURANCE (§ 660\*)—FIRE INSURANCE—ACTIONS—EVIDENCE—ADMISSIBILITY.**

The purpose of Laws 1911, p. 243, § 105, providing that every insurer or agent issuing a fire policy is presumed to know the insurable value of the property, and any insurer or agent knowingly effecting insurance in excess of the insurable value shall be fined, is to prevent over-insurance, and contemplates that an agent before placing a policy will by proper investigation advise himself of the value thereof, and an agent issuing a fire policy may testify to the value of the goods insured at the time of the issuance of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1695; Dec. Dig. § 660.\*]

**3. EVIDENCE (§ 106\*)—REPUTATION—ADMISSIBILITY.**

Where fire insurance companies sought to defeat a recovery for a loss, on the ground that insured, who died before the trial, fraudulently overstated the values and losses to defraud the companies, evidence of the good reputation of insured for truth, veracity and honesty was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.\*]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Actions by J. K. Rasmusson, prosecuted after his death by Andrea Rasmusson, as administratrix, against the North Coast Fire Insurance Company, and against the Dubuque Fire & Marine Insurance Company. From judgments for plaintiff, defendants appeal. Affirmed.

Zent, Powell & Redfield, of Spokane, and McBurney & O'Connor, of Seattle, for appellants. O. C. Moore, of Spokane, for respondent.

CROW, C. J. These two actions, which have been consolidated, were commenced by J. K. Rasmusson on two separate policies of fire insurance for \$1,000 and \$2,000 respectively, executed and delivered to him by the defendant North Coast Fire Insurance Company, a corporation, and the Dubuque Fire & Marine Insurance Company, a corporation, on a stock of merchandise in the city of Spokane. After the commencement of the actions and before trial, the death of J. K. Rasmusson was suggested, and Andrea

Rasmusson, administratrix of his estate, was substituted as plaintiff. From verdicts and judgments in plaintiff's favor, the defendants have appealed.

For many years J. K. Rasmusson was engaged in the retail grocery business in Spokane and carried fire insurance on his stock of goods. On December 27, 1911, the appellant North Coast Fire Insurance Company executed and delivered policy No. 24550 to Rasmusson, insuring his stock of groceries and certain fixtures against loss by fire in the sum of \$1,000. On August 9, 1911, the appellant Dubuque Fire & Marine Insurance Company executed and delivered policy No. 741357 to Rasmusson insuring the same stock and fixtures against loss by fire in the sum of \$2,000. On January 26, 1912, while both policies were in full force and effect, the groceries and fixtures were damaged by fire. Mr. Rasmusson in due season prepared and delivered proofs to appellants, claiming the loss sustained by him exceeded the face value of the two policies. These proofs were rejected by appellants who, in their answers, contend that his losses did not exceed \$1,200. The policies each contained a stipulation which provided that:

"This entire policy shall be void \* \* \* in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss."

Basing their defenses on this provision, the appellants in substance alleged that Mr. Rasmusson made and delivered to each of them a false and fraudulent statement of his alleged loss, in that he stated that the same amounted to \$3,040.13, whereas it did not exceed \$1,200 in all; that he made such false statements with the fraudulent intent and design of inducing appellants to pay him the full amount of the policies; that he fraudulently represented that, within two years preceding the fire, he had purchased goods to the value of \$29,756.26, whereas his purchases during that period did not exceed \$23,797.11. Mr. Rasmusson in his reply admitted that he made such statements in his proof of loss and in response to interrogatories, but alleged that he then believed and still believes the same to be correct and true. The principal issues submitted to the jury were the extent and value of the stock of groceries and fixtures owned by the assured at the date of the fire, the extent of loss sustained, and whether the assured had with fraudulent intent misrepresented the value of his stock and fixtures, and the extent of his loss with the design and for the purpose of defrauding appellants. The jury returned a general verdict, which included interest, in the sum of \$720.16, against the North Coast Fire Insurance Company, and in the sum of \$1,467.84 against the Dubuque Fire & Marine Insurance Company. The jury also answered special interrogatories as fol-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



lows: (1) What was the value of the goods, wares, and merchandise (not including fixtures) at the store of Mr. Rasmussen at the time of the fire? Answer: \$2,100. (2) What was the value of the goods, wares, and merchandise (not including fixtures) at the store of Mr. Rasmussen immediately after the fire? Answer: \$162. (3) What was the amount of damage to the fixtures covered by the policies of insurance in this case occasioned by the fire? Answer: \$250.

[1] Appellants' principal contention is that the trial court erred in denying their motions for judgment notwithstanding the verdict, their position being that the undisputed evidence shows that the loss sustained by the assured did not exceed \$1,200; that he misrepresented the value of his stock of goods, the purchases made by him, and the extent of his loss; that he did so knowingly and willfully with the intention and purpose of defrauding appellants; and that under the provision above quoted the policies were avoided by such fraudulent acts.

In their brief appellants say:

"The Rasmussen proof of loss listed the value of the stock prior to the fire at \$2,750.67; the jury found it to have been \$2,100. The proof of loss claimed damage to stock of \$2,618.48; the jury placed it at \$1,938. The proof of loss claimed damage to fixtures as \$421.65; the jury found this item \$250. This is a reduction of a fraction over 25 per cent. on the claimed loss to stock, and 40 per cent. on fixtures."

They argue that the finding of the jury as to values amounts to a finding of fraud, that fraud is also shown by the undisputed evidence, and that it was the duty of the trial court to enter judgment in their favor. We have carefully examined the record and conclude that appellants' contention in this regard cannot be sustained. The estimates made by appellants' adjusters showing losses sustained, to a considerable extent, constitute evidence which they claim to be undisputed. Without these estimates and appellants' deductions therefrom, they would have no basis for their contention. These adjusters were appellants' representatives, who were looking after their interests and seeking to protect them. There is no more reason for accepting their estimates as undisputed than there would be for accepting the estimate prepared by respondent's representative, an experienced adjuster, as undisputed. The fact is that these estimates dispute each other, and the record shows that the evidence is otherwise conflicting. Appellants admit that to sustain their defense it is not sufficient for them to show that Mr. Rasmussen made false statements, and that he padded his proofs of loss, but that it must also be shown that he did so knowingly and intentionally for the purpose of defrauding them. The evidence is too voluminous to be set forth or analyzed in an opinion of moderate length. It appears that, at or about the time of the fire, the assured was in very bad health; that he died prior to the trial of

these actions; that a dispute arose between him and the adjusters representing the appellants; that, when they advised him of their conclusions, he left them saying he would have nothing to do with their estimate, as his stock and losses were several times the values and losses fixed by them; that he procured the services of an experienced adjuster to prepare an estimate upon which to base proofs of loss; and that this adjuster and Mr. Rasmussen's son, a young man about 21 years of age, who had worked in the store for some time and had made purchases to replenish the stock, prepared an estimate. Their estimate and that of appellants' adjusters differed widely. The findings of the jury as nearly approximate that of the assured as those of the appellants' adjusters. There was no showing that the assured had recently increased his insurance, or that he was carrying overinsurance for fraudulent purposes. The policies were renewals of previous policies for the same amounts. No contention is made that the assured was in any way responsible for the fire. In fact, the evidence is clearly to the contrary. The agents who wrote the policies on behalf of the appellants, and who saw the stock of goods, gave it as their opinion that the assured had a stock ranging in value from \$3,000 to \$3,500. There is no suggestion that they acted fraudulently or conspired with the insured for the purpose of writing excessive insurance. Nor is there any showing of any facts indicating a design on the part of the assured to over-insure or defraud the appellants at any time prior to the making of the proofs of loss. At that time a sharp difference of opinion arose between him and appellants' adjusters. We cannot say as a matter of law that he then made any untruthful statements knowingly or with an intention of defrauding appellants. The trial court by careful instructions which correctly stated the law submitted the issues of false statements and fraudulent intention to the jury. To these instructions no exceptions have been taken. The jury have found against appellants, and our conclusion is that their verdict cannot be disturbed.

[2] The plaintiff called as witnesses one J. H. Tilsley and one W. A. Junkin, the agents of appellants, who wrote and issued the policies of insurance. These witnesses testified to the value of the stock of goods and fixtures, at the time the policies were written and also at or about the time of the fire. Appellants objected to this testimony on the ground that the competency of the witnesses was not shown. It appeared that Tilsley was in the grocery business for about nine years prior to 1900, and that Junkin had kept books in a grocery for about one year. The trial court, however, permitted them to testify by reason of section 105 of chapter 49, Session Laws 1911, page 243, which reads as follows:

"Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined in a sum not less than fifteen nor more than twenty-five dollars. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars."

The evident purpose of this section is to prevent overinsurance. It certainly contemplates that an agent before placing a policy will, by proper investigation, advise himself of the value of the property to be protected, and the presumption is that he has done so. In view of this statute we can find no error in admitting the evidence of which appellants now complain. Other evidence tending to show value was also introduced by the respondent.

[3] Mr. Rasmusson, the assured, died before the trial and his evidence could not be secured. Appellants by their evidence sought to show that, when he prepared and by his oath verified the proofs of loss, he fraudulently and intentionally overstated values and losses for the purpose of defrauding them. On rebuttal respondent called a number of prominent business men of Spokane who had known Mr. Rasmusson during his lifetime. These witnesses, over appellants' objection, were permitted to testify that the reputation of Mr. Rasmusson for truth, veracity, honesty, and integrity was good. Appellants now insist that error was committed in admitting this evidence. They argue that in civil actions evidence of good character is not admissible except where character is directly in issue. In support of this position they cite *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102, and *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372, from this court, and additional authorities from other jurisdictions. The case of *Carter v. Seattle* was one to recover damages for personal injuries. Contributory negligence was pleaded and evidence was introduced by the defendant tending to show plaintiff's intoxication at the time of the injury. Thereupon plaintiff testified that he had not been drinking on the evening of the accident, and also introduced witnesses to testify to his reputation for sobriety. It was held that the admission of

this evidence was erroneous. The character of the plaintiff for integrity was not in issue. Moreover, the plaintiff himself was present in court and testified. Assigning reasons for the ruling made, this court said:

"The general and well-settled rule in negligence cases is that it is not proper for a plaintiff, in order to rebut evidence of particular acts of negligence, to show that he is generally careful, cautious, and prudent; nor can it be shown that a party is habitually careless to support a claim of negligence upon a particular occasion. The principle underlying these cases and the case at bar is that such evidence raises a collateral issue not affecting the question to be determined."

This is not a case where the issue of negligence is involved. Here the assured, who was dead at the time of the trial and could not be called to testify, was positively charged with fraudulent acts and false swearing in his proof of loss for the purpose of securing a much larger recovery than that to which he was entitled. An examination of the case of *Poler v. Poler* will show that it has no bearing on the question now before us. It was there held that the defendant in an action for divorce could not introduce witnesses to show his general reputation as a law-abiding and moral man, that not being an issue in the case. While the general rule seems to be that character evidence is ordinarily inadmissible in a civil action, there is some conflict of authority, and certain exceptions are recognized. We think an exception should be recognized in this case where the assured died prior to the trial and his evidence could not be procured the jury did not have an opportunity to pass upon his credibility by observing his appearance upon the witness stand. As above stated, it was charged by appellants that he had perpetrated a fraud and that in doing so he had sworn to false statements set forth in his proofs of loss. This amounted to a substantial charge of perjury. His denial of this charge could not be obtained. It seems to us that, under these circumstances, there was no error in permitting the plaintiff to show his reputation for honesty and integrity. There are courts that hold that in civil actions, when the character of a plaintiff is assailed by the defense interposed, evidence of his good character is admissible. *Mosley v. Insurance Co.*, 55 Vt. 142, 152; *Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.) 40 S. W. 44; *Allison v. McClun*, 40 Kan. 525, 20 Pac. 125; *Houston Elec. Co. v. Faroux* (Tex. Civ. App.) 125 S. W. 922; *Cudlipp v. C. R. Cummings Export Co.* (Tex. Civ. App.) 149 S. W. 444.

We do not feel that we would be justified in holding the admission of the character evidence was prejudicial.

The judgment is affirmed.

MORRIS, MOUNT, PARKER, and FULLERTON, JJ., concur.

(83 Wash. 601)

**ZELLERS et al. v. CITY OF BELLINGHAM.**  
(No. 12199.)

(Supreme Court of Washington. Jan. 16, 1915.)

**1. MUNICIPAL CORPORATIONS (§ 788\*) — DEFECTIVE STREETS—INJURIES TO PEDESTRIANS — NEGLIGENCE.**

Where plaintiff, a pedestrian, while crossing a city street in process of improvement, was injured by the sudden tightening of a pile driver cable stretched across the street as plaintiff was stepping over it, actionable negligence on the part of the city was not shown, unless an operator of the cable had notice, or, in the exercise of ordinary care ought to have known, that plaintiff was attempting or about to step over it when the operator started to take up the slack.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.\*]

**2. MUNICIPAL CORPORATIONS (§ 821\*) — STREETS — OBSTRUCTIONS — NEGLIGENCE — QUESTION FOR JURY.**

In an action for injuries to a pedestrian by the sudden tightening of a cable in a street, being used as part of the city's instrumentalities to improve the street, as plaintiff was stepping over it, whether the cable was lying loose on the street when plaintiff endeavored to step over it and whether the city's servants knew or ought to have known that plaintiff was in the act of stepping over the cable when it was lifted, *held* for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardy, Judge.

Action by Lilly Zellers and another against the City of Bellingham. Judgment for plaintiffs, and defendant appeals. Reversed.

Dan F. North and Kellogg & Thompson, all of Bellingham, for appellant. Thos. R. Waters and Wm. J. Biggar, both of Bellingham, for respondents.

**MOUNT, J.** Action for damages on account of personal injuries. The case was tried to the court with a jury on issues made by the pleadings. The jury returned a verdict in favor of the plaintiffs for \$2,500. The defendant has appealed.

It appears that the city of Bellingham was improving Central avenue, one of the principal streets in the city. This avenue runs north and south. The east side of the avenue, 30 feet in width, had been improved by piling and capping, upon which capping planking had been laid. The west side was being improved in the same manner. The street was being built upon tidelands, and necessitated piling, capping, and planking to be laid thereon in order to be improved. The contractor for the city used a pile driver in doing the work. This pile driver was built upon a framework upon which was also situated a donkey engine which operated the pile driver, and which was used for the purpose

of moving the pile driver. The easterly side of the street, which had been planked to the width of about 30 feet, was being used by pedestrians. There were no barricades to prevent pedestrians from using the finished portion of the street. In doing the work it was necessary to move the pile driver from place to place as the work progressed. On March 1, 1913, a cable was carried from the pile driver to the east side of the street across the planked portion thereof, and fastened to a telephone pole for the purpose of moving the pile driver.

The testimony on behalf of the plaintiffs tended to show that they were upon the street on the day named looking at the work which was being done. They had gone a little distance away to where a dredger was making a certain fill. They then walked up to where the pile driver was at work. They watched the pile driver for a few minutes. They were standing near the cable which was attached to the telephone pole for the purpose of moving the pile driver. After standing for a few minutes, Mrs. Zellers, seeing that the cable was lying upon the street, spoke to her husband, saying that they could then cross the cable, or words to that effect. She testified that as she was in the act of stepping over the cable, which at that time was lying upon the planking of the street, the engine of the pile driver was suddenly started, the cable was raised, and her foot was caught as she was in the act of stepping over the cable, and she was thrown upon the roadway and severely injured. Others of her witnesses testified to the same effect.

This statement of the occurrence was disputed by the defendant. It contended and produced witnesses to the effect that, at the time the plaintiffs came up to the cable, it was taut; that one end of the cable was fastened to the telephone pole across the completed portion of the street and about 20 inches above the flooring of the street; that the other end of the cable was fastened around the lower portion of the frame of the pile driver, a little below the surface of the planking to the west of the 30-foot strip; that it extended at an angle from the pile driver to the telephone pole, and that at the middle of the completed portion of the street the taut cable was from 8 to 15 inches above the plank roadway; that Mrs. Zellers, while the cable was in this position, attempted to step over the cable, caught her heel or foot on it, and fell to the floor; that the person operating the pile driver did not know Mrs. Zellers was about to cross the cable, and did not see her until after she had fallen. This was the principal issue in the case.

The court instructed the jury as follows:

"You are further instructed that, if you find from the evidence, by a fair preponderance thereof, that at the time the plaintiff Lillie Zellers attempted to pass over the cable the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

same was lying still on the surface of the improved portion of the street, or was then still and near the surface of the street and in such position that a person of reasonable prudence and caution under all the conditions and circumstances, as they then and there existed, would have considered it safe to pass over the cable, and if you further find from the evidence, by a fair preponderance thereof, that the plaintiff Lillie Zellers, in the exercise of ordinary care and prudence for her own protection and safety, attempted to pass over the cable, while the same was in such position, and that, while so attempting to pass over the cable, the defendant, acting by and through the contractor, Sauset, his agents and employees, without warning to said plaintiff Lillie Zellers, suddenly started up the engine of the pile driver, and drew the cable taut, and thereby struck the said plaintiff with the same and raised her up and threw her on the street, and thereby injured her as alleged in the complaint, then and in such case it would be your duty to find for the plaintiff and against the defendant city."

The court refused to give the following instruction:

"You are instructed that before you can find a verdict for the plaintiff in this case you must find, from a fair preponderance of the evidence, that the plaintiff, without any negligence on her part contributing thereto, attempted to step over the cable described in the evidence in this case, while the said cable was lying upon the planking of Central avenue, and that some agent of the defendant, city of Bellingham, with knowledge that she was attempting to step over said cable, or who by the exercise of reasonable diligence should have known from some word or action of the plaintiff that she was about to step over said cable, started or caused to be started the donkey engine attached to said cable, and as a result said cable was raised in the air, and the plaintiff was tripped or thrown and injured by the raising of said cable."

[1] It will be noticed that the difference between these two instructions is that in the one given the jury was not told that before a recovery could be had it was necessary that the city, or some agent of the city, must have had notice, or, in the exercise of ordinary care, must have known that Mrs. Zellers was attempting or was about to step over the cable. This was clearly error; because, if the city did not know, or, in the exercise of reasonable diligence, was not required to know, that the plaintiff Mrs. Zellers was about to step over the cable at the time it was started, there was clearly no negligence on the part of the city. The court should have given the instruction refused, or at least should have modified the instruction given so as to contain this element of notice or knowledge.

In the case of *Pearson v. Willapa Construction Co.*, 72 Wash. 487, 130 Pac. 903, which was a case very similar to this one, we said that the plaintiff could not recover, for three reasons:

"(1) Appellant was not in a dangerous situation until he stepped over the cable; (2) there is nothing to show that respondent knew, or should have known, that appellant was about to step over the cable; (3) there is nothing to show that respondent knew, or had received any intimation, that appellant was in a dangerous position with regard to the cable when the cable was started. Hence the basis upon which that contention rests—one person negligently exposing himself to danger, the other with knowl-

edge of such fact omitting due care for the purpose of avoiding injury—is here lacking. Appellant could plainly see what was going on; the scraper and moving cable were plainly indicative of their use; and, with these facts clearly before him, he chooses his own time to act, with no intimation or knowledge on the part of respondent that he was about to so act."

And so it is in this case. If the cable was lying upon the completed roadway, as the plaintiffs' evidence tended to show, then, in order to show negligence on the part of the agents of the city operating the cable, it was necessary to show that the agent at the time the engine was started knew, or should have known, that the plaintiff Mrs. Zellers was attempting to cross, or was about to cross, the cable at that particular time; otherwise there was no negligence. A recovery in the case depends upon negligence of the city. It certainly was not negligence for the city to be improving the street by the means employed. It seems to be conceded that the means employed were necessary. The plaintiffs themselves, by their own testimony, knew that the cable was across the street; they knew it was being used for the purpose of moving the pile driver; and they knew that when the engine was in motion the cable would be raised above the surface of the street, because they had watched its operation, and, a very short time before they attempted to cross, saw its position. It is true that other people, especially pedestrians, were using the street at that time, and that the street was not closed to traffic. But the mere fact that a cable lay across the street and was being used at that particular time was itself a warning of danger, and persons attempting to cross it were assuming the risk, unless those operating the cable knew, or, in the exercise of ordinary care, should have known, that persons were upon the cable, or about to step over it, or were in a dangerous place at the time it was about to be raised or put into operation. Clearly the only negligence, if there was any negligence at all, was in raising the cable when the plaintiff Mrs. Zellers was in a dangerous position. In order to show negligence, therefore, it was necessary to show that the agents of the city knew, or should have known, of her position. The court entirely omitted this element from the instruction, and it was therefore erroneous.

It is argued by the respondents that the case of *Pearson v. Willapa Construction Co.*, supra, was, in substance, overruled by the later case of *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323. That was an entirely different case from this. In that case the negligence consisted in maintaining a temporary sidewalk six inches lower than the cement walk at a place where the lights cast a shadow upon the permanent walk, so that travelers upon the highway could not see the danger; and no warnings were posted near the place to prevent pedestrians from falling upon the walk. The *Pearson* Case, upon

which the appellant relies in this case, was not even mentioned in the later case.

[2] The appellant insists that its motion for a directed verdict should have been sustained. But we are satisfied that, if the plaintiffs' evidence is to be believed to the exclusion of the defendant's evidence, there was a question for the jury to determine whether the accident happened in the way the plaintiffs testified, or in the way the evidence for the defendant tends to show that it happened. If the plaintiffs' version is the correct one, then the right to recover depends upon the fact whether or not the city or its agents knew, or, in the exercise of reasonable caution, should have known, that the plaintiff Mrs. Zellers was in the act of stepping over the cable when it was lifted from the street. And that, we think, is a question for the jury.

Other errors are assigned in the briefs to the effect that the court erred in refusing to grant a new trial; but from what we have already said it is apparent that it is not necessary to discuss these questions, because a new trial must be granted for the error noticed.

The judgment is therefore reversed, and the cause remanded for further proceedings.

CROW, C. J., and MAIN, and ELLIS, JJ., concur.

FULLERTON, J. (dissenting). As stated in the majority opinion, the city of Bellingham, at the time the respondent received the injury for which she sues, was engaged through a contractor in improving one of its principal streets. One side of the street, the east half, had been theretofore improved by the city, had been open to public travel, and was then in actual use by the public, many persons passing over it each day. The contractor, in the course of the work, and for the purpose of moving a pile driver, stretched a cable across the traveled way, fastening it to a telephone pole on the opposite side of the street in such a manner that when no strain was put upon the cable it would lie flat upon the surface of the street, but when a strain was put thereon would raise up from such surface for a distance of some 20 inches. While the cable was in place, the respondent, who was subsequently injured thereon, passed over the street, and, coming to the cable, found it lying on the surface of the street. She started to cross over it, and, while she was in the act of stepping over it, a strain was put thereon, causing it to raise. In raising, the cable tripped her, throwing her down upon the street and caused her severe injuries. On this state of facts the majority held that the injured person cannot recover, unless she is able to show that the city, or some agent of the city, knew, or, by the exercise of ordinary diligence, should have known, that she was in the act of stepping over the cable at the time it was raised; "because,"

it is said, "if the city did not know, or, by reasonable diligence, was not required to know, that the plaintiff Mrs. Zellers was about to step over the cable at the time it started, there was clearly no negligence on the part of the city." With all due respect to my Associates who concur in this conclusion, I think it without foundation in either reason or authority.

It is a fundamental rule, to substantiate which it would be a work of supererogation to cite authorities, that a city, when it opens a street for public use, must keep it in a reasonably safe condition for travel. It may lawfully, of course, improve a street without closing it entirely to public travel, and may lawfully, in the course of the work, place obstructions or dig trenches therein, provided it leaves the part of the way left open for travel reasonably safe for travel, and uses reasonable care and diligence to protect the public from injury by the defects. It is a general rule, and the rule in this jurisdiction, although perhaps not a universal rule, that the city cannot relieve itself of its primary duty in this regard by letting the work of improving a street to a contractor. This we held in *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844; in *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912; in *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 141, 5 Ann. Cas. 735; and in *Laslyer v. Olympia*, 61 Wash. 651, 112 Pac. 752. It is a general rule, also, that there is a difference in respect to the notice necessary to create liability whether the defect is the result of positive misfeasance on the part of the city, or is the result of mere neglect or nonfeasance on its part—that is to say, whether the defect causing the injury was the immediate act of the city or its agent, or whether the defect arose from natural causes, as by wear from use—as in the one case the city is bound to take notice of the obstruction from the fact of its creation, and is directly chargeable with any injury caused thereby, while in the other it must be shown to have had actual notice, or it must be shown that the defect existed for such a length of time as to imply notice, before it is so chargeable. See, in addition to the cases before cited, the cases of *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892, 61 L. R. A. 583; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; and *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 7 L. R. A. (N. S.) 424, 117 Am. St. Rep. 1062.

Concerning the facts pertinent to the inquiry, the court knows judicially that the city of Bellingham is a city of the first class; that it had a population, as shown by the United States census of 1910, of 24,577, and an estimated population, made by the same authority in the year of the accident, of 29,937. It knows from the record that the street on which the accident happened was one of the principal streets of the city; that

it was left open for travel and was "traveled by hundreds of people daily"; that no guard of any kind was placed around or near the cable; that the obstruction was of such a character when not in use as to allay suspicion or fear, and, when put in use, likely to become highly dangerous. The injured respondent, therefore, was not a trespasser on the street, but, on the contrary, was lawfully thereon. She had the right to assume, and to act on the assumption, that she could pass with reasonable safety over any part of the street left open for travel, and had the right to assume, and to act on the assumption, that the city would not on a sudden, and without warning, change any part of the street from a safe to a dangerous condition.

In the light of these legal principles, and in the light of the conceded facts, I am wholly unable to understand on what theory it can be held that the city was not in this instance guilty of negligence. It seems to me that the city, instead of being free from negligence if it operated the cable without notice, actual or implied, that some person was about to cross over it, was guilty of the grossest negligence if it operated it without first ascertaining that no person was about to or was in the act of crossing over it. It being the primary duty of the city, when it places a dangerous obstruction in a street which it leaves open for travel, to guard and protect the public from injury by such obstruction, the rule, as I understand it, is that it is liable to any one injured from the mere neglect of that duty, unless, of course, it can show that the injured person was himself guilty of negligence contributing to the injury. To hold with the majority in the present case is to hold that the city owed no duty to the respondent other than to refrain from wantonly injuring her. But this is the rule with relation to trespassers only, to persons wrongfully at the place of injury, and has no application to the person rightfully at the place of injury. A person rightfully at the place of injury, and pursuing his way with ordinary care, can recover for an injury caused by a defect in the street by showing mere negligence on the part of the city; he does not have to show a wanton injury. The rule of the majority places the burden on the wrong party. Instead of it being the respondent's duty to notify the city that she was about to cross the cable to cast liability upon the city, it was the city's duty, in order to free itself from liability, to notify her before she attempted to cross that it was about to use the cable in such a manner as to change it from a safe to a dangerous condition. The instruction given by the court, therefore, states the true rule, not the instruction the majority say should have been given.

The case relied upon by the majority to sustain their contention is *Pearson v. Willa-*

*pa Const. Co.*, 72 Wash. 487, 130 Pac. 903. It is said that the case is very similar in its facts to the present case, but, with due respect to my Associates, I think the only similarity is that the plaintiff was in each instance injured by a cable. The cases differ fundamentally. The case cited was rested on the principle that the injured person was a trespasser; that he was traveling where he had no right to travel; and that the operator of the cable owed him no duty to keep the way in a reasonably safe condition for travel, or any duty other than not to wantonly injure him. In the case at bar, the respondent was not a trespasser; she was traveling on a public street where she had a right to be traveling; the city owed her the duty of keeping the street in a reasonably safe condition for travel, and, in consequence, is liable if it neglected that duty to her injury, whether the negligence amounted to wantonness or not. I dissented from the case cited, but not upon the questions of law on which it was rested. It was my opinion that the evidence in the case justified submitting to the jury the question whether the way over which the injured person pursued was of such public use as to make it a quasi public way, contending for the rule of law that, if it was a way in common use by the public, the contractors could not place and leave unprotected dangerous agencies across it without rendering themselves liable to answer for injuries caused thereby. I did not then, and do not now, understand that the majority disagreed with me on the principles of law involved, but that the differences arose from the discordant views taken as to the effect of the evidence.

Of the cases decided by this court which I think contrary to the conclusion reached by the majority, I will notice but a few, and first the case the majority attempt to distinguish, namely, *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323. In that case the appellant was injured by a defect in the street which was in the process of improvement. Stating the general rules governing in such cases, this language was used:

"Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care to keep it in a reasonably safe condition for travel. *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19. A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. *Cady v. Seattle*, supra. Where a city undertakes to improve a street, it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street to public travel. *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 14 [5 Ann. Cas. 735]. It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or, in the exercise of reasonable care, ought to have known, its condition. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847."

Notwithstanding the statement of the majority that the case cited is an entirely different case from the case at bar, I can conceive no reason why the principle announced is not applicable. In the one case the defect consisted in faulty construction; in the other a cable stretched across the street. Surely, if it was necessary to put up guards and give warnings to protect from liability in the one case, it was equally so in the other.

In *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 7 L. R. A. (N. S.) 424, 117 Am. St. Rep. 1062, the plaintiff was injured by falling through an open trapdoor constructed in a sidewalk on one of the principal streets of the city. The doors were double and opened upwards, and, when opened, of themselves formed barriers. At the time of the accident but one of the doors were open, and the plaintiff approached from the opposite way. It was held that the city was liable for the injury on the principle that the opening was on a prominent thoroughfare, in constant use by pedestrians, and that the city knew or ought to have known that to open the doors at any time was dangerous, and, knowing this, was guilty of negligence in not providing for proper guards when they were permitted to be opened. In *Lastyr v. Olympia*, before cited, the plaintiff was injured by falling over a wire netting stretched across a sidewalk to protect a place therein which was being repaired by the owner of the abutting property with the permission of the city. The city was held liable on similar principles. Manifestly, the principle of these cases is contrary to the principle announced in the case at bar; for, if the liability of the city depends on its knowledge of the position of the person injured at the time of the immediate happening of the injury, there could have been no recovery in either of them.

But I need not pursue the authorities. They are all one way, and all against the rule announced by the majority.

Judge Mount, writing for the majority, uses this further language, namely:

"The plaintiffs themselves, by their own testimony, knew that the cable was across the street; they knew it was being used for the purpose of moving the pile driver; and they knew that when the engine was in motion the cable would be raised above the surface of the street, because they had watched its operation, and, a very short time before they attempted to cross, saw its position. It is true that other people, especially pedestrians, were using the street at that time, and that the street was not closed to traffic. But the mere fact that a cable lay across the street and was being used at that particular time was itself a warning of danger, and persons attempting to cross it were assuming the risk, unless those operating the cable knew, or, in the exercise of ordinary care, should have known, that persons were upon the cable, or about to step over it, or were in a dangerous place at the time it was about to be raised or put into operation."

But this, as I understand the rule, goes only to the contributory negligence of the re-

spondent. It is true, of course, that if the respondent was herself guilty of negligence, she cannot recover, even though the city were negligent; and if it is meant to be said that there was such contributory negligence as, as a matter of law, to prevent recovery, then the case should be returned with instructions to dismiss, and not for a retrial. Clearly, to say that she was guilty of contributory negligence does not argue in favor of the principle upon which the case is reversed.

In my opinion, the city was negligent in stretching the cable across the street and operating it in a manner dangerous to the traveling public without warning, and is exempted from liability to those only of the traveling public injured thereby to whom warning was unnecessary. As I agree with the majority that the respondent cannot be so charged with contributory negligence as a matter of law, I conclude that the case should be affirmed, rather than reversed.

(83 Wash. 496)

**PUGET SOUND REALTY ASSOCIATES v. CATLETT et al. (No. 12169.)**

(Supreme Court of Washington. Jan. 11, 1915.)

**1. CHATTEL MORTGAGES (§ 201\*)—PRIORITY OF LIEN—RECORDING—CHANGE OF NAME.**

Simple contract creditors cannot defeat the priority of a recorded chattel mortgage, securing the payment of rent under a lease, by merely showing that, after the mortgagor had slightly changed its corporate name, the mortgagee conveyed the property, covered by the mortgage and held by the mortgagee under a conditional bill of sale, to the mortgagor under its new name, so that the records did not show any mortgage recorded against the owner of the property conveyed by the bill of sale, without showing also that they were actually misled by the state of the record.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 360; Dec. Dig. § 201.\*]

**2. CHATTEL MORTGAGES (§ 138\*)—PRIORITY OF LIEN—RECORD—DECLARATIONS OF MORTGAGOR.**

Nor was the lien of the mortgage affected by the statement of the manager of the mortgagor, made without authority from the mortgagee, that the property was free from lien.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.\*]

**3. APPEAL AND ERROR (§ 1073\*)—HARMLESS ERROR—ERROR NOT AFFECTING RESULT.**

Where chattels mortgaged to secure the payment of rent were sold for less than the rent due, unsecured creditors of the mortgagor are not prejudiced by a ruling allowing the mortgagee damages for the detention of the property beyond the term of the lease.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the Puget Sound Realty Associates against Fred W. Catlett, Receiver of the Blackwell Company, and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Fred W. Catlett, of Cambridge, Mass., and Hughes, McMicken, Dovell & Ramsey, Tucker & Hyland, Higgins & Hughes, and Hyman Zettler, all of Seattle, for appellants. Corwin S. Shank and H. C. Belt, both of Seattle, for respondent.

CHADWICK, J. Stating the facts briefly so as to get at the underlying legal propositions, rather than following the mutations and character of the property out of which this appeal comes, we find: That an owner sells a hotel business to his lessee. The lease is in form a lease and a chattel mortgage and is recorded as such. Lessee thereafter changes its name, for reasons not now material, from The Blackwell Hotel Company to Blackwell Hotel Company. The furniture in the hotel was covered by conditional bill of sale. The purchase price is thereafter paid. A bill of sale in form, "Does hereby sell, assign, transfer and set over unto the said Blackwell Hotel Company in accordance with and as required by said contracts of conditional sale all the personal property so conditionally sold and described in said conditional sale contracts," is executed and delivered to the lessee. The lessee, Blackwell Hotel Company, in the regular course of its business contracts many debts and is owing a number of creditors on October 10, 1913, when the plaintiff, the present lessor, began an action to foreclose the chattel mortgage on the furniture and fixtures to satisfy an arrearage of rent amounting to \$23,036.30, and \$4,000 damages for detention beyond the term of the lease. The lessee being insolvent, plaintiff lessor asked the court to appoint a receiver to take charge and care for the property pending foreclosure. The receiver took charge and has, so far as we can ascertain from the record, acted as a general receiver. When the application for a receivership came on for hearing, the defendant creditors appeared and contested the mortgage and the right of the plaintiff lessor to recover. They contend that the familiar principle of the law that, where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. They cite *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538; *Parker v. Hill*, 68 Wash. 146, 122 Pac. 618. Appellants undertake to apply the rule in this wise: The change of name from The Blackwell Hotel Company to Blackwell Hotel Company was procured in part, at least, by respondent. The legal consequence was that the record did not indicate an existing mortgage made by Blackwell Hotel Company, the debtor of these appellants, and further that the execution of the bill of sale to Blackwell Hotel Company, covering the property theretofore held under the conditional bill of sale by The Blackwell Hotel Company, put upon Blackwell Hotel Company full indicia of ownership, and

those dealing with it should be entitled to protection over a mortgagee who had made that situation possible.

[1] However engaging the theories advanced by appellants may be, we are nevertheless of the opinion that the judgment of the trial court is correct. It is admitted that the mortgage, as between the parties, is a valid and binding instrument. This being so, a superior equity cannot be asserted by simple contract creditors making proof of the recordation and character of the subsequent instruments. To invoke equity they must come forth and show that they were in fact misled by the record and indexes which they claim to be deficient. If it were not so mortgaged, property could not be sold with safety to the mortgagee. The law invites transfers of personal property, and, in the absence of a showing that would sustain an estoppel in pais, no court should say that the integrity of the contract and transaction between mortgagor and mortgagee should be beaten down and destroyed by those who rely upon imperfections afterwards discovered and which in no way entered into the trade out of which their obligation arose.

[2] We have not overlooked the contention of the attorneys for the appellants that Manager Blackwell told them that the property was free of lien. Admitting that the record shows this to be true, although it is extremely doubtful if a finding to that effect could be sustained, it would not destroy the lien of plaintiff's mortgage. It is not sought or contended that Blackwell had any authority from the mortgagee. It is not contended that plaintiff has not and did not have during all that time a valid and subsisting mortgage, and furthermore, admitting that such a representation was made, men who depend upon the veracity of those with whom they deal cannot expect lienholders to waive their rights in order to amend the falsehood of the common debtor.

There is a further contention that 50 per cent. or more of the property which has been sold by the receiver to satisfy the debt was put into the building after the mortgage was executed, and an argument is made and authority cited to the effect that such property is free of the lien of the mortgage. Mr. Blackwell, when on the stand, testified that some \$40,000 worth of property had been put into the hotel after the execution of the mortgage. Upon cross-examination he failed utterly to sustain this contention. His testimony is extravagant and indefinite. It was rejected by the trial court and will not be followed by us.

[3] Appellants contend that, in any event, plaintiffs have undertaken to charge the property with too much; that the \$4,000 asked for damages for detention beyond the term cannot be allowed by the court. It is asserted in the briefs, and it is not denied, that the property has been sold and brought



less than the amount of rent actually due. If this is so, there can be no prejudice to the appellants. We find no error in the record. Affirmed.

CROW, C. J., and GOSE, PARKER, and MORRIS, JJ., concur.

(83 Wash. 451)

**BERG v. YAKIMA VALLEY CANAL CO.**  
(No. 11297.)

(Supreme Court of Washington. Jan. 9, 1915.)

**1. WATERS AND WATER COURSES (§ 253\*)—MUTUAL IRRIGATION CORPORATIONS—TRANSFER OF CERTIFICATES OF STOCK.**

The stock of a mutual irrigation corporation, formed to supply water to its stockholders only, represents water rights, and a transfer of a certificate, separate from the land described therein, transfers the water right for use on other land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 253.\*]

**2. WATERS AND WATER COURSES (§ 234\*)—IRRIGATION CORPORATIONS—WATER RIGHTS APPURTENANT TO LAND.**

Under the articles of incorporation of a mutual irrigation corporation, to supply water to its stockholders only, which provides that each share of stock shall constitute a water right for one acre of land, and shall vest in the owner, his heirs and assigns, title to a specified part of the water at any time actually carried by the irrigation canal of the corporation, and under the by-laws specifying the form of certificates of stock, and under the certificates providing that the owner of each certificate shall be entitled to the specific part of the volume of water for each share of stock, so long as he shall use the water on the land described on the back of the certificate, a water right represented by a stock certificate is appurtenant to the land described in the certificate.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 321; Dec. Dig. § 234.\*]

**3. WATERS AND WATER COURSES (§ 253\*)—RIGHTS OF TENANT—WATER RIGHTS.**

Where a lease of land, to which water for irrigation was appurtenant, provided that the lessee would accept as the full water right one-half of the water right owned by the landlord, and the use of the water on the land was essential to the purposes of the lease, the lease transferred to the lessee the right to use the water therein specified and was an assignment of the water right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 253.\*]

**4. WATERS AND WATER COURSES (§ 253\*)—IRRIGATION COMPANIES—NEGLIGENCE—LIABILITY.**

Where water supplied by a mutual irrigation corporation to its stockholders was appurtenant to land leased by the owner, the water right passed to the lessee, who could sue the corporation for failure to supply water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 253.\*]

**5. WATERS AND WATER COURSES (§ 261\*)—IRRIGATION COMPANIES—NEGLIGENCE—LIABILITY.**

Where a mutual irrigation corporation recognized the rights of a purchaser of land to water as appurtenant thereto, though the stock certificates had not been transferred on its books to the purchaser, and the corporation at no time refused to furnish water to the lessee of the

purchaser because the stock had not been so transferred, the corporation could not escape liability to the lessee for failure to furnish water on the theory that the stock had not been transferred on its books.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 261.\*]

**6. WATERS AND WATER COURSES (§ 260\*)—IRRIGATION CORPORATIONS—FAILURE TO FURNISH WATER—LIABILITY.**

A mutual irrigation corporation, organized to construct, maintain, and operate a canal to carry water for irrigation and domestic purposes to lands owned by its stockholders for an annual water rental, fixed by by-laws, to meet maintenance and operation of the canal, must exercise reasonable care in maintaining the canal in proper repair, and see that each stockholder receives his proportionate share of water, and, where it fails to do so, it is negligent and liable in damages at the suit of a stockholder.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 323; Dec. Dig. § 260.\*]

**7. WATERS AND WATER COURSES (§ 263\*)—MUTUAL IRRIGATION CORPORATIONS—FAILURE TO MAINTAIN IRRIGATION CANAL IN REPAIR—NEGLIGENCE—EVIDENCE.**

Evidence held to justify a finding that a mutual irrigation corporation negligently failed to maintain its irrigation ditch in proper repair, and thereby prevented a stockholder from receiving his proportionate share of water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 324; Dec. Dig. § 263.\*]

**8. DAMAGES (§ 112\*)—LOSS OF GROWING CROP—MEASURE OF DAMAGES.**

The measure of damages for the loss of a growing crop is the value of the crop at the time of the loss, which may be arrived at by evidence of the reasonable value at the time, or the market value at the time of maturity, less cost of tilling, harvesting, and marketing.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

**9. APPEAL AND ERROR (§ 1012\*)—INJURY TO CROP—INADEQUATE DAMAGES—FINDING—EVIDENCE.**

Where, in an action for loss of a growing crop for failure to furnish water for irrigation, the court viewed the land, a finding would not be disturbed, merely because it was not as large as sustainable by testimony of plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

Crow, C. J., and Chadwick, Fullerton, and Mount, JJ., dissenting.

En Banc. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Action by William Berg against the Yakima Valley Canal Company. From a judgment for plaintiff, defendant appeals, and plaintiff cross-appeals. Affirmed.

Englehart & Rigg, of North Yakima (A. L. Agatin, of Duluth, Minn., of counsel), for appellant. Bogle, Graves, Merritt & Bogle, of Seattle, and Thomas H. Wilson, of North Yakima, for respondent.

MAIN, J. The purpose of this action was to recover damages alleged to be due to the negligence of the defendant in failing to properly maintain and keep in repair an irrigation ditch. The cause was tried to the

court sitting without a jury. Judgment was entered for the plaintiff in the sum of \$18,500. The defendant appeals.

The facts are substantially as follows: The defendant, Yakima Valley Canal Company, is a corporation organized and existing under the laws of the state of Washington. The object for which this corporation was formed, as set out in its articles, was to construct, maintain, and operate a canal to carry water for irrigation and domestic purposes from the Naches river in the county of Yakima to the lands owned by its stockholders situated in that county, and in township 13, range 18, E. W. M. The water was to be furnished at cost to the owners of lands upon the line of the canal or lateral branches, who should share in the cost of construction, or become owners of the corporate stock. By the amended articles of incorporation, the capital stock of the corporation was \$4,200, divided into 4,200 shares of the par value of \$1 per share. No dividends were to be paid upon this stock. The canal, after it was constructed, was to be maintained and kept in repair by assessments each year made upon the stockholders. The certificates of stock which were issued provided that the owner of the shares therein specified, in accordance with the articles of incorporation and the by-laws, was entitled for every share of stock to  $\frac{1}{4200}$  part of the volume of water carried by the canal, so long as the water should be used upon the land described upon the back of the certificate.

On March 31, 1909, one William Steward became the owner, by purchase from E. B. Preble, of certain lands which were under the ditch. The certificates of stock which entitled Preble to water to be used upon this land were on this date assigned to Steward, but were not transferred upon the books of the corporation until February 21, 1911. On the 27th day of November, 1909, Steward leased for a period of two years 100 acres of the land above mentioned to William Berg, the plaintiff. This lease provided that Berg would plant the land leased in apple trees of specified varieties, and would cultivate and care for the same, during the period covered by the lease, in a good and husband-like manner. During the time covered by the lease, Berg had the right to plant the entire tract to nursery stock, provided he should not plant any nursery stock, or any other crops, nearer than three feet distant from the apple trees. The lease also provided that Berg should have the right to use a specified portion of the water from the Yakima Valley Canal Company which was then owned by Steward and covered by the certificates which had been assigned and delivered to him by Preble. Berg was a nurseryman, and immediately entered into possession of the land for the purpose of engaging in the nursery business somewhat extensively. Dur-

ing the spring of the year 1910 he planted approximately 70 acres of land in nursery stock. For this purpose he employed about 25 men. Berg claims that the defendant company was negligent in failing to properly maintain and take care of the irrigation ditch during the previous fall and winter, and for that reason he did not receive sufficient water during the spring of 1910 to grow the nursery stock which he had planted. By reason of the shortage of water, Berg claims damages in the sum of \$73,150.

At the conclusion of the trial the court, at the request of one party and with the consent of the other, in company with a representative of each, examined the land. Other facts will be mentioned as they may become pertinent in connection with the consideration of the points urged for a reversal.

The questions to be determined are: First, the right of the plaintiff to maintain this action. Second, is the defendant company liable in damages for negligently failing to properly maintain and keep in repair the irrigation ditch? Third, does the evidence sustain the charge of negligence? And, fourth, the amount of the damages.

[1] I. In order to reach the real question in the case without unnecessary preliminary discussion, it will be admitted, for the purposes of this opinion: (a) That the Yakima Valley Canal Company is what is known as a mutual ditch company (that is, that the company was formed for the purpose of supplying water to its stockholders only, and not to the public generally); (b) that the action must be founded either in tort or contract; (c) that the present action is not one sounding in tort; (d) that an action based upon a contract must be brought by one who is either a party or stands in a relation of privity; and (e) that Berg was not a party to the contract. If, therefore, the present action can be maintained by Berg, it is upon the ground of privity. Whether that relation existed between Berg and the canal company depends upon whether, when Berg took his lease, a right to the water passed to him as an appurtenance to the land. It will hardly be denied that, if the water right passed as an appurtenance to the land, his right to maintain the action is well founded.

In a mutual company the stock certificate represents the water right. A transfer or sale of the certificate may be made separate from the land for use on other land, and will transfer the water right. But where it has not been thus sold or transferred, the question whether the water right is appurtenant to the stockholder's land is generally a question of fact, as is also whether, on a sale or transfer of the land, the water right passes as an appurtenance. In 2 Weil, Water Rights in the Western States (3d Ed.) § 1269, speaking upon this question, the author states the rule as follows:

"So long as the company remains purely a mutual one, the certificate of stock represents the water right. A transfer or sale of the certificate is governed by much the same rules as those elsewhere considered regarding transfers of water rights. Whether the water right is appurtenant to the stockholder's land is a question of fact in each case, as is also whether, on a sale of the land, the water right passes as appurtenance. A sale of the certificate may be made separate from the land for use on other land, and will transfer the water right, where the change does not injure other existing water users by the new place of use (who alone, however, can raise the objection that they are injured); the transfer being complete when (and not until) entered on the books of the company. On the other hand, in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water right and right to the certificate as an appurtenance."

[2] In the present case the water right, as evidenced by the certificate, was appurtenant to the land.

The amended articles of incorporation specify that:

"Each share of stock of this corporation shall constitute a water right for one acre of land, and shall, when duly issued and delivered, vest in the lawful owner thereof, his heirs and assigns, title to one forty-two hundredth ( $\frac{1}{4200}$ ) part of the water at any time actually carried by said canal. \* \* \*

The by-laws of the corporation adopted by the stockholders specify the form of the certificate. The certificate provides that the owner of each certificate of stock shall be entitled to—

"one forty-two hundredth part of the volume of water carried by the canal of said corporation for each share of stock represented by this certificate, so long as he shall use said water upon the land described in the certificate upon the back hereof, and no longer, provided, however, that no water can be taken from said canal by virtue of the ownership of said stock until the certificate upon the back hereof has been filled out, signed and sealed by the secretary of this corporation."

The land formerly owned by Preble and transferred to Steward was described upon the back of the certificates as issued to Preble and assigned and delivered to Steward at the time of the purchase of the land by him. Considering the respective provisions of the articles of incorporation, the by-laws, and the stock certificate, it is plain that it was the intention to make the water right represented by the stock appurtenant to the land.

[3] But it is contended that, even if the water is appurtenant to the land, it did not pass to Berg under the terms of the lease in which it was provided:

"That he [Berg] will accept as the full water right for said land one-half of the water right now owned and held by said first party [Steward], to wit, one-half of one hundred shares of capital stock in the Yakima Valley Canal Company's main canal."

For what purpose was this provision placed in the lease? Steward desired the land leased planted in apple trees. Berg agreed to plant the trees, tend, irrigate, and care for the same during the period covered by the

lease. Berg had the right, for his own purposes, of planting the entire tract to nursery stock, except that he should not encroach upon the apple trees closer than three feet. The use of the water upon the land was absolutely essential to any practical attempt to carry out the provisions of the lease. Without the water the purpose could not be accomplished. While the language used is not as specific as it could have been, it is yet quite sufficient to make the intention of the parties evident. The lease transferred to Berg the right to use the water as therein specified. The lease, for the period of time covered by it, operated as an assignment of the water right, as therein provided. In 3 Kinney, Irrigation and Water Rights (2d Ed.) § 1484, it is said:

"So, again, where a tract of land is conveyed, 'with the water right appurtenant thereto,' or a similar expression used in the deed, and the shares of stock representing the water right were not assigned to the purchaser, such a conveyance must be deemed in law an assignment, and the purchaser can compel a transfer of the stock and delivery to him of all water which was actually appurtenant to the land at the time of the transfer."

[4] The water as appurtenant to the land, having passed to Berg by virtue of the lease, established his privity and, as a result, his right to maintain the action. In Booth v. Chapman, 59 Cal. 149, the defendant had agreed to sell to the plaintiff 20 acres of land with the water right appurtenant. The water right had been purchased by Chapman from an incorporated irrigation ditch company. The plaintiff, not receiving the amount of water which he claimed he was entitled to, brought an action against his vendor. The court there held that the action could not be maintained, but should have been brought against the corporation which controlled the water. It was said:

"The contract was delivered to the plaintiff, and by virtue of it he took and still retains possession of the land, and, as we construe the contract, he became thereby invested with the water right appurtenant to the land. If so, he must look to the corporation which controls the water for the pro rata share belonging to said lot. It does not anywhere appear in the record that the defendant ever agreed to deliver any water to the plaintiff; and the court did not so find. \* \* \*

As sustaining the contention that Berg cannot maintain the action, the authorities cited by the defendant which most nearly approach the question will here be considered. They are Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. 154; Barstow Irr. Co. v. Clegdon (Tex. Civ. App.) 93 S. W. 1023; First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691; Oligarchy Ditch Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. 443; 3 Farnham, Waters and Water Rights, p. 2001; George v. Robison, 23 Utah, 79, 63 Pac. 819.

In both the Knowles and Barstow Cases, the courts were considering leases where the owner of land had undertaken to furnish the tenant with a certain amount of water. In

neither case was it attempted in the lease to transfer the water right to the lessee. There is an obvious distinction between a contract whereby the landlord undertakes to furnish water to his tenant and a contract whereby he attempts to transfer the right to the water itself to the tenant, as in the present case.

In the First National Bank and Oligarchy Ditch Co. Cases there will be found language sustaining the defendant's contention. But in neither case was it necessary, in deciding the cause then before the court, to pass upon the question. In the Bank Case there stood, in the name of one Dickson, stock upon the books of the ditch company. The bank brought suit and attached the stock. Prior to this time the land, on which the water represented by the stock was used, had been sold and transferred by Dickson to a third person. Construing a statute then in force in the state of Colorado, it was held that an attaching creditor was not required to look beyond the books of the corporation to determine who owned the stock. In the Oligarchy Ditch Co. Case there were two corporations, one known as Oligarchy Ditch Company, which was the owner of a ditch with an appropriation of water attached thereto; the other was the Oligarchy Extension Ditch Company. The latter corporation owned no water right and was organized solely as a conduit company. The stock in the extension company did not represent independent water rights, but only the right to carry water obtained from the Oligarchy Ditch Company. It was held that a deed conveying the land, together with all the rights to use water for irrigating the premises, did not include stock in the extension company. This company owning no water right, but being only a carrying company, it is plain that the right to have water carried which the stock represented would not pass as appurtenant to the land. There would seem to be a distinction between stock in a ditch company which represented the right to the water which had been appropriated and owned by the company, and stock in a corporation which owned no water rights, and only carried water for its members which they owned evidenced by certificates of stock in another corporation.

Farnham on Water and Water Rights, supra, states the doctrine broadly that water represented by shares of stock cannot be said to be appurtenant to land. In support of this statement the case of *George v. Robison*, supra, only is cited. An examination of that case will disclose that it does not support the declaration of the text-writer. There the question arose between the vendor and the vendee of land. The vendee claimed the right to water as appurtenant under the covenant of warranty. Nowhere in the deed was there any express reference to water rights or water for irrigation or other purposes. It was held that the right to the water did not pass under the warranty. Had

the right to the water been expressly mentioned or referred to in the deed, as it was in the Berg lease, the court there recognized that the rule would have been different when it said:

"From an examination of the evidence, the conclusion is irresistible that the water rights in question were treated by the owners as personal property, constituted no part of the realty, and, not being expressly mentioned or referred to in the deed, were not conveyed with the land, and that there is no proof that warranted the court in finding that the water was appurtenant to the land, or that the water rights were included in the warranty."

But even if it were conceded that the authorities just reviewed do support the defendant's contention, we yet think the rule stated by *Well*, supra, is founded upon the better reason and in its practical operations would be more just and equitable. To cause arid lands to become valuable for agricultural purposes, water is absolutely essential. The doctrine which makes it a question of fact whether the water right is appurtenant to the land and whether it passes by a lease or other conveyance seems to us sound.

[5] Some claim is made that the corporation cannot be held liable because the stock still stood upon its books in the name of *Preble*. But this objection is not well founded. Prior to the time of the lease from *Steward* to *Berg*, the company had recognized the right of *Steward* in furnishing him water which was represented by the certificates. As to *Berg*, the officers and representatives of the corporation at no time refused to furnish him water because the stock had not been transferred upon the books of the corporation. There was no dispute between them and him as to the amount of water to which he was entitled. Had the officers of the company refused to furnish him water until the stock had been transferred upon the books of the company, a different question would be presented, upon which we now express no opinion.

[6] II. It is argued that a corporation organized for the purpose of furnishing water to its stockholders is not liable even to the stockholders on the ground of negligence, and therefore it would not be liable at the suit of a tenant. It must be admitted that, if the corporation would not be liable to its stockholders, a tenant of a stockholder would stand in no more advantageous relation. Little space need be devoted to the discussion of this question. One of the purposes of the corporation set out in its articles was "to construct, maintain and operate a canal to carry water for irrigation and domestic purposes \* \* \* to lands owned by its stockholders." By the by-laws it was provided that one of the purposes for which the annual water rental was charged was to meet the maintenance and operation of the canal. The rule is that, where a corporation is organized for the purpose of supplying water to its stockholders, it is its duty to exercise reasonable

care in maintaining the ditch in proper repair and to see that each stockholder receives his proportionate share of the water. Failing in this duty, the corporation is guilty of negligence, and may be compelled to respond in damages at the suit of a stockholder. *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245, 30 Pac. 882; *Rocky Ford, etc., Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638. In the *O'Connor Case*, speaking upon this question, it was said:

"The stated objects of the corporation, as expressed in the certificate and the stipulations in the deed, clearly define the duties imposed upon the corporation. By the terms and conditions thereof the corporation is bound to keep the main ditch supplied with water, and to regulate and divide its use among the several stockholders in accordance with their respective interests; and it must necessarily follow that, for any neglect or failure to properly discharge its duty in this respect, it would be liable to the stockholder, who is injured thereby, to the extent of the damages suffered by him."

[7] III. It is next claimed that the evidence does not show negligence. The trial court found that the defendant was chargeable with negligence in two respects: First that it failed to properly care for its canal during the fall of 1909 and the following winter and spring, that this negligence consisted in omitting to clean the canal so that it would carry the quantity of water that it was intended to carry, and that, by reason of this negligence, the plaintiff did not receive the water as early in the spring as it was needed and as it was the duty of the defendant to furnish it; and, second, that the defendant did not supply the plaintiff with his proportionate share of the water that came down the ditch, but permitted other stockholders, occupying lands further up the ditch, to take a greater portion of the water than they were entitled to, that by reason of this negligence the plaintiff lost a large portion of his nursery stock.

The trial judge filed in the case a written opinion. Speaking on the question of negligence he therein said:

"The testimony of the officers in charge of the company during the spring of 1910 shows a clear case of negligence of a very pronounced kind. Very little effort was made to clean out any part of the ditch during the fall of 1909 after the time when it had a right to shut off the water for the purpose of cleaning out and making repairs. No repair work seems to have been done during the winter. It was all put off until the spring, and then the directors seem to have taken their time about everything. They turned the water on when it suited their pleasure, and shut it off to make repairs which might have been made before, showing an utter disregard for the rights of the patrons of the company. No shortage of water is claimed; no serious breaks in the ditch, causing unavoidable delays; in fact, no substantial reason is shown why water should not have been delivered by the first of April, and delivered with reasonable continuity throughout the entire season sufficient to have prevented the loss sustained by the plaintiff."

The views of the trial judge, as expressed in the findings of fact and in the written opinion, are abundantly sustained by the evi-

dence. It would unnecessarily prolong this opinion and serve no useful purpose to review the testimony upon this question.

[8] IV. The defendant in its brief proclaims vigorously against the amount of the judgment. But this invective overlooks the evidence in the record. The plaintiff's evidence shows the value of the nursery stock in its condition at the time of its loss by reason of the failure to receive water. The defendant offered no directly controverting evidence. The proper measure of damages for the loss of a growing crop is the value of the crop at the time of the loss. This value may be arrived at either by evidence showing the reasonable value of the crop upon the land at the time, or the market value at the time of maturity, less the cost of tilling, harvesting, and marketing. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Fuhrman v. Interior Warehouse Co.*, 64 Wash. 159, 116 Pac. 666, 37 L. R. A. (N. S.) 89.

[9] The defendant offered evidence tending to show the inadaptability of the land for the purpose of producing nursery stock. The trial court after the conclusion of the trial, as already stated, viewed the land. The plaintiff is prosecuting a cross-appeal claiming that the court erred in not making the award of damages sufficiently large. It is true that the evidence in the record would have sustained a larger verdict had the cause been tried to a jury and such a verdict returned. This, however, would not be a reason for our disturbing the judgment of the trial court.

Both parties having appealed, and neither having prevailed, no costs will be allowed in this court.

The judgment will be affirmed.

ELLIS, GOSE, MORRIS, and PARKER, JJ., concur.

CHADWICK, J. I dissent from the holding of the majority. Lack of time, owing to the change to be made in the personnel of this court within the next few days, prevents me from elaborating my views or going into the authorities. It will be enough to say that this action is brought against a mutual ditch company not organized for profits, of which Steward was a member. Upon the theory of the majority, he is as guilty of negligence as any other member of the company, and could not maintain an action in his own behalf. Berg stands in his shoes and can claim no greater right against the company than Steward could claim. Furthermore, a mutual ditch company should not be held to answer for the torts of one or more of its members. To do so would charge the innocent as well as the guilty and put upon the innocent the burden of keeping a private contract made by one of the co-owners and in which they had no interest whatever.

In consultation I asked the majority to

tell me, or to state in the opinion, how the judgment in this case could be executed. The question was not answered, nor has it been answered in the opinion. The answer to that question furnishes the key to the whole superstructure of this case. As it now stands, plaintiff has a judgment which, in my opinion, is a paper judgment which cannot be enforced by taking the property or money of the unoffending members. They owed Berg no contract duty and no implied duty, and the water, which they had bought and paid for, is as essential to the tillage of their land as it was to the land leased by Steward to Berg. Surely no court will ever hold that the judgment can be executed by a sale of the ditch property. If it should, then may the property of the innocent and unoffending be taken at will, and justice will be a name without substance.

CROW, C. J., and FULLERTON and MOUNT, JJ., concur in what is said by CHADWICK, J.

(83 Wash. 485)

CLARKE v. YUKON INV. CO. et al.  
(No. 12153.)

(Supreme Court of Washington. Jan. 11, 1915.)

1. LANDLORD AND TENANT (§ 150\*)—REPAIRS—LIABILITY OF LANDLORD.

In the absence of a covenant to repair or to keep the property in condition for intended use, there is no liability upon the lessor to do so.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.\*]

2. LANDLORD AND TENANT (§ 150\*)—REPAIRS—LIABILITY OF LANDLORD—ALTERATIONS REQUIRED BY STATUTE—"OWNER OF HOTEL."

Laws of 1909, p. 43, regulating buildings used for hotels, section 11 (Rem. & Bal. Code, § 6040) of which imposes a penalty upon every owner, manager, agent, or person in charge of a hotel for failure to comply with the act, does not require the owner of a building, leased for a long term to a tenant who is conducting a hotel on the premises, under a lease which did not require the owner to make repairs or equip the building for such purpose, to pay for the installation of a fire escape, as required by the city under the authority of that act; the term "owner of the hotel" referring to the owner of the hotel business and not to the owner of the building in which it was conducted.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action to foreclose a mechanics' lien by H. M. Clarke against the Yukon Investment Company, the Purcell Investment Company, and others, in which the Purcell Investment Company and others filed a cross-complaint asking that the cost of the improvements be charged solely to the Yukon Company. From a judgment for the plaintiff against both defendants, and for the Purcell Company against the Yukon Company, the Yukon

Company appeals, and the other defendants enter cross-appeals. Judgment against the Yukon Investment Company reversed and remanded, with instructions to dismiss as to it; and judgment against the other defendants affirmed.

Bausman, Kelleher, Oldham & Goodale, of Seattle, for appellants. Hughes, McMicken, Dovell & Ramsey, Gay & Kelleran, and Walter B. Beals, all of Seattle, for respondent.

CHADWICK, J. The Yukon Investment Company is the owner of a certain brick building in the city of Seattle, known as the Tourist Hotel property. The Purcell Investment Company held the premises under a long-term lease. The lease contained the following provisions:

"Lessee agrees to keep said premises in good repair, and to make all necessary repairs of whatever nature to said premises. \* \* \* That it is the understanding and intent of the parties hereto that said lessor shall not be required to expend any money on said premises during the term of this lease, except for taxes, general and special. \* \* \* That lessee \* \* \* shall not suffer or permit therein any violation of any of the laws of the state of Washington, or of any of the ordinances of the city of Seattle. \* \* \* It is provided that all such alterations are to be paid for by the tenant."

After the lease had run for about two years, the city of Seattle, through its proper agents, notified the Yukon Investment Company that it would be necessary to install an additional fire escape. The company replied that the property was held under a long-term lease and disclaimed liability. Whereupon the city notified the Purcell Investment Company. The agent of the Purcell Company had certain negotiations with the Yukon Company, out of which, as it is alleged in the pleadings, a contract to pay for the fire escape arose, and that it thereafter acted only as the agent of the Yukon Company. In any event, Purcell negotiated with plaintiff for the installation of a fire escape, accepting the proposal to do so in writing as follows:

"June 28, 1913.

"The H. M. Clarke Iron & Wire Works, 1926-29 Western Avenue, Seattle, Washington—Gentlemen: Confirming our telephone conversation of this date, we accept your proposal of the 24th inst., to build and install the fire escape and balconies on the Tourist Hotel Bldg., cor. Occidental Ave. and Main street, for the sum of nine hundred forty-eight and no/100 dollars (\$948.00), same to be in accordance with drawings furnished and in compliance with city ordinances.

"Yours very truly,

"Purcell Investment Company,

"By P. F. Purcell."

We agree with the trial judge that there was hardly a pretense of sustaining this theory of the case upon the trial. Certainly the Purcell Company did not maintain the burden of proof, and we shall not review the testimony but proceed at once to discuss the legal phases of the case.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] In the absence of a covenant to make repairs or to keep the property in proper condition for the uses intended, there is no liability on the part of the lessor to do so. It has been so held by us in *Howard v. Washington Water Power Co.*, 75 Wash. 225, 134 Pac. 927; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917; *Johnston v. Nichols*, 145 Pac. 417.

[2] The Yukon Company insists that it is not liable (a) under the express terms of the lease; and (b) by a fair construction of the whole act (chapter 29, Laws 1909) it is evident that the Legislature intended it to apply only to an owner who is in possession and who is conducting a hotel business, and the conclusion is compelled that all of the burdens of the act should be borne by the business. Counsel cite *McManamon v. Tobiasson*, 75 Wash. 46, 134 Pac. 524; *Rockwell v. Eilers' Music House*, 67 Wash. 478, 122 Pac. 12, 39 L. R. A. (N. S.) 894; *Hayton v. Seattle, B. & M. Co.*, 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N. S.) 432.

This court has held that where premises are let under general terms, no restrictions being put upon the use, the lessee having the privilege to use them for all lawful purposes, the landlord is not bound to meet a burden imposed by a statute or an ordinance, whether that burden be in the form of money expended to meet the demands of the sovereignty or whether the use to which the property is put is impaired or destroyed in virtue of the statute or ordinance. The theory being that one who leases property without restriction as to use takes under an implied obligation to meet every expense incident to the use to which it may be put, whether induced by considerations of convenience or profit, or whether compelled by superior authority. If it were not so, a landlord might be called upon to meet the cost of fire escapes, if the lessee decided to open a rooming house. If that use proved unprofitable, the tenant might use the property as a theater or picture show, and the landlord would be compelled to provide such additional exits and escapes as the statutes and ordinances require, or, that venture failing, he might be called upon to meet the expenses of adapting the premises to the requirements of a restaurant, if the lessee will to engage in it.

In the *Hayton Case* it was held that a permission to use the property leased for saloon purposes did not restrict the use of the premises for other lawful purposes, and a retirement from that business under compulsion of the local option law did not terminate the lease. The governing principle (i. e., a landlord will not be held to meet the burden of an exercise of the police power) would seem to apply here.

In the *Rockwell Case* there was no restriction upon the use of the demised premises. It was alleged that the property had been

used for public shows and entertainments; that the lessor knew that the property had been leased for the purpose of carrying on a moving picture show; that the lessee did not know and the lessor did not disclose to him that the premises could not be so used or be used for the use of audiences for any purpose "until an exit for escape in case of fire" had been made in the building. It was agreed in the lease that the lessee should make repairs and permanent improvements. The lessor refused to make the exit at its own expense when notified by the chief of the fire department to do so. An action was brought as for an abandonment of the lease by the lessor. We held:

That the "use of the premises was not limited by the terms of the lease; that the lease is complete in itself; that the respondents did not engage to make any repairs or improvements upon the premises; that the appellant did engage to make certain improvements; that both parties were bound to take notice of the police regulations of the city where the subject-matter of the contract was situated; that there is no averment that the respondent misled the appellant, or that it refused to permit him to construct the exit upon the wall of the building without the terms of the lease; that, upon the cancellation or surrender of the lease, the appellant was obligated to pay all rent that had accrued by the terms of the lease; and that the complaint, when read with the lease, shows no breach of any of its terms or of any legal duty upon the part of the respondent."

The logic of this decision is that parties may make any lawful contract, and, in the absence of a stipulation specifically covering the disputed right, the contract is made subject to and with implied knowledge of police regulations, present and prospective, which may affect the use of the property while subject to the tenancy.

The *McManamon Case* rests upon the same principle. There the building was by apt terms let for hotel purposes and such business as is generally incident to the hotel business. It could not be used for any other business without the written consent of the lessor. There, as here, the agency of the state, exercising its police power, made certain demands in the interest of the safety of guests and patrons. Here we have an order to install an additional fire escape; there the order was to provide ventilation in certain of the bedrooms, which, if complied with, required changes and alterations, permanent improvements considering the use to which the lessor had restricted the use of the building. It was held upon the ground of insufficiency of the evidence that a recovery for the expense of the alterations and improvements could not be had. It may be said arguendo that a recovery should have been allowed irrespective of the contract if the theory of the *Purcell Company* is a correct conception of the law, for the improvement was of a permanent character, not within the contemplation of the parties, except as the law charged them with notice of possible safeguards in aid of patrons of the

hotel. The McManamon Case is an apt authority to sustain our reasoning that, while there may be a contract liability for improvements, no such liability arises under the statute where the improvement is compelled by public authority as an incident to the use to which a tenant puts the property.

Counsel for the Purcell Company have cited many cases. *Zeibig v. Pfeiffer Chemical Co.*, 150 Mo. App. 482, 131 S. W. 131, being a fair type of all of them, to sustain its contention that where a statute is in terms similar to Rem. & Bal. Code, § 6040, which is, "every owner, manager, agent, or person in charge of a hotel who shall fail to comply with any of the provisions of" the law shall be guilty of a misdemeanor, puts the burden of providing and paying for any improvement which becomes a permanent part of the structure upon the owner of the property. The whole contention of the Purcell Company is stated in the *Zeibig Case*:

"\* \* \* As between the owner and the lessee, aside from any contract, the obligation of the law is not identical with that which obtains with reference to the public. For in such circumstances the duty of constructing the fire escape rests primarily upon the owner of the property. \* \* \* It is true, as a general proposition, that by the common law the burden of repairs on the demised premises rests upon the tenant, and, unless he covenants to do so, the landlord is not required to construct appurtenances nor repair the premises after having placed them in the possession of the lessee. \* \* \* But to this general rule there is a well-established exception which obtains with respect to the construction of such permanent improvements or fixtures as fire escapes, where the duty is enjoined by a positive statute, as here. \* \* \* It thus appears that, as between the plaintiff owner and the defendant lessee, the obligation to construct the fire escape primarily obtains against the owner of the property, and no recovery may be had against the defendant on account thereof, unless it covenanted to do so. The mere fact that defendant leased the premises for business purposes, with knowledge that the fire escape which the law required had not been constructed, will not imply a covenant to the effect that it should assume the burden suggested, for implied covenants in leases are such only as the law raises from the relation of the parties or from the use of certain terms in establishing that relation."

Other cases relied on are *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Johnson v. Snow*, 201 Mo. 450, 100 S. W. 5; *Carrigan v. Stillwell*, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357.

The *Zeibig Case* as well as the *Arms Case* fell under a statute which required the owner or lessee of all buildings having a height of three or more stories, and used for business purposes, to provide outside fire escapes. It is distinguished because the statute makes a fire escape a component part of and presumptively a benefit to a structure, irrespective of particular use.

The *McAlpin Case* and the *Willy Case* were decided under an act chartering the city of Brooklyn. It provided that any dwelling house of more than two stories in height and any building of more than two stories in height, when occupied as a hotel, boarding or lodging house, factory, mill, offices, manufactory, or workshops, shall be provided with fire escapes, etc.

The *Landgraf Case* was also a case under a statute providing that "all buildings in the state which are more than four stories, etc." shall be provided with fire escapes. Owners, trustees, lessees, and occupants were made answerable to the law.

In the *Carrigan Case* the controlling statute was comprehensive. It required fire escapes to be put upon "every building upon which any trade, manufacture, or business is carried on," etc.

Unless these cases fit our statute, they cannot be held to be controlling, for admittedly there is no common-law liability. *Landgraf v. Kuh*, supra; *Pauley v. Lantern Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661.

Chapter 29, Laws 1909, is made by its terms applicable to a business and not to any or all buildings. The title of the act is:

"An act relating to hotels, inns and public lodging houses, creating the office of state hotel inspector, and providing penalties for the violation thereof, and making an appropriation therefor."

It provides for fire escapes, rope escapes, fire extinguishers, gongs, a sufficient supply of bedding and towels, the dumping of ashes, for disinfection and fumigation after contagious diseases, for sanitation and sanitary plumbing, for inspection, and, following a failure to observe the demands of the law, provides:

"Sec. 17. Any owner, manager, agent or person in charge of a hotel who shall obstruct or hinder an inspector in the proper discharge of his duties under this act, or who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10.00) nor more than one hundred (\$100.00) dollars or shall be imprisoned in the county jail for not less than ten days, nor more than three months or both."

This section, when taken in connection with the other sections of the act, must mean the owner of the hotel business and not the owner of the building, for surely the lessor would not be punished for failing to properly plumb a building or to furnish fire extinguishers, gongs, or rope fire escapes to meet the necessities of the lessee's business.

The distinction between the cases relied on and the one at bar is noticed in *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, where, under a statute providing that "any owner, or agent for owner of any factory, workshop, tenement house, inn or public house if such factory, workshop, tenement house, inn or public house be more than two



stories high, to provide \* \* \* a fire escape. It was held:

"The owner of a building and the owner of a factory which is conducted in the building may be different persons, and, when this is so, the owner of the factory, and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty. \* \* \* Again, in the absence of all legislation on the subject, the common law, founded on principles of right and justice, implies, from the relation of master and servant, a duty on the former to provide reasonable means for the safety of the latter. Hence it is more reasonable to infer that the Legislature intended to impose the duty required by this statute upon the owner of the factory, who assumes the relation of master to those employed therein, and for whose safety the duty imposed by this statute is enjoined, than to hold that it was intended to impose the duty upon the owner in fee of the factory building, who may not sustain any relation to the employees in the factory from which the duty to provide for their safety could be implied, and who may not even know that his building is being used as a factory or workshop."

We assume that the same rule would apply as between innkeeper and guest.

To the same effect is *Schott v. Harvey*, 105 Pa. 222, 51 Am. Rep. 201:

"A number of authorities were cited showing the construction which has been placed upon the word 'owner' both by the Legislature and the courts. But the meaning of the word depends in a great measure upon the subject-matter to which it is applied, and, as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question. The term 'owner' is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainderman in fee is each an owner. So there may be a legal and an equitable estate. The trustee and the cestui que trust are both owners. When, therefore, the Legislature used a term of such varied meaning, we must presume they intended such an owner as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use of it makes a fire escape necessary. Had the owner in fee been intended, it was easy to have said so. This view meets all the requirements of the act. It places the responsibility where it properly belongs, upon the person in the possession and occupancy of the property as owner for the time being, and the nature of whose business renders the erection of fire escapes necessary to protect the lives of his employees."

This case was followed in *Keely v. O'Conner*, 106 Pa. 321, where it was said:

"The act of 1879 is certainly a highly penal statute. It imposes a duty unknown to the common law, and cannot be extended by implication to parties who do not clearly come within its terms. The authorities which have been cited are cases involving common-law liabilities, and we do not think they have application here."

In all of the cases relied on the lessor was held because the law charged the improvement against the building, irrespective of the character of the business or because it was of a certain height, while with us the additional fire escape is required under a special statute and only in consequence of the particular business in which the lessee

may engage and in which the lessor has no interest.

Our conclusion seems to us to be sustained by the better reason. In the case at bar the lessee took the property caveat emptor. It knew that in the exercise of its contract the state or municipality might from time to time make demands in the interest of safety, and which might involve expense. The law rests upon the theory of benefit to property or business. It cannot be assumed that the improvement will be of benefit or use to the lessor at the expiration of the lease in 1921. Shifting trade centers, more engaging offers of rent from mercantile establishments, warehousemen, and wholesalers, might make the premises no longer adaptable for hotel purposes, thus rendering the additional fire escape no longer a necessity under any law or any ordinance of the city. We would then have the utterly un contemplated result—a landlord meeting an expense for an improvement beneficial and necessary only to his lessee, and from which he would reap no benefit or advantage now or hereafter.

A judgment has been heretofore entered affirming the judgment of the court below as to the Purcell Investment Company. The judgment of the lower court as to the Yukon Investment Company is reversed, and the case is remanded, with instructions to dismiss as to it.

CROW, C. J., and GOSE, MORRIS, and PARKER, JJ., concur.

(83 Wash. 499)

# MALLORY et al. v. CITY OF OLYMPIA. (No. 12343.)

(Supreme Court of Washington. Jan. 11, 1915.)

## 1. JUDGMENT (§ 589\*)—BAR—FORM OF ACTION.

Judgment in an action upon an express contract will not bar an action upon quantum meruit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1100, 1101; Dec. Dig. § 589.\*]

## 2. JUDGMENT (§ 634\*) — CONCLUSIVENESS — HOW DETERMINED.

In determining whether the judgment in a former action is conclusive, the court must look to the character of the action, the issue joined, and the judgment entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1150; Dec. Dig. § 634.\*]

## 3. JUDGMENT (§ 589\*) — CONCLUSIVENESS — "RES JUDICATA."

An action on an express contract in which defendant city tendered the issues that the contract had not been performed according to its terms, and that it had a right thereunder to take the work over, if it decided it was not being properly done, and finish it at the cost of the contractor, in which there was no finding as to the amount due on the contract, and in which, without passing on the controversy as to the amount due for labor and material actually furnished, the court entered a judgment of dismissal on the ground that plaintiff therein had been guilty of fraud, and that his willful aban-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

donment of the contract was a bar to a judgment on the express contract, was not a bar to plaintiff's subsequent action on a quantum meruit wherein it was not denied that he furnished labor and material to a municipal improvement; since the merits either upon express or implied contract were not passed upon within the definition of "res judicata" as a matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judicial decision, a fact or question which was actually and directly in issue in a former suit, and there judicially acted upon and determined by a domestic court of competent jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1065, 1100, 1101; Dec. Dig. § 589.\*]

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

#### 4. JUDGMENT (§ 570\*)—BAR—TEST—EVIDENCE.

Such former judgment, tested by whether the same evidence would have maintained both actions, was not a bar to the subsequent action, since in the first action it was incumbent upon plaintiff to prove the execution of its contract and to testify that the work had been performed, making a prima facie case, and incumbent on defendant to show that the work had not been done to its satisfaction, and that a judgment for the contract price would be offset under the terms of the contract by cost to the city of performance according to the contract, while in the subsequent action the plaintiff, showing that he had furnished materials and labor which the city had used without paying its reasonable value, made out a prima facie case, regardless of the terms of the contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1034, 1036-1040, 1042-1045, 1165; Dec. Dig. § 570.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACT FOR IMPROVEMENTS—ABANDONMENT—LIABILITY ON QUANTUM MERUIT.

Where a contractor for a municipal improvement, after substantial performance and the furnishing of labor and material of value, abandoned the contract, the city could not retain the benefits without liability upon a quantum meruit to the contractor's silent partner, who furnished the money for the work, and who himself was guilty of no wrong.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.\*]

#### 6. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACT FOR IMPROVEMENTS—RECOVERY FOR SUBSTANTIAL PERFORMANCE.

In an action by a contractor for a municipal improvement to recover on a quantum meruit, the city could not urge that the contractor, having abandoned the express contract, could not recover for substantial performance, without relying on the contract, nor could the city be allowed to retain labor and property by repudiating its own express contract to pay for the work necessary to conform to the plans and charge it against the contractor; and, the equities being equal, the law should prevail, entitling the contractor to recover the reasonable value of his labor and materials.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.\*]

Department 1. Appeal from Superior Court, Thurston County; R. B. Albertson, Judge.

Action by Henry Mallory and another against the City of Olympia. Judgment for defendant, and plaintiffs appeal. Reversed, with directions.

Troy & Sturdevant and Thomas M. Vance, all of Olympia, for appellants. George R. Bigelow and Frank C. Owings, both of Olympia, for respondent.

CHADWICK, J. This action was begun by appellants after this court had rendered a judgment adverse to appellant Mallory. 75 Wash. 245, 134 Pac. 914.

Plaintiffs seek to recover the reasonable value of labor performed and material furnished to a local improvement district in the city of Olympia popularly known as the Swantown slough. The case reported in 75 Wash. was a proceeding in mandamus. Plaintiff Mallory prosecuted that case in his own name. The record shows, and it is admitted by all sides, that Martin was a silent partner, and that he has met the burden of financing the contract which Mallory assumed to carry out. The city has made substantially the same answer in this case as it made in the mandamus case. When this case came on for hearing it was stipulated that the pleadings and testimony taken in the former case might be introduced as evidence, whereupon counsel for the city moved for a judgment upon the ground that the former judgment was res judicata of all claims and demands that might be made by the plaintiffs. The court was of that opinion and a judgment dismissing the action was entered.

[1] It is not disputed that an action prosecuted upon an express contract will not bar an action upon quantum meruit. *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; *Egbers v. Fischer et al.*, 73 Wash. 308, 131 Pac. 1128; *Buddress v. Schafer*, 12 Wash. 310, 41 Pac. 48. This upon the theory that a party is not put to the hazard of invoking every possible remedy when seeking redress, nor suffer dismissal without remedy because he has invoked one which cannot be sustained in law. 15 Cyc. 262.

[2, 3] In determining whether the plaintiffs are concluded by the former action, we must look to the character of the action, the issue joined, and the judgment entered. Stripped of all verbiage and fine distinctions, and treating the mandamus proceeding as a civil action under the statute (*State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207), the former proceeding was an action upon an express contract to which the city tendered two issues: First, that the contract had not been performed according to its terms; and, second, that under the terms of the contract the city had a right to take the work over at any time it might decide that it was not being done properly, and finish it at the cost of the contractor and his bondsmen. When the case came on for trial the court made no findings, nor were any invited, as to the amount due on the contract and the amount that might be properly set

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

off against the contract price, but entered a judgment holding that Mallory had been guilty of fraud, and that he had abandoned his contract. For these reasons, and these alone, the action was dismissed. The real controversy, so far as an issue was tendered touching the amount due for labor or material honestly and actually furnished, was not passed upon by the court. *Res judicata* is, "a matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judicial decision." 34 Cyc. 1086. "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction." 23 Cyc. 1215.

Can it be said that anything that is urged in this case was settled or decided by the court in the other case? The only possible theory that can be advanced against the right of appellants to maintain this action is that the judgment is conclusive to all things decided or which might have been decided in the former case. We have shown that the real issue between the parties was not decided, nor can it be held that it might have been decided. The plea of abandonment was in the nature of a plea in bar. When the court found that there had been an express contract, and that it had been willfully abandoned, the legal conclusion followed that a recovery could not be had upon the express contract; therefore the question of quantum meruit could not have been decided in the former action. The city asked no findings upon its present theory of the case, but were content with all that the law gave them—a judgment of dismissal. The merits of the case either upon express contract or implied contract were not "judicially passed upon and determined." Consequently, it cannot be said that the merit of the case and any possible issue joined inhered in the judgment because it might have been passed on. Our decision upon the appeal in the former case is drawn upon the theory that the finding of abandonment was a bar to a judgment upon an express contract. We there said:

"When, therefore, the appellant persisted in following his own plan and ignoring that of the city engineer, he in law willfully and fraudulently violated his contract, and cannot make it the basis for now insisting that the city make him the payments specified to be paid him upon the completion of the contract."

We can find nothing in the law or in the record in this case that would bar an inquiry or prevent a recovery upon an action for quantum meruit. It is not denied that the appellants furnished labor and material of great value to the improvement district and which it is using in the exercise of its public functions. It may be admitted that the city has not received that for which it contracted, but it has received that which by the exercise of its privileges under the

contract it has made to conform to its demands and for which it should pay a sum equal to its reasonable worth and value.

In determining whether the former judgment is *res judicata*, we are not limited to an inspection of the judgment alone, for the parties have saved all legal questions as to the power of a court to go beyond the judgment by stipulating that we may consider the pleadings as well as the judgment in the former case. The words, "The plaintiff willfully abandoned his work under said contract, and wholly failed to complete said contract in accordance with the plans and specifications and to the satisfaction of the city engineer," considered in the light of the pleadings, makes it plain that the issue before the court was whether or not the contract had been completed according to the plan. The contractor said it had. The engineer said it had not. We have no right to say, nor had the court in the former case, under the pleadings, the right to say, that there was a willful abandonment. There was a dispute as to whether the work had been completed, and nothing more. A fault in this case from the beginning has been that upon the hearing it appeared by the testimony of the city engineer that Mallory had offered him a sum of money if he would approve the work. From this an inference of fraud has been drawn and allowed to run through the whole case, whereas, if it is true in fact, it occurred after the work had been done, and is evidentiary matter going only to the credibility of the witness. Whether the contract was, in fact, performed according to the plans and specifications is a matter entirely separate and apart.

[4] In *Buddress v. Schafer*, *supra*, it is said:

"To determine whether a former judgment is a bar to a subsequent action, it is necessary to inquire whether the same evidence would have maintained both of such actions."

It is unnecessary to multiply authorities. This principle is laid down by every text-writer and sustained by all authority. It is the primary test of *res judicata*. Let us apply it.

In the first case it was incumbent upon plaintiff to prove the execution of his contract and to testify that his work had been performed. This made *prima facie* case. Defendant, on the other hand, must prove that the work had not been done to the satisfaction of the city, and had been completed at a certain cost and damage to the city, so that a judgment for the contract price would be offset, under the terms of the contract, by the cost to the city of making the work consistent with the plans and specifications. The value of the goods and the labor that went into the work were not material to the issue.

In this case, applying the same test, the terms and conditions, the time and manner

of payment, and all details of the contract are immaterial. When plaintiffs show that they have furnished materials and labor which the city has put to its uses and has not paid its reasonable value, they have made out a prima facie case. Neither does the defense rest in contract, but would go only to the value of the labor and material, less the damages and expenditures the city had been put to in adapting that labor and material to its final use.

[5] This court has endeavored to hold municipalities to the same standard of right and wrong that the law imposes upon individuals. *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999; *Coliseum Investment Co. v. King County*, 72 Wash. 687, 131 Pac. 245; *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492; *Ettor v. Tacoma*, 77 Wash. 274, 137 Pac. 820.

In *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, it was sought to enjoin the execution of a contract on the ground that it had not been let in accordance with the requirements of the statute. The court found that the controlling statutes were, in fact, violated, and that the contract was void. Certainly a contract substantially performed, although held to be abandoned, stands upon no lower plane than a void contract. Yet, notwithstanding, we said:

"This court has adopted the more equitable doctrine of allowing the parties, where the contract, if entered into in conformity with the statutes, would not have been unlawful, to retain from the moneys received by them a sum equivalent to the reasonable value of the property the county acquires and retains in virtue of the execution of the void contract. \* \* \* So in this case, since the county has accepted and made use of the bridge, it is liable to the builders for its reasonable value."

We take it that the trial judge rested his judgment upon the case of *Hawkins v. Reber*, 142 Pac. 432. In that case it is granted that a former suit upon an express contract is not a bar to a second suit upon quantum meruit for the same services when it takes different evidence to establish it. It was held that the case did not fall within the rule. The former judgment was held to be res judicata because the controversy turned on a question of fact whether there had been a mutual and voluntary settlement of all differences and disputes between the parties. The court held in the first case that there had been, and the effect of our holding was that a party could not relitigate a question of fact which had been judicially passed upon and determined by casting his pleadings in a new habit, whereas in this case no question of fact has been determined other than the fact of abandonment, from which the court drew the legal conclusion that the action should be dismissed. Appellants are bound to accept that judgment, but they are not precluded under the authorities and the fundamental principles of the law from asking a court of competent jurisdic-

tion to try the merit of the case presented. It may be that Mallory did all that is claimed, that he did not follow the directions of the city engineer as they were given from day to day, and that he offered a bribe to the city engineer if he would approve the work, but it ill becomes a city to appeal to that fact to justify a taking of that for which it is rendering no recompense to the one whose money has gone to pay for the improvement and who is innocent of all wrong. Such a course is not justified by reference to any provision of the contract, nor can it be sustained by reference to any principle of the common law or equity. It should not be urged by man or municipality, nor should it be tolerated in a court of law.

[6] It is further contended that, the court having found that the plaintiff abandoned his contract, the plaintiffs cannot recover upon the theory of substantial performance. Many authorities are cited to sustain this rule, and it may be that no cases can be found where the doctrine of substantial compliance has been applied where there was an intentional and fraudulent failure to comply with the terms of the contract. The fault in this reasoning is that plaintiffs are not seeking to recover upon the theory of a substantial performance of a contract or upon a contract at all. As I have shown, there was no real question of abandonment in the full sense of that word, but a question of whether the work had been performed. But, granting that there was an abandonment, and that the city can raise the question of substantial performance, it is in no better position. We must look to the record in this case for the premise to sustain the applicable law, and when we do we find this case is distinguished from all the cases relied on by counsel as well as the ultimate holding in *Mortimer v. Dirks*, 57 Wash. 402, 107 Pac. 184. If there had been no contract, or if the contract were silent as to the procedure in the event of a dispute over the fact of performance, we could admit that there could be no recovery where the contractor had been guilty of fraud in the prosecution of his work or had abandoned his contract. The city cannot plead or urge in this court the doctrine of substantial performance without pleading and relying on the contract.

The court, in the case of *Mortimer v. Dirks*, says of the rule allowing a recovery where the contract has been substantially performed:

"But such a rule, being founded in equity, is for the benefit of those who do equity, and it cannot be invoked by those who willfully and intentionally violate and breach their contracts."

The contract of the city to pay for the work necessary to make it conform to its idea of the plans and charge it against the contractor and his bondsmen is as sacred and binding as was the contract of the con-

tractor to do the work according to the plans and specifications. In the Mortimer Case the equities were upon one side. In this case there are equities upon both sides. The equities are equal, and the law should prevail. The city should not be allowed to take labor and property upon the theory of moral wrong practiced by the contractor while it is repudiating an express contract to do the work in its own way and charge the cost, and no more, against the contract price, or, if this action prevails, against the reasonable value of the labor and material.

The judgment of the lower court should be reversed, with instructions to take testimony as to the reasonable value of the labor and material, subject to all lawful offsets, so that an assessment can be made against the improvement district according to benefits to pay the amount due.

CROW, C. J., and GOSE and PARKER, JJ., concur.

(83 Wash. 656)

**MALONEY v. MALONEY.** (No. 12113.)  
(Supreme Court of Washington. Jan. 27, 1915.)

**1. DIVORCE (§ 37\*)—GROUNDS—DESERTION—REQUISITES.**

To warrant divorce for desertion, there must have been a voluntary abandonment of one spouse by the other without consent, justification, or intention to return, and such abandonment must continue for at least a year.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.\*]

**2. DIVORCE (§ 37\*)—ABANDONMENT—REFUSAL TO RETURN.**

A wife will not be deemed guilty of abandonment, who, being justified in separating from her husband by reason of his conduct with another woman, thereafter refuses to listen to his overtures for a reconciliation, when such overtures were made in bad faith, merely in an attempt to put her in the wrong.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.\*]

**3. DIVORCE (§ 34\*)—INCOMPATIBILITY—FAULT OF HUSBAND—RIGHTS OF WIFE.**

That a husband and wife had hopelessly drifted apart is no ground for granting a divorce at his instance, where the separation is due wholly to his own wrongdoing.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 104, 105; Dec. Dig. § 34.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by M. T. Maloney against Louise L. Maloney for divorce. From a decree for defendant, plaintiff appeals. Affirmed.

Daniel Landon and Gay & Kelleran, all of Seattle, for appellant. Arthur E. Griffin and Arthur R. Griffin, both of Seattle, for respondent.

CROW, J. This is an action for divorce. The plaintiff, M. T. Maloney, alleged that he and the defendant, Louise L. Maloney, were married in 1882; that three children were born to the marriage, two, a son and a

daughter, now of the age of majority, and the third, a son, now about 16 years of age; that plaintiff and defendant have lived separate and apart for more than one year last past; that defendant abandoned plaintiff without cause; and that there is an incompatibility of temperament between the parties. Defendant, answering, admitted that she and plaintiff had lived apart for more than one year, but denied that she had abandoned plaintiff. For affirmative answer she alleged that, for more than three years last past, plaintiff had wrongfully abandoned her; that he had refused to provide for her; that he had refused to support her children; and that she has no property or means of support. The relief for which she prays is that the appellant be required to pay her \$75 per month for the maintenance of herself and children, and that she recover a reasonable attorney fee and costs. The trial court found that the defendant had not abandoned plaintiff, but that for more than three years last past he had wrongfully abandoned her; that he is able to support defendant and her minor child; that at times in the past he has done so; that at other times he has failed and refused to support them; and that the sum of \$40 per month is a just and reasonable sum to be allowed the defendant for the support and maintenance of herself and her minor child. Upon these findings a judgment was entered whereby it was ordered that plaintiff's prayer for a divorce be denied, that he be ordered and directed to pay \$40 per month to defendant for the support and maintenance of herself and minor child, and that he pay the costs of the action. From this decree the plaintiff has appealed.

Appellant makes several assignments of error, but the only contention which he presents in his brief is that the trial court should have awarded him a decree of divorce on the ground of abandonment and incompatibility. While it is true that the parties had lived separate and apart for some years prior to the commencement of this action, there is not evidence sufficient to show that respondent abandoned appellant, or that she had lived separate and apart from him wrongfully and without sufficient cause. Appellant himself admitted, when testifying, that he had become enamored of another woman; that he had taken a trip to California with her; that he had taken her to public entertainments; and that he had frequently told his wife he was in love with the other woman and wished to marry her. Respondent testified to his admission that he had sustained illicit relations with the woman, and that his conduct in that regard was the sole occasion of trouble between appellant and herself. Respondent in open court stated that she did not want a divorce, and resisted any decree being granted to appellant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

She asks only separate maintenance, which was granted by the trial court.

[1] Appellant contends that the facts disclosed by the evidence show he was deserted by respondent, and that they cannot live together as husband and wife. To sustain an order granting a divorce on the ground of abandonment, it must appear that there has been a voluntary abandonment of one spouse by the other, without the former's consent, without justification, and without the intention of returning, and that such abandonment must continue for the period of one year. In other words, it must appear that the absence of the spouse accused of abandonment is not justified by the conduct of the other spouse. Appellant's own admissions, which are in harmony with the evidence of his wife, are sufficient to show that, if the respondent did leave him as he contends, her action in so doing was neither wrongful nor unjustifiable. She objects to a divorce. There is no act of hers which entitles him to a decree. To grant him a decree against her protest would place a premium upon his wrongdoing, and punish her.

[2] Appellant contends that he repeatedly sought a reconciliation, which respondent refused. His argument that he is now entitled to a decree is predicated on the assumption that, if one spouse seeks a reconciliation and the other refuses, the latter is guilty of abandonment. There is no evidence that he repented of his course of conduct toward the other woman, that he ceased his improper attentions to her, or abandoned his desire to marry her. On the contrary, it would seem that his efforts for a reconciliation, if any, were made for the express purpose of supporting his contention that he had been abandoned by his wife, so that he might secure a decree for that cause. The record does not indicate good faith on his part in this regard. While the law encourages reconciliation and resumption of marital relations between estranged spouses, it does not enforce condonation, nor require that a wife who declines to live with a husband who has been guilty of adultery and other matrimonial offenses shall herself be deemed guilty of abandonment. *Bovaird v. Bovaird*, 78 Kan. 315, 96 Pac. 686.

[3] Appellant argues that he and respondent have hopelessly drifted apart, that they have been alienated from each other, and that it is impossible for them to live together as husband and wife. He cites *Spute v. Spute*, 74 Wash. 665, 134 Pac. 175, and contends that it is authority for a decree in his favor. We find no resemblance between the facts of that case and the facts before us. While it may be conceded that appellant and respondent have drifted hopelessly apart, that condition in no way is due to any act or misconduct of respondent, but is entirely due to appellant's wrongdoing, and the trial

court so found. This being true, she should neither be punished nor placed in a wrong light by having a decree of divorce entered in favor of appellant and against her.

The judgment is affirmed.

MORRIS, C. J., and CHADWICK and PARKER, JJ., concur.

(33 Wash. 643)

**RADBURN v. FIR TREE LUMBER CO.**  
(No. 12436.)

(Supreme Court of Washington. Jan. 25, 1915.)

**1. NEGLIGENCE (§ 63\*)—CONTRIBUTING CAUSE—STORM.**

In a suit for damages to crops by water backed over plaintiff's land, if rain caused part of the injury, defendant was not liable for such part of the damage, but only for that part which it itself caused, for when a natural cause contributes to an injury the party charged shall not be held for more than the share of damage caused by him.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 80, 81; Dec. Dig. § 63.\*]

**2. TRIAL (§ 260\*)—REQUESTED CHARGE—INSTRUCTION ALREADY GIVEN.**

An instruction that if, during a certain month, there was an unprecedented heavy rainfall, causing damage to plaintiff's crop, defendant was not liable, does not cover a requested charge that defendant was not liable for injury done by the rainfall as a separate concurring cause, with defendant's act, of plaintiff's damage.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**3. WATERS AND WATER COURSES (§ 167\*)—FLOWING LANDS—DAMAGES.**

A riparian owner may dam a stream and flow his own land, and need not anticipate unprecedented storms or rainfalls, being only bound to expect natural agencies of ordinary character.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167.\*]

**4. EVIDENCE (§ 601\*)—SUFFICIENCY—UNPRECEDENTED RAIN.**

Evidence of government weather records for 13 years back held insufficient to support a finding that a certain month's rainfall was unprecedented.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.\*]

**5. TRIAL (§ 273\*) — INSTRUCTIONS TO JURY — EXCEPTIONS—TIME FOR TAKING.**

Under Laws 1909, p. 184, § 1, subd. 4, providing that "either party, at any time before the hearing of a motion for new trial, may except to the instructions given by the court or any part thereof," applies to all instructions, whether given or refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 680-682; Dec. Dig. § 273.\*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by A. Radburn against the Fir Tree Lumber Company. From a judgment against it for \$656, defendant appeals. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Frank C. Owings, of Olympia, and Hayden, Langhorne & Metzger, of Tacoma, for appellant. Thos. M. Vance and W. W. Manier, both of Olympia, for respondent.

**OHADWICK, J.** This action was brought by respondent to recover damages from the appellant, it being alleged that the appellant in the prosecution of its business as a saw-mill proprietor obstructed the flow of a natural water course flowing through the lands of the respondent; that the water was backed upon and over respondent's fields, damaging his crop of growing grain and hay to the extent of \$1,448. There was testimony from which the jury might conclude that appellant was responsible in some degree for the flooding of respondent's lands. It is shown that in the month of August, 1912, there was a rainfall of 3.10 inches, which was unusual for this section of the country. Testimony was also offered and tended to show that a part, if not all, of the crop of growing grain could have been harvested, notwithstanding the flooding of the land. The case went to a jury, and a verdict was returned in the sum of \$656.

[1] It is not contended that there was not evidence to sustain the verdict, but errors are assigned in that the court refused to instruct the jury:

"If you find from the evidence in this case that plaintiff's crop was damaged by rain, as well as by any act of the defendant, then and in that event the defendant in this case is not liable for any damages caused to the crop by rain, and you can only allow plaintiff such an amount of damage as you find, if any, was caused by the defendant."

We think this instruction should have been given. It is the law that where a cause attributable to the one charged concurs with a natural or accidental cause, and both contribute to the injury, a party charged shall not be held to answer for more than his share of the wrong or damage done. We think it will require no citation of authority to sustain this proposition.

[2] Respondent contends that the following instruction was sufficient, and is to the same purport and effect as the requested instruction:

"If you believe from the evidence in this case that during the month of August, 1912, there was an unprecedented rainfall on and in the section and vicinity of plaintiff's land and Thurston county, and that it was by reason of such rainfall that plaintiff's crops and pasturage were damaged or destroyed, if you find they were damaged or destroyed, and not through any act of the defendant, then your verdict will be in favor of the defendant."

It will be seen, however, that the second instruction is based upon an entirely different theory from that maintained by the appellants upon the trial. The latter instruction seems to have been drawn upon the assumption that the defense was that the alleged unprecedented rainfall was the sole cause of the damage complained of. The

defense of concurrent causes is entirely overlooked.

The court was requested to instruct the jury:

"I instruct you as a matter of law that if you find from the evidence in this case that the defendant, when it diverted the water of the creek in question to the log pond and made the excavation for its log pond, used all reasonable care and caution to prevent the water of the stream in question from backing up onto the plaintiff's lands and doing injury to his crops, and if you further find from the evidence that, after the defendant had completed his operations and had diverted the waters of the stream in question into the log pond so excavated by it, the effect thereof was to cause only a slight backing up of the waters of said stream, which backing up of the waters did not extend beyond the lands owned by the defendant and onto the lands owned by the plaintiff, and if you further find that during ordinary rainfall there would be no backing up of the waters of said creek by reason of any of the operations of the defendant in diverting said stream onto the lands of the plaintiff, and if you further find from the evidence in this case that during the months of July, August, and September, 1912, there was an unprecedented heavy downfall of rain, which, combined with the operations of the defendant in diverting said stream and excavating said log pond, caused the waters of said stream to back up onto the lands of the plaintiff, still the defendant would not be liable for any damages, as it could not be held to have foreseen such an event."

There was no error in refusing to give this instruction.

[3, 4] A riparian proprietor has a right to dam a stream flowing by his premises. He may back the water within his own boundary, and is not bound to anticipate unprecedented storms or rainfalls. He is bound to contemplate the possibility of interference by natural agencies of an ordinary character (8 Am. & Eng. Encl. 574); but the law does not put upon men who are engaged in the prosecution of rightful enterprises the duty of anticipating that which is unprecedented, or which has not occurred within the memory of man. But the instruction cannot be sustained by reference to any issuable fact. While it is true that appellants allege by way of answer that the whole of southwestern Washington had been visited by an unprecedented rainstorm in the month of August, 1912, it introduced the government records running over a period of 13 years, which show that, in August, 1900, there was an even greater rainfall than in the year 1912. The government records back of the year 1899 are not shown. We cannot say as a matter of law that the rainfall either in 1900 or 1912 was unprecedented, or even extraordinary; nor could a jury predicate a verdict upon the evidence that it was so.

[5] We have not overlooked the contention of counsel that exceptions were not properly taken to the refusal of the court to give requested instructions. Counsel rely upon the last paragraph of Rem. & Bal. Code, § 339:

"Either party, at any time before the hearing of a motion for a new trial, may except to the instructions given by the court, or any part thereof."

This was inserted as a new enactment in subdivision 4 of section 1, chapter 88, Laws 1909, page 184. It is insisted that the act in terms refers only to exceptions to instructions given by the court, and that exceptions to instructions requested and refused must be taken under the practice prevailing prior to the enactment of the law of 1909. Chapter 88, Laws 1903, p. 121; Code 1881, § 221. Under the old practice the purpose of taking exceptions to the instructions of the court was to give an opportunity to correct error. Accordingly exceptions were taken after the jury had retired and before the verdict was returned. Under the last enactment exceptions may be taken at any time before the motion for a new trial is heard. The theory upon which exceptions were taken prior to the return of the verdict cannot apply to exceptions to instructions requested and refused, because the court has had its attention called to the requested instructions before the jury is instructed, and has had an opportunity to decide whether they state the law and should be given as requested, or in a modified form. There is no rule of practice, and no reason for a rule of practice, that would require an exception to an instruction requested and refused to be taken under the practice prevailing prior to the law of 1909, for neither under the original practice act (Code 1881, § 221), nor in the two amendatory acts, is there anything that suggests the manner of taking exception to the refusal to give requested instructions. Therefore, for the sake of orderly practice, if for no other reason, it should be held that, the purpose and spirit of the last act (1909) being to give the court an opportunity to correct error at the time he passes upon the motion for a new trial (*Coffey v. Seattle Electric Co.*, 59 Wash. 686, 109 Pac. 202), all exceptions, whether to instructions given or to instructions refused, should be taken in the same way and considered at the same time by the trial court.

For the error assigned, the case is reversed and remanded for a new trial.

MORRIS, C. J., and PARKER, MOUNT, and HOLCOMB, JJ., concur.

(83 Wash. 660)

STATE v. HAYNES. (No. 12414.)

(Supreme Court of Washington. Jan. 27, 1915.)

CRIMINAL LAW (§ 877\*)—VERDICT—CODEFENDANTS—INCONSISTENCY.

Where H. and B. were jointly charged and tried, under Rem. & Bal. Code, § 2605, for grand larceny the conviction of H. was not inconsistent with the acquittal of B. on attempted proof that B. accepted from H. \$10 of the \$34.70 taken by H., where the evidence also tended to show that the amount taken was \$24.70 and not \$34.70.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2096, 2097; Dec. Dig. § 877.\*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Edward Haynes was convicted of larceny from the person, and he appeals. Affirmed.

John Mills Day, of Seattle, for appellant. John F. Murphy and Louis T. Silvain, both of Seattle, for the State.

PARKER, J. Edward Haynes and George Brenzel were jointly charged by information with the crime of larceny from the person of Frank Brooks, under section 2605, Rem. & Bal. Code, defining grand larceny. They were tried jointly before the court and a jury, resulting in a verdict of not guilty as to Brenzel and a verdict of guilty as to Haynes, upon which verdict of guilty Haynes was sentenced to imprisonment. From this judgment and sentence he has appealed.

The evidence tended to show that Haynes committed the offense, as charged, by actually taking at least \$24.70 from the person of Brooks, and also tended, but we think not so strongly, to show that the amount so taken by Haynes from the person of Brooks was \$34.70, and that immediately afterwards he gave to Brenzel, and Brenzel accepted, a \$10 bill of the money so taken. The acceptance of this bill by Brenzel was the main fact relied upon by the prosecution to show his guilt. The jury, however, evidently arrived at the conclusion that Haynes took from the person of Brooks only \$24.70, and did not give to Brenzel, and that Brenzel did not accept the \$10 bill as claimed by the prosecution. Manifestly it was upon this theory that the jury convicted Haynes and acquitted Brenzel.

Counsel for appellant Haynes contends that the finding of Brenzel not guilty by the jury is so inconsistent with the findings of Haynes guilty as to render the conviction of Haynes without legal support, in view of the joint charge and the evidence tending to show joint participation in the commission of the offense. Counsel invokes the rule that, "if the acquittal of one shows the other to be innocent, the verdict is contradictory, and though in terms it pronounces those thus appearing innocent to be guilty, it will not sustain a judgment against them," as stated in 1 Bishop's New Criminal Law, § 800. This rule is applicable where only two persons are alleged to be participants in a conspiracy, and the jury find one guilty and the other innocent; or where two defendants are jointly indicted for larceny of a single article of personal property, and the jury convict one of grand larceny and the other of petit larceny, where the distinction rests alone upon the value of the stolen property. In such cases, of course, both are necessarily equally guilty or innocent. We think this doctrine is of no aid to counsel for appellant in his contention here made, for the evidence as a



whole is, we think, more convincing that Haynes actually took from the person of Brooks at least \$24.70 than that he so took \$34.70 and gave \$10 thereof to Brenzel. Under such conditions, the guilt of Haynes is not necessarily inconsistent with the innocence of Brenzel.

Counsel cite and rely upon *Davis v. State*, 75 Miss. 637, 641, 23 South. 770, where two persons were indicted for a misdemeanor, and the testimony was exactly alike as to both, from which the court concluded that both or neither was guilty, observing as follows:

"The general rule that where two are jointly indicted for the same offense, it not being in its nature a joint offense, the jury may acquit one and convict the other, or disagree as to the other, is, of course, admitted. That is a mere rule of pleading and practice. They may, but when? Only when the evidence warrants it. They may believe one witness and disbelieve another; they may accept circumstances against positive testimony; where there is the slightest difference in the testimony as between the two, they, weighing that testimony, may make the difference. But in a case like this, where the whole testimony is that of a single witness in every particular the same against one as the other, it is not legally possible that a verdict which distinguishes is a response to the evidence."

Counsel also cites and relies upon *State v. Wilson & Davis*, 3 McCord (S. C.) 187, where there was under consideration a charge of larceny against two defendants, one of whom was found by the jury guilty of grand larceny, and the other guilty of petit larceny; the distinction between those crimes resting alone upon the value of the property taken, and the evidence showing that both joined in the taking of all of the property or none. Of course, there could not be a different measure of value of the property in the hands of one from its value in the hands of the other.

Counsel for appellant does not contend that there is a want of sufficient evidence to sustain the verdict of guilty as against Haynes, apart from his contention resting upon the theory of the guilt of one being inconsistent with the innocence of the other.

We are of the opinion that the judgment against appellant Haynes must be affirmed. It is so ordered.

MORRIS, C. J., and MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

(75 Or. 117)

# HOME TELEPHONE & TELEGRAPH CO. OF PORTLAND v. MOODIE.

(Supreme Court of Oregon. Jan. 26, 1915.)

## 1. TELEGRAPHS AND TELEPHONES (§ 10\*) — RIGHTS IN AND USE OF STREET—MOVING WIRES—ORDINANCE AND FRANCHISE.

Plaintiff telephone company operated under a franchise providing that, when any one obtained a city permission to remove any building, the company on due notice should adjust its wires so as to allow an unobstructed

passage of the building, and that if after notice it neglected to do so the city authorities might do so at its expense. A prior general ordinance provided that one desiring to move a house, etc., along a street, should obtain a permit from the superintendent of streets, give 24 hours' notice to any electric company, and pay or tender in advance the cost of moving and replacing its wires. *Held*, that the prior ordinance applied only so far as it was necessary for defendant to obtain authority to move a house, but that the company was not entitled to charge defendant for moving and replacing its wires; that duty being enjoined upon it by its franchise.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.\*]

## 2. STATUTES (§ 207\*) — CONSTRUCTION—SPECIAL AND GENERAL PROVISIONS.

Special provisions relating to specific subjects control general provisions relating to general subjects, and the things specifically treated will be considered as exceptions to the general provisions.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 284; Dec. Dig. § 207.\*]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by the Home Telephone & Telegraph Company against A. D. Moodie. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

On two counts the plaintiff corporation seeks to recover the quantum meruit of certain services alleged to have been performed by it for the defendant at his special instance and request in moving its wires on certain streets in the city of Portland. The performance of the work is admitted in the answer, but all other averments respecting it are denied. The defendant alleges that the plaintiff is carrying on a telephone and telegraph business in Portland under a franchise containing this condition:

"Whenever any person or company shall have obtained permission of the properly constituted authorities of the city of Portland to remove any building through any street or streets, the grantee, his successors or assigns, if he or they have a line on said streets, on due notice from such person or company, shall raise, remove, or adjust his or their lines so as to allow an unobstructed passage of such building, and if said grantee, his successors or assigns, shall after said notice neglect so to do, the properly constituted authority of the city of Portland shall, at the expense of said grantee, his successors or assigns, remove said lines as far as they are an obstruction to the passage of said building."

He further states that he was engaged in the business of house moving in Portland; that the services upon which the action is based were performed by the plaintiff under the requirements of its franchise and in pursuance of his notice, after having been given permission by the city authorities to move the building.

The reply admits that the services consisted in raising, removing, and adjusting plaintiff's lines so as to allow an unobstructed passage for buildings which were being removed by the defendant under permission of the city

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Portland after having given due notice to the plaintiff. It further contends that the work was performed under Ordinance 7683. The court made findings of fact and conclusions of law in favor of the plaintiff, and, from the ensuing judgment, the defendant appeals.

R. R. Duniway, of Portland (C. L. Whealdon, of Portland, on the brief), for appellant. R. W. Montague, of Portland (H. A. Swart and Geo. T. Wilson, both of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1, 2] The question in this case is whether the plaintiff is bound by the terms of its franchise without reference to the former general ordinance of the city respecting the moving of wires to allow the passage of houses being moved from one point to another. Ordinance 7683, referred to in the reply, declares, in substance, that when any person desires to move a house along a route which crosses or interferes with the lines of any street, railway, telephone, telegraph, electric light, or other electric wire line, he shall, besides obtaining a permit from the superintendent of streets, give a 24 hours' notice to the owner or manager of each electric line which would be affected by the moving of the house, and "shall also pay in advance or tender to such owner or manager the amount of the cost and expense of cutting, repairing, moving, raising, and replacing such wires as will be cut or interfered with by moving such house." It further provides, in substance, that the superintendent of streets shall obtain from the superintendent of fire alarm telegraph an estimate of the probable cost of adjusting the wires involved, and that the amount so ascertained shall be the sum to be tendered or paid. That enactment also requires that the owner or manager of each electric line so affected, on receiving the notice and being tendered or paid the cost or expense as thus computed, shall readjust his wires so as to permit the passage of the house; and unless he does so the city authorities shall move the wires at the expense of the recalcitrant company. The defendant contends that, having obtained permission from the city to move the house, it was the duty of the plaintiff to adjust its wires to allow the passage of the house without any condition of payment. On the other hand, the plaintiff maintains that the defendant should have paid or tendered the amount required by ordinance 7683 before it could be required to move its wires.

The rule of construction in such cases is thus stated by Mr. Justice Mayfield in the case of *City of Birmingham v. So. Express Co.*, 164 Ala. 529, 538, 51 South. 159, 163:

"Special provisions relating to specific subjects control general provisions relating to general subjects. The things specially treated will be considered as exceptions to the general provisions. When a specific subject has been specially provided for by law, it will not be considered as repealed by a subsequent law which deals with a general subject in a general way, though the specific subject and the special provisions may be included in the general subject and general provisions"—citing *Parker v. Hubbard*, 64 Ala. 203; *Montgomery v. B. & L. Ass'n*, 108 Ala. 336, 18 South. 816.

The rule is stronger, if anything, where a general enactment on a subject, as in this case, precedes special legislation. Notwithstanding the general regulation on the subject of readjusting wires for the purpose under consideration, the city of Portland had the right to grant a franchise to the plaintiff on such terms as seemed most advisable. Section 8 of its franchise quoted above plainly requires it to readjust its wires whenever it is called upon by one who has authority to move a house along the streets of the city. Its duty as well as its privilege is measured by the terms of its franchise. Unless expressly so authorized, it cannot make any charge for a service enjoined upon it by law. The former ordinance is applicable to the present situation only so far as it would be necessary to obtain authority to move the house. As for the service under consideration, a measure of compensation cannot be established unless one is authorized, and we find no sanction for it in the franchise or privilege granted by the city to the plaintiff. If it were necessary to fix a recompense for the service, the procedure is probably laid down in the general ordinance to which allusion has been made. Such a computation, however, is not necessary, because the duty of changing wires is visited upon the plaintiff by its franchise without condition or reward. The authority under which it operates in the city of Portland is an exception to the general rule. The facts admitted in the pleading and disclosed by the court's findings did not authorize the conclusion reached by the trial court. In brief, the plaintiff is not entitled to charge for the services mentioned because they constitute part of its duty enjoined upon it by its franchise.

The judgment is reversed, and the cause remanded, with directions to the circuit court to enter judgment for the defendant.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(74 Or. 373)

## Ex parte JUNG SHING.

(Supreme Court of Oregon. Jan. 19, 1915.)

## 1. INDICTMENT AND INFORMATION (§ 15\*) — SUCCESSIVE INDICTMENTS.

Where relator was indicted for murder in the first degree, and later the Constitution of the state was so amended as to abolish the death penalty, conceding that thereby murder in the first degree was left no crime for lack of punishment, the court properly resubmitted the indictment to the grand jury, which returned another indictment for murder in the second degree, so that the petitioner be held on bench warrant thereunder; since murder in the second degree, being a distinct and separate crime, is unaffected by such constitutional amendment, and since the court, under L. O. L. §§ 1704-1706, is given the requisite authority as to the dismissal of charges.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88, 448; Dec. Dig. § 15.\*]

## 2. INDICTMENT AND INFORMATION (§ 189\*) — DEGREES OF MURDER.

An indictment charging murder in the first degree includes the crimes of murder in the second degree and manslaughter, and a conviction of any one of the three may be had thereunder.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

## 3. INDICTMENT AND INFORMATION (§ 185\*) — DEGREES OF MURDER.

Trial on an indictment charging murder in the second degree cannot result in conviction of murder in the first degree, since it does not include all the necessary elements of murder in the first degree.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 526, 575; Dec. Dig. § 185.\*]

## 4. HABEAS CORPUS (§ 30\*)—GROUNDS FOR RELIEF—IRREGULARITIES—DEFECTS IN INDICTMENT.

Habeas corpus will not afford relief, unless the process under which petitioner is held is not merely irregular, but void.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

Department 2. Original application by Jung Shing, alias Louie Hing, for writ of habeas corpus. Writ dismissed, and petitioner remanded.

This is an original proceeding to test the right of the sheriff of Multnomah county to restrain the petitioner of his liberty. A petition for writ of habeas corpus was filed in this court by Jung Shing on December 5, 1914, and on the same day an order of allowance was made, whereupon the clerk issued the writ which commanded the sheriff of Multnomah county to certify and return the time and cause of imprisonment or restraint on January 15, 1915. The sheriff filed his return on the day specified in the writ.

There is no controversy about the facts. An indictment was returned by the grand jury of Multnomah county on March 22, 1913, alleging the killing of one Lum Fong, and charging the petitioner, who was accused un-

der the name of "Louie Hing," with the crime of murder in the first degree. A bench warrant was issued for the arrest of petitioner, who was, on November 21, 1914, apprehended and taken into the custody of the sheriff. The arraignment occurred December 4, 1914, and a plea of not guilty was entered December 8, 1914. On motion of the district attorney, an order was made December 21, 1914, by the circuit court resubmitting the indictment to the grand jury, and on the following day an indictment was returned into court charging the petitioner, under the name of "Louie Hing," with the crime of murder in the second degree for the alleged killing of Lum Fong. After arraignment, time to plead was waived, and on December 24, 1914, the petitioner entered a plea of not guilty to the second indictment. Pursuant to an order of the court made January 13, 1915, by reason of the second indictment, a bench warrant for the arrest of petitioner was issued on the same day and immediately served. The circuit court fixed January 18, 1915, as the time for the trial of petitioner on the last indictment. The district attorney proposes to proceed on the second indictment only. The petitioner has been in the custody of the sheriff continuously since November 21, 1914, the date when the first bench warrant was served.

William P. Lord and Daniel E. Powers, both of Portland, for petitioner. Arthur A. Murphy, of Portland, for the State.

HARRIS, J. (after stating the facts as above). The questions presented involve a consideration of the constitutional amendment abolishing the death penalty, and the effect, if any, had by that amendment upon the proceeding already narrated. The phase of the case most discussed, however, is whether the order resubmitting the first indictment and all subsequent proceedings were void.

[1] In the petition for the writ it is asserted that the imprisonment of petitioner violates section 10 of article 1, and infringes upon section 1 of the fourteenth amendment, of the Constitution of the United States. At the argument counsel did not insist upon the contention made in the petition, but it was urged that the circuit court did not have authority to make the order resubmitting the first indictment, and that, as a consequence, all subsequent proceedings were of no effect; that, since the second indictment is void, only the first indictment can be said to exist in legal contemplation; that, if a trial is had on the first indictment, the petitioner could only be tried for murder in the first degree, the crime specifically charged; but that the accused cannot be tried for that offense, because the constitutional amendment abolishing the death penalty leaves the crime without a penalty, and that therefore the peti-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tioner is entitled to be discharged, since he is restrained for an act that is not punishable.

At the general election held November 3, 1914, there was submitted to the electorate a proposed constitutional amendment which reads as follows:

"Article 1 of the Constitution of the state of Oregon shall be, and hereby is, amended by the addition of a section to said article 1, and it shall be designated as section 36 of article 1.

"Article 1.

"Section 36. The death penalty shall not be inflicted upon any person under the laws of Oregon. The maximum punishment which may be inflicted shall be life imprisonment.

"All provisions of the Constitution and laws of Oregon in conflict with this section are hereby abrogated and repealed in so far as they conflict herewith, and this section is self-executing."

Having received the required number of votes, and the result of the election having been proclaimed by the Governor, the amendment is now a part of the organic law of the state.

[2, 3] Murder in the first degree is defined by section 1893, L. O. L. Murder in the second degree is defined by other sections of the Code, and so, too, is manslaughter defined by different sections. "Every person convicted of murder in the first degree shall be punished with death." Section 1903, L. O. L. Every person convicted of murder in the second degree shall be punished by imprisonment for life. Section 1904, L. O. L. A separate section of the Code prescribes the penalty for manslaughter. While culpable homicide may present itself in any one of the three forms, and although the three offenses mentioned are separately defined by different and distinct sections of the Code, nevertheless an indictment charging murder in the first degree also includes the crimes of murder in the second degree and manslaughter, and a conviction of any one of the three may be had on such indictment. Neither the charge of murder in the second degree nor the offense of manslaughter includes the requisite elements of murder in the first degree. If tried on the second indictment, the petitioner could not be convicted of murder in the first degree.

It is not necessary at this time to decide whether the constitutional amendment referred to ex proprio vigore substitutes life imprisonment for the death penalty where the latter was the punishment heretofore prescribed; nor is it essential to the conclusion by us reached to determine whether the state could proceed upon the first indictment and place the petitioner on trial for the distinct crime of murder in the second degree. Assuming, however, for the purpose of argument only, that the constitutional amendment had the effect of stripping what was the crime of murder in the first degree of any enforceable penalty, and leaving it a mere nude definition, without vigor, because devoid of a penalty, and therefore not a crime

(State v. Stephanus, 53 Or. 135, 99 Pac. 423, 17 Ann. Cas. 1146; State v. Smith, 56 Or. 21, 107 Pac. 980), even then on that assumption there is no ground for the contention that the crime of murder in the second degree is in any way affected. Murder in the second degree is a distinct crime, defined by the Code the same now as before the amendment, and it is punishable the same now as before. The mere fact that the Code permits a conviction of murder in the second degree on an indictment charging murder in the first degree affords no room for the claim that the constitutional amendment in any way affects the definition of the crime of murder in the second degree or changes the prescribed punishment.

[4] Did the circuit court have the authority to resubmit the first indictment? And, if such power did not exist, then were the subsequent proceedings void? While considering these questions, it must be borne in mind that mere irregularities cannot be inquired into, and the writ of habeas corpus will not afford relief unless the process upon which the petitioner is being held is void. Ex parte Tice, 32 Or. 179, 49 Pac. 1038; Ex parte Foster, 138 Pac. 849. Throughout the inquiry we are also governed by the rule that the object of this proceeding is to ascertain whether the petitioner was legally restrained of his liberty at the time the sheriff made his return. Iasigi v. Van De Carr, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045; Ex parte Dye, 32 Mont. 132, 79 Pac. 689.

The order complained of was made by the circuit court December 21, 1914, and, after giving the title of the cause, reads as follows:

"Comes now Thomas G. Ryan, deputy district attorney, and moves this honorable court for an order resubmitting this cause to the grand jury of Multnomah county, Or., on the ground and for the reason that the indictment herein, No. C-3143, was restrained by the grand jury of Multnomah county, Or., on the 22d day of March, 1913, charging the above-named defendant and others with the commission of the crime of murder in the first degree; that since that time the penalty for said crime has been abolished by the people of the state of Oregon by initiative measures, and therefore, in order to avoid any possibility or probability of error which might result in defeating the ends of justice, this motion is made, and the court, being fully advised in the premises, and being of the opinion that said motion should be granted:

"It is therefore ordered that this indictment No. C-3143 be, and the same is hereby, resubmitted to the grand jury of Multnomah county, Or., for such consideration as they may deem fit and proper in the premises."

The petitioner plants himself on the ground that the statute does not furnish any authority for the action taken by the court; that the order was void with the result that the second indictment and bench warrant issued thereon are likewise of no effect.

The Code provides when an indictment must be set aside on the motion of a defendant (section 1483, L. O. L.); and, if set aside on such motion, the case may be resubmitted

to the grand jury (section 1485) in which event the accused must remain in custody, unless admitted to bail (section 1486, L. O. L.). If a demurrer is interposed by a defendant, and if it is sustained, the court is empowered to direct that the case be resubmitted. Section 1495, L. O. L. The four sections of the Code referred to are all included in chapter 8. Section 1488 of that chapter provides that:

"An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same crime."

The petitioner argues that the chapter mentioned only provides for resubmitting a case when a motion or a demurrer has been interposed by the accused and sustained by the court; and for the purposes of this case we shall assume that his position is well grounded, and also assume that no statute thus far mentioned confers upon the court power to resubmit an indictment on the motion of the district attorney, as was done in the cause we are now considering.

We shall now consider the sections of the Code permitting the dismissal of an indictment on the motion of the district attorney or of the court. Section 1704, L. O. L., reads thus:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed; but in that case, the reasons of the dismissal must be set forth in the order, which must be entered in the journal."

It will be observed that the section just quoted provides for a dismissal of the indictment. The order questioned by petitioner merely provides that the indictment be resubmitted.

Section 1705, L. O. L., provides that the district attorney cannot discontinue or abandon a prosecution for crime, except as provided in section 1704; and finally section 1706, L. O. L., is to the effect that an order for the dismissal of a charge or action, as provided in this chapter, is a bar to another prosecution for the same crime if it be a misdemeanor, but it is not a bar if the crime charged be a felony. The three sections just mentioned are all parts of chapter 16. Murder in the second degree is a felony, and therefore, by the express terms of the statute, the dismissal of an indictment charging murder in the first degree would not bar a prosecution for murder in the second degree; nor does section 2375, L. O. L., strengthen the argument of petitioner, even if it be assumed that what was once murder in the first degree is now not a crime because no punishment may be imposed. *State v. Gaunt*, 13 Or. 115, 121, 9 Pac. 55.

If the order made by the court be deemed to be a dismissal within the meaning of section 1704, then by the terms of section 1706 the grand jury was warranted in returning

the second indictment. If, on the other hand, the order to resubmit did not amount to a dismissal, and if we treat the first indictment as still pending, nevertheless the grand jury was not precluded from returning the second indictment. Up to this time the petitioner has not been put in jeopardy. *State v. Steeves*, 29 Or. 85-107, 43 Pac. 947.

The rule announced in *State v. Reinhart*, 28 Or. 466, 38 Pac. 822, is decisive of the question, and in that case the court uses the following language:

"It is also claimed that the power of the grand jury is at an end when it returns an indictment into court, and that it cannot afterward return another indictment against the same defendant for the same offense, unless by order of the court the case is resubmitted to them. We can find no warrant in law for this contention."

The general rule is that successive indictments may be returned against the same person for the same offense, unless prevented by some obstacle, such as former jeopardy or a statute. *Stuart v. Commonwealth*, 28 Grat. (69 Va.) 950, 966; *Perkins v. State*, 66 Ala. 457-461; 22 Cyc. 223.

It appears from the record that the name of the petitioner has been erroneously entered as Chin Shing, as Jing Shing, and, when arraigned on the second indictment, Gung Shing appears as his true name. Although in no way involved at this time, still the errors mentioned should be corrected.

Viewing the facts from any position and at any angle of the case, the conclusion is that the petitioner is legally detained.

The writ is dismissed, and the petitioner is remanded.

MOORE, C. J., and EAKIN and BEAN, JJ., concur.

(74 Or. 381)

# BURGGRAF v. BROCHA et al.

(Supreme Court of Oregon. Jan. 19, 1915.)

## 1. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION—FRAUD—EVIDENCE.

In an action to recover the value of land, traded for other land title to which failed, plaintiff may give in evidence a pretended abstract of defendants' title, given him by them, not as evidence of title, but to prove defendants' lack of title to land in question; such abstract, as against the defendants, being prima facie proof of that fact.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

## 2. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION—EVIDENCE.

Where, in an action to recover value of land, traded for other land title to which has failed, evidence of the value of the property conveyed to defendants in exchange for theirs is competent.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

## 3. EVIDENCE (§ 272\*)—ADMISSIONS.

In a suit for value of land, traded for other land to which title had failed, the declaration of defendants that plaintiff should have traded off the land before investigating the title was

competent, as tending to show that he had no faith in his own title to land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105–1107; Dec. Dig. § 272.\*]

**4. DISMISSAL AND NONSUIT (§ 56\*)—PARTIES (§ 90\*)—MISJOINDER OF PARTIES.**

Misjoinder of defendants can be taken advantage of only by those misjoined, and is not fatal to the complaint, and not ground for a nonsuit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 95, 124–128; Dec. Dig. § 56; \* Parties, Cent. Dig. § 148; Dec. Dig. § 90.\*]

**5. PARTIES (§ 75\*)—MISJOINDER—WAIVER OF DEFECT.**

A defect of parties in the complaint is waived, if objection is not raised by demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75; \* Pleading, Cent. Dig. § 494.]

**6. DAMAGES (§ 141\*)—PLEADING—ALLEGATIONS OF DAMAGE.**

Where the facts alleged in the complaint necessarily involve damage, no specific allegation to that effect is necessary.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 406–408, 412, 414, 415; Dec. Dig. § 141.\*]

**7. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION—PLEADING—ALLEGATION OF FRAUD.**

Where, in an action for the value of land, traded for other land title to which had failed, the complaint charged that the defendants represented that they owned their land and had good title thereto, when in fact they did not, a clear case of fraud, at least constructive fraud, is made out.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14–18; Dec. Dig. § 8.\*]

**8. INJUNCTION (§ 3\*)—MOTION TO DISSOLVE.**

Where plaintiff sues to recover the value of land, exchanged for land to which the defendants had no title, a motion to dissolve a restraining order, in the nature of an injunction, prohibiting the defendants from disposing of the land in question, was improperly denied, since the suit is at law, while injunction is an equitable remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by John Burggraf against Molly Brocha and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action to recover the value of land traded to defendants for property in Michigan to which defendants had no title. Plaintiff and defendants entered into an agreement for the exchange of lands. Plaintiff conveyed to defendants lot 1, in block 24, Tinker's Second addition to Long Beach, and lots 3, and 4, in block 5, Tinker's North addition to Long Beach, Wash., in exchange for the S. E.  $\frac{1}{4}$  of section 12, township 18 N., range 5 W., in Clare county, state of Michigan, and six lots in Ocosta, Wash. Said lots of plaintiff were incumbered by a mortgage in the sum of \$2,000. Defendants executed a deed to plaintiff for said S. E.  $\frac{1}{4}$  of section 12, township 18 N., range 5 W., and represented to plaintiff that they were the owners and had good title to said land in Michigan. At the time of the

trade defendants delivered to plaintiff a pretended abstract of title: but plaintiff alleges that the land in Michigan did not belong to defendants, and he sued to recover \$6,000, the alleged value of his land so conveyed to defendants. At the commencement of the action plaintiff obtained a restraining order to enjoin defendants from selling or disposing of any real property which they might own until the determination of the action now pending. The case was tried before the court without a jury, and resulted in a judgment for the plaintiff in the sum of \$5,000, from which the defendants appealed.

W. E. Critchlow, of Portland, for appellants. J. J. Fitzgerald and S. M. Johnson, both of Portland (B. S. Pague, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). [1] The first assignment of error is as to the receiving in evidence of plaintiff's Exhibit 2, an abstract. Plaintiff testified as to the signing of the agreement, which provides, among other things:

"The party of the second part [G. F. Brocha], in consideration of the premises, agrees to exchange to the said party of the first part [Burggraf] the following described property for the above described property as follows: The southeast quarter of section 12, township 18 north, of range 5 west, situated in Clare County, state of Michigan—to be free of incumbrance except as to taxes of 1912, which party of the first part agrees to assume, \* \* \* to give abstract on the Michigan property, and a certificate on the Washington lots."

At the same time they made to the plaintiff an affidavit to the effect that G. F. Brocha is the owner of the property described, namely, the S. E.  $\frac{1}{4}$  of section 12, township 18 N., of range 5 W., as a part of the basis of the trade. Defendants furnished to plaintiff a pretended abstract of title, and plaintiff thereupon offered in evidence the said alleged abstract, to which defendants objected on the ground that it was incompetent. The court overruled the objection, and it was received in evidence. The abstract was not offered as evidence of the title, but plaintiff was seeking to prove that defendants did not have title to the land. See Jaeger v. Harr, 62 Or. 16, 123 Pac. 61, 901. And as against defendants the exhibit was prima facie evidence of that fact.

[2] Assignments Nos. 2, 3, 4, 6, and 7 relate to the overruling of objections to the offer of evidence tending to show the value of plaintiff's property conveyed to defendants in exchange for the Michigan property. One of the main issues tendered was that plaintiff's property was worth \$6,000, the amount he seeks to recover. The prayer for judgment is based thereon, and it was competent testimony.

[3] The fifth assignment of error relates to what defendant G. F. Brocha said to a witness as to his title to the Michigan land.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The answer particularly shows the relevancy of the question. When he was spoken to about it, Brocha said, "Why didn't he trade it off before he investigated it [the title]?" which was clearly competent, as tending to show that he had no confidence in his title.

[4-7] The eighth assignment is as to the denying of the motion for nonsuit, which is based on several grounds. The first reason given is that the plaintiff did not allege that the Michigan property did not belong to defendants; but that is the charge of subdivision 4 of the complaint. The second point relates to the misjoinder of defendants, which is a defect that no one can take advantage of except the persons misjoined. It is not fatal to the complaint. *Tieman v. Sachs*, 52 Or. 560, 98 Pac. 163. Even a defect of parties is waived, if not raised by demurrer. See section 68, L. O. L., and cases there cited. The fourth argument concerns the allegation of damages, but the facts alleged show damage, and that is all that is required. The fifth subdivision is as to the failure to allege the elements of fraud. It is specifically charged that defendants represented that they owned the Michigan land, and had good title, when in fact they did not own it—a clear case of fraud, constructive, at least, if not criminal.

[8] An injunction was allowed at the commencement of this action; but an injunction is an equitable remedy, and is not available in law actions. We think that upon the showing made and the case pending plaintiff was not entitled to the injunction, and the court erred in denying the motion to dissolve it. The injunction is hereby dissolved.

We find no error in the record. The judgment is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur. McBRIDE, J., taking no part in the consideration of this case.

(74 Or. 386)

#### LAMPMAN v. LAMPMAN.

(Supreme Court of Oregon. Jan. 19, 1915.)  
EXECUTION (§ 161\*)—ISSUANCE OF WRIT—MOTION TO QUASH.

Where an execution issued and an attempt to levy has been made, it is improper to issue a second execution while the first is still pending and the second writ will be quashed on motion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467-471; Dec. Dig. § 161.\*]

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Suit for divorce by Kathleen Lampman against C. E. Lampman, resulting in decree for plaintiff. From an order overruling a motion to quash a second writ of execution to enforce the judgment for payments for support of children, defendant appeals. Reversed and remanded, with directions.

On December 23, 1912, the plaintiff began a suit for a divorce against defendant in the

circuit court for Marion county. The defendant made no appearance, and upon a trial of the case a decree was entered in favor of plaintiff, dissolving the bonds of matrimony then existing between the parties, and awarding the custody of the two minor children to plaintiff, and directing defendant to pay to plaintiff the sum of \$15 on the 1st day of March, 1913, and \$15 on the 1st day of each month thereafter, for the support, nurture, and education of such children. Thereafter, on May 12, 1914, an execution was issued to the sheriff of Marion county upon this money judgment, and on May 18, 1914, the sheriff filed in the county clerk's office a certificate of attachment of certain real property, which is all, so far as the record discloses, that was ever done under or by virtue of the writ. On June 20, 1914, one Kathleen Shreve, who certifies that she is identical with the plaintiff, also certifies that she has received various amounts, aggregating \$115, as payments upon the judgment, but this statement is not verified and does not say whether or not she has received any other sums. On June 20, 1914, another execution was issued by the county clerk to the sheriff of Marion county upon the same judgment, and on the same day the sheriff again filed with the clerk a certificate of attachment of certain real property in Marion county. Thereafter, on July 20, 1914, the defendant, appellant herein, filed a motion in the lower court, asking that the second execution be quashed, and from an order overruling such motion, defendant appeals. There was no appearance in this court for respondent by brief or otherwise.

Philip Gilbert and A. O. Condit, both of Salem, for appellant. Page & Roberts, of Salem, for respondent.

BENSON, J. (after stating the facts as above). There are several reasons assigned by appellant to justify a reversal of the order made by the circuit court, but it will not be necessary to consider more than one.

It appears from the record that there are two writs of execution out at the present time, and that there has been an attempted levy under each.

"If a writ has been issued, and its execution commenced, it must first be completed before a new writ can issue. \* \* \* After a levy is made, the plaintiff has no right to wantonly abandon it; and if he does so, and procures the issuing of an alias writ, or if under any circumstances an alias issues while a levy under a prior writ remains undisposed of, such alias may be quashed." *Freeman on Executions* (2d Ed.) § 50.

And the same doctrine has been approved by this court. *Wright v. Young*, 6 Or. 87.

It follows that the order overruling the motion to quash the second writ of execution should be reversed and the cause remanded, with directions to allow the motion.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—41

(74 Or. 388)

ANDERSON et al. v. PHEGLEY et al.

(Supreme Court of Oregon. Jan. 19, 1915.)

APPEAL AND ERROR (§ 1177\*)—AFFIRMANCE—REMAND—FURTHER PROCEEDINGS—NEW ISSUES.

Where the issues presented to the trial court were well defined, and the evidence was directed to the issues as framed, and there was nothing in the pleadings to mislead defendant R., the Supreme Court having decided the issues presented on the entire record as made and determined by the questions presented, and judgment having been affirmed, the court could not remand the cause to the end that R. might file a new answer presenting new and different questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.\*]

In Banc. On rehearing. Affirmed.  
For former opinion, see 142 Pac. 593.

Earl C. Bronaugh, of Portland (Teal, Minor & Winfree, of Portland, on the brief), for appellant. W. C. Hale, of Grants Pass (O. S. Blanchard and George H. Durham, both of Grants Pass, on the brief), for respondents.

HARRIS, J. This court on May 26, 1914, affirmed the decree appealed from, and on July 7th denied a petition for rehearing. The mandate was issued July 8th, and recorded by the clerk of the circuit court on July 23d. Thereafter in the month of July the defendant Robinson filed a motion to recall the remittitur. The motion to recall was not for the purpose of correcting any mere clerical mistake in the mandate, nor to make it conform to the decree of this court; but the motion was in effect a petition for a rehearing and a modification of the decree. The remittitur was returned August 4th, and on November 10th, after the expiration of the March term of court, the motion to recall was denied, and thereupon the mandate was again sent to the clerk of Josephine county. Thereafter the mandate was directed to be returned and was received by the clerk of this court November 28th. This court, on its own motion, on December 1st, ordered that the mandate be recalled and granted a petition for a rehearing, and the case was heard anew January 4, 1915. At the last hearing the plaintiffs contended that jurisdiction to make the order entered December 1st did not exist, on the theory that the termination of the March term divested the appellate court of any power to modify the decree rendered. It is not necessary to determine any question of jurisdiction, because of the conclusion reached after again fully considering the case on its merits; and we shall therefore assume, but not decide, that this court had power to recall the order complained of.

The plaintiffs were the owners of mining property. The Galice Consolidated Mines

Company, hereinafter referred to as the "corporation," owned a group of unpatented mining claims adjoining the property of plaintiffs. The corporation on June 10, 1904, gave a note for \$2,000 to the Grants Pass Banking & Trust Company, and for the purpose of securing this note the corporation gave a mortgage covering its group of mining claims. The plaintiffs on November 16, 1905, obtained a decree in the circuit court for Josephine county against the corporation restraining the latter from maintaining a ditch on the property of plaintiffs and also secured a judgment for \$2,500 as damages. Plaintiffs commenced a law action against the corporation November 18, 1905, and on April 25, 1906, obtained a judgment for \$2,600. A second mortgage was given by the corporation to Grant Phegley on October 17, 1906, to secure a note of that date. Prior to March 16, 1907, the bank assigned its note and mortgage to Grant Phegley, so that Phegley then became the owner of both mortgages. Phegley was contemplating the foreclosure of his mortgage and entered into negotiations with plaintiffs with a view of forming a "pooling agreement" to handle the property of plaintiffs and the adjoining group of mining claims covered by the mortgages. The negotiations resulted in an agreement between the plaintiffs and Phegley, which agreement, after reciting the above-mentioned judgment for \$2,500, the judgment for \$2,600, the first and second mortgages, is as follows:

"Whereas, the said Grant Phegley is desirous, with all convenient dispatch, of acquiring title to the said mortgaged premises of the Galice Consolidated Mines Company and, upon doing so, desires to make a consolidation of said properties with their appurtenant water rights, with the said properties and water rights of the parties of the first part, for the purpose of effecting a joint sale of said properties:

"Now therefore, in consideration of the premises, and the sum of one dollar by each of the parties hereto to the other respectively in hand paid, the receipt whereof is hereby acknowledged, the said parties hereby covenant and agree to and with each other that, upon the acquisition of the title to the said mortgaged premises of the Galice Consolidated Mines Company by the said Grant Phegley within the period of eighteen months from this date, the said parties of this agreement will pool their respective properties for the purpose of making a joint sale thereof upon the following basis, to wit:

"The united properties shall be valued at the minimum price of twenty-six thousand dollars (\$26,000.00), and, if said properties shall be sold for said price, the parties of the first part shall receive thereof and therefrom the sum of sixteen thousand dollars (\$16,000.00), and the party of the second part the sum of ten thousand dollars (\$10,000.00), and any amount realized upon such sale in excess of twenty-six thousand dollars (\$26,000.00) shall be equally divided between the parties to this agreement; that is, one-half of such excess to the parties of the first part; and one-half thereof to the party of the second part; and, until such sale is made, it is understood and agreed between the parties hereto that the said T. K. Anderson shall represent the party of the second part as his agent and representative upon the said properties of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the Galice Consolidated Mines Company, when acquired by the said party of the second part, until such contemplated sale is made of the joint properties, and shall supervise all necessary assessment work and ditch repair and maintenance required to be done by said party of the second part to maintain and hold his title thereto, and shall receive, for such supervision, the sum of forty dollars (\$40.00) per month, to be paid to said Anderson monthly by the said party of the second part; and it is understood and agreed that the said party of the second part shall, during the term of said Anderson's employment and until said joint sale can be effected, do, at his own expense, all necessary assessment work and repairs, maintenance and use of the ditches and water rights appurtenant to the said properties hereafter spoken of as the Phegley properties, as may be requisite and necessary to maintain his title thereto.

"It is further agreed between the parties hereto that the said Grant Phegley shall use his influence to have the said Galice Consolidated Mines Company, the appellant in the said appeals now pending in the Supreme Court of the state of Oregon, dismiss the same at the appellant's costs, with all convenient dispatch, and that, thereupon, the said parties of the first part shall cause an order of sale and execution to be issued upon their respective decree and judgments against the said Galice Consolidated Mines Company, and cause the same to be sold at public auction as by law required, and to bid in the same at such sales for the amounts due from the said judgment debtor to the parties of the first part upon their said decree and judgments, and also, if necessary, for the amounts due to the said Grant Phegley upon his assigned mortgage for two thousand dollars (\$2,000.00) and his other mortgage for six thousand dollars (\$6,000.00), and for the purpose of such sale, the said parties of the first part are hereby authorized to bid, in their own names, the amounts due upon said mortgages with like effect so far as said bidding is concerned as if they were the owners thereof, and their receipt to the sheriff or county clerk of Josephine county for the amounts due on said mortgages, shall, for the purpose of such bidding and sale, stand in lieu of the actual payment of cash to said sheriff at such sale, and such bidding may be done either by the parties of the first part as the judgment creditors upon said judgments or by the said T. K. Anderson in person for convenience in handling the same, as may be deemed most advantageous, or bid said property subject to said mortgages. In case, however, that said appeals shall not be dismissed, then the said party of the second part shall forthwith proceed to foreclose his mortgages, and cause a sale thereunder of the said mortgaged premises, to be made with all convenient dispatch, to the end that said Phegley may acquire title to the said mortgaged premises, as soon as possible for the purpose of this pooling agreement; in which case, the said properties shall be bid in either by the said Phegley, or by the said parties of the first part, or one of them, on the same terms and conditions as above provided for.

"It is further agreed between the parties that whoever of the parties shall bid in the said mortgaged premises at execution or mortgaged foreclosure sale, shall do so pursuant to the terms of this agreement, and that the rights of all parties to this instrument shall be respected and preserved thereby and thereunder, with due regard to the existing priorities.

"It is further agreed between the parties hereto that should it become necessary to repair the ditch now belonging to the Galice Consolidated Mines Company, and crossing the lands of the parties of the first part, the maintenance of which is covered by said injunction in order to preserve and hold the water right appurtenant to said mortgaged premises, and in order to effect the sale of said joint properties con-

plated herein, that the parties of the first part will permit the same to be done, but that such permission and such repair shall be deemed permissive and temporary only, and done and suffered for the purposes aforesaid, without in any wise modifying said injunction order, and without prejudice to the rights of the said parties of the first part under said injunction in any way whatsoever; and this pooling contract and agreement is to remain in force for the period of thirty-six months, only, from the date of this execution, and if a sale of the joint properties shall not be made by the parties hereto within that time, then, unless the time therefor shall be extended by joint agreement of the parties hereto, the said parties of the first part, in the event that said Phegley properties shall have been sold and purchased by the parties of the first part, or any of them, upon their executions issued in consequence of the dismissal of said appeals, the said parties of the first part shall be deemed to own the lands so purchased by them subject, however, to the prior mortgage thereon of two thousand dollars (\$2,000.00) and interest in favor of said party of the second part, and subject to the right of the said party of the second part to redeem the said Phegley lands from said sale should the parties of the first part pay off the first mortgage upon his second mortgage within the time allowed therefor by statute and, in case said mortgaged lands shall be sold on a foreclosure of said mortgages, and the title thereto purchased under such sale by the said party of the second part, and no sale of the joint properties be made within the time limited therefor, then the liens acquired by the said parties of the first part upon said lands, by virtue of their said decree and judgments, shall not be affected by said mortgage sale, but the said parties of the first part shall be entitled to have and receive out of said mortgaged lands the amount due them upon their respective decree and judgments subordinate only to the first mortgage of two thousand dollars (\$2,000.00) and interest upon said premises; in other words, if this pool agreement shall not be finally executed by the sale of said joint premises hereunder, the respective rights and priorities of the parties hereto shall not be affected by anything done hereunder for the purpose of carrying this agreement into execution."

Thereafter Phegley commenced a suit to foreclose his mortgage covering the group of unpatented mining claims owned by the corporation, and on April 29, 1907, he obtained judgment and a decree of foreclosure, wherein the amounts and priorities of the above-mentioned judgments and mortgages were ascertained and determined. Pursuant to an order of sale, the property was, on June 15, 1907, duly sold by the sheriff to Grant Phegley for \$15,432.56; that sum being the amount of the mortgages and judgments. Although no cash was paid, nevertheless the plaintiffs and Phegley signed and delivered to the sheriff an instrument which, after reciting the amounts to which Phegley and plaintiffs were entitled, reads as follows:

"Whereas, by the terms of an agreement made and executed by the said Anderson, Williamson and Phillip, and Grant Phegley, of date March 18, 1907, and acknowledged June 15, 1907, by said Anderson and Phegley, it is provided that either of said parties may bid in, at said foreclosure sale, the said mortgaged premises without prejudice to the rights and priorities of the said parties respectively, and whereas, at said sale, held at the courthouse in Grants Pass, Josephine county, Oregon, on said June 15, 1907, the said property was so bid in

by the said Grant Phegley under and in compliance with the terms of their said agreement of March 16, 1907, and, as trustee for the said Anderson, Williamson, Phillip, and Phegley, the said parties do hereby receipt Joseph Russell, sheriff of Josephine county, Oregon, the officer making said sale, the sum of fifteen thousand four hundred thirty-two dollars and fifty-six cents (\$15,432.56)."

At the same time Phegley signed and delivered to plaintiffs a writing as follows:

"Whereas, on the 15th day of June, 1907, the undersigned, Grant Phegley, bought at sheriff's sale, held in Josephine county, Oregon, certain properties belonging to the Galice Consolidated Mines Company, at a foreclosure sale, in suit wherein the said Grant Phegley was plaintiff and the Galice Consolidated Mines Company, T. K. Anderson, H. A. Williamson and A. Phillip were defendants, for the aggregate sum of fifteen thousand four hundred thirty-two dollars and fifty-six cents (\$15,432.56), of which said sum the said Grant Phegley is entitled to a priority to the amount of two thousand five hundred and fifty dollars and sixty-three cents (\$2,550.63), the said Anderson, Williamson and Phillip, are next entitled to the sum of five thousand nine hundred sixty-one dollars and ninety-three cents (\$5,961.93), and the said Grant Phegley is thereafter entitled to the balance of six thousand nine hundred twenty dollars (\$6,920.00) and the said Grant Phegley, if such sale shall be confirmed and sheriff's deed made to him under such sale, shall and will hold the said property in trust for himself and the said Anderson, Williamson and Phillip, as their interests appear respectively in said decree of foreclosure and order of sale, and in accordance with the terms of a certain agreement between the said parties, of date March 16, 1907, to which agreement this memorandum shall be attached as a part thereof."

The sale on foreclosure was duly confirmed and a sheriff's deed delivered to Phegley, the deed being recorded September 13, 1907. At some time in June, 1907, Phegley sold an undivided one-half of his individual interest to defendant Robinson, and, in October of the same year, defendant Robinson acquired the remaining interest owned by Phegley. The time limit expressed in the agreement of March 16, 1907, having expired, and a sale of the properties described in the agreement not having been made, the plaintiffs commenced a suit against defendant to foreclose the agreement. The complaint contained a recital of the facts substantially as they are hereinbefore stated.

Phegley did not contest the suit, but the defendant Robinson answered. The answer of defendant Robinson in substance alleged that the purpose and legal effect of the "pooling agreement" was to vest the legal title in Phegley for the purpose of making a sale of the properties and a distribution of the proceeds of sale to the respective parties; and if a sale was not made the agreement had the effect of preserving and extending the judgment liens of the plaintiffs for a period of three years in addition to the statutory period of redemption. The defendant Robinson claimed in her answer that the "pooling agreement" only gave the plaintiffs the right to redeem within a period of 60 days after March 16, 1910, and, since plaintiffs had not

redeemed within that time, they had forfeited all their right. The answer also alleged that plaintiffs had breached the contract in various ways, and by reason thereof had forfeited all their rights; but as to this allegation defendant did not offer any evidence. Practically no evidence was offered by plaintiffs except the judgment rolls in three cases referred to in the evidence as the first contract foreclosure suit (see *Anderson v. Robinson*, 57 Or. 172, 109 Pac. 1118, 110 Pac. 975), the receiver's suit (see *Anderson v. Robinson*, 63 Or. 228, 126 Pac. 988, 127 Pac. 546), and the Phegley foreclosure suit, which last case terminated in the sheriff's deed to Phegley. The defendant did not offer any evidence except a letter written to Phegley by an attorney representing Anderson.

The trial court rendered a decree ordering a sale of the mining claims and a distribution of the proceeds to plaintiffs and defendant Robinson in accordance with the priorities determined by the agreement of March 16, 1907, and that the surplus, if any, be paid to defendant Robinson as the assignee of Phegley. The decree of the trial court was affirmed by this court. *Anderson v. Phegley*, 142 Pac. 593.

At all stages of this case up until the last hearing the defendant Robinson has contended that the pooling agreement served only to extend for three years the time within which the plaintiffs could redeem; that "plaintiffs had no further right in or to said property"; and that "a decree should be here entered dismissing plaintiffs' complaint, requiring Phegley to deed over the property to appellant Emma G. Robinson, free of any trust or charge; and that plaintiffs be declared to have no right or interest in or to said property."

We have again carefully examined the entire record and considered all the authorities cited at the different hearings and questions presented, with the result that we are brought to the conclusion that the sheriff's deed, together with the instrument signed by Phegley and plaintiffs and the pooling agreement, created a trust. At the final hearing counsel for defendant Robinson agreed that the court correctly construed the contract as creating a trust and not an equitable mortgage. Not even by any strained construction of the language of the instrument can it be said that the parties intended that the transaction should merely serve as an extension of the statutory time within which plaintiffs might redeem. However, the defendant now contends that the cause should be remanded, with directions permitting the filing of a new answer presenting new and different questions. The issues presented to the trial court were clean cut and well defined. The evidence was directed to the issues framed. There was nothing in the pleadings that might have misled defendant Robinson. *McPhee v. Kelsey*, 45 Or. 290, 78 Pac. 224. This

court has decided the issues presented on the entire record as that record was made by the parties. Every issue raised by the pleadings, every question presented by the record, and every right asserted in the pleadings or claimed from the evidence by any of the litigants has been decided and determined. The case as made by the record has been fully adjudicated, and this court cannot now remand the cause for the purpose of framing what would be equivalent to a new case.

Counsel urged at the argument that defendant Robinson had expended considerable sums of money for the preservation of the property; that these expenditures benefited plaintiffs as well as defendant; that the proceeds of sale should first be applied to reimburse defendant; and that therefore an accounting should be ordered. As already stated, every issue made by the record has been adjudicated, and nothing further is required to be done to enable a complete determination of the case presented on appeal. The decree rendered leaves nothing undone. If any party to this litigation has expended moneys for the preservation of the property, and if it is equitable that reimbursement be made, then no doubt the trial court will, on a proper showing and in an appropriate proceeding, adjust the rights of the parties in conformity with equitable principles.

The former opinion is adhered to, and the decree affirmed.

(75 Or. 108)

### STIRES v. SHERWOOD et al.

(Supreme Court of Oregon. Jan. 19, 1915.)

#### 1. RELEASE (§ 29\*)—JOINT TORT-FEASORS—RELEASE OF ONE OR MORE OF SEVERAL TORT-FEASORS.

Where a number of policemen sued for false imprisonment acted together with one common purpose in committing the acts complained of, an unconditional release of certain of the defendants from all liability, without any reservation of plaintiff's right of action against another defendant who refused to settle, discharged such other defendant, as plaintiff had but one cause of action for which he could have but one satisfaction, and, when it was unqualifiedly discharged as to any one liable upon it, it was dead and he could not again enforce it.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.\*]

#### 2. APPEAL AND ERROR (§ 781\*) — DISMISSAL OF APPEAL—EFFECT OF SETTLEMENT.

Where, pending an appeal from a judgment for defendants in an action for false imprisonment, plaintiff settled with defendants and executed a release, nothing was left for the Supreme Court's consideration but a mere academic question, and the appeal would be dismissed on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

In Banc. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Harry Stires against Benjamin F. Sherwood and others. Judgment for de-

fendants, and plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

Harold V. Newlin and John A. Jeffrey, both of Portland, for appellant. Henry A. Davie, W. P. La Roche, City Atty., Platt & Platt, Beach, Simon & Nelson, and Griffith, Leiter & Allen, all of Portland, for respondents.

BURNETT, J. [1] The defendants are composed of 14 members of the police force of the city of Portland and certain surety companies who subscribed their official bonds. The action is for false imprisonment. After reciting the appointment of the individual defendants and their several qualifications by filing a bond underwritten by the different surety companies mentioned, the complaint alleges that the defendant officers, while acting together in their capacity as patrolmen, but without any order, warrant, or process of any court authorizing them to do so, arrested the plaintiff against his will on a pretended charge of having committed some felony, the nature of which was not disclosed to him, except by intimating to him that he was an opium smoker. The quality and extent of his subsequent imprisonment and discharge without any hearing are detailed in the complaint. Alleging damages in the sum of \$5,000, he demands judgment against all the defendants. In their joint answer the defendants admit that the individual officers were acting together in the affair of which complaint is made, and allege other things not necessary to be here mentioned. The reply traversed the allegations of the answer. At a subsequent jury trial when the plaintiff rested his case, the court directed a nonsuit as to all the parties except two officers and their sureties, and at the end of all the evidence directed a verdict in favor of the remaining defendants. The plaintiff afterwards appealed. The defendant Sherwood now moves for an order dismissing the appeal for the reason that the cause of action sued upon has been extinguished by the act of the plaintiff and there are no real issues to be determined upon the appeal. Appended to the motion is an affidavit of the attorney for the moving defendant reciting the history of the case and stating substantially that the plaintiff had settled with and discharged seven of the individual defendants with their surety company for \$225, and six others and their underwriter for \$200, for the injuries which he claimed to have suffered as stated in his complaint. Annexed to the affidavit as an exhibit is a copy of a written release of the six and their surety substantially as follows: "Know all men by these presents, that I, Harry Stires, \* \* \* for and in consideration of the sum of \$200 to me in hand paid by the National Surety Company, a corporation, \* \* \* and Lee Martin, A. L. Long, M. W. Lillis, Douglas Leisy, W. L. Miller and Enoch A. Slover, all of Portland, Oregon, the receipt whereof is hereby acknowledged, hereby release

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and forever discharge said National Surety Company and said Lee Martin, A. L. Long, M. W. Lillis, Douglas Leisy, W. L. Miller and Enoch A. Slover, of and from all liability to me for, and on account of, and by reason of, the damages sustained by me on account of having been forcibly removed from my room in the Idora Hotel in the city of Portland and placed under arrest by the said (individuals, naming them) on the 22d day of June, 1912, and from all claim, demand, right, or cause of action of whatever nature arising or to arise from, or on account of, my arrest on the 22d day of June, 1912, and on account of my imprisonment on the 22d, 23d, and 24th, and 25th days of June, 1912, it being the express intention of the undersigned, Harry Stires, to release the said (individuals, naming them) from any and all liability on account of the acts hereinbefore mentioned, which acts were performed by the aforesaid parties while they were acting as police patrolmen of the city of Portland, state aforesaid, and it also being the express intention of the undersigned, Harry Stires, to release, acquit, and forever discharge the said National Surety Company, said company being surety on the bonds of the aforesaid police patrolmen (naming them) at the time the undersigned was arrested and imprisoned as aforesaid. In witness whereof, I have hereunto set my hand and seal this 3d day of September, 1914.

"Harry Stires. [Seal.]"

This instrument was executed under seal in the presence of two subscribing witnesses and acknowledged by Stires before a notary public. In a counter affidavit plaintiff's attorney declares substantially that, after the judgment of the circuit court was rendered, he attempted to settle the whole controversy; but, as the defendant Sherwood and his surety refused to pay any sum whatever in discharge of plaintiff's claim, the affiant negotiated with the other defendants with the result stated above. He contends that he did not contemplate the entire satisfaction of plaintiff's claim, but intended only to effect a partial release and satisfaction of the same. He appends copies of correspondence had between himself and the attorneys of the released defendants, too voluminous to reprint in full in an opinion.

It will be observed that there are no reservations or conditions in the release, the terms of which are admitted by the parties. On the face of that document, it is an absolute discharge of the parties named from all liability on account of the cause of action described in the complaint. The plaintiff alleges, and it is admitted by the defendants in their joint answer, that the parties who made the arrest and committed the other acts complained of in the complaint were acting together with one common purpose. The allegation and admission fixed the status of the defendant officers as joint tort-feasors, if they are at all to blame. The well-established rule of law is that the absolute discharge of one joint tort-feasor from liability on account of the alleged tort is a release of all the others. The reason of the precept is that the plaintiff has but one cause of action and can reap but one satisfaction.

There are some apparent variations from this doctrine. One is that an agreement not to sue one of the culpable parties is no bar

to an action against the other. This depends upon the principle that joint tort-feasors are jointly and severally liable and that any individual against whom action is instituted cannot complain of the nonjoinder of his fellows. It can make no difference in principle whether the nonjoinder is a gratuity on the part of the plaintiff, or whether he has been moved to that course by monetary considerations. The authorities strongly support this apparent exception: *Bell v. Perry*, 43 Iowa, 368; *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257; *Louisville Times Co. v. Lancaster*, 142 Ky. 122, 133 S. W. 1155; *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267; *Smith v. Dixie Park & Amusement Co.*, 128 Tenn. 112, 157 S. W. 900; *Robertson v. Trammell*, 98 Tex. 364, 83 S. W. 1098; *Id.*, 37 Tex. Civ. App. 53, 83 S. W. 258.

It is also stated by some writers and judges that a partial settlement only may be effected without prejudice to the chose in action against the others, where one of the wrongdoers pays a valuable consideration to the plaintiff and secures from him a release when it is expressly agreed between the contracting parties that the discharge of the one shall not bar the action against the remaining defendants. In such cases, however, the amount paid extinguishes pro tanto the amount of damages otherwise recoverable from the other parties in subsequent litigation. The authorities favoring this proposition proceed upon the theory that the intention of the parties to the contract should govern where it is expressed in the terms of the stipulation between them. Supporting this view are such cases as *Atchison, etc., Ry. Co. v. Classin* (Tex. Civ. App.) 134 S. W. 358; *St. Louis, I. M. & S. Ry. Co. v. Bass* (Tex. Civ. App.) 140 S. W. 860; *J. Rosenbaum Grain Co. v. Mitchell* (Tex. Civ. App.) 142 S. W. 121; *Kropidlowski v. Pfister & Vogel Leather Co.*, 149 Wis. 421, 135 N. W. 839, 39 L. R. A. (N. S.) 509; *Blackmer v. McCabe*, 86 Vt. 303, 85 Atl. 113; *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618. Others put it upon the principle that, considering together both the feature embodying the release and the reservation of right to pursue the remaining wrongdoers, such an instrument is properly construed as a covenant not to sue the party discharged.

Many other authorities hold that an absolute discharge of one, although accompanied by the reservation of right to sue other defendants, still operates as a discharge of all of them. The teaching of these precedents is that the contracting parties have no right to give an effect to their stipulation prejudicial to the rights of other individuals, and that their reservation is simply void as contrary to the general effect and design of the document. This principle is supported by the following citations: *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61; *Ducey*

v. Patterson, 37 Colo. 216, 86 Pac. 109, 9 L. R. A. (N. S.) 1066, 119 Am. St. Rep. 284, 11 Ann. Cas. 393; Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181; Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864; Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125; Burns v. Womble, 131 N. C. 173, 42 S. E. 573; Farmers' Savings Bank v. Aldrich, 153 Iowa, 144, 133 N. W. 383; Louisville & N. R. Co. v. Allen (Fla.) 65 South. 8.

In the instant case, however, none of these departures from the original rule appear, and the mere mention of them is sufficient. The release of the contracting defendants is absolute and without reservation or condition. Counsel for the plaintiff contends that he has a right to show the circumstances under which the release was made for the purpose of interpreting that document. It is immaterial whether this contention is sound or not in the present case; for, giving to the affidavit for plaintiff and the appended correspondence full effect as matters of fact, the circumstances disclosed thereby are simply that he was endeavoring to effect a settlement with all the defendants, one of whom with his surety was not willing to settle; whereupon for a valuable consideration paid to the plaintiff the latter released all the other defendants. Relying upon such decisions as that rendered by Mr. Chief Justice Shaw in *Dunbar v. Dunbar*, 71 Mass. (5 Gray) 103, the plaintiff contends for liberality in construing the effect of the release, but in that very opinion the learned jurist laid down the principle in this language:

"Where general words are used, and there is nothing in the instrument to limit them, the words, as in other instruments, are to be construed most strongly against the releasor."

The instrument in question is plain and simple in its structure, and its language must be construed according to the ordinary meaning. Indeed, there is no room for mere construction. The document speaks for itself and must be given effect according to its obvious terms. According to the practically unanimous voice of the precedents, unconditioned as it is, it operates to release all who were concerned in the case as defendants. *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194; *Wallner v. Chicago Consol. Tract. Co.*, 245 Ill. 149, 91 N. E. 1053; *Horgan v. Boston Elev. Ry. Co.*, 208 Mass. 287, 94 N. E. 386; *Laughlin v. Excelsior Powder Mfg. Co.*, 153 Mo. App. 508, 134 S. W. 116; *Howard v. J. H. Harris Plumbing Co.*, 154 N. C. 224, 70 S. E. 285; *Peterson v. Wiggins*, 230 Pa. 631, 79 Atl. 767; *Sircey v. Hans Rees' Sons*, 155 N. C. 296, 71 S. E. 310; *Hubbard v. St. Louis & M. R. Co.*, 173 Mo. 249, 72 S. W. 1073; *Chicago Herald Co. v. Bryan*, 195 Mo. 574, 92 S. W. 902; *Rogers v. Cox*, 66 N. J. Law, 432, 50 Atl. 143; *Dufur v. Boston & M. Ry. Co.*, 75 Vt. 165, 53 Atl. 1068; *Allen v. Ruland*, 79 Conn. 405, 65 Atl. 138, 118 Am. St.

Rep. 146, 8 Ann. Cas. 344; *Snyder v. Mutual Tel. Co.*, 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45; *Cleveland, etc., Ry. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

[2] Any one, whether culpable or not, may buy his peace from an aggrieved suitor for a price, and this will put a quietus upon any remedy against the person paying the money; but it does not discharge the cause of action as to remaining offenders. On the other hand, if the complainant, for a valuable consideration, unconditionally releases a single wrongdoer from the cause of action, it operates to discharge all others concerned jointly in the tort with the one released. In short, while there may be many individuals whom a plaintiff may sue or not as he chooses, although possibly influenced on that point by monetary considerations moving from those who escape his litigation, yet he has but one cause of action for which he can have but one satisfaction; and when once it is unqualifiedly discharged as to any one liable upon it he can never again enforce it. It is dead. A contrary rule would allow an injured party to levy damages upon his several adversaries in detail until he had reaped ample satisfaction and even profit, and then to gamble for more on the uncertainties of jury trials. It would thus encourage litigation which the law abhors. The result is an end of the controversy leaving for our consideration a mere academic question. Under such circumstances, the practice is to dismiss the appeal on motion of the respondent. *Moore v. Moore*, 36 Or. 261, 59 Pac. 327; *Livesley v. Johnston*, 48 Or. 40, 84 Pac. 1044; *Thomas v. Booth-Kelly Co.*, 52 Or. 534, 97 Pac. 1078, 132 Am. St. Rep. 713; *State ex rel. v. Webster*, 58 Or. 376, 114 Pac. 932; *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125.

The appeal is dismissed.

(74 Or. 399)

#### STATE v. YOUNG.

(Supreme Court of Oregon. Jan. 19, 1915.)

#### 1. CRIMINAL LAW (§ 1158\*)—APPEAL—FINDINGS OF FACT.

Findings of fact by the trial court have the force of a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3063, 3070, 3071, 3074; Dec. Dig. § 1158.\*]

#### 2. STATUTES (§ 181\*)—CONSTRUCTION.

The object of construing statutes is to ascertain the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

#### 3. STATUTES (§§ 174, 175\*)—CONSTRUCTION.

Unambiguous statutes should not be construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 254, 266; Dec. Dig. §§ 174, 175.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. STATUTES (§ 228\*)—"PROVISO"—OFFICE OF.

The office of a "proviso" is to limit or restrain the preceding enactments, and cannot be held to enlarge such enactments.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.\*]

For other definitions, see Words and Phrases, First and Second Series, Proviso.]

#### 5. MASTER AND SERVANT (§ 13\*)—HOURS OF EMPLOYMENT — STATUTES — CONSTRUCTION — "NECESSARY REPAIRS."

Laws 1913, p. 169, § 2, declares that no person shall be employed in any mill, factory, or manufacturing establishment more than ten hours in any one day, except watchmen and employes engaged in making necessary repairs, provided that employes may work overtime, not to exceed three hours, upon payment therefor. *Held* that, as the proviso does not enlarge the exception, the prohibition does not apply to a servant in a sawmill engaged in making ordinary repairs necessary to the conduct of the business, although they were not unusual, and would in any case have to be made sooner or later, for the term "necessary repairs" should be construed as convenient or needful repairs; it not being the purpose of the Legislature to discourage the immediate repairing of machinery (citing Words and Phrases, Necessary Repairs).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.\*]

In Banc. Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

James Young was convicted of crime, and he appeals. Reversed, and defendant discharged.

On May 11, 1914, the defendant, James Young, was indicted by the grand jury of Lake county for the violation of the provisions of chapter 102, General Laws of Oregon 1913, by employing one William Harvey for more than 10 hours in one day—to wit, for 11 hours. The cause was tried before the court without the intervention of a jury. Based upon a stipulation, the court made, in substance, the following findings of fact: That the above-named defendant, James Young, for more than a year last past has been, and now is, operating a sawmill engaged in the manufacture of lumber, in Lake county, Or., and was so occupied on the 8th day of May, 1914; that said sawmill is such a mill, factory, and manufacturing establishment as is contemplated by chapter 102 of the General Laws of Oregon for the year 1913; that on the 8th day of May, 1914, James Young employed and caused one William Harvey to work in said mill for 11 hours; that William Harvey is regularly employed at such mill in making repairs to the machinery, equipment, and appliances, and was so employed on the 8th day of May, 1914, for a period of 11 hours; that William Harvey was not on the 8th day of May, 1914, a watchman; that the repairs which William Harvey made on that date in the mill were such repairs as are required in all sawmills for the purpose of keeping the machinery, equipment, and appliances in good working order, and were the repairs which

are ordinarily, regularly, and continuously required in all mills and factories, and were in that sense necessary repairs in such mill, but that they were not necessary in the sense that a failure to make them involved immediate or imminent danger to life or property, and that at said time in said mill there existed no other emergency where life or property was or is in imminent danger; that William Harvey did not receive pay at the rate of time and one-half the regular wage for all time in excess of 10 hours of such work: that defendant refused to pay such excess. Based upon the findings of fact, the court, as a conclusion of law, found that the defendant, James Young, was guilty, and adjudged that he pay a fine of \$50. The defendant appeals.

W. Lair Thompson, of Lakeview, for appellant. Geo. M. Brown, Atty. Gen. (O. C. Gibbs, Dist. Atty., of Lakeview, and A. M. Crawford, Ex Atty. Gen., on the brief), for the State.

BEAN, J. (after stating the facts as above). [1-5] Section 2, c. 102, Laws 1913, p. 169, is as follows:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employes when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employes may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage."

The question for determination is whether or not the defendant is guilty of the violation of this statute upon the facts as stipulated and found by the court. The findings of fact of the trial court have the force and effect of a jury's verdict, and it is necessary only to examine the conclusion of law deduced therefrom. The question arises as to the construction of the words "necessary repairs." If it was the legislative intent that necessary repair work should not be included in those employments which when continued for more than ten hours were denounced by the Legislature, then the defendant is not guilty. In the brief of the Attorney General the case is stated thus:

"If the phrase 'necessary repairs,' as there used, means the usual and ordinary repairs regularly and continuously required in all mills, factories, and manufacturing establishments to keep the machinery and equipment in that good working order which is necessary for their most economical operation, William Harvey was within the exception of the statute; the provision requiring the payment of time and one-half the regular wage for all time worked in excess of ten hours was inoperative (as to him), and the conviction of the defendant for his failure and refusal so to pay Harvey must be set aside. On the other hand, if the phrase 'necessary repairs,' as used in the section quoted, means only such repairs as are indispensable to the immediate and continued operation of a mill, factory, or manufacturing establishment, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the want of which such mill, factory, or manufacturing establishment would immediately be forced to close down and cease operations entirely, William Harvey was not within the exception of the statute. \* \* \*

The cardinal point in the construction of a statute is to ascertain the intention of the Legislature. Such intention and the object aimed at controls the literal interpretation of particular language in a statute, and an expression capable of more than one meaning must be taken in the sense harmonizing with such intent. *State v. Simon*, 20 Or. 365, 26 Pac. 170; *Northern Counties Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188; 26 Am. & Eng. Ency. Law, 597. By the first general rule of statutory construction we are not permitted to interpret that which has no need of interpretation. It is only when the act in question is of doubtful or ambiguous meaning that the province of construction or interpretation begins. 26 Am. & Eng. Ency. Law, 597, 598; *Hamilton v. Rathbone*, 175 U. S. 421, 20 Sup. Ct. 155, 44 L. Ed. 219. It was held by this court in *Dutro v. Ladd*, 50 Or. 120, 91 Pac. 459, that, when the language of a statute is clear and unambiguous, the court should declare the meaning imported, and not resort to rules of construction for some other meaning. From a review of the statute it would seem that there is no necessity for applying to it any of the rules of construction. The language is plain and unambiguous, and should be applied according to its obvious meaning without the application of any of the artificial rules of construction. From the whole context it appears that the law inhibits generally employing a person in a mill, factory, or manufacturing establishment more than ten hours in one day. Excepted from this provision are: (1) watchmen; (2) employes when engaged in making necessary repairs; and (3) persons employed in case of an emergency where life or property is in imminent danger. There is a proviso attached which applies to all employes conditioned that they may work overtime not to exceed three hours in any one day upon the payment at the rate of time and one-half the regular wage. This proviso we construed in *State v. Bunting*, 139 Pac. 731, 735, in the nature of a mild penalty, and as an assistance in the enforcement of the law in cases of the infraction thereof by reason of employment for a short time in excess of that directed. If, however, we assume that the statute is somewhat ambiguous, and apply the rules of construction, we shall reach the same point by another path. Mr. Black on *Interpretation of Laws* (2d Ed.) p. 428, states:

"When the technical terms are used with technical precision, the distinction between a proviso and an exception is this: An exception exempts absolutely from the operation of an enactment, while a proviso defeats its operation conditionally. An exception takes out of an enactment something which would otherwise be part of the subject-matter of it; a proviso

avoids it by way of defeasance or excuse. There is also a well-known distinction between an exception in the purview of the act and a proviso in this respect. If there be an exception in the enacting clause of a statute, it must be negated in pleading, but a separate proviso need not be, and that although it is found in the same section of the act, if it be not referred to and ingrafted on the enacting clause."

In *Campbell v. Jackman Bros.*, 140 Iowa, 475, 118 N. W. 755, 27 L. R. A. (N. S.) 288, a case involving the construction of the liquor laws of the state of Iowa, in which it was insisted that in the use of an exception it should not receive a construction that would absolutely exempt from the operation of the law liquor dealers, the court said:

"The effect of any sweeping, general statutory provision which is followed by, or coupled with, an express exception naturally and necessarily depends upon the nature and extent of the exception, and, if this be of such character as to emasculate the principal clause or render any of its terms meaningless, the courts are nevertheless required to give effect to such exception, whatever they may think of the candor or want of candor which controlled the phraseology of the law. \* \* \* The office of an exception in the statute is, generally speaking, to take or exclude from the operation of the statute certain things or subjects which would otherwise be included therein (see *Bouvier's Law Dictionary*), and, where the exception is clearly expressed and is within the constitutional power of the Legislature, those who question its justice, wisdom, or policy must seek the remedy at the hands of the Legislature itself."

The Supreme Court of Oklahoma, in *Leader Printing Co. v. Nicholas*, 6 Okl. 302, 50 Pac. 1001, in determining the effect of a double exception, held that a double exception or proviso which is capable of two constructions, the one of which would render the use of the first exception meaningless, and the other of which would give effect to both exceptions, should receive a construction that would give effect to both. In the case under consideration, if the Legislature had intended to require the payment of time and one-half for overtime to employes engaged in necessary repair work, there would have been no need to have included in the section the words "except watchmen and employes when engaged in making necessary repairs," for the reason that the proviso for time and one-half covered every class of employment in a mill, factory, or manufacturing establishment. In other words, if the proviso for time and one-half for overtime applies to employes engaged in necessary repair work, then the exception excluding repairmen above quoted is meaningless. The office of a proviso is to limit or restrain preceding enactments, and cannot be held to enlarge the scope of such preceding enactment. *Stiers v. Mundy* (Ind. App.) 89 N. E. 959. It is laid in *Minis v. U. S.*, 15 Pet. 423, 10 L. Ed. 791:

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."



The word "necessary" must be construed in the connection in which it is used. It is a word susceptible of various meanings. It may import absolute physical necessity, or that which is only convenient or useful or essential. 5 Words and Phrases, p. 4705. The courts have many times construed the word "necessary," and it has almost universally been held to mean needful or convenient; especially is this the case where the word is used in conjunction with other and stronger terms. In *McCulloch v. Maryland*, 4 Wheat. 413, 4 L. Ed. 579, Mr. Chief Justice Marshall, holding the authority vested in the United States Congress to pass necessary laws to carry into effect the powers granted to that body, had the following to say in regard to the meaning of the word "necessary":

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. \* \* \*"

See, also, *People v. Mauran*, 5 Denio (N. Y.) 389; *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121; *No. Pac. Ry. Co. v. McAdow*, 44 Mont. 547, 121 Pac. 473; *Butte, A. & Pac. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Chicago, I. & L. Ry. Co. v. Baugh*, 175 Ind. 419, 94 N. E. 571, 573.

This court, in construing our exemption statute in *Stewart v. McClung*, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374, held that the exemption from execution of the "necessary wearing apparel owned by any person to the value of one hundred dollars" does not mean that it is such apparel as is indispensable, but that necessary means convenient and comfortable. *Kinser Const. Co. v. State*, 204 N. Y. 381, 97 N. E. 871.

It is contended by counsel for the state that necessary repairs can only mean those extreme cases in which failure to repair machinery would tie up the plant or imperil life; that the labor ordinarily and daily employed in maintaining reasonable efficiency was not intended to be excluded from the application of the act. With this contention we are not able to agree. We cannot believe from the language of the act that the lawmakers intended that, in the trial of cases for an alleged infraction of the statute, an issue should be litigated in regard to which different minds might disagree as to the necessity of making repairs; but, rather, that the word "necessary" is used to prevent the matter of making of repairs from being used as a subterfuge to defeat the purpose of the law; that is, according to the legislative intent, "necessary repairs" denotes those need-

ful, not frivolous or unnecessary. Needful repairs are indispensable to the proper operation of the manufacturing establishment. They are also indispensable to the immediate and continued successful operation of such an industrial plant, and urgent in order to lessen the danger of accident to life and limb, and as we view it, in order to carry out one of the important purposes of the act. To encourage the delay of making repairs until "they were necessary in the sense that a failure to make them would involve immediate or imminent danger to life or property" would be an effort to adopt the rule of "locking the stable after the horse is stolen," and we do not think that such was the intention of the lawmakers, as disclosed by the plain provisions of the statute. The natural result of the law is twofold, the one being the protection of the employes and the attainment of a high degree of intelligence and citizenship on their part, and the other the enhancement of a degree of excellence and efficiency in the operation of the industrial establishment. The law has been upheld by this court upon the ground, *inter alia*, of reasonableness. To require a mill or factory to shut down and the majority of the force of operatives to remain idle while the ordinary and usual repairs are being made by those upon whom that duty devolves would tend to work a hardship upon all concerned. Such is not in accordance with the plain requirements of the statute, which appears to contemplate, to express it in common parlance, the running of such manufacturing establishment for ten hours per day without penalty or extra compensation, at such remuneration to those employed as may be agreed upon by the parties. The position that one in making necessary repairs would be excluded from the provisions of the act only in case of emergency, is no more tenable than that a watchman would be excluded from such provisions only under the same circumstances. The employment of William Harvey in the sawmill in making repairs necessary for keeping the machinery, equipment, and appliances in the mill in good working order which are ordinarily required in mills and factories, for more than ten hours, was not a violation of the statute of 1913.

The judgment of the lower court will therefore be reversed, and the defendant discharged.

(74 Or. 287)

**KLAMATH LUMBER CO. v. BAMBER et al.**  
(Supreme Court of Oregon. Jan. 19, 1915.)

1. PLEADING (§ 8\*)—FACT OR CONCLUSION—DISSOLUTION OF CORPORATION.

In corporation's action on notes, in which defendant pleaded in abatement that plaintiff had not filed the annual reports nor paid the annual license fees required by law, a reply admitting the allegations as to filing its reports and paying its license fees, and in avoidance averring that the corporation had dissolved and



brings the action to wind up its business, as is allowed by statute, is a mere conclusion of law, the reply not alleging that the steps required by L. O. L. § 6701, as amended by Laws 1913, p. 465, providing for dissolution by resolution of stockholder's meeting, had been taken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

## 2. CORPORATIONS (§ 618\*) — DISSOLUTION — JUDGMENT.

Under L. O. L. § 6699, providing that corporations expiring by limitation, or dissolved under the provisions of section 6701, as amended by Laws 1913, p. 465 (requiring a filing of a statement of vote of dissolution with the secretary of state, etc), or annulled by forfeiture or other cause by the judgment of the court, to continue as bodies corporate for five years to settle their business, where the corporation has not expired by limitation, the "forfeiture or other cause" must either or both be the result of a judgment of the court.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2457, 2458; Dec. Dig. § 618.\*]

## 3. CORPORATIONS (§ 613\*) — DISSOLUTION — PROCEEDINGS—STATUTE.

L. O. L. §§ 6716-6719, providing that a corporation neglecting for two consecutive years to furnish to the secretary of state any statement required by law, or to pay any license fee, shall be dissolved, requiring the secretary of state to report to the governor a list of delinquent corporations, whereupon the Governor shall by proclamation declare them dissolved, and providing a penalty for exercising the corporate powers thereafter, are penal and must be strictly construed, and failure to pay the fees does not ipso facto dissolve a corporation, but the filing of a list and proclamation are necessary to dissolution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2431-2434, 2437-2444; Dec. Dig. § 613.\*]

## 4. CORPORATIONS (§ 499\*) — RIGHT TO SUE — NONCOMPLIANCE WITH STATUTE.

Under the express provision of L. O. L. § 6708, a domestic corporation, which has failed to pay the last annual license tax, cannot maintain any suit in any court of justice within the state while such delinquency continues.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919, 2030; Dec. Dig. § 499.\*]

## 5. ABATEMENT AND REVIVAL (§ 85\*)—PLEA IN ABATEMENT—DISPOSITION.

A plea in abatement cannot be joined with a plea in bar, and must be disposed of before an answer to the merits can be considered.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 156, 508-510; Dec. Dig. § 85; Pleading, Cent. Dig. § 186.]

## 6. CORPORATIONS (§ 516\*)—PLEA IN ABATEMENT—WAIVER BY ANSWER TO MERITS.

In view of L. O. L. § 6709, providing that a plea that any domestic corporation has not paid any tax or fee required by law may be interposed at any time before trial on the merits, and, if issue is joined thereon, it shall be first tried, the mere filing of an answer to the merits does not of itself deprive the defendant of a separate plea in abatement, based on the corporation's delinquency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2029, 2046; Dec. Dig. § 516.\*]

In Banc. Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by the Klamath Lumber Company against Stella M. Bamber and another.

There was a judgment for defendants in justice court, and on plaintiff's appeal to the Circuit Court there was a judgment abating the action, and plaintiff appeals. Affirmed.

See, also, 142 Pac. 359.

The plaintiff brought an action in the usual form against the defendants to recover the amount of three promissory notes executed and delivered by them to the plaintiff. On August 18, 1913, the defendants filed a plea in abatement in which, after alleging their own residence in Klamath county for three years, and that the plaintiff has been doing business in that county since June 15, 1910, they state:

"That the plaintiff has not filed 'the annual reports as required by law for the year ending June 30, 1912, and 1913, nor has it paid the annual license fees for the year ending June 30, 1913, and 1914, as required by an act providing for the licensing of domestic corporations and foreign corporations, joint-stock companies and associations, to provide for the recording and filing of certain information concerning corporations, joint-stock companies, and associations, etc., approved February 16, 1903,' in violation of and in derogation of the express requirements and commands of said statute, and is a delinquent corporation, and has no rights or standing in any court of justice in this state under and by virtue of said statute to maintain any suit or action in any court of said state, and is in default of the payment as aforesaid of its license fees, and is in default of making its annual reports as required by law."

On the same day the defendants filed an answer to the merits in which they allege three separate defenses, one a denial of every allegation of the complaint, except signing the notes, another lack of consideration, and, third, a counterclaim. The plaintiff filed a reply on September 3d, denying the new matter in the answer, and on the following day replied to the plea in abatement, traversing it in some particulars, and made the following averment:

"Admits the allegation of paragraph 3 as to filing its reports and paying its annual license fees, but in avoidance says this is not necessary, as the corporation has dissolved and only brings this action to wind up its business, as is allowed by statute."

W. M. Duncan, of Klamath Falls, for appellant. W. H. A. Renner, of Klamath Falls, for respondents.

BURNETT, J. (after stating the facts as above). [1] The plaintiff would excuse itself from payment of the annual license fees mentioned in the plea by reliance upon section 6699, L. O. L., reading thus:

"All corporations that expire by limitation specified in their articles of incorporation, or are dissolved by virtue of the provisions of section 6701, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

Section 6701, L. O. L., to which allusion is there made, was amended by the act of February 26, 1913 (Laws 1913, c. 238). As thus amended, the latter section provides for dissolution of a corporation by the action of a stockholders' meeting called for such purpose. Certain requirements are there prescribed, relating to the form of resolution to be adopted and the fee to be paid, and the following provision is then made in the act:

"The filing by the secretary of a corporation of proof of the passage of a resolution of dissolution, as hereinbefore provided, shall not be sufficient to absolve such corporation from the payment of any annual license fee required by law, unless the directors of such corporation shall, by a majority vote, have also adopted a resolution to dissolve such corporation, and proof thereof shall have been furnished to the secretary of state by the written statement of the secretary of such corporation, setting forth a true copy of such resolution and showing the vote by which the same was adopted, and that such corporation is proceeding to dissolve, which statement shall be signed and sworn to by such secretary."

The confession and avoidance in the reply to the plea does not disclose that the steps required by section 6701 were taken, and consequently amount to nothing more than a conclusion of law. The facts concerning the requirements of the statute should have been alleged, if the plaintiff was proceeding to dissolve, and would thereby escape the payment of fees.

[2] Referring again to section 6699, L. O. L., we observe that the plaintiff does not appear to claim that its corporate existence expired by limitation. Neither is it disclosed that it was annulled by forfeiture or other cause by the judgment of any other court. It was contended that, by the language of that section, the term "forfeiture" was not necessarily controlled or qualified by the words "by the judgment of a court." In our opinion, however, the converse is true, and the words "forfeiture or other cause" are to be included in the same category, and either or both must be the result of a judgment of a court. The conclusion on this point is that the plaintiff can claim nothing under the provision of that section.

[3] Another contention of the plaintiff is based on sections 6716-6719, inclusive. It is said in section 6716:

"If any corporation organized or formed under, by, or pursuant to the laws of this state, whether now existing or hereafter created \* \* \* shall, for two consecutive years, neglect or refuse to furnish to the secretary of state any statement required to be furnished under any law of this state, or to pay to the state treasurer any license fee required to be paid under any law of this state, it shall be dissolved in the manner hereafter provided, and all powers conferred by law upon such corporation are hereby declared inoperative and void, unless the Governor shall, for good cause shown to him, give further time for the filing of any such statement and the payment of any such license fee. \* \* \*

This is part of the act of 1905 found in chapter 172 of the laws of that year. Other

sections of the same statute require that the secretary of state shall report to the Governor a list of all delinquent corporations on or before the first Monday in January of each year, and that the Governor shall forthwith issue his proclamation declaring such corporations dissolved and their articles of incorporation revoked and repealed. Publication of the proclamation and other details are required and a penalty provided for any one who shall exercise the corporate powers involved after the issuance of the proclamation. The construction of this act urged by the plaintiff is that the failure to pay the fees required ipso facto works a dissolution of the corporation, with the result that, for a period of five years thereafter named in section 6699, it may prosecute or defend actions or suits in the settlement of its business, etc. The statute of 1905 is penal in its nature, and provides for a forfeiture of corporate powers, and must therefore be strictly construed. Reading all the terms of the act together, it is plain that the filing of the list by the secretary of state and the proclamation by the Governor are integral parts of the process of dissolution which we cannot disregard. From this point of view, therefore, we are still compelled to say that the plaintiff has not shown such a state of affairs as warrants us in saying that it was dissolved to the extent of exempting it from the payment of fees.

[4] In our judgment the situation is controlled by section 6708, L. O. L., which declares:

"No domestic corporation, and no foreign corporation, joint-stock company, or association, which shall have failed to pay the last annual license fee, or any other tax or fee which shall have become due and payable against it, as provided in this act or any law of this state, shall be permitted to maintain any suit, action, or proceeding in any court of justice within this state, while such delinquency shall continue. \* \* \*

In the analogous case of *Hirschfeld v. McCullagh*, 64 Or. 502, 127 Pac. 541, we held that under such circumstances the courts would be closed against the offending corporation while its delinquency continued.

[5] It is further urged that the defendants waived the plea in abatement by answering to the merits. Since *Hopwood v. Patterson*, 2 Or. 49, it has been the rule in this state that a plea in abatement cannot be joined with a plea in bar and must be disposed of before an answer to the merits can be considered. *La Grande v. Portland Public Market*, 58 Or. 126, 113 Pac. 25; *Rafferty v. Davis*, 54 Or. 77, 102 Pac. 305; *Harrison v. Birrell*, 58 Or. 410, 115 Pac. 141.

[6] These precedents would control the case against the contention of the defendants, if they had in fact joined the plea in abatement and their defense to the merits in the same pleading. The record, however, does not disclose such a condition. Although filed on the same day, the plea in abatement was in a

separate statement of the defendants' reasons for defeating the present action while the defenses on the merits were embodied in an entirely separate document. Under such circumstances, the only requisite is that the plea in abatement shall be first considered and determined, and that was the procedure in this instance. In the present case this conclusion is strengthened by reference to section 6709, to this effect that:

"A plea that any domestic corporation or foreign corporation, joint-stock company, or association has not paid any tax or fee required by any law of this state, and which is then due and payable, may be interposed at any time before trial upon the merits in any action, suit, or proceeding, and, if issues be joined upon such plea, the same shall be first tried."

This section plainly contemplates that the mere filing of an answer to the merits will not of itself deprive the defendant of the plea in abatement, based upon the delinquency of the corporation, but that, whenever such failure of duty appears at any time before the trial of the action, the defendant may interpose the plea.

It follows that the judgment must be affirmed.

(75 Or. 168)

**RUSSELL v. CROOK COUNTY COURT et al.**  
(Supreme Court of Oregon. Jan. 19, 1915.)

**1. ATTORNEY AND CLIENT (§ 75\*)—SUBSTITUTION OF ATTORNEYS.**

Attorneys other than those who conducted the proceeding in the trial court for plaintiff, appearing for him in the Supreme Court and moving to dismiss his appeal, not having been substituted as provided by L. O. L. §§ 1086, 1087, will not be recognized.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110-119; Dec. Dig. § 75.\*]

**2. APPEAL AND ERROR (§ 776\*)—VOLUNTARY DISMISSAL—INTEREST OF PUBLIC.**

The public being interested, the appeal of plaintiff, in a proceeding to review the action of a county court in submitting to a vote the creation and establishment of a county, should not be dismissed at his instance, but should be disposed of on the merits; his original attorneys not having withdrawn or consented to such dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3115-3119; Dec. Dig. § 776.\*]

In Banc. Appeal from Circuit Court, Crook County; W. L. Bradshaw, Judge.

Proceeding by A. D. Russell against the County Court of Crook County and others. Heard on motion to dismiss plaintiff's appeal. Motion denied.

Claude McColloch, of Portland, and W. P. Myers, of Prineville, for appellant. W. H. Wilson, of The Dalles, Lewis H. Irving, of Madras, and Willard H. Wirtz, of Prineville, for respondents.

**EAKIN, J.** [1, 2] This is a proceeding by writ to review the action of the county court of Crook county in submitting to the voters of the county the matter of the creation and

establishment of Jefferson county, brought here by appeal. The plaintiff A. D. Russell by attorneys moves to dismiss the appeal, which motion is signed by A. D. Russell, petitioner, and by W. P. Myers and Claude McColloch as petitioner's attorneys. The proceeding was commenced and conducted in the circuit court by M. R. Elliott and N. G. Wallace, attorneys for plaintiff. The appearance and objects sought to be obtained by Myers and McColloch are antagonistic to the purposes of plaintiff's original attorneys, and without their concurrence. Sections 1086, 1087, L. O. L., provide how a change or substitution of attorneys may be accomplished. Myers and McColloch have not been substituted or otherwise recognized as attorneys in the case, and under present conditions they cannot be recognized here until regularly substituted or changed. The general rule is that a party to litigation may settle the case out of court or dismiss a case pending if it works no injury to the attorneys. However, in this case it appears that others than plaintiff are interested in the result to be accomplished, the matter in controversy being one of public interest; and the case should be disposed of on the merits in the interest of the public, as the original attorneys have not withdrawn or consented to such dismissal. The motion is denied.

(74 Or. 409)

**DU BOIS LUMBER CO. v. CLATSOP COUNTY et al.**

(Supreme Court of Oregon. Jan. 19, 1915.)

**1. HIGHWAYS (§ 122\*)—STATUTES—TAXATION—IMPLIED REPEAL.**

L. O. L. § 6384 et seq., providing that, whenever three freeholders of any road district shall petition the road supervisor to call a district road meeting of the voters of the district, the supervisor shall cause notice to be given, and shall hold a meeting for the improvement of highways and the levy of taxes therefor, was not superseded by Gen. Laws 1913, p. 610, amending section 6321, vesting the power to vote such additional taxes as they may deem advisable to improve the roads of a district in "resident taxpayers" of the district, etc.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**2. HIGHWAYS (§ 138\*)—IMPROVEMENT—ADDITIONAL ROAD TAX—VALUATION OF ASSESSABLE PROPERTY IN DISTRICT—CERTIFICATE.**

Where proceedings were instituted to improve certain highways at the expense of a highway district, under authority conferred by a meeting of legal voters of a road district, failure of the county clerk to furnish a certificate of the aggregate valuation of the assessed property of the district on application of the road supervisor, as required by L. O. L. § 6383, was a mere irregularity, and did not vitiate the proceedings.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 392; Dec. Dig. § 138.\*]

**3. HIGHWAYS (§ 138\*)—IMPROVEMENT—ADDITIONAL TAX—DESCRIPTION OF HIGHWAYS.**

Where a resolution adopted at a road district meeting of legal voters for the improvement of highways and the levy of a tax so des-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ignated the highways to be improved that there could be no mistake as to where the funds raised were to be expended, it was not defective for insufficiency of description.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 392; Dec. Dig. § 138.\*]

**4. HIGHWAYS (§ 138\*)—IMPROVEMENT—RESOLUTION—SUFFICIENCY.**

A resolution adopted at a road district meeting for the improvement of highways and the levy of a tax therefor, specifying generally the character and extent of the proposed improvements, the amount to be expended, etc., sufficiently constituted compliance with L. O. L. § 6387, regulating the proceedings to be taken for the levy of a tax for highway improvements, etc., and was not objectionable for failure to show whether the road was to be macadamized or to be improved with corduroy, plank, or hard surface improvement, or merely graded.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 392; Dec. Dig. § 138.\*]

**5. HIGHWAYS (§ 138\*)—IMPROVEMENT—ROAD DISTRICT MEETING—CHAIRMAN.**

L. O. L. § 6390, provides that the county road supervisor shall be ex officio chairman of all road district meetings of his district, and, in case of his absence or inability to act, the meeting shall elect a temporary chairman from its own members, who shall be a legal voter of the district. *Held* that, where a road district meeting at which a tax was levied for highway improvements, elected a chairman, omission of the minutes to show the reason why the road supervisor did not act as chairman did not affect the regularity of the proceedings.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 392; Dec. Dig. § 138.\*]

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by the Du Bols Lumber Company against Clatsop County and others to restrain the collection of a special road tax in district No. 15. A demurrer to the complaint was sustained, and the suit dismissed, and plaintiff appeals. *Affirmed*.

The complaint contains the usual allegations in such cases showing that plaintiff is the owner of a large area of land in the road district named. It then sets out all the proceedings concerning the levying of the tax in that district, and alleges that plaintiff has tendered the payment of all its taxes except the road district levy.

J. E. Magers and Chas. H. Carey, both of Portland (Carey & Kerr, of Portland, on the brief), for appellant. C. W. Mullins, Dist. Atty., and G. C. Fulton, both of Astoria, for respondents.

BEAN, J. The proceedings were initiated under the provisions of section 6384, L. O. L. Under this section three freeholders petitioned the road supervisor to call a district road meeting of the legal voters of the district to determine, under the provisions of section 6386 et seq., what, if any, county roads in the district should be improved, the character and extent of the improvements, and to levy a special tax to defray the expenses thereof. The petition, with the affidavit of the road supervisor authenticating the same, to the

effect that the signers were freeholders and legal voters residing in the district, was made a part of the record of the meeting. Notices of the time, place, and object of the meeting signed by the road supervisor were posted in three public places in the district more than 10 days prior to the meeting, as shown by the affidavit of the district supervisor. Pursuant to the petition and notices, a meeting of the legal voters, freeholders, and taxpayers of the district was held on November 22, 1913. By a majority vote a chairman and secretary were elected, the road supervisor acting as temporary chairman. A resolution was passed requiring the secretary to keep a record of the proceedings of the meeting and proof of posting of notices thereof, and to file the same with the county clerk. The following resolution was adopted by a majority vote:

"Resolved, that the following county roads in this district be improved in the manner following, to wit: That portion of road No. 15 lying between road No. 77 and Mr. H. Behneke's place, and road petitioned by Adolph Cook and others, and that portion of road lying between south end of Nehalem bridge and Chas. Gronnel's place, and the portion of road extending from main county road on south side of Nehalem bridge in an easterly direction to McKay creek. It is recommended that \$400 be expended on Adolph Cook road, \$500 on road leading to Behneke's, \$1,800 on that leading to Chas. Gronnel's place, and \$200 on road running to McKay creek, and the balance of the five (5) mill levy be expended on the main county road between James Jamison's place and end of road of road district No. 15 near Elsie. \* \* \*

"Resolved, that there be, and hereby is, levied a special tax of five (5) mills on the dollar upon all the taxable real and personal property of this district, for the purpose of raising money with which to defray the expenses of the special improvements heretofore by this meeting determined to be made."

By a majority of the voters present the following resolution was also passed:

"Resolved, that the proposed improvements and the character and manner thereof, and the rate of tax levied therefor, be submitted to the county court, and that the secretary report back to this meeting the action taken by the county court thereon."

The record of the meeting, including the resolutions above quoted, was certified by the chairman and secretary, and filed with the county clerk November 25, 1913. The minutes of an adjourned meeting held November 28, 1913, show that the county court approved the resolutions and the levy of a special tax; that all action taken was ratified by the voters of the district, and the record thereof certified by the county clerk.

[1] The plaintiff assigns that the court erred in sustaining the demurrer and in dismissing the complaint. It contends that the record does not disclose a compliance with the law, and that the tax is void. It is urged by counsel for plaintiff that section 6384, which is section 70 of the act of 1903 (Laws 1903, p. 283), was superseded, though not in terms, by the act of 1913 amending section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6321, L. O. L. (Gen. Laws 1913, p. 610); that the latter act is incompatible with the former; that it was not the intention to provide two methods by which road district taxpayers should convene for the purpose of voting special road taxes; and that there was not a compliance with the terms of the law of 1913. This latter act vests the power to vote such additional tax as they may deem advisable to improve the roads of the district in "resident taxpayers" of such district. The requirements, so far as considered necessary to note, are: (a) At least 10 per cent. of taxpayers of the district shall give notice. (b) Notices shall be posted by the road supervisor of the district by posting in three public places in the district and at the county courthouse at least 10 days prior to the meeting. (c) One notice shall be published at least three weeks in a weekly newspaper of general circulation in the county. (d) The notices shall be signed by at least 10 per cent. of the taxpayers of the road district, and shall give the time, place, and object of the meeting, which shall be held in the month of November. (e) Proof of posting notices shall be made by affidavit of the road supervisor and submitted to the meeting together with proof of publication. (f) At the time of the meeting it shall be organized by the election of a chairman and secretary. It will be noted that provision is made in the act of 1913 for raising funds to improve the roads of the district, without specifying any special road or roads or portions thereof, as mentioned in section 6384 et seq., L. O. L. The limitation as to the amount of the levy contained in the law of 1903 is not found in the later enactment. The scope and purpose of the two statutes are not the same. A complete system of road law was enacted in 1903. If we go back of that law and notice the act of 1893 (Laws 1893, p. 185; B. & C. § 4795 et seq.), we find detailed and voluminous provisions for petitioning the county court for, and remonstrating against, improving a road or portion thereof by grading, macadamizing, etc.; for the viewing and surveying of the same; for reports and hearings; for the assessment of the costs and expenses of the improvements, less the benefits upon all the land within three miles of such improvements; for the advertisement and letting of the contract and many other details; and providing for an appeal to the circuit court. It would seem that, this law not being satisfactory, in 1903, section 6384 et seq. was adopted as a more convenient and practical method of making special improvements upon certain roads or portions thereof.

In the consideration of the case at bar we are not concerned with the efficacy or expediency of the provisions of the act of 1913 amending section 6321. Neither the original act of 1909 nor the last amendatory statute expressly or impliedly repealed or amended the act of 1903. See *Leffingwell v. Lane*

County, 64 Or. 144, 129 Pac. 538. Repeal of a statute by implication is not favored. It is the duty of the court, if possible, to so construe the acts that both will be operative. A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *Sedgwick, Const. of Stat. & Const. Law* (2d Ed.) p. 97; 8 Cyc. 748. *Sutherland on Statutory Construction*, § 465, states the general principle, as summed up in *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417, as follows:

"(1) That the law does not favor a repeal of an older statute by a later one by mere implication. (2) The implication, in order to be operative, must be necessary, and, if it arises out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. \* \* \* A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose. \* \* \* A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute."

In a recent opinion of this court by Mr. Justice Ramsey in *Beirl v. Columbia County*, 144 Pac. 457, proceedings for the levy of a tax by virtue of sections 6384-6392 were upheld, thus giving the act under consideration in the case at bar full force.

[2] It is further contended by counsel for the plaintiff that the proceedings in question do not conform to the requirements of section 6384 et seq. Section 6383 provides that, on the application of any road supervisor or three resident freeholders of a road district, the county clerk shall furnish a certificate showing the aggregate valuation of the assessable property of the road district. The record does not show that such certificate was procured. In reviewing the record of a meeting of the legal voters of a road district levying a road tax, it is safe to take the rule stated in *Cooley on Taxation* (2d Ed.) p. 337:

"In voting the tax the people will be acting in their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that local business is largely and of necessity in the hands of plain people who are unskilled in the technicalities of law and unaccustomed to critical or even accurate use of language. A strict construction of their doings would inevitably be mischievous, and would defeat the collection of revenue in very many cases. It will be found, therefore, that the courts sustain such action whenever sufficient appears to make plain the intent of the voters, provided the intent is warranted by law."

Section 6386, L. O. L. directs:

"District road meetings legally called shall have power to determine what, if any, county

roads or portions thereof of the road district shall be improved in any special manner, and to determine the extent and character of the improvement or improvements they shall make thereon; provided, however, that the proposed improvements, and the character and manner thereof, shall have first been submitted to the county court; and shall have power to levy a special tax, not to exceed ten mills on the dollar, upon all the taxable real and personal property of the district, for the purpose of raising money with which to defray the expense of such special improvement or improvements, and such levy shall be based upon the valuation of the taxable property of the district as shown by the last certificate of the county clerk next preceding the district road meeting at which the tax is levied."

It is evident from a reading of the statute that the provisions for the obtainment of a certificate of the aggregate valuation of the taxable property of the district is a means for the voters of the district to secure information in order that they may vote intelligently upon the question of tax. The procuring of such certificate is not by the terms of the statute made a condition precedent to levying a tax. It is not alleged in the complaint that on account of the failure to procure such certificate the voters of the district made any error in levying the tax, or that the amount of the tax is unreasonable, or that any part thereof is unnecessary to improve the roads described. The statute does not require that such certificate, which is in the nature of a matter of evidence, should be made a part of the minutes of the meeting. At the most, the failure to obtain the certificate, if there was a failure, would be an irregularity only, and would not vitiate the proceedings of a road district meeting legally called.

[3] It is next contended that the resolutions adopted at the road district meeting did not sufficiently describe the county roads or portions thereof which it was proposed to improve. A careful examination of the description of the roads contained in the resolution above set forth leads us to believe to the contrary. The roads are so delineated that there can be no mistake as to where the funds proposed to be raised are to be expended. They refer to the county record of the road, and plainly indicate the portions thereof to be improved. While the descriptions contained in the resolution are necessarily general, we think they would be sufficient, under the statute, for a description in the petition for the laying out of a county road, where there is reason for more definite description than in the resolution in question.

[4] It is further urged on behalf of the plaintiff that the record of the meeting should show whether the road is to be macadamized or improved with corduroy, plank, or hard surface improvement, or whether it is simply to be graded. Section 6387, L. O. L., referring to resolutions for improvement and levy of a tax, provides:

"If any road district in this state shall determine to specially improve any county road or roads, or portions thereof, in such district, and

to levy a special tax to defray the expense thereof, as provided in the last preceding section, they shall do so by proper resolution, describing therein the road or roads, or portions thereof, they wish to improve; giving the initial and terminal points of the desired improvement or improvements, with the character and extent and estimated expense thereof, and also the rate of the tax levied, which resolution shall be signed by the chairman and secretary of the meeting, and transmitted to the county court by its next regular meeting following, and shall also be spread upon the minutes of the district road meeting."

While the resolution is general as to the character and extent of the proposed improvements, the amounts to be expended are plainly stated, and the proceedings relating thereto are much more extended and specific than those approved by this court in *Beirl v. Columbia County*, supra. Applying the rule quoted from Judge Cooley that technical irregularities should be overlooked so long as the substance of a good vote sufficiently appears, we think the resolutions, taken as a whole, are a substantial compliance with the statute, and sufficient in this respect to uphold the tax. *Oregon-Wisconsin Timber Co. v. Coos County*, 142 Pac. 575. The record in the last-named case shows that the proceedings were commenced upon the petition of three freeholders to the road supervisor, the same as in the case at bar.

[5] Section 6390, L. O. L., directs that the county road supervisor shall be ex officio chairman of all road district meetings of his district. In case of his absence or inability to act, the meeting shall proceed to elect a temporary chairman from among its own members, who shall be a legal voter of the road district. A competent secretary shall be elected, who shall keep the minutes of the meeting. These shall be submitted to the chairman for his approval. As approved, he and the secretary shall sign the same, and, after he has certified them, they shall be transmitted to the county clerk. It appears that at the time of levying the tax in question the meeting elected a chairman. The minutes do not disclose the reason for the road supervisor not acting as such chairman. We fail to discover wherein any injury has been effected by such proceeding. It is not alleged in the complaint that the acting chairman committed any errors or failed in any way in the performance of his duties, or that the result was in any way affected. The writer has attended New England town meetings, which were referred to in the argument, and we think the proceedings of the road district meeting were as full and technically correct as the usual proceedings in such town meetings when levying a tax. It would require a very strict construction of the minutes in question to hold that they were not sufficient. They show the jurisdictional facts, and the evidence of the levying of a tax affirmatively appears from the record of the meeting of the legal voters of the district. *Leffingwell v. Lane County*, supra.

It is also suggested that the minutes of the meeting do not show that the persons present had the required qualifications. However, it is recorded that "all persons present being taxpayers residing in and legal voters of such district," therefore we think this plainly indicates that the minutes, while not detailing all the qualifications, which would be impracticable, show that the members of the meeting were legal voters. The proceedings in this case are as full and specific as those in either the case of *Oregon-Wisconsin Timber Co. v. Coos County*, supra, or that of *Beirl v. Columbia County*, supra.

The requirements of the statute for the protection of the taxpayers as to notice and legality of the road district meeting have, we think, been strictly complied with. We find no failure to observe the letter of the law which tends to injuriously affect the taxpayer. 37 Cyc. 971, 972. To require a more strict or technical fulfillment of the special road tax law by the legal voters of a road district than is shown by the record in the case under consideration would be to practically nullify the statute authorizing such tax.

The lower court held that the tax levy as set forth in the complaint was valid. This holding was correct. There was no error in sustaining the demurrer to the complaint, and in dismissing the suit.

The judgment of the lower court is therefore affirmed.

MOORE, C. J., and EAKIN and HARRIS, JJ., concur.

(74 Or. 433)

CITY MESSENGER & DELIVERY CO. v.  
POSTAL TELEGRAPH CO.

(Supreme Court of Oregon. Jan. 26, 1915.)

1. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENT OF PARTIES.

The court should construe a contract with regard to the intent of the parties as expressed in the words used.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

2. CONTRACTS (§ 228\*)—MODIFICATION—CONSTRUCTION.

A contract between a telegraph company and a messenger company required the latter to deliver messages for the former, at specified rates of payment for deliveries within 20 blocks, and authorized the messenger company to collect reasonable charges from the addressees for deliveries outside that limit, not however to exceed the charges for similar service made by other telegraph companies. Several years after the contract was made, another telegraph company established free delivery throughout the city, and the messenger company was notified to discontinue charging addressees for the delivery of any telegrams. The manager of the telegraph company at that time stated that it would pay for such deliveries. *Held*, that the written contract was modified by the parties, and the messenger company was not required to make the deliveries outside the 20-block limit free,

but could recover from the telegraph company the reasonable value of such deliveries.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1042-1044; Dec. Dig. § 228.\*]

3. EVIDENCE (§ 397\*)—PAROL EVIDENCE—TERMS NOT IN WRITING.

Where a part of a transaction has been reduced to writing, but another part has not, the rule against contradicting terms of the writing applies only to that part reduced to writing.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

4. EVIDENCE (§ 445\*)—PAROL EVIDENCE—ORAL MODIFICATION.

A written agreement, except when prohibited by positive law, may be modified or annulled by a subsequent valid oral agreement.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

5. CONTRACTS (§ 238\*)—MODIFICATION—NEW CONDITIONS.

Where the situation of the parties to a written contract is materially changed by conditions unforeseen when the contract was made, so as to cause additional expense in its performance, the one who agrees to bear such expense cannot, after the contract has been performed by the other, repudiate that agreement and rely upon the terms of the written contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.\*]

6. CONTRACTS (§ 176\*)—CONSTRUCTION—QUESTIONS FOR COURT—ORAL MODIFICATION.

Where it was practically undisputed that a written contract had been modified by a subsequent oral agreement, the construction of the contract as modified was a question for the court.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.\*]

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by the City Messenger & Delivery Company against the Postal Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff brings this action to recover from the defendant the reasonable value of certain services rendered it. From a judgment based upon a verdict for the plaintiff, the defendant appeals.

Both parties to the action are Oregon corporations. The plaintiff, as its name implies, is engaged in the delivery, by messengers, of packages, messages, and telegrams. Its business is conducted in the city of Portland, Or. The defendant is a common carrier of telegrams for hire, operating in the state of Oregon, and forms part of a general system of telegraph and cable lines known as the "Mackay System," or "Postal Telegraph-Cable System." The services, for which recovery was had in the lower court, consisted in the plaintiff delivering a large number of telegrams for the defendant from the 1st day of February, 1912, to the 1st day of September, 1913. These were all delivered within the corporate limits of the city of Portland, and were what are known as "long deliver-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—42



les"; that is, they were addressed to places more than 20 blocks distant from the office of the defendant from which the telegrams were issued. It is conceded that the plaintiff actually rendered the services for which recovery was had. Such performance having been admitted, the plaintiff was required, in its direct case, to prove only the reasonable value thereof. Competent testimony upon this point was introduced, and the matter submitted to the jury for determination. No attack is made upon the conclusiveness of the determination by the jury so far as the reasonableness of the charges made by the plaintiff is concerned.

Omar C. Spencer, of Portland (Holman & Hampson, of Portland, on the brief), for appellant. Charles D. Mahaffie, of Portland (Brewster & Mahaffie, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is the defendant's theory of this case that, although the plaintiff performed the services in question of the reasonable value of \$2,373.70, nevertheless the company was under no obligation to pay the plaintiff this sum, or any sum, for the rendition of the same. Defendant contends that the services in question were performed by the plaintiff under the terms of a contract by which the latter was required to render the same in consideration of the general compensation moving from the defendant to the plaintiff under the contract, which heretofore the defendant has fully paid.

On October 1, 1903, the plaintiff entered into a written contract with the Postal Telegraph-Cable Company, a New York corporation, by the terms of which it was provided that the plaintiff should deliver for this company all its telegrams for delivery in the city of Portland, Or., for a period of 10 years from the date of the contract. It was further provided that the contract should be binding upon the parties thereto, and upon their respective successors and assigns, and it was understood and agreed that the Postal Telegraph-Cable Company of New York and its allied companies should be considered as one and the same company. The fact was established at the trial of this case that the defendant Postal Telegraph Company, an Oregon corporation, is allied with the Postal Telegraph-Cable Company, one of the contracting parties to the agreement of October 1, 1903. It further appeared that ever since the organization of the defendant company in November, 1903, the plaintiff and the defendant have acted under and in part performed the contract of October 1, 1903, as though the defendant had been one of the original contracting parties thereto. The defendant set up this contract in its answer, on the theory that it required the plaintiff to perform the services in question without special compensation from the defendant. The

provisions of the contract which are deemed material to this litigation are as follows:

"Third. The Messenger Company further agrees to promptly deliver in the said city of Portland, Or., all telegraph messages handed it by the Postal Company for delivery. \* \* \*

"Fourth. The Postal Company \* \* \* agrees to pay to the Messenger Company three and one-half (3½) cents for each telegraph message collected by the Messenger Company within seven (7) blocks of any of its offices where messengers are kept for the collection of messages, and accepted for transmission by the Postal Company, and three and one-half (3½) cents for each telegraph message delivered for the Postal Company by the Messenger Company within said limits; and further agrees to pay to the Messenger Company five (5) cents for each telegraph message collected by the Messenger Company between seven (7) and twenty (20) blocks distant from such offices, and accepted for transmission by the Postal Company, and five (5) cents for each telegraph message delivered for the Postal Company by the Messenger Company within said limits. \* \* \*

"Sixth. It is mutually agreed that \* \* \* during the continuance of this agreement \* \* \* the Postal Company \* \* \* shall not without the consent of the Messenger Company collect or deliver telegraph messages by messengers or permit any other corporation, firm, or individual to collect or deliver telegraph messages by messengers for said Postal Company in the said city of Portland, Or. \* \* \*

"Eighth. It is mutually understood and agreed that the Messenger Company may charge and collect from the addressees reasonable sums for the delivery of any of said telegraph messages addressed to points out of the delivery districts hereinabove described in paragraph fourth, in said city of Portland, provided, however, that such charges shall not exceed the sums charged by other telegraph or district companies in said city for like service. \* \* \* it being understood and agreed that the Postal Company and its allied companies shall be considered as one and the same company."

It was alleged and proved by the defendant that on November 20, 1911, the Western Union Telegraph Company, a business competitor of the defendant, adopted a policy of delivering telegraph messages free of delivery charges or tolls to the addressees thereof, at all places within the city limits of Portland. It is contended by defendant's counsel that by express written agreement the plaintiff was required to deliver for the defendant all the latter's telegrams addressed to points in the city of Portland; that the defendant, in addition to agreeing to pay the stipulated sums of money, extended to the plaintiff the privilege of collecting from the addressees of telegrams addressed to points out of the delivery districts above mentioned reasonable sums, "provided such sums should not exceed the sums charged by other telegraph or district companies in said city for like service." Under this contract, prior to November 20, 1911, the plaintiff delivered for the defendant all its telegrams within the city limits of the city of Portland, and the defendant paid the plaintiff the agreed amounts, and permitted the latter to collect from the addressees reasonable sums for messages delivered beyond the 20-block limit. It is shown by plaintiff that afterwards and until February, 1912, plaintiff



submitted bills, and the defendant paid for deliveries outside the 20-block limit. It also appears that during the time of the contract for deliveries outside the city limits the plaintiff collected of the recipients of messages, when able to do so, and, when not, the defendant paid therefor. On November 20, 1911, upon adoption by the defendant of a free delivery system, and a notification to the plaintiff that the latter should make no further collection from the addressees for the long deliveries, defendant claims that the plaintiff was still required to make such deliveries under the express terms of the contract; that the privilege of collecting from the addressees ceased, since the collection of any sum would have exceeded that charged by the Western Union Telegraph Company; but that no obligation or duty on the part of the defendant to pay the plaintiff particular or additional sums for making these long deliveries existed or arose, since, under the terms of the contract, the plaintiff was already required to perform the same as part of the general services agreed to be rendered by it thereunder.

The trial court refused to accept the defendant's theory of the case and charged the jury to find for the plaintiff the reasonable value for making the long deliveries mentioned. By exceptions to such instruction, and to the refusal of the court to charge the jury according to defendant's interpretation, and by a motion for a directed verdict in favor of the defendant, the question is raised as to whether or not the plaintiff was required under the terms of the agreement to make the long deliveries as a part of the general services to be performed by it during the 10-year term in consideration of the stipulated sums of money to be paid by the defendant. The only question involved depends upon the construction of the contract. Defendant's counsel urge that after the free delivery system was extended by the defendant, by paragraph 8 of the agreement, plaintiff was precluded from making any charge against addressees, and that there was no express obligation in the contract requiring the defendant to pay the plaintiff specially for making long deliveries.

[1] It is the duty of the court to construe a contract having regard to the intent of the parties as expressed in the words they have used. 2 Elliott on Contracts, § 1507; *Arment v. Yamhill Co.*, 28 Or. 474, 479, 43 Pac. 653; *Smith v. Kerr*, 108 N. Y. 31, 37, 15 N. E. 70, 2 Am. St. Rep. 362; *Walker v. Tucker*, 70 Ill. 527, 532; *Mathews v. Phelps*, 61 Mich. 327, 332, 28 N. W. 108, 1 Am. St. Rep. 581; *Wallowa Lake A. Co. v. Hamilton*, 142 Pac. 321.

[2] The letter of notification from the defendant to the plaintiff, when acceded to by the latter, modified paragraph 8 of the contract so that there was no agreement as to compensation for deliveries outside the 20-block limit. Under the contract, as so chang-

ed, what was the situation of the parties as to the payment for this service? The agreement had been in force for a long time. The change in the limits of the free delivery district does not appear to have been in the contemplation of the contracting parties at the time of the original agreement. The proviso, in paragraph 8, "that such charges shall not exceed the sums charged by other telegraph or district companies in said city for like service," was intended to regulate the amounts of collection from addressees in order not to curtail the business of the Telegraph Company, and not to stipulate the compensation of the delivering company in the event that such collections should be dispensed with. The Telegraph Company during all the time made provisions for delivering messages within certain limits free of expense to the addressees, yet the plaintiff was to be compensated by the defendant for services within such free delivery districts. Nowhere is it apparent that the Messenger Company should perform services free of charge, or that the rates received within any certain limits should liquidate or affect to any extent the payment for deliveries outside such limits. No good reason appears to warrant the belief that the parties intended that the plaintiff should be paid for making deliveries at a short distance from the office and receive no remuneration for carrying telegrams a longer distance. This is indicated both by the terms of the contract and the conduct of the parties thereunder. The change merely extended the boundaries of the free delivery area. The subject of the amount to be paid for this particular service, after the change in the system, was not embraced within the terms of the written memorandum.

[3, 4] Where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form, the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. 4 Wig. Ev. § 2430. A subsequent departure from the terms of a written contract by the parties and mutually acquiesced in abrogates the original contract to that extent. A written agreement, except when prohibited by positive law, may be modified or annulled by a subsequent valid oral agreement of the parties. *Zanella v. Iron Works*, 62 Or. 213, 124 Pac. 660; *Pippy v. Winslow*, 62 Or. 219, 224, 125 Pac. 298.

The manager of the plaintiff company testified, in effect, that after the receipt of the notice not to charge he communicated with Mr. Annand, the manager of the defendant company, and asked him who would pay for the long deliveries, and was assured that the Postal Telegraph Company would pay the same; that after that telegrams were sent out under that arrangement.

[5] Where, after a contract is entered into,

conditions materially change in a way unforeseen at the date of the agreement, and the question arises as to who is to bear the expense, the party then agreeing to assume it cannot, after the work is done, fall back on the terms of the original contract. *Stewart v. Ketitas*, 22 N. Y. Super. Ct. 261. There is no more certain way of finding out what the contracting parties meant than to ascertain what they have actually done in carrying out the contract. By so doing we learn what construction the parties themselves have placed upon the terms of their stipulation. 2 Page on Contracts, § 1126; *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 269, 272, 24 L. Ed. 410; *Hall v. French Wine Co.*, 149 App. Div. 609, 134 N. Y. Supp. 158; *Lowrey v. Hawaii*, 206 U. S. 206, 27 Sup. Ct. 622, 51 L. Ed. 1026.

[8] There was practically no dispute that the contract was changed. It was therefore proper for the court to construe it as modified, and to submit to the jury the determination of the amount of the reasonable value of the services.

The interpretation of the contract by the learned judge was correct.

The judgment of the lower court will therefore be affirmed.

MOORE, C. J., and EAKIN and HARRIS, JJ., concur.

(74 Or. 327)

SHARKEY et al. v. PORTLAND GAS & COKE CO.

(Supreme Court of Oregon. Jan. 19, 1915.)

APPEAL AND ERROR (§ 832\*)—GROUNDS FOR REHEARING — MISSTATEMENT OF FACT IN OPINION.

In an action for injury to plaintiff's trees, etc., from gas escaping from a main due to a break from defective filling of an excavation, an alleged erroneous statement in the opinion that the testimony tended to show that the break was due to a water main laid across the gas main held no ground for a rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

On motion for rehearing. Motion overruled.

For former opinion, see 144 Pac. 1152.

BURNETT, J. In the opinion heretofore filed in this case the following language was used:

"Some of the testimony tends to attribute the break to the fact that a water main had been laid across the gas main by the city authorities, and that the refilling of the excavation caused a pressure against the gas main, which it could not withstand, resulting in the breach from which the gas escaped."

The petition for rehearing is based upon the hypothesis that the excerpt quoted is not a true statement of the fact. According to the petition, the inaccuracy consists in stating that the water main was laid across the gas main instead of directly beneath it. The

opinion does not state that one main was laid upon the other, and it can make little difference whether it was laid transversely above or below or parallel above or below the other conduit, for the cause of the break was attributed to the manner in which the excavation was refilled and not to the contact of one main with the other. There was abundant testimony that the gas escaped; that the trees died; and that the break in the gas main was caused by the defective manner in which the excavation for the city water main was closed. Whether the defendant was negligent in not discovering the leak and controlling the escaping gas was a question of fact for the jury, to be determined from all the circumstances disclosed by the testimony; and hence it was an error to allow the nonsuit. As it was the defective filling of the excavation to which the break was attributed, the inaccuracy of statement concerning the relative position of the two mains does not affect the case and constitutes no reason for a rehearing.

The motion is overruled.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(74 Or. 544)

DUESTER et al. v. ALVIN.

(Supreme Court of Oregon. Jan. 19, 1915.)

1. DEEDS (§ 150\*)—BUILDING RESTRICTIONS—VALIDITY.

A reservation in a deed of a city building lot of the right of forfeiture for the grantee's violation of building restrictions was only a partial restraint on the use of the property incident to a transfer of the title and was valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480; Dec. Dig. § 150.\*]

2. COVENANTS (§ 53\*)—EFFECT—SUBJECT-MATTER NOT IN ESSE.

Covenants relating to a subject-matter not in esse are personal, and do not run with the land so as to bind assignees, unless they are expressly named in the deed.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 22, 52; Dec. Dig. § 53.\*]

3. DEEDS (§ 150\*)—USE OF PROPERTY—REGULATIONS—LIMITATIONS.

Limitations placed on the use of real property obtain their force from the right of the fee owner to reasonably regulate the manner in which the premises, when conveyed by him, shall be occupied, with reference to the kind and value of the structures to be erected and their location.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 480; Dec. Dig. § 150.\*]

4. COVENANTS (§ 69\*) — BUILDING RESTRICTIONS—COVENANTS RUNNING WITH LAND.

A purchaser of real property subject to building restrictions, of which he has knowledge when he obtains the title, is bound to comply therewith.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 67-69; Dec. Dig. § 69.\*]

5. COVENANTS (§ 77\*) — BUILDING RESTRICTIONS—ENFORCEMENT—RIGHT TO SUE—OTHER PROPERTY OWNERS.

Where defendant acquired city property with knowledge that it was subject to building

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

restrictions for the benefit of the entire district, owners of other property in the district acquired from the same grantor were entitled to sue in equity to enforce the restrictions.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 77-89; Dec. Dig. § 77.\*]

**6. INJUNCTION (§ 62\*)—SCOPE OF REMEDY—NEGATIVE COVENANTS IN DEEDS.**

Equity will enforce by injunction negative covenants and clauses in deeds restricting the use of real property, though such covenants do not in law constitute assignments or covenants running with the land.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 124-127, 129; Dec. Dig. § 62.\*]

**7. NUISANCE (§ 72\*) — PUBLIC NUISANCE — RIGHT TO SUE.**

When the creation or maintenance of a public nuisance especially injures a person in a manner distinct from that suffered by the public, such person may sue to restrain its continuance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

**8. INJUNCTION (§ 114\*) — BUILDING RESTRICTIONS—ENFORCEMENT—PARTIES.**

In proceedings to enforce building restrictions, the rights and remedies of the original grantor and of those immediate and intermediate grantees not being similar, it was unnecessary to join them as parties plaintiff, or to aver that they had been especially injured, or that the original grantor on request refused to become a party, in order to authorize an owner of a lot in the addition to protect his right in maintaining the uniformity in the location and value of residences to be erected in the district, by enforcing the restriction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 202-220; Dec. Dig. § 114.\*]

**9. ESTOPPEL (§ 83\*) — BUILDING RESTRICTIONS—PERSONAL COVENANT.**

Where a corporation opened a residence addition and sold lots subject to restrictions as to the first cost of buildings to be erected thereon and restraining their location nearer than 20 feet from the street line, etc., such covenants were not personal to the grantor, but it was bound thereby under the doctrine of equitable estoppel, whereby each purchaser of property in the addition, except in the business district, was entitled to rely on the restrictions, and could enforce them against all purchasers except such as secured title without knowledge of the limitations imposed.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 218, 227-229; Dec. Dig. § 83.\*]

**10. COVENANTS (§ 51\*) — BUILDING RESTRICTIONS—AUTHORITY TO CHANGE.**

Where a corporation opened a city addition and sold lots therein subject to restrictions as to the location of buildings, the corporation, after having sold lots subject to the restriction, could not change the general plan or scheme of the residences to be erected in the district set apart for that purpose by selling a lot free from the restriction.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 50; Dec. Dig. § 51.\*]

Department 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by F. X. Duester and others against P. A. Alvin. Decree for complainants, and defendant appeals. Affirmed.

This is a suit by F. X. Duester and H. C. Raven, for themselves and all other persons who might wish to join them, against P. A. Alvin, for a mandatory injunction to require

him to remove from his real property a building, and also to set back further from the line of a street the foundation for another structure to be erected on the premises. The facts are that E. Henry Womme, the owner in fee of a tract of real property in Multnomah county, Or., caused the land to be surveyed and platted as Overlook addition to the city of Portland, dedicating to the public all the streets, alleys, and boulevards noted on the plat, which map was duly recorded. The plat did not indicate reservations for any purpose, except the right of the dedicator to construct, maintain, and operate street railways on, over, and through some of the specified highways. Womme from time to time conveyed parts of the land so platted to the Overlook Land Company, a corporation, which sold and conveyed lots in that addition as purchasers thereof could be secured. The deeds so executed by the company contained a clause which reads:

"This conveyance, however, is made with the further consideration that the grantee —, heirs or assigns, will not use said premises for any other than resident purposes; will not erect more than one residence on each and every lot thereof; will not construct any building nearer to the front line of any street than 20 feet, nor erect any residence on said premises, the first cost of which shall be less than \$2,000; and that any violation of such covenants, or either of them, shall work a forfeiture of the estate of the said grantee, —, heirs or assigns, in and to the said premises."

The corporation, on June 15, 1907, executed to Hans Holmberg and Theresa Holmberg, his wife, a deed to lot 9 in block E in that addition; the conveyance being subject to the foregoing building restrictions, except that two residences were permitted to be erected on the premises. The side lines of this lot as platted extend at right angles from Overlook boulevard on the easterly end to an acute angle on Melrose drive at the westerly end, the premises being 50 feet wide, its northerly line 185 feet and its southerly line 153 feet. The greater part of the boulevard named is parallel with the westerly border of Overlook addition; that boundary as run from the northwest corner of the tract being south 37° 52' 15" east. All blocks east of Overlook boulevard, except such as are rendered angular by that highway, extend north and south, consisting of lots numbered from 1 to 8, inclusive, on the east side and from 9 to 16 on the west. Each of such lots is 50 feet from north to south and 100 feet from east to west. The blocks border upon avenues extending north and south, the first of which is Maryland avenue on the east, and upon streets extending east and west. The lot conveyed by the company to Holmberg and his wife being so much larger than ordinary, the corporation granted permission to erect upon the premises two residences, but required each dwelling to comply with the restrictions hereinbefore mentioned. Holmberg and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his wife, on March 6, 1908, conveyed the lot to F. P. Nelson and Emma Nelson, his wife, who, reserving the easterly 80 feet of the premises, sold and conveyed the remainder on May 11, 1912, to the defendant, P. A. Alvin, but in the deed evidencing a transfer of the title Nelson and his wife inadvertently omitted the restricting covenant referred to. Alvin, pursuant to authority obtained from a representative of the Overlook Land Company to erect on the premises a garage, put up near the back part of the land so conveyed to him, at an outlay, as alleged in the answer, of \$750, a building which was finished inside as a dwelling and which he occupied as a residence. He also procured plans for a house 28 feet wide and 48 feet long to be built on his land; the easterly end of the structure joining the smaller building and the westerly end, including a proposed built-in porch, the upper portion of which was to be finished as a part of the house, coming to a point, at its closest distance of 5 feet 4½ inches at an acute angle with Melrose drive. He excavated a basement for the entire house, except the porch, and was putting in cement foundation walls when this suit was instituted.

The complaint charges, in effect, that the Overlook Land Company, intending to convert such addition into an exclusive and desirable residence district, adopted a general plan and scheme of building restrictions for the entire addition, except a few lots in blocks —, and, to evidence a transfer of the legal title to such real property, approved a general form of deed, containing the restrictive covenants hereinbefore quoted; that the plaintiffs have purchased from the company lots in Overlook addition and are the owners and holders of the legal title thereto; and that they and other purchasers of lots in such addition had knowledge of, and relied upon, such general scheme and plan of improvement for the benefit of the entire addition, by reason whereof a greater consideration was paid for such real property than would otherwise have been given without such restrictions, and they have severally erected valuable dwelling houses in compliance therewith. The complaint sets forth the facts, in substance, as hereinbefore stated, and avers that the defendant purchased his part of a lot with knowledge of such general plan and scheme, and had been notified thereof and requested to remove the structure erected on his premises so as to conform with the requirements of such plan, but that he had refused to comply therewith, and that the plaintiffs had no plain, speedy or adequate remedy at law.

A temporary restraining order was granted when the suit was commenced. The defendant moved to dissolve the injunction, and also demurred to the complaint on several grounds, but stipulated, however, that the motion might be denied and the demurrer overruled, reserving the right to present at

the trial the legal questions so raised. The answer denied the material allegations of the complaint, and for a further defense averred, in effect, that the corporation did not at any time place a general restriction over the entire addition, but reserved to itself the right originally to deal with the real property therein to suit itself and to sell and convey lots for business purposes without any restrictions; that the corporation has permitted numerous violations of such restrictions, as to the limit from the street lines and the cost of buildings, and there never was any general plan or scheme to beautify the addition or to provide uniformity with respect to the distance of buildings from the street or to the minimum cost of residences; that defendant's house, as located upon the ground, will not obstruct the view, or interfere with the enjoyment of plaintiffs' property; and that he had been damaged by the temporary injunction issued herein.

The reply put in issue the allegations of new matter in the answer, and, the testimony having been taken, the court made findings of fact and of law as alleged in the complaint, and granted the relief therein prayed for, from which decree the defendant appeals.

W. A. Leet and L. D. Mahone, both of Portland, for appellant. S. C. Spencer, of Portland (H. J. Parkison, Harry Yancovich, and E. V. Hillius, all of Portland, on the brief), for respondents.

MOORE, C. J. (after stating the facts as above.) It is contended that the complaint fails to show any legal right on the part of the plaintiffs to maintain this suit, for which reason their primary pleading does not state facts sufficient to entitle them to equitable interference, and that an error was committed in receiving any evidence on their part, to the introduction of all of which objections were made on that ground and exceptions saved.

[1] It will be remembered that the restrictions imposed by the Overlook Land Company upon each grant of real property in Overlook addition, except as to lots set apart for business purposes, provided that a violation of any of the covenants contained in the deeds should work a forfeiture of the estate of the grantee, his heirs or assigns, in or to the premises. It will thus be seen that the corporation reserved to itself a possible reversionary interest in the several lots conveyed, whereby the conditional estate granted might become forfeited for a violation of any of the restrictions prescribed. Such provision in the deeds was only a partial restraint, incident to a transfer of the title to real property, and is valid. Seeck v. Jakel, 141 Pac. 211.

[2] Covenants relating to a subject-matter not in esse, as for the building of a fence or

the erection of a structure upon designated real property, are personal, and do not run with the land so as to bind assignees, unless they are expressly named in the deed. *Brown v. Southern Pacific Co.*, 36 Or. 128, 58 Pac. 1104, 47 L. R. A. 409, 78 Am. St. Rep. 761; *Hisey v. Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60.

[3] Regulations and limitations placed upon the use of real property obtain their binding force and efficiency from the right which every owner of the fee has reasonably to regulate the manner of how the premises, when conveyed by him, shall be occupied, the kind and value of the structures to be erected, or the buildings to be placed thereon, and their location with respect to exterior or other lines.

[4] When land is granted subject to such restrictions, the grantee, who had knowledge thereof before accepting a conveyance of the title to the premises, cannot equitably repudiate the restrictions, or refuse to comply with or fulfill them. A purchaser of real property subject to such limitations, if he secured the title with knowledge of the restrictions thus imposed, is bound thereby, and it would be unjust for him to trench upon or ignore the covenants and conditions which his immediate grantors assumed with respect to the premises. *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 859, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

Though the restrictions herein provide "that any violation of such covenants, or either of them, shall work a forfeiture of the estate of the said grantee, —, heirs or assigns, in and to said premises," it is unnecessary to consider the nature of the covenant, for the testimony establishes the fact that, when negotiating for a purchase of a part of lot 9 in block E in Overlook addition, the defendant was informed by Mrs. Nelson, the then part owner of the premises, of the restrictions imposed thereon by the original grantor. This covenant grants a conditional estate, in the nature of a negative easement, whereby each grantee who secured a title to any land in Overlook addition with knowledge of the limitations prescribed became seised of a servient estate as to his own premises, and also the owner of a dominant estate in all other lots the deeds to which contained such conditions. *Silberman v. Uhrlaub*, 116 App. Div. 869, 102 N. Y. Supp. 299; *Landsberg v. Rosenwasser*, 124 App. Div. 559, 108 N. Y. Supp. 929.

[5] The covenant in each deed executed by the corporation was made in pursuance of a general scheme adopted by it for the purpose of preserving the addition as desirable residence property. The restriction created an equitable servitude which must be regarded as of value to the whole property. It was inserted in the deeds for the benefit of those who became owners of separate parcels, and is binding in equity on a grantee

of any portion of the premises who secured a title thereto with knowledge of such restriction. *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701.

[6] Courts of equity will enforce, by injunction, negative covenants and clauses in deeds, restricting the use of real estate, though such conditions do not, in law, constitute easements or covenants running with the land. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027.

These restrictions, in the case at bar, prohibit each owner of real property so conveyed from violating the limitations put upon his premises, because a breach thereof would or might affect the dominant estate therein of some or all other owners of lots. Since his land is subjected to the burdens incident to a servient estate in the premises, he has the corresponding advantage of enforcing in equity his rights in and to the dominant estate as to all other real property the owners of which obtained their title with knowledge of the covenant, and he may prevent any infringement that would or might affect his land.

[7] The rule prevails in this state that, when the creation or maintenance of a public nuisance would specially injure a private party in a manner distinct from that suffered by the public, he may maintain a suit to restrain its continuance. *Parrish v. Stephens*, 1 Or. 74; *Luhrs v. Sturtevant*, 10 Or. 170; *Watts v. Foster*, 12 Or. 247, 7 Pac. 24; *Essex v. Wattier*, 25 Or. 7, 34 Pac. 756; *Blagen v. Smith*, 34 Or. 394, 56 Pac. 292, 44 L. R. A. 522; *Van Buskirk v. Bond*, 52 Or. 234, 96 Pac. 1103; *Moore v. Fowler*, 58 Or. 292, 114 Pac. 472; *Bernard v. Willamette Box & L. Co.*, 64 Or. 223, 129 Pac. 1039. The obstruction of a highway is a public nuisance constituting a misdemeanor, and, upon a conviction for a violation thereof, the party so found guilty may be punished. L. O. L. § 2210. In such case, whether the state or a private party who has sustained a special injury prosecute the action for an infringement of the public right is unimportant, for the principal relief sought in either instance is identical. Other illustrations might be cited where the misapplication of public funds have been enjoined at the suit of a private party, in which case the state also could have obtained the same relief. In the case at bar, however, a suit by the Overlook Land Company against one of its grantees of real property in Overlook addition to have a forfeiture decreed for an alleged breach of the covenant would essentially differ from a suit by one or more of the owners of lots in such addition who, by reason of their dominant estate, seek to enjoin a violation of such restrictions by the owners of other lots, though each suit might be predicated upon an allegation of the same facts.

[8] The rights and remedies of the original grantor and of its immediate or intermediate grantees of such lots not being similar, it

his wife, on March 6, 1908, conveyed the lot to F. P. Nelson and Emma Nelson, his wife, who, reserving the easterly 80 feet of the premises, sold and conveyed the remainder on May 11, 1912, to the defendant, P. A. Alvin, but in the deed evidencing a transfer of the title Nelson and his wife inadvertently omitted the restricting covenant referred to. Alvin, pursuant to authority obtained from a representative of the Overlook Land Company to erect on the premises a garage, put up near the back part of the land so conveyed to him, at an outlay, as alleged in the answer, of \$750, a building which was finished inside as a dwelling and which he occupied as a residence. He also procured plans for a house 28 feet wide and 48 feet long to be built on his land; the easterly end of the structure joining the smaller building and the westerly end, including a proposed built-in porch, the upper portion of which was to be finished as a part of the house, coming to a point, at its closest distance of 5 feet 4½ inches at an acute angle with Melrose drive. He excavated a basement for the entire house, except the porch, and was putting in cement foundation walls when this suit was instituted.

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A temporary restraining order was granted when the suit was commenced. The defendant moved to dissolve the injunction, and also demurred to the complaint on several grounds, but stipulated, however, that the motion might be denied and the demurrer overruled, reserving the right to present at

the trial the legal questions so raised. The answer denied the material allegations of the complaint, and for a further defense averred, in effect, that the corporation did not at any time place a general restriction over the entire addition, but reserved to itself the right originally to deal with the real property therein to suit itself and to sell and convey lots for business purposes without any restrictions; that the corporation has permitted numerous violations of such restrictions, as to the limit from the street lines and the cost of buildings, and there never was any general plan or scheme to beautify the addition or to provide uniformity with respect to the distance of buildings from the street or to the minimum cost of residences; that defendant's house, as located upon the ground, will not obstruct the view, or interfere with the enjoyment of plaintiffs' property; and that he had been damaged by the temporary injunction issued herein.

The reply put in issue the allegations of new matter in the answer, and, the testimony having been taken, the court made findings of fact and of law as alleged in the complaint, and granted the relief therein prayed for, from which decree the defendant appeals.

W. A. Leet and L. D. Mahone, both of Portland, for appellant. S. C. Spencer, of Portland (H. J. Parkison, Harry Yanckwich, and E. V. Hillius, all of Portland, on the brief), for respondents.

MOORE, C. J. (after stating the facts as above.) It is contended that the complaint fails to show any legal right on the part of the plaintiffs to maintain this suit, for which reason their primary pleading does not state facts sufficient to entitle them to equitable interference, and that an error was committed in receiving any evidence on their part, to the introduction of all of which objections were made on that ground and exceptions saved.

[1] It will be remembered that the restrictions imposed by the Overlook Land Company upon each grant of real property in Overlook addition, except as to lots set apart for business purposes, provided that a violation of any of the covenants contained in the deeds should work a forfeiture of the estate of the grantee, his heirs or assigns, in or to the premises. It will thus be seen that the corporation reserved to itself a possible reversionary interest in several lots conveyed, whereby the estate granted might become a violation of the deed. Such partial violation of the deed. Seeck.

Jakel, 141 Pac.

[2] Covenants

not in esse.



was unnecessary to join them as parties plaintiff, or to aver that they had been specially injured, or that the Overlook Land Company, upon request, refused to become a party, in order to authorize an owner of a lot in such addition to protect his right in maintaining the uniformity of the location and the value of residences to be erected upon the premises. *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

In *Sharp v. Ropes*, 110 Mass. 381, 385, Mr. Justice Ames, in discussing this subject, says:

"It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee."

To the same effect see *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. 684; *Hills v. Metzgeroth*, 173 Mass. 423, 53 N. E. 890; *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171; *Coughlin v. Barker*, 46 Mo. App. 54; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701.

The plaintiffs herein are proper parties, and the averments of the complaint in respect to their right to maintain this suit are sufficient.

It is maintained that, since the Overlook Land Company conveyed lot 9 in block E in Overlook addition to Hans Holmberg and his wife, granting the right to place on the premises two dwellings, each to be located with reference to the prescribed distance from the street lines, authority to change the restrictions was thereby reserved to the company, whereby the limitation was not binding upon it, for which reason the restrictions are not reciprocal or obligatory upon the defendant, and hence an error was committed in granting the relief prayed for in the complaint.

"A court of equity," says Vice Chancellor Stevens in *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111, "will restrain the violation of a covenant entered into by a grantee restrictive of the use of lands conveyed, not only against the grantee covenantor, but against all subsequent purchasers having notice of the covenant, whether it run with the land or not. There is, however, this distinction: The original grantor in imposing the covenant upon the grantee either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or a part of the remaining lands."

Building restrictions, however, must be construed so as to give effect to the intention of the parties. *Hyman v. Tash* (N. J. Ch.) 71 Atl. 742. An examination of some of the deeds executed by the Overlook Land Company of property in Overlook addition, which conveyances were received in evidence, fails to show any covenant upon the part of that grantor whereby it expressly stipulated to

bind itself. As the corporation is not a party to this suit, whatever may be said in this opinion in respect to its method of dealing with the real property cannot be binding upon it. A printed circular issued by its agents, offering for sale lots in such addition, refers to the street and other public improvements that had been made on the premises; the car service which had been secured; the scenery which the location afforded; and the restrictions which were to be imposed on each lot. Relying upon these representations, of which the corporation undoubtedly had notice, purchasers of lots in the addition secured a title thereto by deeds containing, with but few exceptions, the restrictions specified.

[9] From a careful examination of all the testimony and from a consideration of all the circumstances attending the sale of lots we are satisfied that the covenants hereinbefore set forth were not personal to the corporation, but that it was bound thereby under the doctrine of an equitable estoppel, whereby each purchaser of real property in Overlook addition, except in the business district, had the right to rely upon the restrictions, and can enforce them against all other purchasers, except such as have been mentioned, who secured a title to their premises with knowledge of the limitation imposed. *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209.

It is argued that the 20-foot restriction with respect to the location of residences does not apply to lots that border upon a street in any other manner than a right angle, and, as the defendant's real property abuts upon Melrose drive at an acute angle, his part of a lot is exempt from the limitation. Several houses have been built slightly within the prescribed limits on lots, the fronts of which are rendered angular, and one deed executed by the corporation of a lot having such front provides that the dwelling to be erected thereon may be placed as near as 15 feet from the property line. It is stated in the briefs of the plaintiffs' counsel that the lot, for the benefit of which the corporation pretended to confer authority upon the owners to erect a residence nearer than 20 feet from the street, has no building thereon, and that such attempted violation of the restriction was unknown to them until the trial of this cause.

[10] From what has been said upon another point, it is believed that the corporation did not reserve the privilege, nor could it exercise authority, to change the general plan and scheme of the residences to be erected in the district set apart for that purpose. The testimony shows that, when this cause was tried, there had been erected in Overlook addition 130 houses, 5 of which were nearer than 20 feet from the front line of the lot on which each was respectively placed. The defendant's evidence shows several dwellings



have been erected, each of which has been placed a few inches nearer the street line than prescribed. It appears, however, that these infringements upon the covenant were caused by errors of building contractors, who, in erecting dwellings, failed to locate the margins of the several streets. A few slight departures from the prescribed restrictions should not defeat the right of an owner of a dominant estate in the lots where the violations have occurred from enforcing the limitations as to other lots.

It is conceded that the restrictions with respect to the 20-foot limit do not apply to all the buildings erected on Maryland avenue, on which highway the houses used for business purposes are located. It is necessary that goods, wares, and merchandise should be kept for sale within reasonable distance from residence districts, and, complying with this requirement, it seems to have been mutually agreed by the residents of Overlook addition that offices, shops, and stores devoted to trade and business should be erected near the property line in order to accommodate the public. But, however this may be, the few departures on Maryland avenue from the general plan ought not to defeat the entire scheme.

Many other alleged errors are assigned, but, deeming them unimportant, and believing this cause was correctly decided, the decree should be affirmed; and it is so ordered.

**BURNETT, EAKIN, and BENSON, JJ.,**  
concur.

(74 Or. 442)

# KINNEY v. ECKENBERGER.

(Supreme Court of Oregon. Jan. 26, 1915.)

## 1. BROKERS (§ 49\*)—RIGHT TO COMPENSATION—FAILURE TO COMPLETE CONTRACT—"PURCHASE."

Plaintiff agreed, in consideration of assistance rendered him by defendant in securing an option on land owned by the S. Company, to pay defendant a specified commission in case he purchased the property or it was purchased by other parties through him; it being understood that plaintiff would purchase the land for the purpose of reselling it. Plaintiff procured from C. and S. an option to purchase the property or the stock of the S. Company at the election of the sellers, and the time for making payment was subsequently extended by an agreement providing that plaintiff agreed to purchase such of the capital stock as might be in the hands of C. and S., the value of the balance to be deducted from the price, and that plaintiff agreed not to raise any question as to the ownership of the land; this, however, referring to certain minor defects in the S. Company's title. A third agreement recited that plaintiff had forfeited his right to purchase the property or stock and provided that he should be given an opportunity to purchase such stock until a specified date. The S. Company had no marketable title to a large part of the land, and plaintiff did not exercise his option to purchase. *Held*, that all of the agreements with C. and S. were options, though the second agreement somewhat indicated that plaintiff had elected to purchase the property, and, as plaintiff never purchased the property, the broker was not entitled to the specified commission, as

"purchase" as used in the agreement meant the acquisition of title or interest in property, an executed and not an executory contract, and an option to buy was not an actual purchase nor an executed contract of purchase.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

For other definitions, see Words and Phrases, First and Second Series, Purchase.]

## 2. CANCELLATION OF INSTRUMENTS (§ 4\*) — MISTAKE OF FACT.

The agreement between plaintiff and defendant having been entered into under a mutual mistake as to the S. Company's title to the land, plaintiff should be relieved from the obligation thereof and the agreement should be canceled.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 4.\*]

## 3. BROKERS (§ 63\*)—RIGHT TO COMPENSATION—FAILURE TO COMPLETE CONTRACT.

A marketable title in fee simple to property desired to be purchased by a principal is necessary to sustain a broker's claim for commissions when the purchaser has not entered into a binding contract to purchase.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.\*]

Department No. 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by M. J. Kinney against H. C. Eckenberger. Decree for plaintiff, and defendant appeals. Affirmed.

This is a suit by M. J. Kinney against H. C. Eckenberger to enjoin the defendant from prosecuting a certain action at law and for the cancellation of a contract sued upon in that action. A decree was rendered in favor of the plaintiff, and the defendant appeals.

About the 1st of March, 1902, the plaintiff desiring to obtain an option to purchase the land of the Southern Oregon Company in the counties of Coos and Douglas in this state, and having been advised that one Frank Hoberg was in a position to be of assistance to him in the matter, went to interview him at the office of the defendant Eckenberger where he had desk room. Hoberg was out of the city, but plaintiff informed Eckenberger of his wish, and defendant said he would assist the plaintiff in his efforts for a compensation and would use his influence with Hoberg to bring about the desired results. Plaintiff thereupon made the following agreement with defendant:

"Portland, Oregon, March 1, 1902.

"In consideration of valuable assistance rendered to me by H. C. Eckenberger in securing an option on the property of the 'Southern Oregon Company,' located in the counties of Coos and Douglas, state of Oregon, I hereby agree that in case I purchase said property, or if the property is purchased by other parties through me, to pay to the said H. C. Eckenberger a commission of 2½% on basis of price of six hundred thousand dollars (\$600,000.00).

"[Signed] M. J. Kinney."

Soon after this plaintiff went to Boston, Mass., and interviewed Prosper W. Smith and William W. Crapo. Hoberg gave him a let-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ter of introduction to Elijah Smith of Boston and also sent a telegram announcing his coming. Prior to that time Hoberg had an agent's option contract upon the property mentioned and was supposed to have some influence with the owners. Plaintiff's trip resulted in an agreement on the 15th day of March, 1902, with William Crapo and Prosper Smith, acting in behalf of the stockholders of the S. O. Company, the owner of the property, whereby plaintiff paid them \$5,000, and secured an option to purchase, within three months of that date, the property of the S. O. Company, or all the stock of such company for the sum of \$600,000, by the payment of \$60,000 August 1, 1902, and the sum of \$535,000 within six months from the date of his election to avail himself of his rights to purchase the property. In the event of a purchase the sellers could at their election deliver the stock or the property of the company in fulfillment of their agreement. It was agreed that, if the sellers elected to deliver the property of the S. O. Company, title thereto should be free and clear. On December 15, 1902, by a supplementary agreement between the same parties, Crapo and Smith agreed to extend the time of payment on the contract of March 15, 1902, due on that date, until January 15, 1903, without grace, on the following conditions, among others:

"Interest on the deferred payment shall continue as heretofore at five (5) per cent. per annum until date of payment; payment to be made in Boston, Mass. Mr. Kinney agrees to purchase such amount of the capital stock of the S. O. Company, as may be in the hands of Crapo and Smith at the date of the final payment, not less than 13,369 shares."

Crapo and Smith also agreed to deliver to Kinney the 1,547 shares of the stock which belonged to the S. O. Company, as soon as the same could be purchased, and not later than March 1, 1903. Such stock of the capital of 15,000 shares as might not be in the hands of Crapo and Smith or not delivered would be taken to be worth \$41 per share and deducted from the final payment. The following paragraph is contained in that agreement:

"It having been represented that there is some question in regard to some of the land which is on the list of land supposed to be owned by the S. O. Company, although Mr. Kinney agreeing to buy the stock of the company of course assumes the responsibility of the title to such land, but in order to make it clearly understood between the parties hereto, Mr. Kinney agrees not to raise any question as to the ownership of that land by the S. O. Company. Whatever title there may be in the S. O. Company to this property is conveyed to Mr. Kinney."

On February 20, 1903, the same parties entered into a third agreement, in which the two former ones were referred to, and which further recited that:

"Kinney has failed and neglected to make payment as stipulated and has forfeited all right to purchase said property or stock and the money which has been paid by him."

It was agreed that for a specified consideration "the said Crapo and Smith, rep-

resenting the stockholders of the Southern Company, grant to said Kinney the opportunity to purchase the stock of the S. O. Company until April 10, 1903." It was stipulated that all sums paid by Kinney should be retained by Crapo and Smith in the event the contract was not carried out by Kinney. The latter bases his complaint upon the following facts: That he was induced to enter into the written agreement for commissions of March 1, 1902, by Eckenberger's false and fraudulent representations; that Eckenberger performed no service whatever for him in procuring the option thereof referred to, except the letter of Hoberg to Elijah Smith which was not used, and the telegram sent by Hoberg, and that Eckenberger was not instrumental in obtaining the option; that plaintiff never purchased the real property and that it was never purchased by other parties through him. The property of the S. O. Company referred to in the written agreement for commissions consisted of 103,000 acres of land, of which 95,345.12 acres were granted to the state of Oregon by an act of Congress passed March 3, 1869, entitled "An act granting lands to the state of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said state," and attempted to be conveyed to the Coos Bay Wagon Road Company, a corporation, by an act of the Legislature of Oregon passed October 22, 1870, purporting to grant to said company "all lands, rights of way," and all other rights granted to the state of said act of Congress "for the purpose of aiding said company in constructing the road mentioned in said act of Congress and upon the conditions and limitations therein prescribed." About May 31, 1875, this property was attempted to be transferred by the Coos Bay Wagon Road Company to one A. R. Woodruff, under the name of John Miller, through whom the S. O. Company derives all the title to such lands that it ever held; that by reason thereof, and because of the conditions and restrictions in the grant, the S. O. Company never acquired any good or commercial title to 95,345.12 acres of the land; that the option thereon of March 15, 1902, was wholly inoperative and void; that Kinney could not at any time purchase the land, nor the S. O. Company sell or convey the same, and that no purchase thereof was ever made or could be made; that said 95,345.12 acres of land was very valuable timber land and constituted nine-tenths of the value of the 103,000 acres referred to in the agreement for commissions and without which the option would be of no value; that this was understood between Kinney and Eckenberger; that by reason of the defect in title Kinney was unable to secure the real property mentioned and lost \$80,000 in partial payments made upon the option contracts, and damages in excess of \$100,000; that a valid purchase or sale of the title to said 95,345.12

acres of timber land under the option was a condition precedent to any claim for commissions by Eckenberger for securing the option or assisting to procure the same; that both Kinney and Eckenberger understood and believed at the time the agreement was entered into that the S. O. Company was the owner in fee simple of the 95,345.12 acres of timber land free from all defects and incumbrances, and could give a good commercial title thereto; that Kinney could secure the same under the option; that they were mutually mistaken in regard thereto and entered into the agreement solely and only by reason of such belief and mutual mistake, and would not have done so otherwise; that the agreement is inequitable and invalid; that at divers times he had paid Eckenberger \$6,980 to avoid litigation.

Defendant Eckenberger alleges that the conditions of the contract have been fulfilled, and that through his influence plaintiff obtained an option upon such property; that the amount less the sum paid left a balance of \$17,399.79.

W. E. Thomas, of Portland (Chamberlain, Thomas & Kraemer, of Portland, on the brief), for appellant. B. B. Beekman and A. M. Smith, both of Portland (Watson & Beekman, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1, 2] There is but little controversy in regard to the facts in the case. It appears from the evidence that Kinney expended a large sum of money in cruising the timber on the land and endeavored to make a sale of the property; that negotiations were had with several responsible persons, among the last of whom was a Mr. Woods of San Francisco who examined the land carefully; that when Kinney was called to San Francisco and went there expecting to close the deal with Mr. Woods, thinking the negotiations for a sale of the property were about completed, a telegram published in a newspaper came from Coos Bay reading that 100 persons had made application to the government for the land. Mr. Woods said that he did not want to buy a lawsuit, and that the deal was all off. It appears that Kinney was unable to make any sale on account of litigation questioning the title to the land. The plaintiff asserts and is uncontradicted that the defects referred to in the second agreement made with Crapo and Smith had reference to about 70 minor defects in the title to a small portion of the property near Coos Bay and did not refer to the timber land.

From a careful examination of the three option contracts above alluded to, it appears that Kinney obtained only an option to purchase nearly all the shares of stock of the S. O. Company. It was considered that by obtaining all this stock the title to the land would be obtained. By subsequent developments it was proved otherwise. The agree-

ment between Kinney and Eckenberger based the payment of commission to Eckenberger upon a condition precedent. Kinney thereby agreed that if he purchased the property, or if it was purchased by other parties through him, he would pay the stipulated commission. Kinney never purchased the property, nor did any other parties. Therefore, according to the agreement, he did not become liable for the commission. *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Hill v. Dakin* (Iowa) 143 N. W. 821; *Allen v. Philips*, 2 Litt. (12 Ky.) 1; *Atlantic Avenue R. R. Co. v. Johnson*, 134 N. Y. 375, 81 N. E. 903. It was well known and understood by Eckenberger that Kinney's object in obtaining an option on the land was to make a sale thereof to some other party at a profit. It was not expected or contemplated that Kinney would purchase the land for himself. In order for him to make such a sale or for an option to purchase to be of any value to him, it was necessary that it should give him the privilege of purchasing a good marketable title to the land. Whatever the outcome of the litigation relative to the title to the land may be, it is certain that neither Crapo nor Smith, nor the other stockholders of the S. O. Company, nor the company itself, could give Kinney a valid option to purchase the land described or convey a good marketable title thereto. Under these circumstances, Kinney could not make a deal or sale so as to realize a profit. The agreement between Kinney and Eckenberger, the terms of which are very general, was in effect, as explained by the evidence, an agreement to divide commissions or profits on the contemplated deal. Hoberg, with whom Eckenberger was to work in order to obtain an option on the land, had held an option on the land a short time prior thereto, and the matter was well understood by both.

Under the authority of *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 511, 79 Am. St. Rep. 345, and other like cases, it is urged by counsel for defendant that where a broker finds a person from whom the broker's principal desires to purchase property, and such principal makes a valid agreement with the persons produced by the broker, the latter has earned his commission, even if it turns out that the customer or seller cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the transaction. The only difficulty with this proposition of law is in its application to the facts in the case at bar. For some reason, and apparently a wise one, Messrs. Crapo and Smith cautiously avoided executing a contract giving Kinney an option to purchase the land desired. They simply gave an option on the capital stock of the S. O. Company, or the property, retaining to themselves the right to elect which should be transferred, and in the subsequent contracts with Kinney extending the time of the option it was plainly provided that the shares of

stock were all they proposed to sell. As to the contracts between Kinney, Crapo, and Smith, the first and third were plainly option agreements. While the second recites that the time for making payment is extended and somewhat indicates that Kinney had elected to purchase the property, we think the effect of the contract was simply to extend the time of the option contract, by extending the time of the payment. This conclusion is confirmed by the language of the third agreement which purports to continue the former stipulations in force and does not appear to be of any more or less scope than those. This third contract is certainly no more than an option, and recites that Kinney had forfeited his right to purchase the shares of stock. The most that appears from the whole transaction is an intention to purchase a portion of the shares of the stock. Therefore Kinney, the principal, never made a valid agreement to purchase the property referred to in his contract with Eckenberger, and the latter, the broker, never earned his stipulated commission.

[3] The word "purchase," as used in the written agreement between the plaintiff and the defendant, is unqualified by the context, and means, as there used, the acquisition of title or interest in property, an executed and not an executory contract. 4 Kent (14th Ed.) 441; 23 Am. & Eng. Ency. Law (2d Ed.) 462; *Hessell v. Johnson*, 70 Wis. 538, 539, 36 N. W. 417. An option to buy on condition of making specified payments at specified dates is not an actual purchase nor an executed contract of purchase. *Darr v. Mummert*, 57 Neb. 378, 17 N. W. 767; *Heimberger v. Rudd*, 30 S. D. 289, 138 N. W. 374, 377; *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350. A marketable title in fee simple to property desired to be purchased by a principal is necessary in order to sustain a claim for commissions by a broker when the purchaser has not entered into a binding contract to purchase with the seller. *Beach v. Steele*, 12 N. H. 82; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98. At the time of the contract in suit, both parties thereto believed, as did people in general, that the S. O. Company had a good title to the 95,345.12 acres of land, the main part of the timber tract for which plaintiff was anxious to negotiate. There was a mutual mistake made by the parties as to the subject-matter of the contract of March 1, 1902. There was in reality no meeting of the minds of the parties in regard to the property as it really existed. It would be unjust and inequitable to permit the defendant to enforce the contract and compel the plaintiff to pay commissions for assisting to do a thing that was impossible. The circumstances under which the agreement was made and the object in view must be considered in giving meaning to the ambiguous terms. The plaintiff should be relieved from the obligation of the contract, and the same should be canceled. *Nordyke &*

*M. Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600, 607.

It is said in 20 Am. & Eng. Ency. Law, p. 812:

"Contracts are daily made upon the assumption of certain facts, and the parties give their assent, not absolutely, but upon the implied condition that the reality conforms to the assumption. If it should prove otherwise, the condition is broken and equity relieves from the apparent agreement because there is no real assent."

At page 813 of the same work it is said:

"The existence of a subject-matter being essential to every contract, it follows that the mistake of the parties in supposing something to exist which does not exist invalidates any contract in respect thereto, except, of course, where the uncertainty of the existence of the thing is the very essence of the agreement. Thus, if after an agreement for the collection of a claim it appears that the claim had been allowed before the contract was made, or if, after a contract for the sale of real property, it turns out that by the operation of some settled principle of law of which both parties were alike ignorant the party who contracted to sell had in fact no title to the land. \* \* \* In all these cases the contract is voidable."

At page 818, *supra*, we read:

"A mistake of fact is no less such for having been induced by a mistake of law. \* \* \* and equity will relieve against a mistake in respect thereto as against other mistakes of fact."

In so far as the contract between the plaintiff and the defendant bears thereon at the time of the making thereof, all the property of the S. O. Company might as well have been washed away or destroyed by an earthquake. It would then have been just as properly a subject-matter of the contract as it was under the conditions shown in the record.

The equities are with the plaintiff. The decree of the lower court is therefore affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

(74 Or. 464)

FRANCIS et al. v. SCHUMAN et al.

(Supreme Court of Oregon. Jan. 26, 1915.)

APPEAL AND ERROR (§ 781\*)—DISMISSAL—MOOT QUESTIONS.

Where, pending appeal from a decree dismissing a suit against the state printer to restrain performance of an alleged contract with certain printing organizations relating to the general employment of printers in the state printing office, the term of office of the state printer expired, so that any injunction that might be issued against him would be nugatory, the appeal would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by W. C. Francis and others against Chris Schuman and others. Decree for defendants, and complainants appeal. Dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

This is a suit brought by W. C. Francis, James Archer, and F. R. Bussard, all taxpayers of the state, the last two named being experienced printers, against R. A. Harris, state printer, the Governor, secretary of state, and state treasurer of the state of Oregon, composing the state printing board, and the individual members of the Allied Printing Trades Council of Salem, Or., the Capital Typographical Union No. 210, and the Salem Printing Pressmen and Assistants Union No. 247; all being voluntary organizations. The purpose of the suit was to enjoin the carrying out of a certain contract entered into between R. A. Harris, state printer, and the above printing organizations, relating to the general employment of printers in the state printing office, the scale of wages to be paid, and the use of the Union label of such associations upon state printing, and to enjoin the paying of employes engaged under the contract. Upon a hearing May 4, 1914, the circuit court sustained a demurrer to the complaint and dissolved the temporary injunction. Plaintiffs not desiring to plead further, a decree was entered in favor of the defendants and against the plaintiffs. From this the plaintiffs appeal.

S. C. Spencer, of Portland (Wilbur & Spencer and A. L. Clark, all of Portland, on the brief), for appellants. Ernest R. Ringo and J. A. Benjamin, both of Salem (A. M. Crawford and James W. Crawford, both of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). Since the rendition of the decree the term of office of Mr. R. A. Harris, as state printer, has expired. He has ceased to officiate in that capacity, and is no longer in a position to employ any persons in the state printing office to be paid by the state, or to fix the wages of employes, control or use the union label in the printing office, or in any manner to enforce or carry into effect the contract to which reference is made.

It is alleged in the complaint that "the said state printing board have at no time, by any action on the part of the said board, authorized or empowered the said R. A. Harris to enter into said contract"; that the same was without the authority of the board and has not been ratified by it; and that the contract is illegal. It is not alleged, nor was it suggested at the argument, that the state printing board, or any present state officer, intends or will attempt to carry out the provisions of the contract, or that the alleged agreement is in any way binding upon the board or other state officers. The state printing board appointed Mr. Arthur Lawrence as state printer in place of R. A. Harris, who formerly served in that capacity. On January 1, 1915, the newly appointed officer entered upon the discharge of his duties. It therefore clearly appears that the reason for

the injunction prayed for has ceased to exist; that, if the same were granted, it would be of no force. An injunction will not be maintained when it is manifest that its continuance would be useless. 2 High on Injunctions (4th Ed.) § 1495. It is a well-settled general rule that an appellate court cannot, in the absence of express statutory authority, assume jurisdiction of, or render opinions which will be of any binding force upon, an abstract question of law, unless it is involved in a substantial controversy existing between adverse parties and brought before such court for review in the manner prescribed by law. Jacksonville School Dist. v. Crowell, 33 Or. 11, 13, 52 Pac. 693; Moores v. Moores, 36 Or. 261, 264, 59 Pac. 327; State ex rel. v. Grand Jury, 37 Or. 542, 543, 62 Pac. 208; Oregon Electric Ry. Co. v. Terwilliger Land Co., 51 Or. 107, 114, 93 Pac. 334, 930; Thomas v. Booth-Kelly Co., 52 Or. 534, 97 Pac. 1078, 132 Am. St. Rep. 713; Eilers Piano House v. Pick, 58 Or. 54, 56, 113 Pac. 54. In the case at bar there is nothing at the present time upon which the writ of injunction could act. It would be of no efficacy.

Nothing remains before the court, except a moot question of law, and therefore the appeal should be dismissed; and it is so ordered.

MOORE, C. J., and EAKIN and HARRIS, JJ., concur.

(74 Or. 457)

#### FREDERICK & NELSON v. BARD.

(Supreme Court of Oregon. Jan. 26, 1915.)

#### 1. NEW TRIAL (§ 58\*)—TRIAL (§ 339\*)—IMPROPER VERDICT—CORRECTION.

Where under the pleadings the utmost possible verdict that could have been rendered for defendant was the difference between the principal and interest due on the notes sued on and \$950 pleaded by him as a counterclaim, but the jury returned a verdict for defendant against plaintiff for \$950, the proper remedy was to submit the case to the jury for correction of the verdict, as provided by L. O. L. § 150, and not to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 121-124; Dec. Dig. § 58; \* Trial, Cent. Dig. §§ 791-794; Dec. Dig. § 339.\*]

#### 2. NEW TRIAL (§ 110\*)—JUDGMENT—VACATION BY COURT SUA SPONTE.

Where the court has entered judgment on an erroneous verdict, it has jurisdiction sua sponte to set it aside and grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 231; Dec. Dig. § 110.\*]

Department No. 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Frederick & Nelson, a corporation, against W. H. Bard. From an order setting aside a judgment for defendant and granting a new trial, he appeals. Affirmed.

This is the second appeal in this case. The following statement is adapted from the for-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mer opinion reported in 66 Or. 259, 134 Pac. 318:

"The plaintiff, Frederick & Nelson, a corporation, declares in the usual form upon two promissory notes executed and delivered to it by W. H. Bard, amounting together to \$750 of principal, besides interest, as stated in the complaint. The answer admits the actual execution of the notes, but makes two affirmative defenses. The first is, in substance, that the notes were executed without consideration, specifying under this head that the plaintiff had agreed to give him 10 per cent. commission on the sale of all goods by it, either to himself or brought about by his procurement, that by virtue of that contract he had earned commissions largely in excess of the notes in question, and that when they were executed the plaintiff falsely represented to him that he had already been credited and paid those commissions in the settlement of an account which the defendant's former wife had contracted with the plaintiff, and which the defendant had assumed and agreed to pay, and that the amount represented by the notes was due from the defendant to the plaintiff over and above the commissions. The second affirmative defense is also based on the alleged contract for commissions, and is interposed as a counterclaim to the amount of \$950. The reply traverses the new matter of the answer."

After the trial the jury, on October 28, 1913, returned into court the following verdict:

"We, the jury in the above-entitled action, find for the defendant therein, our verdict being that he have judgment against the plaintiff in the sum of \$950.00." [Signed by the foreman.]

The following occurred after the judge had read the verdict:

"The Court: Gentlemen, that verdict cannot stand. I am not going to allow this verdict to stand; this man here wrote letters time and time again in which he admitted he owed these notes; now, he is a lawyer, and he knew perfectly well what he was doing, and if anybody thinks I am going to allow those people over there to be robbed in this manner, they will get fooled. This man lives in Portland here, and strong influences have been brought to bear here, and it don't make any difference; this verdict will not stand. This man owes that money, and every man on this jury knows it. Gentlemen, you will be discharged from further consideration of this case. There will be a new trial granted. It takes 13 men to rob anybody in this court, and I want that understood. That man owes that money, and he will pay it if I have anything to say about it.

"A Juror: If the court please, we will retire and correct the verdict, but that is the way we understood it.

"The Court: This verdict cannot stand, and a new trial will be granted.

"Mr. Brewster: I will ask at this time that a new trial be granted.

"The Court: A new trial will be granted; that man owes that money and he will pay it if I can bring it about.

"Mr. Watrous: Will the court allow us to save an exception?

"The Court: Yes, but file that verdict and set it aside—this thing of allowing men to make promissory notes and beat them, just because they can beat them, has got to end, and it is going to end right here now."

Judgment for the defendant on the verdict was entered in the usual form, and afterwards the judgment here set out was entered by direction of the court:

"This cause having heretofore been taken under advisement by the court, and the court now

being fully advised in the premises, of its own motion finds that a new trial should be granted the plaintiff, on the ground that there is no evidence to support the verdict rendered therein. Wherefore it is considered, ordered, and adjudged that the verdict heretofore rendered in said cause, and the judgment entered thereon, be and the same hereby are canceled, set aside, and held for naught, and that a new trial be granted plaintiff.

"Dated October 31, 1913."

From this latter judgment the defendant appeals, assigning as error, in substance, that the circuit court was wrong in not giving the jury further instructions and in setting aside the verdict and judgment on its own motion.

R. E. Hitch, of Portland (James E. Fenton and Martin Watrous, both of Portland, on the brief), for appellant. J. H. Hendrickson, of Portland (Brewster & Mahaffie, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). It is manifest from the facts in the case that the essence of the dispute between the parties was whether the defendant was entitled to commissions as he claimed and, if so, whether the plaintiff had given him credit in the settlement resulting in the execution of the promissory notes upon which the action was brought. There is no dispute but what the defendant signed the notes as stated. Under such circumstances, as disclosed by the pleadings, the utmost possible verdict that could have been rendered for the defendant was the difference between the amounts of principal and interest due on the notes and the sum of \$950, urged by him as a counterclaim.

[1] The verdict returned was almost as incongruous as one would have been awarding to the plaintiff the return of the property purchased from it. In short, the verdict was not within the range of the pleadings, which are the standard by which the issues between the parties must be adjusted. The problem presented by such a verdict should have been solved under the provisions of section 150, L. O. L.:

"\* \* \* If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

Without commenting on the weight of the testimony or giving any intimation of what he thought should be the verdict, the trial judge, after explaining the limits of the verdict as controlled by the pleadings, should have either sent the jury out again, or allowed it to correct the verdict. It was not necessary to visit upon the parties the expense of a third trial.

[2] The refusal of the court to allow an amendment of the verdict before filing was clearly erroneous; but, the jury having been discharged, it is too late to correct the mistake. Consequently the question is resolved into this: Can a court of its own motion set aside an erroneous judgment which it has

rendered? On principle this is one of the inherent powers of a court of justice, even on its own motion. Judicial tribunals are not mere parliamentary bodies, and are not in all cases dependent for their authority on written motions of the parties. On their own initiative they may interpose to preserve the rights of parties and to uphold the law. In *De Vall v. De Vall*, 60 Or. 493, 118 Pac. 843, 120 Pac. 13, 40 L. R. A. (N. S.) 291, Ann. Cas. 1914A, 409, the circuit court set aside a judgment and verdict on grounds not mentioned in the motion interposed for that purpose. This action was approved in an elaborate opinion by Mr. Chief Justice Eakin. The same doctrine was enunciated by Mr. Justice Moore in *Smith & Bros. Typewriter Co. v. McGeorge*, 143 Pac. 905, in this language:

"When the trial court, within the time allowed, discovers that such a mistake of law has been made, it may, *sua sponte*, or on motion, correct the error by setting aside the judgment and granting a new trial, thereby avoiding the necessity of and the expense that would be incurred by an appeal."

In effect the court in *De Vall v. De Vall*, *supra*, set aside the judgment on its own motion, for it proceeded on grounds not suggested by either party to the litigation. In the situation resulting from the court refusing to allow the jury to correct its verdict in the case at bar, it was no error to overturn the judgment, for the verdict was incompatible with the issues in the case.

The decision of the circuit court is affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(75 Or. 57)

## BRIDAL VEIL LUMBERING CO. v. PACIFIC COAST CASUALTY CO.

(Supreme Court of Oregon. Jan. 26, 1915.)

### 1. INSURANCE (§ 646\*)—ACTIONS ON POLICIES—PLEADING AND PROVING EXCEPTIONS.

In an action on an employers' liability insurance policy, which excepted losses resulting from certain causes, the burden was on the insurer to allege and prove that the loss was one excepted by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.\*]

### 2. INSURANCE (§ 437\*)—EMPLOYERS' LIABILITY—NEGLIGENCE OF INSURED.

Under Employers' Liability Act (Laws 1911, p. 16), providing that all owners, contractors, etc., engaged in the construction, repair, etc., of any building or other structure or in the erection or operation of machinery, shall see that all material, etc., shall be carefully selected and inspected, and that all scaffolding, staging, or other structures, more than 20 feet from the ground or floor, shall be provided with a strong and efficient safety rail or other contrivance to prevent persons from falling therefrom, where the proprietor of a sawmill maintained a flume for floating lumber, which in places was more than 20 feet above the ground, and alongside which was a plank walkway maintained for employes to walk on when working on or about the flume, it was its duty to provide a safety rail or other

contrivance to prevent persons from falling therefrom, as, while the flume itself would serve as a railing on one side, it would not serve as a safety rail upon the other side, and hence the employer could not recover on an employers' liability insurance policy, which provided that it did not cover accidents if insured had failed to comply with any rule relative to safeguarding machinery and places of work.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 437.\*]

### 3. STIPULATIONS (§ 14\*)—CONSTRUCTION—ACTIONS FOR INJURIES—EVIDENCE.

In an action on an employers' liability insurance policy, a stipulation of facts stating that an employe, while acting in the course of his employment and working on a lumber flume, accidentally fell from a walkway alongside the flume, warranted a finding that the employe was properly on the walk and engaged in the performance of his duty at the time of the injury.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

### 4. INSURANCE (§ 437\*)—EMPLOYERS' LIABILITY INSURANCE—RISKS COVERED.

Under an employers' liability insurance policy providing that it did not cover any accident if the insured failed to comply with any law relative to safeguarding machinery and places of work, insured's violation of the law did not exempt the insurer from liability, unless an injury to an employe was due to such violation.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 437.\*]

Department 2. Appeal from Circuit Court, Multnomah County; George E. Davis, Judge.

Action by the Bridal Veil Lumbering Company against the Pacific Coast Casualty Company, on an employers' liability insurance policy to recover the sum of \$2,750. The cause was tried before a jury mainly upon a stipulation of the facts. A verdict was rendered in favor of the defendant. From a judgment rendered thereon, the plaintiff appeals. Affirmed.

A. R. Watzek, of Portland (Platt & Platt and Palmer L. Fales, all of Portland, on the brief), for appellant. S. C. Spencer, of Portland (Wilbur & Spencer, of Portland, on the brief), for respondent.

BEAN, J. The defendant, a California corporation, engaged in the accident insurance business in the state of Oregon, in consideration of a premium paid by the plaintiff, issued to the latter an employers' liability insurance policy covering the sawmill and other parts of the plaintiff's plant at Bridal Veil, Or., and insuring against loss or expense arising from claims upon it for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by any employe of the plaintiff by reason of the prosecution of the work described in the policy. Condition H of the policy, containing an exception, reads as follows:

"This policy does not cover accidents to or caused by any minor employed in violation of law, nor any accident if the insured has not in force a certificate of inspection from the state labor commissioner, or has failed to comply with any law relative to safeguarding machinery and places of work."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On February 11, 1912, during the term of the policy, Joe Stricklewich, an employé of the plaintiff at its sawmill and box factory, while working on a lumber flume, in the course of his employment fell from a walkway alongside the flume or trough and was injured. Afterwards the injured man brought an action against the Bridal Veil Lumbering Company to recover damages in the sum of \$25,000 for the injuries sustained. The defendant, the Pacific Coast Casualty Company, undertook the defense of the action as required by the terms of the policy, reserving, however, all its rights, and refusing to pay any judgment which might be recovered against the Bridal Veil Lumbering Company in that action, upon the ground that the Pacific Coast Casualty Company claimed that under the exception to the policy, above quoted, it was not liable to the lumbering company for any judgment that might be recovered, for the reason that such company was operating its sawmill and plant in violation of law, and that the injury to Stricklewich was caused by the fact that the plaintiff was not complying with the law of the state of Oregon, to wit, the Employers' Liability Act, in failing to guard with a railing the walkway from which the employé fell. The plaintiff's sawmill is located some distance from the railroad by which it ships lumber when ready for market. In order to convey the lumber from the sawmill to the point where it can be loaded upon the cars, the company has constructed around the mountain side a large flume or trough into which water is allowed to enter at the sawmill, and the lumber is floated down this flume. It varies in height in different places in its course, and at the particular place where Stricklewich fell and received his injury it was 50 feet above the ground. On the side of the flume a plank walkway had been constructed, evidently intended to be used by employés in doing the work necessary to be done in connection with the plant. There was no hand rail or guard rail on the outside. It was constructed along the edge of the flume in some places one plank in width.

Before the trial of the case an adjustment was made with Stricklewich by which he was paid the sum of \$3,750 in full settlement for all claims for damages against the plaintiff on account of the injuries which he had received. Of this amount the Pacific Coast Casualty Company contributed the sum of \$1,000, and the Bridal Veil Lumbering Company the sum of \$2,750, for which latter amount this action is brought.

It is the claim of the Pacific Coast Casualty Company that the walkway from which Stricklewich fell is one which the Employers' Liability Act requires to be safeguarded by an efficient railing on the outside, and that the failure of the Bridal Veil Lumbering Company to safeguard the walk in order to prevent employés from falling off while using

the same in the course of their employment, with the result that Stricklewich fell therefrom, brings the case within the exception named in the policy, and that the insurance company is therefore not liable for any claim for damages because of such failure. The defendant company also pleads and claims that the payment of plaintiff towards the settlement with Joe Stricklewich was a voluntary one and cannot be recovered. Some evidence was introduced, and the stipulation of facts was read to the jury. At the close of plaintiff's case, there being no evidence introduced by the defendant, the latter moved the court for a nonsuit, which was overruled. The defendant then requested the court to instruct the jury to return a verdict in favor of the defendant. This motion was also overruled. The defendant took a cross-appeal and assigns as error the refusal of the court to direct a verdict in defendant's favor.

[1] It is claimed by plaintiff upon this appeal that the defendant has not shown that the loss suffered by plaintiff comes within the exception of the policy of insurance. The defendant has alleged that the loss to the plaintiff comes within condition H of the policy above quoted. Where a policy of insurance covers certain general risks, and in a separate clause of the policy excepts losses resulting from certain causes or under certain circumstances, the burden is on the insurer to allege and prove that the loss was one excepted from the general risk covered by the policy. It is the general rule that the burden is on the insurer to show a loss is within such an exception. 4 Cooley's Briefs on Law Ins. pp. 3179, 3180. This principle has been applied in an action on a policy of life insurance in the case of *Denver Life Ins. Co. v. Price*, 18 Colo. App. 30, 69 Pac. 313. See, also, *Newman v. Covenant Mut. Ins. Association*, 76 Iowa, 56, 40 N. W. 87, 91, 1 L. R. A. 659, 14 Am. St. Rep. 196. The same precept holds in accident insurance. *Sutherland v. Standard Ins. Co.*, 87 Iowa, 505, 54 N. W. 453; *Martin v. National Livestock Association*, 65 Or. 29, 32, 131 Pac. 511. We are not directed to any case in which this question was passed upon in relation to an employers' liability insurance policy. We think, however, that, if in life, accident, indemnity, and fire insurance the burden is on the insurer to prove that a loss is within an exception, it must follow that the same rule would prevail in an action upon a policy of employers' liability insurance.

[2] In the case at bar the plaintiff contends that the walkway from which Joe Stricklewich fell is not embraced within the provisions of the Employers' Liability Act; that plaintiff was not required to provide such a walk with an efficient safety rail or other contrivance, so as to prevent any person from falling therefrom; and that the defendant



as failed to show a noncompliance with the law on the part of the plaintiff. That part of the Employers' Liability Act of 1910 (Gen. Laws Oregon 1911, p. 16), so far as deemed material in this case, is as follows:

"All owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or dismantling of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatsoever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, \* \* \* and generally, all owners, contractors, subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

[3] It appears that the flume and walk were a part of the plant operated by the plaintiff and used in the conduct of its manufacturing establishment. The evidence tends to show, and the jury was warranted in finding, that the employees of the plaintiff, when engaged in their duty, used the plank walk while working on or about the flume, and that the injured employee was properly on the walk and engaged in the performance of his duty at the time of the injury.

While the stipulation of facts, about many of which there is little controversy, is somewhat general, we think that such a finding as we have just indicated might reasonably be derived therefrom. Paragraph 5 of the stipulation is as follows:

"It is stipulated that during the period covered by the policy set forth in the complaint, and on the 11th day of February, 1912, Joe Stricklen, an employee of the plaintiff company at its sawmill, planing mill, and box factory, at Bridal Veil, Multnomah county, Or., while acting in the course of his employment and working on a lumber flume of the Bridal Veil Lumbering Company near its box factory at Bridal Veil, Or., accidentally fell from a walkway alongside said flume and was seriously injured; that said flume was 50 feet from the ground and the plank walkway alongside of said flume was without a railing other than the flume itself."

Photographs of the flume and walkway taken before the accident, showing no railing along the walk, and others taken after the injury, showing a three-rail guard along the walk, are contained in the evidence. The portions of the walk exhibited indicate to a certain degree that it was designed to be used for the purpose indicated. It will be noticed

that the Employers' Liability Act has provided that in the construction or repairing of certain structures, "or in the erection or operation of any machinery," all scaffolding, staging, false work, or temporary structure shall be of a certain strength. Then follows the somewhat general clause:

"And all scaffolding, staging or other structure more than 20 feet from the ground or floor shall be \* \* \* provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom."

This is a provision connected with the former clause concerning the erection or operation of any machinery. The walk and flume in question, being used in connection with and as a part of the machinery and manufacturing establishment of the plaintiff, and being in places more than 20 feet from the ground, and evidently dangerous for persons to walk upon or along, while engaged in the course of their employment, working on the lumber flume, comes within the terms of the Employers' Liability Act; and it was the duty of the Bridal Veil Lumbering Company to construct an efficient safety rail or other contrivance along the outside of the walkway so as to prevent any person working on the lumber flume in the course of his employment from falling therefrom. It is the contention of the plaintiff that the flume itself would serve as a railing. While this might be sufficient upon one side, it is clear, from an inspection of the walk, that it would not serve as a safety rail upon the other side; that the failure of the Bridal Veil Lumbering Company so to do was a violation of this law. As somewhat instructive upon this point, although the circumstances in the cases differ to a certain degree, see *Dunn v. Orchard Land Co.*, 68 Or. 97, 136 Pac. 872; *Evans v. P. Ry., L. & P. Co.*, 68 Or. 603, 135 Pac. 206; *Schaedler v. Columbia Contract Co.*, 67 Or. 412, 135 Pac. 536.

The terms and provisions of the insurance policy are plain and unambiguous. They are binding upon the insured: and, in order for the plaintiff to prevail, it must comply therewith. *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809; *Bruce v. Phoenix Ins. Co.*, 24 Or. 486, 34 Pac. 16. It would not be of advantage to the plaintiff for us to ascertain whether or not there is much remaining of the policy, except the clause relating to the premium. Plaintiff contends that it is not shown that the plaintiff was rightfully upon the walk. Such, however, we do not understand as the plain meaning of the stipulation. On this point counsel for plaintiff cite *Morrison v. Burgess Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634. The facts in that case, where a canvas was placed over certain machinery or shaft, and it was held that it was not intended for an employee to stand thereon, are dissimilar from the circumstances in the case at bar. It is shown by the stipulation of the parties and by photographs in evidence that the walk was main-

tained by the plaintiff for the purpose of allowing employes to walk thereon when working on or about the flume. Cleats appear to be nailed on the walk, indicating that the same are intended as steps. Indeed, we are unable to conjecture how the jury could have found that the walk was intended for any other purpose. It is not germane to the issue for us to determine just what staging or structures are directed by the terms of the law to be safeguarded. Suffice it to say that in our opinion the scaffolding or walk along the flume used in connection with the operation of the mill and box factory machinery of the plaintiff is within the intent and scope of the act, and that in order to comply with the command of the law under consideration, where the walk is more than 20 feet from the ground, it should be provided with a strong and efficient safety rail or other contrivance so as to prevent any person from falling therefrom. It may be conceded that, in order to exempt an insurance company from liability because the employer has violated a statute, the injury to the employe must have been due to the violation, under the authority of 4 Cooley's Briefs on Law of Ins. p. 3149; *Cluff v. Mutual Benefit Co.*, 95 Mass. (13 Allen) 308, 319; *Bloom v. Franklin Co.*, 97 Ind. 478, 49 Am. Rep. 469, 474; *Kirkpatrick v. Aetna Co.*, 141 Iowa, 74, 117 N. W. 1111, 22 L. R. A. (N. S.) 1255.

We give our most careful consideration to the following, which counsel for plaintiff suggest:

"In studying the Employers' Liability Act a person unquestionably receives the impression that the people of the state of Oregon, when they adopted that act, intended to limit it to contractors and owners engaged in the construction or repair of buildings and to a certain class of employers engaged in the manufacture or use of certain dangerous substances or appliances. \* \* \*"

We cannot, however, ignore the direction of the statute to those engaged in the operation of any machinery. As to the general clause of the law quoted, we refer to it as somewhat confirming the meaning we have given to the former part of the section.

It is alleged in the complaint that the policy under which the plaintiff claims covers the sawmill and other parts of the plant of the plaintiff company, and that "Joe Stricklewich, an employe of the plaintiff company, at its sawmill and box factory at Bridal Veil, Multnomah county, Or., while acting in the course of his employment and working on a lumber flume of the plaintiff company near its box factory at Bridal Veil, Or., accidentally fell from said flume and was seriously injured; that said Joe Stricklewich, at the time of said accident, was employed by the plaintiff company and engaged in the performance and prosecution of work covered by the terms of said policy, and said Joe Stricklewich was at the time of said accident such an

employe as was covered by the terms of said policy."

[4] In order to be exempt from liability because of the alleged violation of law, the defendant must show that the injury to the employe was due to the violation. 4 Cooley's Briefs on Law of Ins. p. 3149.

As to the use intended to be made of the walk referred to, we defer to a certain extent to the judgment of the jury. As to whether the injured party was properly on the walk was also a matter for the jury to determine from the evidence. It is stipulated that at the time he was acting in the course of his employment and working on the lumber flume; and we fail to see how the jury could arrive at any other conclusion than that the employe was rightfully and necessarily there. From the circumstances disclosed, although meager, the jury could reasonably find that the lack of the safety rail was the proximate cause of the injury. The jurors are not required to shut their eyes and not exercise their knowledge of the common everyday affairs of life in the conduct of works in manufacturing establishments. The plaintiff saved exceptions to the instructions of the court that it was the duty of the plaintiff, under the law, to provide a rail along the walkway, and submitted for the determination of the jury the questions whether J. Stricklewich was rightfully on the walkway, and whether the injury occurred because the plaintiff failed to provide a railing. The plaintiff assigns the same as error. The submission of the questions to the jury was more favorable to the plaintiff than granting the motion of defendant for a directed verdict in its favor would have been, and plaintiff has no reason to complain in that respect. Our view of the main question submitted renders unnecessary the consideration of the other errors assigned by the plaintiff and also by the defendant.

We find no prejudicial error in the record, and the judgment of the lower court must therefore be affirmed; and it is so ordered.

MOORE, C. J., and EAKIN and HARRIS, JJ., concur.

## COE v. COE.

(75 Or. 145)

(Supreme Court of Oregon. Jan. 26, 1915.)

### 1. DIVORCE (§§ 124, 298\*)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to justify a decree for divorce and the custody of the children in favor of defendant.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 392-398, 450; Dec. Dig. §§ 124, 298.\*]

### 2. TRUSTS (§ 81\*)—RESULTING TRUSTS—HUSBAND AND WIFE—EVIDENCE.

To establish a resulting trust in favor of a husband of property purchased by him with title taken in his wife's name, it must be shown to have been understood between the parties, at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

the time the title was taken, that the wife was to hold it as trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118; Dec. Dig. § 81.\*]

### 3. TRUSTS (§ 89\*)—RESULTING TRUSTS—EVIDENCE.

Evidence held insufficient to establish a resulting trust in favor of husband buying property and taking title in his wife's name.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.\*]

### 4. TRUSTS (§ 89\*)—RESULTING TRUST—EVIDENCE.

The evidence to establish a resulting trust is not required to go so far as to be free from doubt.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Consolidated actions by Viola M. Coe against Henry W. Coe, for divorce, and against him and another, for an accounting. From a decree for defendant, plaintiff appeals. Modified and affirmed.

This is a suit by Viola M. Coe against Henry W. Coe, for a dissolution of their marriage contract and for the custody of their two sons, whose ages are, respectively, 18 and 20 years. She also instituted a suit against the defendant and the Sanitarium Company, a corporation, for an accounting. These suits were consolidated, and issues having been joined, were tried, whereupon the defendant secured the divorce, the custody of the children, and it was decreed that certain real property, the title to which stood in the plaintiff's name, was held in trust by her, and she appeals.

George W. Joseph and C. W. Fulton, both of Portland (Joseph & Haney, of Portland, on the brief), for appellant. A. E. Clark, of Portland (Malcolm H. Clark, of Portland, on the brief), for respondent.

MOORE, C. J. The testimony shows that the parties were married at Mandan, N. D., June 24, 1882. Prior to their wedding the plaintiff had been engaged in teaching school and the defendant in practicing medicine. Desiring to obtain a better education, the plaintiff, after the birth of her eldest son, now 29 years old, attended a medical college, from which she received a diploma, and is a licensed physician. In the year 1891 the parties moved to Portland, Or., where the defendant resumed the practice of his profession. Soon thereafter he commenced as a specialist to treat patients afflicted with nervous and mental ailments. In September, 1899, he incorporated the Sanitarium Company with a capital stock of \$30,000, to which corporation he transferred the business, furniture, equipment, etc., receiving in payment thereof 157 shares of the capital stock of the par value of \$15,750. In the year 1903 the Sanitarium Company secured the title

to about 15 acres of land at Mt. Tabor, then a suburb of Portland, and erected on the premises buildings and equipment for the service in which it was engaged. In the succeeding year the Sanitarium Company entered into a contract with the United States for the care and treatment of insane patients from Alaska for the term of five years, which agreement has been renewed and is now in force. The rapid growth of the city of Portland greatly increased the value of the Mt. Tabor lands, and the care of the patients by the Sanitarium Company became quite profitable, so much so that other physicians secured shares of the capital stock of the corporation, and Dr. Coe, though nominally in charge of the hospital, left much of the actual management to his associates, while he engaged in other business. From a sale of a part of his capital stock and from other sources, the defendant accumulated a large sum of money, and, considering himself quite wealthy, he concluded to purchase in Portland real property and to erect thereon a family residence, the original cost of which should not exceed \$20,000. In order to carry out that purpose, two lots were purchased at an expense of \$7,500, but, when the place for the house was prepared, it was deemed desirable to buy two adjoining lots, for which a further sum of \$8,000 was paid. The legal title to all such real property was taken in the plaintiff's name. The person in charge of the construction of the dwelling was directed by Dr. Coe to defer to the wishes of his wife in all matters pertaining to the erection of a three-story house with a basement, which, when finished, cost about \$54,000. The furniture, furnishings, etc., for the house were purchased for about \$10,000, thereby incurring an entire outlay of about \$79,500, which sum, when paid, left the defendant with but little ready money and also absorbed nearly all of his outside property. In October, 1907, a financial depression arose, and the defendant's creditors began to press the payment of his promissory notes, whereupon he urged Mrs. Coe to sell the house, and with the money to be thereby obtained discharge his obligations, and from the remainder to purchase a less expensive house, but she refused to comply with such request. The defendant, finding it necessary to maintain a large house with but little income, began to give his attention to the sale of irrigated lands in Umatilla county, Or., to accomplish which he organized the Columbia Land Company, a corporation. The Inland Irrigation Company, a corporation, the owner of a large tract of such lands, entered into a contract with the Columbia Land Company, pursuant to which agreement the defendant employed many agents whom he sent to various states to induce prospective purchasers to visit Oregon and inspect these lands with a view of buying parts thereof. He also undertook the development of a town

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

site at Stanfield, a railway station in the tract of irrigated lands, where several buildings were erected, and he also organized at that place the Stanfield Bank, of which he became president. The Inland Irrigation Company stipulated to pay a commission for the sale of its lands, and Dr. Coe and his agents, as brokers and employes of the Columbia Land Company, negotiated the sale of real property amounting to \$900,000, of which, however, \$200,000 consisted of options, on account of which small payments had been made. In dealing with the owner of such lands, the defendant, as the managing agent of the Columbia Land Company, discovered that the expense incurred in securing purchasers exceeded the commissions stipulated, and in consequence thereof overdrew his account with the latter corporation and failed to pay over to the Inland Irrigation Company \$102,000, which had been received for the sale of lands in excess of the commissions. He, as a partner of W. J. Sloan & Co., secured from the Bank of Stanfield a loan of \$5,000, giving a firm note as evidence thereof. As partial payment of the overdraft referred to, the Columbia Land Company stipulated to build for the Inland Irrigation Company an additional dam in the Umatilla river to facilitate the storing and distribution of water to be used on these lands.

The defendant in July, 1910, in order to obtain what he regarded as a much-needed rest, made preparation for a trip to the Orient. Mrs. Coe urged him to go, and furnished him with \$1,000 with which to pay his expenses. Before starting on his journey, Dr. Coe called to Portland his chief agents in negotiating the sale of irrigated lands, and the superintendents of other branches of industry, with whom he conferred in respect to the management, during his absence, of the business in which he was interested. He also executed to his eldest son, George Coe, a power of attorney to enable him properly to execute papers for him. The defendant left San Francisco, Cal., for Honolulu, H. I., July 26, 1910, arriving at the latter city in about six days. Soon after his departure from Portland, Mrs. Coe, hearing rumors of his financial embarrassment, went with an attorney to Stanfield, Or., where she learned the facts with respect thereto. Thereupon she discharged the agents engaged in the sale of lands and other persons, informing them that Dr. Coe had gone abroad in order to obtain rest. At the same time she also executed to the Stanfield Bank, in place of the obligation given to it by the defendant as W. J. Sloan & Co., her promissory note for \$5,000, upon which an action was immediately instituted and the home property in Portland attached as security for any judgment that might be recovered. Returning to her home she tried without avail to borrow money with which to liquidate Dr. Coe's debts and also to protect his interest under the contract with the Inland Irrigation Company.

Finally, by the aid of a personal friend of Mr. Sigmund Frank, a loan of \$33,000 was obtained to be secured by a mortgage on her home, but, discovering the power of attorney referred to was inadequate, the defendant, pursuant to a cablegram sent by his son George, executed to him at Honolulu another instrument granting greater authority, and conformable therewith the mortgage was given, the money obtained and paid out in discharging Dr. Coe's liabilities. After the mortgage was executed, a rumor gained credence that Dr. Coe's trip abroad was caused by some mental ailment with which he had been and was suffering. When in Honolulu Dr. Coe received from his wife a letter to the effect that all his business interests were in fine condition, and she hoped soon to join him, though at that time she was very much worried and was making every possible effort to ward off what appeared to be an impending financial catastrophe. The defendant mailed a photograph, representing him as sitting at a banquet, and having on his head and around his neck floral wreaths. Nearly every other gentleman and lady at the table was pictured as having like adornments around the neck. This print was entitled: "The Lonely Man at the Luau, Honolulu, Aug. 13, 1910." Another small photograph was also mailed, portraying the defendant and two ladies as occupying chairs, one at his right and the other at his left, while three other ladies were standing behind him. This picture bore the inscription: "In the Hands of his Friends, Honolulu, Aug. 1910." After the receipt of these pictures, George Coe, on October 12, 1910, wrote his father, saying in part:

"We have tried to get money at the banks but because of the 'crop moving period' money has been awful tight. This coupled with the fact that 'Dr. Coe spent money like a drunken sailor' (at Stanfield); 'Dr. Coe does not know the value of a dollar'; 'Dr. Coe is a fugitive from justice and his affairs have gone to the dogs and he is now a bankrupt'—all stories spread broadcast by Moody and repeated so many times that even our friends have begun to believe there is some truth in the statements. \* \* \* Now to get to the real point. We have got to ask you to cut down your expenses. The way I figure it out you have been gone 12 weeks and have spent 1,200 dollars or at the rate of 100 a week. This (100) is too much and we can't stand it. You can live very comfortably on 75 a month and luxuriously on 100 and you not only ought to but you *must* do so. \* \* \* Carey does not want you to come home until we get everything settled. \* \* \* So you stay there until we send for you. Of course on 75 or 100 a month you can't do very much [many] 'millionaire' stunts but that is the best we can do. This will all come out all right in time but it will take time. Meanwhile we are *nearly* broke (living here on borrowed money only)."

George Coe on October 22, 1910, wrote his father, again saying in part:

"I am extremely sorry but I must say to you that we cannot provide you with any further funds. Don't draw any more checks on us; that is, against either your own account or of the sanitarium. \* \* \* Sell the presents you wrote you had bought on your journey and that will give you some money. Get into a cheap

boarding house and look around and find some light job which will make you self-sustaining and remain out of the country. You could do no good here. Carey agrees with us in this matter."

Dr. Coe reached San Francisco on his return trip October 29, 1910, and wired his son George as follows:

"If not needed Oregon will go to Berkeley for month. Have seen telegram. If indicted would come immediately. Answer."

In response he received a message on the same day, signed "M. Coe," which reads:

"Carey says come. Conditions might be worse. Wire when starting."

Replying he telegraphed George Coe as follows:

"Leaving tonight for Portland to help whip our outside enemies."

Before reaching Portland, however, he saw in a daily newspaper a published statement to the effect that the Sanitarium Company had sold and disposed of all its property. Upon arriving home he learned that Mrs. Coe was the ostensible purchaser.

It is needless to detail the circumstances of such sale or to narrate the business that was subsequently conducted for about two years under the plaintiff's management. The facts referred to have been stated in order to show the relation of the parties to each other and to determine therefrom who, if either, is entitled to the divorce. Mrs. Coe testified: That, while she objected to selling the home because she feared that all the money derived therefrom would be lost in the Eastern Oregon venture, she was ready and willing to mortgage the property to aid in liquidating Dr. Coe's debts. That she desired him to make the trip abroad because of the nervous strain which a close attention to the sale of the irrigated lands had imposed upon him, and she wrote him that the business was in a flourishing condition because she did not wish to burden him with any more anxiety, and that she was unable to write him but once, since she did not know where to address him. This latter statement seems to be confirmed by the fact that the letters written him by his son, to which reference has been made, were not delivered but returned and received after the defendant reached home. George Coe testified that these letters were written after having received the photographs referred to, and while he believed his father was associating with immoral persons. The defendant's testimony shows: That it is the custom at Honolulu, as evidenced by the larger picture, to adorn guests at a banquet with floral wreaths. That in the smaller photograph the women represented as sitting beside and standing behind him were a mother and her daughters, who were traveling companions. Copies of the original letters mentioned were received in evidence, and George Coe, referring to them, stated upon oath that he prepared them, as originals, but his mother

underscored the words hereinbefore emphasized, corrected one word in brackets, inserted the words indicated in parentheses, and also added to the letter of October 12th the following:

"Sell cigars to send last 100. Sloan is having a heap of a time collecting his 20,000.00, as every one says, 'Dr. Coe said he would take care of me.'"

It appears from the testimony that prior to July, 1910, and before Dr. Coe left home, Mrs. Coe visited and consulted with a mental alienist at Seattle, Wash., and detailed to him the symptoms and conduct of a person whose name was not given, and, based upon the hypothetical case, the physician informed her that the individual referred to was afflicted with "paranoia." At Portland, Or., she also conferred with two physicians, who are experts in mental ailments, and, predicated upon the same hypothetical case, they informed her that the supposed patient was troubled with "paranoia." George Coe testified that with this information, which did not consist of a written opinion from either physician, his mother had instructed him to meet his father in San Francisco, upon his return from China, and have him incarcerated in some hospital for the insane in California. Mrs. Coe denied this statement and testified that its mere recital demonstrated its absurdity, saying that commitments to asylums were not made upon such showings. She on February 3, 1913, subscribed her name and made oath to an affidavit wherein it is stated that it was executed after due and careful consideration; that a serious difficulty had arisen between Dr. Coe and her, as to whether their home, which had been erected at his expense upon lots which had been conveyed her as a present from him, should be sold and the proceeds invested in his business; that she had declined to accede to his frequent requests to sell such property, thereby creating a condition of intense tension between them; and that statements which he made and other matters which arose led her to declare that he was mentally unsound; that, from the time their house was nearly completed until the culmination of the troubles in respect to Eastern Oregon matters, he was laboring under great business cares and serious financial anxieties, occasioned by the withdrawal of large sums of money invested in the house, and was much overworked and worried; "that the lapse of time, and with a deliberate study of the whole situation, I now clearly see that this whole matter was not one of mental import in any degree but simply and only was a business disagreement which then appeared to me irreconcilable. I am certain my husband has no mental disease now, and that he never has had a mental disease of any kind or character."

[1] Upon this evidence the court gave the defendant a decree of divorce and the cus-

tody of the two minor sons. We concur in the conclusion thus reached. In doing so, however, and without any direct evidence on the subject, it would seem to be inferred that Mrs. Coe, realizing the serious financial difficulties which Dr. Coe had encountered, and possibly fearing his indictment, as indicated in his telegram, began to formulate the defense of insanity. This view of the case is charitable, though only conjectural; but, however that may be, the court, having seen the witnesses and heard their testimony, had a superior advantage in determining the equities of the cause.

After Dr. Coe returned from the Orient, he made an amicable settlement with the Inland Irrigation Company, whereby he secured the legal title to some land in Umatilla county, Or., in recognition of the amount due him. He executed to Mrs. Coe a deed to most of the lands thus obtained. In disposing of the property interests, it was decreed that the plaintiff holds the legal title to lots 1, 2, 6, and 7 in block 15 in Goldsmith's addition to the city of Portland, with the house thereon, in trust, however, for the defendant as a home and place of residence for him and his family, and that the plaintiff and the defendant and their sons, or any or either thereof, shall have the right to make all reasonable use of the house, grounds, and equipment as a home and place of residence. The defendant, in referring to the purchase of these lots and the building of the house thereon, testified as follows:

"I had a talk with her, I—I talked with her as a man would naturally talk to his wife. She said she wanted a home in her name; and I said, 'Certainly, you shall have the home in your name.' It was her home, but, of course, I did not think that she would ever claim it as her own property to the exclusion of the rest of the family. I said, 'You would have to sign a deed with me if I sold my property, and I with you;' and I said, 'I am building a home for my children, my wife, and myself;' so I put it in her name—the lots. I did not dream that there would be any difficulty in doing so. It was a home for my children, my wife, and myself."

Dr. Coe was asked:

"And did the Columbia Land Company owe Mrs. Coe anything at that time?" (referring to the time the mortgage for \$33,000 was given).

He answered:

"The Columbia Land Company owed that house and it was in her name."

Counsel, not considering the answer responsive to the inquiry, requested the question to be read to the witness, whereupon the court remarked:

"I think that is an answer to your question. I think he meant that house was conveyed to her for the benefit of the family, and not as her own personal property, to do as she saw fit to do with it. Of course, he put up the money, and it was conveyed to her as trustee for the family."

To which observations the witness responded:

"You bet your life."

[2-4] The foregoing comprises all the testimony tending to establish a resulting trust, and, as between husband and wife, we think the evidence is insufficient for that purpose. *Parker v. Newitt*, 18 Or. 274, 277, 23 Pac. 246, 247. In that case Mr. Justice Lord, in discussing this subject, says:

"Moreover, the onus of establishing a resulting trust rests upon him who seeks its enforcement; and before a court of equity will be warranted in making a decree therefor, the evidence must be clear, definite, and free from doubt. Hence, to entitle the plaintiff to conveyances of the premises in controversy to himself he must fairly establish, if he paid for the property and took title in the name of his wife, that at that time it was mutually understood and was the intention that she should hold the title to the premises, not in her own right, but in trust for him, or, if it was money in her possession belonging to him with which she bought the property and paid for it and took the title to herself, that it was done without his knowledge or consent or direction. As advancements are ordinarily, if not always, voluntary, in order to ascertain whether the transaction was a trust or intended as an advancement, when the title is in the name of the wife, the intention at that time is the point of inquiry, and to which we must look."

In the language thus quoted, what is said about the evidence necessary to establish a resulting trust being "free from doubt" is a degree of proof not required in civil cases.

When the lots were purchased for the purpose of erecting thereon a house, Dr. Coe considered himself possessed of adequate means to construct a dwelling, the entire cost of which property, when improved, would not exceed his expectations. No agreement was entered into by Dr. Coe and Mrs. Coe when the real property was purchased and the deed secured whereby she stipulated to hold the legal title in trust for him or for any purpose. This being so, an error was committed in the part of the decree disposing of the home. The defendant is entitled to the undivided third part in his individual right in fee of the whole of lots 1, 2, 6, and 7 in block 15 in Goldsmith's addition to the city of Portland, and the plaintiff is entitled to the remainder of the estate in such premises. *L. O. L. § 511*. The defendant's interest in these lots to be charged, as is also all other real property conveyed by him, to the plaintiff, with the mortgage of \$33,000. All the furniture, furnishings, etc., in the dwelling house, that are not fixtures, having been purchased with the money furnished by the defendant, are hereby set apart to him.

The decree will therefore be modified as herein indicated, but in all other respects it is affirmed.

EAKIN, BEAN, and HARRIS, JJ., concur.

(19 N. M. 474)

## STATE v. KLASNER. (No. 1567.)

(Supreme Court of New Mexico. Feb. 12, 1914.  
On Rehearing, Dec. 1, 1914. Appellant's Motion for Rehearing Denied Jan. 9, 1915.)

*(Syllabus by the Court.)*1. INDICTMENT AND INFORMATION (§ 125\*)—  
-DUPPLICITY.

A count of an indictment charging that defendant, "at the time and place named, nineteen head of calves, of the goods, chattels, and property of owners to the grand jury unknown, then and there being found, did then and there unlawfully, etc., steal, take," etc., is not bad for duplicity, as it prima facie discloses that the larceny occurred at the same time and place, and constituted but a single transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

2. LARCENY (§ 41\*) — UNKNOWN OWNER —  
KNOWLEDGE OF GRAND JURORS—BURDEN OF  
PROOF.

Where, upon the trial, witnesses testify that certain known parties owned the alleged stolen animals, and the indictment charges that the owners of the animals are unknown to the grand jury, it is incumbent upon the state to prove that the names of the owners were unknown to the grand jury and could not, by reasonable diligence, have been ascertained.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 127-129; Dec. Dig. § 41.\*]

## On Rehearing.

3. CRIMINAL LAW (§ 1032\*)—APPEAL—VARI-  
ANCE—OBJECTION BELOW—NECESSITY.

On rehearing, it having been called to the attention of the court that no motion was made for an instructed verdict on the ground of a variance between the indictment and proof, or such variance in any manner called to the attention of the trial court, the judgment of reversal is set aside, as it is a well-established rule of this court that the question of variance, between the allegations in the indictment and the proof, unless raised in the court below, cannot be reviewed here.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. § 1032.\*]

4. LARCENY (§ 60\*) — UNKNOWN OWNER —  
KNOWLEDGE OF GRAND JURORS—BURDEN OF  
PROOF.

Where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, it is not incumbent upon the state to prove, in the first instance, affirmatively, that such fact was unknown to the grand jury; but it must show that such name is unknown, or prove such a state of facts or circumstances as render the alleged unknown fact uncertain, in which event such fact is presumed to have been unknown to the grand jury. But if there is evidence tending to show that the grand jury did know, or could by the exercise of reasonable diligence have known or ascertained, the name of the true owner, or that it was negligent or perverse in not alleging what was at its command to know, then the burden is upon the state to show that the grand jury did not know such alleged unknown name.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 156-158; Dec. Dig. § 60.\*]

5. CRIMINAL LAW (§ 262\*)—ARRAIGNMENT—  
WAIVER.

Failure to formally arraign a defendant is not a fatal objection, where such defendant was present in court and testified as a witness upon his trial in his own behalf, and was represented by counsel, and no objection is inter-

posed to proceeding with the trial without such arraignment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 614, 615; Dec. Dig. § 262.\*]

6. CRIMINAL LAW (§ 1056\*)—INSTRUCTIONS—  
EXCEPTION BELOW—NECESSITY.

Where no exceptions are taken to instructions given by the court of its own motion, error cannot be assigned upon such instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

7. CRIMINAL LAW (§ 413\*)—DECLARATIONS BY  
DEFENDANT—ADMISSIBILITY.

Declarations made by a defendant in his own favor, unless a part of the *res gestæ*, or of a confession offered by the prosecution, are not admissible for the defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

8. CRIMINAL LAW (§ 485\*)—OPINION EVI-  
DENCE—EXAMINATION OF EXPERTS—HYPO-  
THETICAL QUESTION—BASIS.

No error is committed in sustaining an objection to a hypothetical question propounded to a witness, where such question is not based upon facts as to which there is such evidence that a jury might reasonably find that they are established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.\*]

9. CRIMINAL LAW (§ 958\*)—MOTION FOR NEW  
TRIAL—SUPPORTING AFFIDAVITS.

Where a motion for a new trial is based on the ground of newly discovered evidence, such motion must, in addition to the affidavit of the applicant, be supported by the affidavits of the new witnesses, which must set forth the newly discovered evidence and the facts to which such witnesses will testify, or a satisfactory excuse must be given for not obtaining such affidavits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 953.\*]

*(Additional Syllabus by Editorial Staff.)*10. INDICTMENT AND INFORMATION (§§ 86, 87\*)  
—CONSTRUCTION—"THEN"—"THEN AND  
THERE."

As used in an indictment, the word "then" is an adverb of time, meaning "at that time," and the phrase "then and there" means at the time and place charged, and refers to a single transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-255; Dec. Dig. §§ 86, 87.\*]

For other definitions, see Words and Phrases, First and Second Series, Then; Then and There.]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

Lillie C. Klasner was convicted of larceny, and appeals. Affirmed.

Renehan & Wright, of Santa Fé, for appellant. H. S. Clancy, Asst. Atty. Gen., for the State.

ROBERTS, C. J. [1] Appellant was indicted, tried, and convicted in the district court of Lincoln county upon the second count of an indictment charging her with the larceny of 19 head of calves, "of the goods, chattels and property of owners to the grand jurors unknown." It is contended by appellant that the indictment is fatally defective, because

it charges more than one offense in the same count. The contention is predicated upon the assumption that the state, by using the plural, "owners," meant to charge that the property alleged to have been stolen had more than one owner, and, such being the case, more than one offense was charged in the same count. Accepting as correct appellant's construction that the count charged the larceny of property belonging to different owners, would it follow that the same was demurrable? If the indictment can be said to charge but one offense against the state, it would not be open to the objection that it is bad for duplicity. On the other hand, if it attempts to charge two or more distinct offenses, it would be demurrable. This indictment, omitting the formal parts, reads as follows:

"That Lillie C. Klasner \* \* \* on the 24th day of August in the year one thousand nine hundred and nine, at," etc., "nineteen head of calves, of the goods, chattels and property of owners to the grand jurors aforesaid unknown, then and there being found, did then and there unlawfully, knowingly, and feloniously steal, take, lead and drive away, and the said property did then and there, and in the manner aforesaid," etc.

If we give to the language used, a fair and reasonable construction, it becomes apparent that but one offense is attempted to be charged.

[10] The pleader says that appellant did the acts "then and there"; that is, at the time and place charged she did steal, take, lead, and drive away the property.

"Then, as an adverb of time, means 'at that time,' referring to the time stated; and the necessary import of the words 'then and there,' as employed in the information, is that the larceny of the \$9.50 in money as a whole, a part of which is charged as belonging to Jane Engle and a part to Samuel Engle, occurred at the same time and place, and constituted but a single transaction." *Furnace v. State*, 153 Ind. 93, 54 N. E. 441.

The language quoted from the above case disposes of appellant's contention that several distinct crimes are charged in the same count. While the property is alleged to belong to more than one person, but one taking is charged. In other words, appellant is charged, at the same time and place, with having stolen property belonging to divers owners. As the Indiana Supreme Court further say in the above-cited case:

"We recognize no good reason to depart from what may be considered the great current of authority, and hold the pleading in question bad, when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen, did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The information, prima facie, under the circumstances, can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity."

The principle enunciated by the court is supported by a long list of authorities, which will be found collected in the case cited. See, also, *State v. Laws*, 61 Wash. 533, 112 Pac. 488. The indictment charged but a single offense, and the demurrer on the ground stated, was properly overruled.

[2] The cause must be reversed, however, because of the failure of the state to offer any evidence in support of the allegation in the indictment that the defendant stole, took, led, and drove away 19 head of calves, "of the goods, chattels and property of owners to the grand jury unknown." Upon the trial of the cause witnesses for the state testified to the names of the owners of the calves in question, but there was no attempt whatever by the state to prove that the owners of the animals in question were unknown to the grand jury, and that the grand jury by reasonable investigation could not have ascertained the names of the true owners.

"Ownership must be proved by sufficient evidence, or the conviction cannot be supported. Where the owner is alleged in the indictment as unknown, there can be no conviction unless it is proved that the grand jury did not know his name and could not discover it by due diligence. 25 Cyc. 125." *Sharp v. State*, 29 Tex. App. 211, 15 S. W. 176.

"Ownership, except as statutes have varied the unwritten rule, must be proved as laid, because it identifies the offense, distinguishing it from all other instances." *Bishop's New Criminal Procedure*, § 488b.

In the case of *Stone v. State*, 30 Ind. 115, the Supreme Court of Indiana discussed the failure of the state to offer proof to support an allegation that the Christian name of the defendant was unknown to the grand jurors, and held the omission fatal. The court say:

"Our statute requires the names of the parties to be stated, or the person to be described as one whose name is unknown to the grand jury. 2 G. & H. p. 400, §§ 54 and 60. In *Commonwealth v. Stoddard*, 9 Allen [Mass.] 280, it was held that where the name of the person injured was unknown to the grand jury, it may be so alleged in the indictment; but the proof must correspond with the allegation, and, unless the traverse jury are satisfied that the name was unknown to the grand jury, the defendant is not to be convicted. In this case there is no proof on the subject, and the jury could not form any conclusion as to the truth of the averment that the Christian name of the defendant was unknown to the grand jury. For this failure of proof the case must be reversed."

For the reasons stated, the cause is reversed and remanded, with directions to the trial court to award defendant a new trial; and it is so ordered.

HANNA and PARKER, JJ., concur.

On Rehearing.

Renehan & Wright, of Santa Fé, for appellant. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

ROBERTS, C. J. [3] A rehearing was granted by the court in this case, upon motion therefor filed by the state, wherein it



is shown that we overlooked the fact that the question as to whether the owners of the animals in question were unknown to the grand jury, and that the grand jury by reasonable investigation could have ascertained such names, was never raised in the court below, and therefore such question was not properly before this court for consideration; also that the question of variance between the allegations in the indictment and the proof was never raised or passed upon in the trial court, and hence was not reviewable here.

In the case of *State v. Padilla*, 139 Pac. 143, we said, in discussing a question of variance between the indictment and proof, where such variance was not called to the attention of the trial court:

"The record does not disclose that this question was raised during the trial of this case in the court below, and it is not, therefore, properly before this court for review, and cannot be reviewed by this court, as it is not a question which was directly passed upon by the trial judge at the time of the trial, and no assignment of error by the trial judge can be made where he was not given an opportunity to and did not specifically pass upon the question raised. It was the duty of the defendant to raise this question before verdict, either by motion to dismiss on the grounds of a variance between the allegations of the indictment and the proofs offered at the trial, or by a request for an instruction of not guilty."

The courts generally hold that the question of variance, unless raised in the court below, cannot be reviewed in an appellate court. *Greene v. People*, 182 Ill. 278, 55 N. E. 343; *State v. Boogher*, 8 Mo. App. 600; *Taylor v. State*, 130 Ind. 66, 29 N. E. 415; *State v. O'Connell*, 144 Mo. 387, 46 S. W. 175; *People v. Cruger*, 38 Hun (N. Y.) 500; *State v. Chamberlin*, 30 Vt. 559; *Hinds v. State*, 55 Ala. 145; *Wood v. State*, 64 Miss. 761, 2 So. 247; *State v. Ballard*, 104 Mo. 634, 16 S. W. 525; *State v. Jenkins*, 51 N. C. 19; *Bond v. State*, 56 Ark. 444, 19 S. W. 1062.

And applying the doctrine announced by this court in the cases of *State v. Eaker*, 17 N. M. 479, 131 Pac. 489, *State v. Lucero*, 17 N. M. 484, 131 Pac. 491, and *State v. Analla*, 136 Pac. 800, it is clear that the court should not have reviewed the question of variance or the sufficiency of the evidence, as such questions were not called to the attention of the trial court upon the trial, and the question of the sufficiency of the evidence to sustain the conviction is based solely upon the technical ground that the state failed to prove that the names of the owners of the alleged stolen animals were unknown to the grand jurors. Under section 37, c. 57, S. L. 1907, appellant is precluded from urging here the questions attempted to be raised, because no ruling of the district court was invoked thereon, to which exception was taken. It is true, in the case of *State v. Garcia* (decided at the present term) 43 Pac. 1012, we held that the statute only applied to the parties, and not to the court, and that this court had the inherent power to

see that a man's fundamental rights were protected in every case, and we there refused to sustain a conviction where the record affirmatively showed that the defendant was not guilty, although the question was never raised in the trial court. We said, however:

"The restrictions of the statute apply to the parties, not to this court. This court, of course, will exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims; nor will we consider the weight of evidence, if any substantial evidence was submitted to support the verdict. If substantial justice has been done, parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here."

In this case it appears that substantial justice has been done, and the objection urged is purely technical. This being so, this court will not consider the question urged, because of appellant's failure to call the question to the attention of the trial court and invoke its ruling thereon. This being true, the cause should not have been reversed on the grounds stated in our original opinion.

[4] While the order of reversal must be set aside, on the grounds stated, it is perhaps proper to say, in order to avoid a misconstruction of our original opinion, that the Attorney General argues that the rule laid down by the court, to the effect that, where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, there can be no conviction, unless it is proved that the grand jury did not know his name and could not discover it by due diligence, is too broad, and places an unnecessary burden upon the state; that under such rule it will be necessary for the state, in all cases, to call the entire panel of the grand jury, and prove by each member thereof such fact so alleged. If the rule is susceptible of this construction, it is concededly too broad. The true rule is: Where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, it is not incumbent upon the state to prove in the first instance affirmatively that such fact was unknown to the grand jury; but it must show that such name is unknown, or prove such a state of facts or circumstances as render the alleged unknown fact uncertain, in which event such fact is presumed to have been unknown to the grand jury; but if there is evidence tending to show that the grand jury did know, or could by the exercise of reasonable diligence have known or ascertained, the name of the true owner, or that it was negligent or perverse in not alleging what was at its command to know, then the burden is upon the state to show that the grand jury did not know such alleged unknown name. *Carter v. State*, 172 Ind. 227, 87 N. E. 1081; section 549, *Bishop's New Criminal Procedure* (2d Ed.). In this case the proof affirmatively shows that the sheriff copied the brands upon the alleged stolen calves, and had this information at hand at

the time he testified before the grand jury. Having the brand of an animal, it is an easy matter in this state to ascertain the name of the owner. A resort to the recorded brand will supply the information.

"If the name might be known to the grand jury, yet they will not learn it, their willful ignorance, thus proceeding from no necessity, creates none." Bishop's New Criminal Procedure (2d Ed.) § 549.

As the order of reversal, on the grounds stated in our original opinion, must be set aside, it is necessary for us to consider the grounds urged by appellant for a reversal, which were not considered in our former opinion, in view of our conclusion.

[5] It is urged that appellant was not arraigned. The record in this regard shows the following:

"Whereupon the defendant enters her plea of not guilty to the charge contained in the indictment herein, heretofore withdrawn for the purpose of filing demurrer."

Later, upon application made by appellant, supported by several affidavits of parties who claimed to have been present in court and to have been cognizant of the fact that appellant had not been arraigned, the trial court of its own motion, and on the personal recollection of the judge, amended the record so as to show a proper arraignment and plea. This appellant argues he had no right to do, in view of the affidavits on file showing the contrary. Waiving this question, however, is the failure to arraign a defendant fatal, where he is present in court in person and by counsel, participates in the trial of the cause, goes on the witness stand, and proceeds, without objection, as though he had been arraigned?

Counsel for appellant relies upon the cases of *Territory v. Conzales*, 13 N. M. 97, 79 Pac. 705, and *United States v. Aurandt*, 15 N. M. 292, 107 Pac. 1064, 27 L. R. A. (N. S.) 1181, which concededly lay down the rule that arraignment and plea are indispensable to a valid verdict and judgment of conviction. These cases, however, were decided while New Mexico was a territory, and its courts were required to conform to the views of the Supreme Court of the United States. In these cases the territorial court followed the rule announced by the United States Supreme Court in the case of *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. This case was overruled by that court in the recent case of *Garland v. State of Washington*, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772. The court said:

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of pro-

cedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain Case*, when he said: 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if the defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.' Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the *Crain Case* is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

Many of the state courts have departed from the old practice, which held that arraignment and plea were indispensable to a valid verdict and judgment of conviction. The cases will be found collected in a case note to *State v. Walton*, 13 L. R. A. (N. S.) 811, an examination of which will show that Arkansas, Iowa, New York, Georgia, Nebraska, Washington, and Montana no longer adhere to the old practice. We believe that the correct rule was announced by the Supreme Court of the United States in the *Garland Case*, and hold that appellant cannot raise, in this court, the question that she was not arraigned, where she proceeded with the trial as if she had been duly arraigned, and failed to object or in any manner call to the attention of the trial court the fact that she had not been arraigned.

[6] It is next urged that the trial court erred in giving certain instructions to the jury of its own motion. No exception was taken by appellant, however, to any of the instructions; hence they are not reviewable here. *State v. Lucero*, 17 N. M. 484, 131 Pac. 491; *U. S. v. Cook*, 15 N. M. 124, 103 Pac. 305.

[7] The calves in question were found inclosed in a small alfalfa pasture near appellant's residence. This pasture was surrounded by a post and wire fence; the wires being either five or seven in number, the bottom wire being eight or twelve inches from the ground, and the second wire the same distance from the first, while the remaining wires were somewhat further apart. On the trial, counsel for appellant propounded to one of her witnesses the following questions:

"Q. State whether Mrs. Klasner, at or prior to this 24th day of August, 1909 (which was the date of the alleged larceny), ever said anything

to you as to those calves that would get in that pasture."

"Q. I will ask you now to state whether or not you didn't have standing directions from Mrs. Klasner to turn the stock out of that pasture when you found the stock in the pasture—whether or not your orders from her, while you were in her employ up to the 24th day of August, 1909."

Upon objection interposed by the state, the court refused to permit the witness to answer the questions, on the ground that statements made by appellant to the witness, disconnected from the alleged crime, tending to show absence of criminal intent, would constitute self-serving declarations. This action of the court counsel contend constituted error; but, aside from the statement that the answers sought to be elicited had a direct bearing on the question of intent, no argument is advanced in support of the admissibility of the evidence. Appellant could testify as to her intent, and we can see no reason why she should have been permitted to prove statements made by her, before the commission of the alleged crime, in no way a part of the *res gestæ*, for the purpose of establishing a fact to which she could testify. It is a familiar and well-established rule that declarations made by a defendant in his own favor, unless a part of the *res gestæ*, or of a confession offered by the prosecution, are not admissible for the defense. Wharton's Criminal Evidence (10th Ed.) § 690. If, while the calves in question in this case had been confined in the appellant's pasture, she had requested the witness to turn them out, such statement would have been admissible as a part of the *res gestæ*. The witness had been in the appellant's employ for four or five years, and, so far as the question disclosed, the orders referred to might have been given at any time during that period. While some authority can be found in support of the admissibility of such evidence (Wigmore on Evidence, § 1732), the great weight of authority and reason is against the rule. To hold such evidence competent would permit designing criminals to manufacture a defense, in advance of the commission of a crime, by which they would be able to prove absence of criminal intent, by statements made to others of their purpose or object in doing the contemplated act, and by such statements, not made under oath, and upon which the searchlight of a cross-examination would not be available, mislead the jury and escape just punishment. Defendants are permitted to testify, on the witness stand, as to their motive or intent, and no reason exists for permitting third parties to testify to declarations of intent made by a defendant, not against interest, and which form no part of the *res gestæ*, or of a confession given in evidence by the state.

In the case of *State v. Dean*, 72 S. C. 74, 51 S. E. 524, a defendant, charged with murder, sought to prove certain statements which he had made some hours before the murder,

as to his purpose in going to a certain place, for the purpose of showing absence of evil intent. The court said:

"In the case of *State v. Adams*, 68 S. C. 421, 47 S. E. 676, it is said: 'The rule is that a defendant cannot introduce in his defense his own statements made to others.' The rule is thus stated in 9 Enc. of Law (1st Ed.) 692: 'Declarations and statements made by defendant before the homicide regarding matters connected therewith are not admissible in his defense, unless they form a part of the *res gestæ*; but where they tend to show motive for committing the homicide, or malice in its commission, they may be proved by the prosecution.' The declarations were not a part of the *res gestæ*."

In the case of *Commonwealth v. Kent*, 6 Metc. 221, the Supreme Court of Massachusetts held that on the trial of a party indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit money, that it was not competent for him to give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purpose for which he wished it to be made. See, also, *Birdsong v. State*, 47 Ala. 68; *State v. Van Zant*, 71 Mo. 541; *Newcomb v. State*, 37 Miss. 383; *People v. Wyman*, 15 Cal. 70.

For the reasons stated, the court committed no error in excluding the offered evidence.

[8] The next assignment of error questions the action of the court in sustaining the objection of the state to the following questions, propounded to a witness for defendant.

"Q. Now, I will ask you this question: Take a calf from five to seven months old; state whether a calf of that age is capable of going through a wire fence, where the strands of wire range from eight to twelve inches apart? Say the bottom wire from the ground ranges from eight to twelve inches, and the next wire ranges from eight to twelve inches."

This question was followed by:

"State whether a calf of the description mentioned could go through wires of that kind, from the experience which you have had as a stockman covering the period you have mentioned."

This witness had qualified as an expert, and appellant sought to show that calves, such as those in question, could have gone through the fence which surrounded the pasture in which the calves were found. The trouble with the questions, however, is that the fence surrounding the pasture was not described to the witness. This fence was shown by all the witnesses to have had, at the time in question, from five to seven strands of wire, while the question stated called for the opinion of the witness as to whether calves could go through a fence of two wires, which might have been but 16 inches high.

"Hypothetical questions must be based upon facts as to which there is such evidence that a jury might reasonably find that they are established." 17 Cyc. 247.

[9] Lastly, it is claimed that the court erred in not granting a new trial on the ground of newly discovered evidence. This ground

of the motion is supported by the affidavit of appellant alone, in which she states that Pablo Verial and Jiesto Chavez were repairing a fence on her lands the latter part of August, 1909, and that they saw calves going through the fence in question; that such witnesses resided at Picacho, in said Lincoln county; and that she used due diligence in finding all the facts serviceable to her in her defense. Waiving the question of diligence shown, this ground of the motion for a new trial was properly overruled by the trial court, because of appellant's failure to support her application by the affidavits of the witnesses as to what they would testify to, or to offer any excuse whatever for the absence of such affidavits. It is a familiar and well-established rule that:

"In addition to the affidavit of the applicant, the newly discovered evidence must be established by the affidavits of the new witnesses, setting forth the facts to which they will testify, or a satisfactory excuse must be given for not obtaining such affidavits." 14 Ency. Pl. & Pr. 825; Territory v. Claypool et al., 11 N. M. 568, 71 Pac. 463.

Finding no available error in the record, the judgment of the lower court will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(58 Colo. 337)

CORT-HAMES MERCANTILE CO. v. HANLON. (No. 8112.)

(Supreme Court of Colorado. Jan. 4, 1915.)

JUSTICES OF THE PEACE (§ 72\*)—VENUE—NOTES—PLACE OF PAYMENT.

Where a note was payable in a city within a particular justice's precinct, such justice had jurisdiction of an action thereon as provided by Rev. St. 1908, § 3719, though defendant did not reside there.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 58, 143-145, 235; Dec. Dig. § 72.\*]

Error to Elbert County Court; Frank S. Turner, Judge.

Action by the Cort-Hames Mercantile Company against R. J. Hanlon. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

B. C. Hilliard, of Denver, T. M. Jones, of Elizabeth, and J. R. Alphin, of Denver, for plaintiff in error.

MUSSER, C. J. This review relates to a judgment of the county court dismissing a suit that had been appealed from a justice of the peace. It was dismissed because it had not been commenced in the precinct where the defendant resided. Only one of the reasons urged in the brief why the court erred in dismissing the suit need be noticed.

At the hearing, on the motion for dismissal, it was made to appear, by stipulation, that the suit was brought on a promissory note specifically made payable at Elizabeth, Colo.,

and that Elizabeth was in the justice precinct in which the suit was commenced.

The suit was properly commenced in the justice precinct where the note sued on was specifically made payable. Section 3719, R. S. 1908.

The judgment is reversed, and the cause remanded, with directions to proceed with the trial.

Reversed and remanded.

GABBERT and HILL, JJ., concur.

(58 Colo. 334)

CENTRAL TRUST CO. v. CULVER.

(No. 8023.)

(Supreme Court of Colorado. Jan. 4, 1915.)

1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—REVIEW.

A finding supported by testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

2. APPEAL AND ERROR (§ 1082\*)—QUESTIONS REVIEWABLE—CROSS-ERRORS.

Court rule 50 (130 Pac. ix), providing that errors assigned to the judgment of the Court of Appeals shall be limited to those raised by the petition, which must be filed and considered before the party seeking a review by the Supreme Court will be heard, applies to both parties, and a plaintiff, filing on defendant's appeal to the Court of Appeals cross-errors not passed on by the Court of Appeals, must, to raise them on defendant's writ of error to the Supreme Court, present them by petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1133-1136, 4270, 4281-4284, 4289-4292; Dec. Dig. § 1082.\*]

En Banc. Error to Court of Appeals.

Action by Conrad Culver, prosecuted after his death by Elvira E. Culver, against the Central Trust Company. There was a judgment of the Court of Appeals (23 Colo. App. 317, 129 Pac. 253), affirming a judgment for plaintiff, and defendant brings error. Affirmed.

Hugh McLean, of Denver, for plaintiff in error. John A. Rush, of Denver, for defendant in error.

PER CURIAM. Cary Culver brought an action against plaintiff in error to restrain the latter from diverting water from the Little Thompson for the purpose of irrigation. The only issue involved, so far as necessary to consider, was whether the rights awarded the priority under which defendant claimed had been abandoned. Trial was to the court, and upon conflicting testimony this issue was determined in favor of plaintiff. Defendant appealed to the Supreme Court, where the judgment was reversed, and the cause remanded for a new trial upon the ground that material, competent testimony offered on behalf of defendant had been excluded. Central Trust Co. v. Culver, 35 Colo. 93, 83 Pac. 1064. Prior to the second trial Culver died, and his widow was sub-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stituted as plaintiff. A retrial of the cause again resulted in a judgment in favor of plaintiff, from which defendant appealed to this court. The cause was transferred to the Court of Appeals, where the judgment was affirmed. *Central Trust Co. v. Culver*, 23 Colo. App. 317, 129 Pac. 253. The defendant brings the case here for review on error.

[1] So far as material, the issue at the second trial was the same as at the first, namely, abandonment, which was found in favor of plaintiff. The Court of Appeals refused to disturb the finding of fact on this issue, because it was based on conflicting evidence. This ruling was correct, because it appears there is sufficient testimony to support the finding of the trial court on the subject of abandonment. Counsel for defendant, however, urge that the Court of Appeals erred in sustaining the trial court in the reception of testimony, and in holding that plaintiff was not estopped or precluded from maintaining the action. From the facts narrated in the opinion of the Court of Appeals, and as disclosed by the record, we think the ruling of the Court of Appeals on these questions was correct.

The further point is made that the Court of Appeals overlooked another question upon which defendant relied for reversal of the judgment. From the opinion it appears that the Court of Appeals did not consider this question. It was called to the attention of the court by a petition for rehearing, but in our opinion the proposition is not applicable to the case.

[2] Plaintiff has also filed cross-errors, which were not passed upon by the Court of Appeals, although filed in that court. The record fails to disclose that plaintiff sought to have the questions thereby raised considered by a petition for rehearing. Rule 50 (130 Pac. ix) provides that the errors assigned to the judgment of the Court of Appeals shall be limited to those raised by such petition, which must be filed and considered before the party seeking a review of the judgment by the Supreme Court will be heard. This rule applies to both plaintiff and defendant in error.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

(58 Colo. 303)

McCAUSLAND v. PEOPLE. (No. 8135.)  
(Supreme Court of Colorado. Dec. 7, 1914.  
Rehearing Denied Jan. 9, 1915.)

1. ANIMALS (§ 40\*)—OFFENSES—CRUELTY—ELEMENTS OF OFFENSE—MALICE.

Cruelty to animals not being a crime or misdemeanor at common law, malice is not an essential ingredient of that offense created by Rev. St. 1908, §§ 1910, 1923, not being expressly made so by the statute.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 101-106; Dec. Dig. § 40.\*]

2. ANIMALS (§ 42\*)—CRUELTY—ABUSE—STATUTES—CONSTRUCTION.

Rev. St. 1908, § 1910, provides that every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats or needlessly mutilates or kills or carries in or on any vehicles or otherwise in a cruel or inhuman manner any animal, shall on conviction be punished. *Held*, that the words "in a cruel or inhuman manner" relate to the phrase immediately preceding them, concerning the carrying of animals, and do not qualify any of the other several preceding words or phrases each of which in and of itself indicates a complete offense, and hence a complaint, charging that accused did torture, torment, unnecessarily and cruelly beat, and needlessly mutilate a certain horse, etc., was not defective for failure to charge he did so in a cruel and inhuman manner.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 108-110, 112-114; Dec. Dig. § 42.\*]

3. ANIMALS (§ 42\*)—OFFENSES—CRUELTY—COMPLAINT.

A complaint, charging that defendant did "unnecessarily and cruelly beat one roan gelding (horse)," was sufficient without a further allegation of the specific facts constituting the alleged cruelty.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 108-110, 112-114; Dec. Dig. § 42.\*]

4. CRIMINAL LAW (§ 260\*)—SUMMARY PROSECUTION—JURISDICTION—APPEAL.

Where a justice of the peace had jurisdiction of a prosecution for cruelty to animals, objections that he set the case for hearing more than 10 days off, contrary to the statute, and issued a warrant before the complaint was filed, related to matters of form only, and were waived by defendant's appeal from the justice's judgment to the county court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 567-609; Dec. Dig. § 260.\*]

Error to District Court, Routt County; Chas. A. Morning, Judge.

Action by the People of the State of Colorado against William J. McCausland. From a judgment overruling defendant's motion to dismiss and finding him guilty of cruelty to animals, he brings error. Affirmed.

Chas. T. Whitaker and Arthur L. Wessels, both of Steamboat Springs, for plaintiff in error. Fred Farrar, Atty. Gen., and Frank C. West, Asst. Atty. Gen., for the People.

BAILEY, J. This is an action commenced in a justice's court in Routt county, against William J. McCausland, plaintiff in error, resulting in a judgment against him in the county court, to which he took an appeal from an adverse judgment in the justice's court. The complaint upon which trial was had charges that:

"William J. McCausland, on the 8th day of July, 1910, in said county, did torture, torment, unnecessarily and cruelly beat, and needlessly mutilate one roan gelding (horse) contrary to the form of the statute," etc.

Defendant interposed a motion to quash on the ground that the complaint or information does not state facts sufficient to constitute an offense or crime under the laws of the state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of Colorado, which was overruled. Upon trial, defendant's motion for dismissal for want of sufficient evidence having been overruled, the court, the cause tried before it by consent, found defendant guilty and imposed a fine of \$10, and costs. He prosecutes this writ of error.

The controlling question turns upon the order overruling the motion to quash, because, as is alleged the offense is insufficiently charged. The sections of the statute for consideration read in part as follows:

"Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicles, or otherwise in a cruel or inhuman manner, any animal \* \* \* shall, upon conviction, be punished, \* \* \*" etc. Section 1910, R. S. 1908.

"In this act the word 'animal' shall be held to include every living dumb creature; the words 'torture,' 'torment' and 'cruelty' shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue when there is a reasonable remedy or relief, \* \* \*" Section 1923, R. S. 1908.

[1] The statute embraces separate and distinct offenses. The offense charged was not a crime or misdemeanor at common law, and therefore malice is not a necessary ingredient, since not expressly made so by statute. 1 R. C. L. §§ 108, 109.

[2] It is contended that as the charge did not contain the words of the statute "in a cruel or inhuman manner" it was insufficient. These words relate to the phrase immediately preceding them, concerning the carrying of animals. They cannot be said to qualify any of the other several preceding words or phrases, for each of them in and of itself alone indicates a complete offense. The only construction possible, and in accord with the plain purpose, terms and meaning of the act, is that these words are necessary and properly apply to only that part of the act above specified, thus completing the statement of the offense. That portion of the statute relating to the carrying of animals, when properly understood, must be held to mean that every person who carries in or upon any vehicle, or otherwise carries, in a cruel or inhuman manner, any animal, shall upon conviction be punished, etc. This is only one of several offenses embraced in the statute.

[3] It is further contended by plaintiff in error that a charge in the language of the statute does not sufficiently set out the facts which constitute the offense; that the words of the statute are so general and broad as to embrace cases which fall within its terms, but not its spirit, and therefore it was necessary to allege in the complaint specific facts to bring the case within the inhibition of the law. Among other things, the complaint charges that the defendant did "unnecessarily and cruelly beat" one roan gelding (horse).

This was sufficient. *State v. Watkins*, 101 N. C. 702, 8 S. E. 346; *State v. Allison*, 90 N. C. 733; *Commonwealth v. McClellan*, 101 Mass. 34; *Commonwealth v. Lufkin*, 7 Allen (Mass.) 579. In *Bishop on Statutory Crimes* (3d Ed.) § 1115, it is said:

"Under the statutory word 'beat,' as in the expression 'cruelly beat any horse,' it is sufficient to say, in allegation, that the defendant 'did beat' the animal, not specifying more minutely the beating. For the idea is simple, and this word alone adequately particularizes the act and the instance."

In *State v. Watkins*, supra, the indictment charged that the defendant "did \* \* \* torture, torment and act in a cruel manner," etc. The court said:

"These are words of the statute, but they are not precise in their meaning; they designate rather than define the offense or suggest the acts that constitute it; they do not, of themselves, import what is meant by the statute; in pleading, they need to be aided by charging acts that certainly imply what is meant by the terms torture and torment, and they should be so charged as that the court can see that they do. If the charge contained in the proper connection one or more of the words beat, wound, shoot, kill, and the like, \* \* \* such precise and pertinent words would have implied the offense forbidden."

Upon principle and authority we conclude that the offense was sufficiently charged.

[4] Objection was made in the county court to the jurisdiction of the justice's court, and also to that of the county court on appeal, because of lack of jurisdiction in the justice's court. The objections urged are based on the claim that the justice set the case for hearing more than ten days off, contrary to the statute, and issued the warrant before the complaint was filed. The justice undoubtedly had jurisdiction of the subject-matter, and since the objections under consideration go to matters of form and procedure merely, they were such as could be and were waived by the defendant when he took an appeal to the county court, which also had jurisdiction of the subject-matter, and there contested the charge on its merits.

The evidence supports the judgment, and it should be affirmed.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

(58 Colo. 306)

LIBERTY BELL GOLD MINING CO. v. MOORHEAD MINING & MILLING CO.  
(No. 7673.)

(Supreme Court of Colorado. Jan. 4, 1915.)

1. MINES AND MINERALS (§ 51\*)—TRESPASSES—DAMAGES.

In case of an innocent trespass in a mine, where the trespasser sells the finished product of metalliferous ores, the measure of damages is the gross value of the ores in the mines before removal, and the damages may be ascertained by deducting from the finished value of the ores the cost of mining, milling, etc.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.\*]

**2. MINES AND MINERALS (§ 51\*)—TRESPASS—DAMAGES.**

In case of willful trespass in a mine, where ores are converted, the measure of damages is the gross proceeds of the ore without any deduction for the expense of mining.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.\*]

**3. MINES AND MINERALS (§ 51\*)—RECOVERY FOR TRESPASS—VERDICTS—CONSTRUCTION.**

Where the court ruled that plaintiff could recover only for trespasses upon the secondary veins, and defendant's own evidence showed that the value of ore taken from the main vein was about \$150,000, it cannot be assumed that an award in favor of plaintiff of \$48,000, approved by the court, was based on trespasses upon the main vein, where the award was about the difference between the value of the ore admitted to have been taken by defendant, and the ore claimed to have been taken by plaintiff.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.\*]

En Banc. Error to District Court, San Miguel County; Sprigg Shackelford, Judge.

Action by the Moorhead Mining & Milling Company against the Liberty Bell Gold Mining Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Macbeth & May, of Denver, for plaintiff in error. H. M. Hogg, of Cortez, and W. L. Hogg and E. B. Adams, both of Telluride, for defendant in error.

GARRIGUES, J. 1. The Moorhead Mining & Milling Company, plaintiff below, defendant in error, owns the Franklin lode mining location situated in Upper San Miguel mining district; and the Liberty Bell Gold Mining Company, defendant below, plaintiff in error, owns the Lucky Boy, Tariff, Overlook, Ione, and Winner lode mining locations, all joining the Franklin. A main vein, called the Liberty Bell vein, traverses the mountain, on the strike for miles, in an easterly and westerly direction. Two secondary veins to the main vein apex upon the Franklin called by defendant the S. Hanging Wall and the Winner veins, and by plaintiff, Franklin No. 1 and the Waters veins. The dip of all these veins is southerly, and on the dip they pass under and through the Franklin and extend far beyond the plane of its southerly side line and unite with the main vein forming but one vein beyond the junction. The Moorhead Company brought this action at Telluride against the Liberty Bell, to recover damages for underground trespass by the latter upon the Franklin by driving beneath its surface underground workings into its territory and mining and removing ore from beneath the Franklin surface, also from veins apexing upon its surface after they pass on the dip outside of and beyond the southerly side line of the Franklin extended downward vertically, and to enjoin further

trespassing. The controversy turned upon whether the veins apexed upon Franklin or Liberty Bell territory. In the early stages of the litigation each party claimed the apexes of all these veins upon its territory, and extralateral rights; that is, the right to follow the veins on the dip under and through the Franklin surface and beyond its vertical southerly side line. Since the finding of the lower court, they abandon this position. The court found the main vein apexed upon Liberty Bell territory, and the result or effect of the decree was to award this vein to defendant with extralateral rights. It found the secondary veins apexed on the Franklin and awarded plaintiff these veins with extralateral rights down to the junction or union with the main vein. It refused to grant an injunction against the Liberty Bell from working the main vein under, through, and beyond the Franklin, but granted an injunction restraining defendant from working the two minor veins from their apexes down to their junction with the main vein. With the injunctive decree, both parties express themselves here as content. Defendant admits the decree allows it to work all the ground to which it is entitled, viz., all the main vein and extralateral rights thereon; that plaintiff owns the secondary veins on which defendant trespassed and mined, removed, and milled ores therefrom and sold the finished product, all the proceeds of which it appropriated to its own use. It takes no issue with the decree enjoining defendant from further trespassing upon these secondary veins, and plaintiff abandons its original claim of ownership to the main vein. These concessions and admissions in the briefs and oral argument render it unnecessary to consider but two assignments of error: First, did the court refuse to properly instruct the jury upon the measure of damages for willful trespass? Second, the court erred in failing to confine and restrict the jury, in awarding damages, to the two secondary veins; but permitted them to roam over the whole case unrestricted, and the jury may have based some damages upon ore removed from the main vein.

2. Defendant admits plaintiff owned the secondary veins upon which it trespassed for over three years and removed large bodies of ore which it milled and sold the finished product and applied all the proceeds to its own use. The only excuse it now offers for the trespass is that a great portion of the ore was taken innocently with an honest mistake of plaintiff's right thereto; that the apexes of the veins were buried under a deep wash, and their location could only be calculated; that, in its deep mining beneath the surface, defendant made a mistake in calculating the location of the tops of the veins, which, as soon as it ascertained, it ceased mining thereon except that, in cleaning up, about 300 tons of ore was removed from the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Winner vein after the mistake was discovered.

[1] 3. In case of innocent trespass by mining and milling metalliferous ores, where the trespasser sells the finished product and applies the proceeds to his own use, the owner should be reimbursed for his actual loss, and his damages are compensatory only. The measure of damages is the gross value of the ore in place before it was disturbed, not the net product or gross proceeds. The damages may be ascertained by deducting, from the enhanced value or gross proceeds, the cost of making the product at the time of conversion. It was agreed on the trial in this case, where the trespass was innocent, the deduction should be \$4.64 per ton.

[2] 4. The court, in effect, told the jury in willful trespass the measure of damages was the enhanced value or gross proceeds realized from the ore at the time of the conversion with no deductions—that is, the owner could recover the full amount realized by defendant from the ore at the time of conversion without deductions for any cost in making the finished product from the raw material—that, in willful trespass of this kind, the defendant should be at the expense of mining and milling the ore for the benefit of the owner. This is complained of as error. Defendant admits, in willful trespass, it was entitled to no deductions for the cost of mining and bringing the ore to the mouth of the mine, but claims it was entitled to deductions thereafter for milling and transportation charges; in other words, that the conversion took place at the mouth of the mine, and not at the time it applied the gross proceeds or finished product to its own use. This contention has lately been decided adversely to defendant by the United States Circuit Court of Appeals. *Liberty Bell Co. v. Smuggler Co.*, 203 Fed. 795, 122 C. C. A. 113. Defendant's contention is based upon cases of trespass upon coal veins, where the conversion usually takes place at the collar of the shaft, and hence are not applicable here. In case of willful trespass upon metalliferous veins, where the trespasser has mined, milled, and sold a finished or enhanced product, the conversion takes place when he applies the proceeds to his own use, and the measure of damages is the enhanced value or gross proceeds realized from the ore without deductions on account of any value the trespasser may have bestowed upon the ore by his labor.

[3] 5. The jury returned a general verdict for \$46,072.50. No special finding was made or requested. Complaint is now made that the jury may have based some of its damages on ore taken from the main vein, which the court found belonged to defendant. Plaintiff's evidence of ore taken from the S. Hanging Wall vein was 5,445 tons of the value of \$74,324.25; from the Winner vein,

12,220 tons of the value of \$83,707—making a total tonnage from these two veins of 17,665 tons, and a total value of \$158,029. Allowing from this the agreed deduction of \$4.64 per ton, it leaves as the net value of the finished product, according to plaintiff's minimum values, \$76,165.65. Defendant's testimony showed an admitted trespass on the two veins of 2,842 tons of the value of \$15,996, and the average between plaintiff's minimum and defendant's maximum values gives \$46,035.80, or within \$35 of the verdict. Plaintiff claimed in its complaint a tonnage in excess of 100,000 tons and a damage of over \$500,000; and, if the jury had based its verdict on the main vein, it would seem they must have found much larger damages than they did. From defendant's own testimony, had they allowed damages on the main vein, the verdict would have been \$138,727.36. The court found the trespass was on the secondary veins owned by plaintiff, and not on the main vein owned by defendant; it instructed the jury that each party to the action was entitled to all the veins, throughout their entire depth, the top or apex of which lay inside the surface lines of the location extended downward vertically, although such veins so far departed from a perpendicular in their downward course as to extend outside the vertical sideline of the claim. It adopted the finding of the jury and entered judgment on the verdict which it refused to set aside, showing that the court and jury were in accord as to the damages, and the court considered that the jury limited the damages to the same veins upon which it granted the injunction.

We are of the opinion plaintiff recovered damages for trespass and conversion upon the secondary veins only. Judgment affirmed.

Affirmed.

(53 Colo. 327)

**DENVER & R. G. R. CO. v. DOYLE**  
(No. 7814.)

(Supreme Court of Colorado. Jan. 4, 1915.)

**1. CARRIERS (§ 395\*)—CARRIAGE OF PASSENGERS—BAGGAGE—DUTY OF CARRIER.**

The fare of a passenger includes transportation for baggage, but ordinarily the baggage must be transported by the same train as the owner and called for within a reasonable time after arrival.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1505-1518; Dec. Dig. § 395.\*]

**2. CARRIERS (§ 397½\*)—CARRIAGE OF PASSENGERS—BAGGAGE—LIABILITY OF CARRIER.**

While a railroad company has charge of a passenger's baggage as a common carrier, it is an insurer of the property.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1519-1528; Dec. Dig. § 397½.\*]

**3. CARRIERS (§ 404\*)—CARRIAGE OF PASSENGERS—BAGGAGE—CARRIER AS WAREHOUSEMAN.**

Where a passenger fails to remove baggage from a railroad station within a reasonable time after its arrival, the liability of the carrier



changes from that of insurer to that of warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1539-1543; Dec. Dig. § 404.\*]

4. CARRIERS (§ 404\*)—CARRIAGE OF PASSENGERS—BAGGAGE—"REASONABLE TIME."

The "reasonable time" within which baggage must be removed is a time within reason after the arrival of the baggage, not the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1539-1543; Dec. Dig. § 404.\*]

For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]

5. CARRIERS (§ 408\*)—CARRIAGE OF PASSENGERS—BAGGAGE—QUESTIONS FOR COURT.

Where the facts are undisputed, it is a question of law for the court what constitutes a reasonable time for the removal of a passenger's baggage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.\*]

6. CARRIERS (§ 404\*)—CARRIAGE OF PASSENGERS—BAGGAGE—LIABILITY AS WAREHOUSEMAN.

Where baggage arrived at its destination shortly after noon and was not called for that day or the next, and was stolen from the station the second night, the court should have instructed the jury as a matter of law that it was not called for within a reasonable time, and that the carrier was liable only as warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1539-1543; Dec. Dig. § 404.\*]

7. CARRIERS (§ 404\*)—CARRIAGE OF PASSENGERS—BAGGAGE—LIABILITY AS WAREHOUSEMAN.

The fact that a passenger's failure to call for her baggage was due to her inability to secure sleeper accommodations on the same train or on the one the following day does not make the carrier liable as insurer of the baggage, where the passenger gave no notice to the baggage-master that she was not going on the train for which her baggage was checked.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1539-1543; Dec. Dig. § 404.\*]

Error to Mesa County Court; Walter S. Sullivan, Judge.

Action by Mary M. Doyle against the Denver & Rio Grande Railroad Company. Judgment for the plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss the action.

E. N. Clark and R. G. Lucas, both of Denver, for plaintiff in error. Henry R. Rhone, of Grand Junction, and J. H. Burkhardt, of Denver, for defendant in error.

GARRIGUES, J. This action for damages is on account of the failure of the railroad company to produce and deliver a suit case when it was called for, which it as a common carrier had received as baggage for transportation.

1. The facts are admitted, and there is no conflict in the testimony. Mary M. Doyle came to Denver August 9, 1911, from her home at Clifton, Colo., where she had purchased a round-trip ticket over the Denver & Rio Grande Railroad. She started to return on the evening of the 14th and upon arriving at the Union Depot first checked her suit

case to Clifton, and then went to the Pullman office to secure a sleeper berth, which she was unable to do, for the reason that they were all sold. Feeling that she was physically unable to travel at night without Pullman accommodations, she remained in Denver without informing the company that she did not intend to travel on the same train with her baggage, and the next morning, the 15th, went to Colorado Springs, where she endeavored to secure a berth on the night train, and was again informed that they were all sold. She remained at Colorado Springs until the morning of the 16th, secured a sleeper, and left that night, arriving at Clifton on the afternoon of the 17th, where she called for her baggage, which the company failed to deliver, and later she was informed by the agent that the depot had been burglarized the night before and her suit case stolen. In the court below, plaintiff tried the case upon the theory that under these facts the company was accountable as a common carrier and insurer of the baggage, without proof of negligence, and rested without attempting to prove negligence. Defendant then interposed a motion for a nonsuit upon the ground that it was not liable as an insurer or common carrier; that it was only accountable to the plaintiff as a bailee or warehouseman, and, no negligence having been shown, plaintiff could not recover. This motion was overruled. Defendant then introduced its evidence, from which it appeared that Clifton was a small day station, the agent remaining on duty from 8 a. m. to 8 p. m.; that the suit case in question arrived on the afternoon of the 15th, and, being unclaimed, it was stored in the baggage room used for that purpose; that on the night of the 16th the depot was burglarized and the suit case, with other property, stolen; that the depot was a substantial building with doors and windows equipped with ordinary locks and fastenings; that when the agent left at 8 o'clock on the night of the 16th, the doors and windows were securely locked and fastened; that the next morning it was discovered that an entrance had been forced through a window and the building burglarized.

The court, in its instructions, after stating the issues, told the jury that they should determine from the evidence and circumstances whether plaintiff called for her baggage within a reasonable time after it arrived at Clifton; that what constituted a reasonable time for her to remove it after it arrived was a question of fact which should be determined by the jury, and in that connection that they might consider whether her failure to demand her baggage sooner was because of the inability or failure of the company to furnish her proper and suitable accommodations for travel, considering her state of health at the time; that the liability of the company terminated as a common carrier after her baggage arrived at Clifton and a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—44

reasonable time had elapsed to remove it; that if she failed to remove her suit case after a reasonable time after it arrived, the liability of the company shifted or changed from that of a common carrier to that of a warehouseman; that as a warehouseman, the company was only bound to use that degree of care and attention which a man of ordinary prudence and diligence would use in reference to the goods, under the circumstances, if they were his own, and if the company used such reasonable diligence in storing and caring for the goods, it would not be liable in case of loss by burglary; that as a warehouseman, it was its duty to store the baggage in a room reasonably safe and secure, used for that purpose; that where a railroad company places uncalled-for baggage in its storeroom where it is its custom to place uncalled-for baggage, and such room appears to be reasonably secure for its safe-keeping, the railroad company will not be liable unless guilty of negligence which caused the loss, and if they found for plaintiff, the measure of damages would be the value, for use by the plaintiff, of the property lost, at the time and place of its loss, together with legal interest thereon from that date all damages having been waived except those coming within the above rule.

2. The undisputed testimony shows: August 14, 1911, plaintiff at the Denver Union Depot checked her suit case to Clifton, where it arrived August 15th, at 1:45 p. m.; it was uncalled for on its arrival, and the agent placed it in the baggage room of the depot; during the night of August 16th, the depot was burglarized, and the suit case, with other articles, stolen; August 17th plaintiff arrived at Clifton at 1:10 p. m., and called for the baggage, which the company failed to deliver, because it had been stolen; that the station was a substantial building, and no negligence was shown in caring for the baggage, which occasioned its loss. Plaintiff tried the case upon the theory of the company's liability as a common carrier and insurer. The theory of the defendant was that its liability as a common carrier terminated long before plaintiff called for the baggage, and had changed or shifted to that of a bailee or warehouseman before the property was stolen, and that it was only liable as a warehouseman upon proof of negligence which caused the loss.

[1] 3. Plaintiff's railroad fare covered transportation for herself and baggage to Clifton, and ordinarily it is presumed that baggage and passenger will go by the same train, and that the baggage will be called for within a reasonable time after the arrival at its destination. *Marshall v. P., O. & R. R. Co.*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650; *Blumenthal v. R. R. Co.*, 79 Me. 550, 11 Atl. 605; *Wilson v. G. T. Ry.*, 56 Me. 60, 96 Am. Dec. 435.

[2] 4. While the company had charge of the baggage as a common carrier, it was an

insurer of the property and must pay for its value if it failed to deliver it while held in this capacity.

[3] It was the duty of the company to have the baggage ready for delivery within a reasonable time after it reached its destination, and it was the duty of the plaintiff to take it away within a reasonable time. If the baggage remained uncalled for, it was the duty of the defendant to store it in the baggage room at the station or in some other suitable place, and if plaintiff failed to take it away within a reasonable time after its arrival, the liability of the company as a common carrier and insurer changed or shifted to that of a bailee or warehouseman. It then held the property in storage; its liability as an insurer or common carrier no longer existed, and in case of its loss, plaintiff could only recover against the company as a warehouseman, upon proof that its negligence caused the loss. 4 *Elliot on Railroads* (2d Ed.) § 1659; 3 *Hutchinson on Carriers* (3d Ed.) § 1285 et seq.; 2 *Redfield on Railroads*, § 171; 6 *Cyc.* 672.

[4, 5] 5. A reasonable time means sufficient time within reason to remove baggage after it, not the passenger, arrives. Where the facts are not disputed, what constitutes a reasonable time for a passenger to remove his baggage after arriving at its destination is a question of law which the court must determine. *D. & R. G. R. Co. v. Peterson*, 30 Colo. 77-87, 69 Pac. 578, 97 Am. St. Rep. 76; *Chicago Ry. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Schnitzmeyer v. Ill. C. R. R. Co.*, 147 Ill. App. 101; *K. C. Co. v. Patten*, 3 Kan. App. 338, 45 Pac. 108; *Louisville Co. v. Mahan*, 8 Bush (71 Ky.) 184; *Graves v. Fitchburg Co.*, 29 App. Div. 591, 51 N. Y. Supp. 636; *Onimitt v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Chicago Co. v. Addizoat*, 17 Ill. App. 632; *Galveston Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Kahn v. Ry. Co.*, 115 N. C. 638, 20 S. E. 169; *Ditman Co. v. K. & W. Ry. Co.*, 91 Iowa, 416, 59 N. W. 257, 51 Am. St. Rep. 352.

[6] 6. The court left the jury to determine from all the admitted facts and circumstances whether plaintiff called for her baggage within a reasonable time, and whether the liability of the company had shifted from that of a common carrier to that of a warehouseman. This was error. Plaintiff's baggage arrived at 1:45 p. m., on the 15th, and remained in the baggage room until the night of the 16th without being called for, and it was the duty of the court to have held, as a matter of law, that the baggage was not demanded within a reasonable time after it arrived.

Plaintiff could not recover against the company as a common carrier or insurer of the baggage as a matter of law. She did not demand or take it away within a reasonable time after it arrived, and she could not recover against the company as a warehouse-

man, because there was no proof of negligence.

[7] 7. Plaintiff attempted to show, as a special circumstance excusing her from removing the baggage on the afternoon of the day it arrived, that she endeavored to, but could not, get a sleeper until the night of the 16th, and did not feel able to travel without one. In this way she sought to extend the reasonable time to remove the baggage after it arrived at Clifton. If plaintiff had used ordinary care, thoughtfulness, and prudence, it must have occurred to her that if she waited until a few minutes before train time, she might have difficulty, at that season of the year, in securing a berth. Without making any inquiry or knowing whether or not she could procure a berth, she first went to the baggageroom and checked her suit case, expecting and intending to take the same train upon which it would go. Learning, upon inquiry, that she could not get a berth, she decided not to take that train, but to wait until she could secure sleeper accommodations. She allowed her baggage to go on, and it reached its destination two days in advance of her arrival, when she could easily have checked it for the train on which she was to travel. Under such circumstances, all the company could do was to store it in its baggageroom on its arrival. There was no delinquency on the part of the company in transporting either plaintiff or her baggage which would excuse her for not calling for and removing it without delay upon its arrival, or which would extend the reasonable time for its removal after it arrived. It was the fault of the passenger that the baggage was not called for and delivered upon its arrival.

By motion for a nonsuit, by requested instructions, by a request for a directed verdict, and by motion for a new trial, the court was given ample opportunity to have disposed of the case according to law. It not having done so, the judgment is reversed, and the cause remanded, with directions to dismiss the action.

Reversed.

MUSSER, C. J., and HILL, J., concur.

(58 Colo. 319)

CHENEY v. BIERKAMP et al. (No. 7770.) (Supreme Court of Colorado. Jan. 4, 1915.)

1. ELECTION OF REMEDIES (§ 4\*)—RIGHT TO ELECT—REMEDIES OF PURCHASER—RESCISSION.

A court cannot, over the objections of both parties, require a purchaser, who has elected to sue for the rescission of a contract for the purchase of land on account of the breach thereof by the vendor, to change his cause of action to one for damages for breach, since the two remedies are inconsistent, and the purchaser's election is binding at least so far as that action is concerned.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 5; Dec. Dig. § 4.\*]

2. VENDOR AND PURCHASER (§ 110\*)—RESCISSIION BY PURCHASER—BREACH OF COLLATERAL AGREEMENT.

An agreement by the vendor that he would render irrigable from a certain lateral a portion of the land sold, which was above the level of the lateral, the cost of which would be about \$75, which agreement was collateral to the contract for the sale of five acres of land worth \$2,500, and which was not to be performed until after the purchaser went into possession and began making payments, is not an essential part of the contract, the breach of which entitles the purchaser to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 196, 197; Dec. Dig. § 110.\*]

3. APPEAL AND ERROR (§ 157\*)—WAIVER OF ERROR—RULINGS ON PLEADINGS—COMPLIANCE.

A plaintiff, who sued to rescind a contract for the purchase of land, does not lose his right to object to an order requiring him to amend his complaint to one for damages by complying with the order under protest and without waiving his objections thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 971, 972, 978; Dec. Dig. § 157.\*]

4. PLEADING (§ 236\*)—AMENDMENT—DISCRETION OF COURT.

It was not an abuse of the trial court's discretion to refuse to allow plaintiff to amend his complaint for rescission of the contract on ground of breach by the defendant, by adding fraud as a further ground for rescission, where the proposed amendment was not offered for more than one year after the suit was begun, and after the court had entered a decree which, though interlocutory, should have included a final judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by C. L. Cheney against William Bierkamp, Jr., and others, to rescind a contract for the purchase of land in which the defendants filed a cross-complaint asking for rescission of the contract for plaintiff's breach. Judgment affirming contract and awarding damages to defendants, and plaintiff brings error. Reversed and remanded, with instructions to enter a decree for defendants on their cross-complaint.

Clarence J. Morley, of Denver, for plaintiff in error. L. Ward Bannister and Leroy McWhinney, both of Denver, for defendants in error.

HILL, J. The plaintiff in error brought this action to rescind a contract for the purchase of five acres of land and water, and to secure the return of that portion of the purchase price then paid, etc., for the alleged reason that the defendant Bierkamp, who sold him the land, refused to comply with the terms of the contract to put it all under irrigation for the season of 1910.

The defendants admit the execution of the contract; deny any refusal to comply therewith; aver that the land was under irrigation by a lateral from the Highline Canal; allege that during negotiations a question

arose whether about one-tenth of it was lower or higher than this lateral, upon account of which it was agreed that there should be inserted in the contract a proviso whereby Bierkamp would agree, in case this portion was too high, to put it under irrigation, that is, would provide a means by which water from this lateral or otherwise from the canal could be made to cover all the land, that this proviso meant that Bierkamp should do this by raising or changing the lateral or by shaving off the top of the land, thereby lowering its surface, and that either could be done for not to exceed \$100. They deny that the agreement to put this piece under irrigation was any particular consideration for the contract, or for the \$200 paid; allege that the real consideration was possession and agreement to convey, that plaintiff took possession, the reasonable value of which was the agreed price, viz., \$2,500, and that the plaintiff refused to permit them to comply with this provision of the contract, etc. By cross-complaint defendants allege the execution of the contract, its assignment to the defendant corporation, the plaintiff's possession, the agreement to put it all under irrigation by lowering the portion higher than the lateral, or changing the lateral, the plaintiff's refusal to allow them to do so, and his refusal to continue his payments of \$10 per month and interest, upon account of which the corporation served notice on him of its cancellation of the contract, etc., and that he notified it that he would make no further payments or further comply with its terms. The corporation alleged damages in excess of the sum paid and its right to retain the amount then paid as liquidated damages, etc., with a prayer for cancellation, etc.

By replication the substance of the new matter in the answer and certain portions of the cross-complaint were denied. A jury was impaneled to whom two interrogatories were submitted, covering one phase of the plaintiff's contention. They were answered in his favor, namely: First, that the defendants did not offer to put said entire five acres under irrigation either by lowering its surface or by building a new lateral; and, second, that they were not denied this privilege by the plaintiff. The court made findings that at that time neither was entitled to a rescission of the contract; the defendants, because they had not carried out its terms in placing all the land under irrigation; the plaintiff, because this was a collateral or an independent promise, and not made a part of the consideration for the conveyance of the land and water. Both sides excepted to these findings. The court, upon its own motion, then ordered that an interlocutory decree be entered, which would reaffirm the contract and provide that an issue be framed on the difference in value of the land, had it all been put under irrigation as provided by the contract, and its present

value, without having been so placed under irrigation, and that this amount should be applied upon the payments due the defendant corporation under the contract so far as it would go; the decree then to be made final requiring the plaintiff to pay the balance as it became due, and upon its completion the defendant company to make the conveyance provided by the contract, etc. Both parties objected to this order. The plaintiff filed a motion to vacate it, etc. This motion was denied, and the interlocutory decree entered. The defendants filed a motion to withdraw the decree which was likewise denied. The decree commanded the plaintiff, within 20 days, to file a supplemental complaint setting forth his claim for damages, etc., on account of the breach of the contract concerning the irrigation clause, which damages were to be in conformity with the measure fixed therein. It gave the defendants 20 days thereafter to plead thereto, and the plaintiff 10 days to reply, and provided further that when issues were thus joined it be set down for trial by a jury on the question of such damages only, and that the cause be continued for this purpose. Both parties excepted to this decree, and further pleadings were filed by the plaintiff under objections and exceptions and by reason only of complying with its terms and without waiving any rights on account of so doing. On these subsequent pleadings the plaintiff was allowed a credit of \$200 for damages on account of Bierkamp's failure to comply with the irrigation clause of the contract, and judgment was given against the plaintiff for \$247.75, being the remainder of the deferred payments then due on his note and contract after the allowance of this credit.

[1] What transpired after the issuance of the interlocutory decree is immaterial, as neither the issues made by the original pleadings nor the findings of fact were in harmony therewith. By this decree the court created and assumed jurisdiction of a new cause of action not presented by any pleading or sought by either side, but objected to by both. Under his version of the facts the plaintiff had his election of two remedies, namely, to rescind the contract and recover the usual damages in such cases; or, to affirm the contract and sue for damages on account of its noncompliance. There remedies are inconsistent, not concurrent; both were open to the plaintiff, and when once he made his election to rescind, etc., he was bound thereby, at least so far as this action is concerned, and upon this issue he should have been allowed to stand or fall. *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086; *Wilson v. New United States Cattle-Ranch Co.*, 73 Fed. 994, 20 C. C. A. 241; *Breckenridge Mer. Co. v. Ballif*, 16 Colo. App. 554, 66 Pac. 1079; *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379; *Hummel v. Moore* (C. C.) 25 Fed. 380; *Gallup v. Wortmann*, 11

Colo. App. 308, 53 Pac. 247; *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, 63 Pac. 1061.

In *Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826, it was held that, where a plaintiff has elected one of two inconsistent remedies, he may not be permitted by an amendment to choose the other. This means, of course, over the objection of the other party. In the *Slayden* Case the action was originally for damages on account of breach of contracts. By an amended complaint the plaintiff sought to rescind the contracts; it was held that the change was not admissible. In the present action, over the objections of plaintiff and defendants, the court ordered that the action be changed from one to rescind the contract, which was sought by both parties, to one in damages on account of its alleged breach by the defendants. This it had no right to do.

[2] At the time of ordering the interlocutory decree, the court found that the agreement to put the land under irrigation before the next irrigation season was a non-essential and wholly unimportant feature of the contract, and that the defendants' failure to perform did not entitle the plaintiff to rescind. We agree with this finding. The record discloses that only about one acre of the land was affected by this clause, which, if necessary, was to be irrigated by either moving or raising the lateral, or lowering the surface of the land; that either could have been effected at a cost of about \$75; and that the defendant Bierkamp was to have five or six months after the execution of the contract to do this; that, when the contract was executed, plaintiff paid \$200 as a part of the purchase price and continued to make installment payments, as per its terms, until August of the next year, and also went into possession. The breach of this clause was not of the essence of the contract; it was not an essential part of the consideration; it was not a condition precedent, or a dependent covenant. On the other hand, it was a minor detail for which the plaintiff could be thoroughly compensated in damages; it was to be effected long after plaintiff had paid a part of the purchase price and had entered into possession; it was wholly distinct and separable from the other and principal agreements whereby the defendants agreed to sell, deliver possession, and convey title to the land and water of an approximate value of \$2,500 unaffected by this clause, and all of which could be performed without performance of this clause, which it would cost about \$75 to comply with, and which cost the plaintiff could have offset against the unpaid balance of the purchase price. Under such circumstances, the plaintiff was not entitled to rescind. Page on Contracts, vol. 3, § 1450; *Luce v. New Orange Industrial Ass'n*, 68 N. J. Law, 31, 52 Atl. 306; *Kauffman v. Raeder*,

108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Burge v. Cedar Rapids & Mo. R. R. Co.*, 32 Iowa, 101; *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; *Brevort v. Hughes*, 10 Colo. App. 379, 50 Pac. 1050; *Anglo-Wyoming Oil Fields v. Miller*, 117 Ill. App. 552; *Weintz v. Hafner*, 78 Ill. 27; *Bloomington Electric Light Co. v. Radbourn*, 56 Ill. App. 165.

[3] The defendants, although objecting to it, etc., now contend that the plaintiff cannot be heard to complain concerning the interlocutory decree, because he complied with it in filing supplemental pleadings. We cannot agree with this contention; its language is mandatory; it was objected to and complied with by the plaintiff under protest, and without waiving any right, etc., the plaintiff had elected between two inconsistent causes of action, as he had a right to do. The defendants, by cross-complaint, plead their election to rescind. Each sought to rescind. No other issue was presented. The contention was the grounds: if the plaintiff's, he was entitled to a return of the amount then paid, etc., if the defendants', they were entitled to retain the payments made, etc. Neither was asking any other relief upon account of its nonperformance. The judgment discloses that plaintiff was owing in excess of the amount allowed for damages for defendants' noncompliance with the irrigation clause. Under such circumstances, the plaintiff may have selected his remedy, preferring, could he not rescind under his theory, that defendants be allowed to keep the amount paid as liquidated damages, as they had declared their intentions to do. The final judgment was not responsive to these issues, and, as the plaintiff objected and excepted to all process by which it was secured, we think he saved his right to complain. *Archuleta v. Archuleta*, 52 Colo. 601, 123 Pac. 821; *Travelers' Insurance Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195.

The defendants' position is rather inconsistent concerning this. They also objected to the decree, and, had the result been more favorable to the plaintiff and less favorable to them, it is quite likely that they, instead of him, would now be complaining concerning it.

[4] Error is assigned upon the court's refusal to allow the plaintiff, by amendment, to set forth an additional reason why he was entitled to rescind the contract, namely, that his execution of it was secured through fraud, false representations, etc. The defendants claim that this amendment attempts to state a new cause of action, but in fact states none, etc. We think it unnecessary to determine these questions. The filing of an amendment is largely within the discretion of the trial court. The record discloses that this one was not offered until more than a year after the suit was begun

and about eight months after the interlocutory decree was entered, which, had it been as it should, would have included a final judgment against the plaintiff. Under such circumstances, we cannot say that the court abused its discretion in refusing it when it did, eliminating all other questions concerning it.

For the reasons stated, the judgment is reversed, and the cause remanded, with instructions to enter a decree in favor of the defendants on their cross-complaint, to include a cancellation of the contract and note; they to retain all payments made up to the date of the judgment as liquidated damages. The costs of the trial will be taxed to the plaintiff. Each side to pay its costs here.

Reversed.

MUSSER, C. J., and GARRIGUES, J., concur.

(58 Colo. 338)

BIVENS v. HULL et al. (No. 8120.)

(Supreme Court of Colorado. Jan. 4, 1915.)

1. SPECIFIC PERFORMANCE (§ 14\*)—CONTRACTS—ISSUANCE OF CORPORATE STOCK.

Equity would not grant specific performance of a contract, to which a corporation was not a party, contemplating an increase of the corporation's stock and a disposition thereof in accordance with the contract, especially where the corporation itself was not a party to the suit.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 33, 41; Dec. Dig. § 14.\*]

2. CORPORATIONS (§ 60\*)—CAPITAL STOCK—DISPOSITION—"CAPITAL."

The stock of a corporation forms its "capital" at par, and the corporation alone may dispose of it according to law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 162; Dec. Dig. § 60.\*]

For other definitions, see Words and Phrases, First and Second Series, Capital.]

3. CORPORATIONS (§ 72\*)—"TREASURY STOCK."

"Treasury stock" of a corporation is not stock to be held by the corporation unsubscribed for and unissued.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 72.\*]

For other definitions, see Words and Phrases, Second Series, Treasury Stock.]

4. CORPORATIONS (§ 99\*)—CONTRACT—SALE OF CORPORATE STOCK—ISSUANCE.

A contract between plaintiff and defendants, who were interested in a corporation, that plaintiff should sell \$33,333 par value of the stock of the corporation for \$5,000, which was all that it should ever receive therefor, and that plaintiff for his services should receive \$50,000 par value of the stock, was invalid as providing for an issue of corporate stock to a greater amount than the value of the services for which it was to be paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

5. APPEAL AND ERROR (§ 954\*)—MATTERS OF DISCRETION—TEMPORARY RESTRAINING ORDER.

Where the question of emergency for the issuance of a temporary restraining order was passed on by two district judges adversely to the contention of defendants, the Supreme

Court, though affirming the ruling below sustaining a demurrer and dismissing the complaint, will not reverse an order refusing to enter judgment on the emergency bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.\*]

Error to District Court, Routt County; John T. Shumate, Judge.

Suit by C. E. Bivens against Horace Hull and another. Decree for defendants, and complainant brings error. Affirmed.

John H. Gabriel, of Denver, and J. K. Bozard, of Steamboat Springs, for plaintiff in error. Wells B. McClelland and C. R. Monson, both of Steamboat Springs, for defendants in error.

MUSSER, C. J. The action below was for the specific performance of a contract and an injunction. A general demurrer to the amended complaint was sustained and the action dismissed. The amended complaint alleged that the plaintiff in error, who was plaintiff below, entered into a contract with the defendants in error, who were defendants below, wherein it was recited that the defendants were the owners of a majority of the stock of the Hull Telephone Improvement Company; that they desired Bivens, the plaintiff, to raise money to finance the company, and that Bivens had agreed to raise at least \$5,000 by sale of treasury stock at not less than 15 cents a share; that in consideration of this promise the defendants agreed, as stated in the words of the contract—

"to cause a meeting of the stockholders of said company to be called and held for the purpose of increasing the capital stock of said company from the sum of \$50,000 to the sum of \$250,000, and increase the directors of said company from three to seven; and further agree that the capital stock of said company shall be held as follows: 140,000 shares as treasury stock, and the balance, 110,000 shares, promotion stock, of which 110,000 shares 30,000 is outstanding, and the balance to be distributed as follows: 50,000 shares to C. E. Bivens on his fulfilling his part of this agreement, the other 30,000 shares to Horace Hull and his associates. In consideration of which the said C. E. Bivens agrees to raise the sum of at least \$5,000 to finance said company, by selling treasury stock of said company for not less than 15 cents a share, on the sale of which and delivery of the sum of \$5,000 to said company said C. E. Bivens is to receive 50,000 shares of said promotion stock, and the other 30,000 shares of promotion stock to be delivered to said Horace Hull and his associates."

The amended complaint further alleged that at the time of the execution of the contract the capital stock of the company was \$50,000, divided into shares of the par value of \$1 each; that of this, 30,000 shares were issued and outstanding, of which the defendants owned 22,500 shares and had a proxy for 5,000 shares more; that defendants were two of the three directors of the corporation; that pursuant to the contract a meeting of the stockholders was called and held for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purpose of increasing the capital stock from \$50,000 to \$250,000, and to increase the number of directors from three to seven; that at the meeting the defendants voted all the stock owned and controlled by them as aforesaid against the increase of the capital stock, and advised all the other stockholders to vote against it, so that such proposed increase was defeated; that at that stockholders' meeting, the defendants voted to increase the number of directors from three to seven, and the increase of directors was made; that the plaintiff, relying upon the said contract and in full confidence that the defendants would, at the stockholders' meeting, vote to increase the capital stock, proceeded to raise the sum of \$5,000 as provided in the contract, and entered into a contract of sale and sold to certain parties 33,333 shares of the capital stock of the company at 15 cents a share, for the full sum of \$5,000; that this stock so sold was the stock provided by the contract with the defendants to be sold; that the purchasers of the said stock have demanded the same of the plaintiff, and threaten to bring suit against him to compel its delivery; that before the commencement of the action plaintiff tendered to the defendant for the company the \$5,000 named in the contract to be raised, and demanded that the defendants carry out that contract and cause to be issued to the purchasers the 33,333 shares of the capital stock of the company; and that the defendants failed and refused to do this. Then follow further allegations on matters, the existence of which were necessary to compel a specific performance of a contract for the sale of stock, and also matters necessary to obtain an injunction. The prayer was for a temporary injunction restraining the defendants from transferring any of the stock which they held, and that upon a final hearing the defendants be ordered to specifically perform the contract and to cause a meeting of the stockholders to be held to increase the capital stock as provided therein, and upon the holding of the stockholders' meeting the defendants be ordered to do everything necessary to increase the capital stock, and upon the increase to issue to the plaintiff 50,000 shares of the stock, and to issue to the purchasers the stock which the plaintiff had sold to them.

The defendants insist that all they contracted to do was to cause a stockholders' meeting to be called and held for certain purposes; that such meeting was called and held, and therefore the defendants fulfilled their contract. Be this as it may, there are various reasons why a court of equity should give no further countenance to the contract, among which the following are sufficient:

[1] The original issue and disposition of its capital stock are acts to be performed by a corporation. It was proposed in the contract to issue and dispose of stock that was not and could not become the property of

either plaintiff or defendants until it was issued and disposed of by the corporation in the manner provided by law. In order to give the relief sought for by plaintiff it would be necessary to coerce the corporation, not only to increase its capital stock, but to issue and dispose of it in accordance with a contract with which it had nothing to do, and in an action to which it was not a party.

[2] Furthermore, the unissued capital stock of a corporation belongs to it. It forms its capital at its par value, and the corporation only has the right to dispose of it, and that in accordance with law. This contract proposed to dispose of the capital stock of the corporation. \$140,000 worth of it was to be treasury stock.

[3, 4] Treasury stock has a meaning different from what was meant thereby in this contract. It is evident that what was termed "treasury stock" in the contract was stock to be held by the corporation as unsubscribed for and unissued. Bivens was to sell enough of this so-called treasury stock at 15 cents a share to produce \$5,000. It is plain that this stock to be sold by Bivens was to be carved out of the original issue, and the corporation was to originally issue and part with \$33,333 worth for \$5,000. That is all it was ever to have, or could expect to obtain, and that is what the plaintiff wants a court of equity to say that the corporation shall take for it, whether it wants to or not, because three individuals have contracted that it shall do so. \$110,000 worth of the stock was to be promotion stock, whatever that may be. Of this, \$30,000 worth was already issued and outstanding, and the remaining \$80,000 worth was to form a melon, which was to be cut up so that Hull and his associates were to get \$30,000 worth and Bivens \$50,000 worth.

So far as it appears from the contract, the corporation was to receive nothing whatever for the 30,000 shares of stock that was to go to Hull and his associates. There is no law to warrant any such disposition of the capital stock of a corporation. \$50,000 worth of the stock was to go to Bivens. It may be urged here that the services of Bivens in selling stock so that the corporation would get \$5,000 would be a consideration for the issuance of the \$50,000 worth to Bivens. It may be true that our Constitution and statutes authorize the issuance of stock for services rendered to a corporation. If that is so, it is coupled with the idea that the services rendered shall be of the value of the stock issued therefor. It is also true in this connection that the authorities, when good faith is present, give to the value of the property or services for which stock is issued an elastic quality, but there is no authority that stretches such value to the extent of authorizing the payment of \$50,000 of the original capital stock for services rendered in procuring \$5,000 in money for the corporation. By this contract, then, this corporation was to part with \$113,000 worth of its capital stock, and all

that it was to receive therefor was \$5,000. The value of \$5,000 is fixed. There is no prospect of it ever being worth any more. Its purchasing power may increase or diminish, but its value always remains at \$5,000. Without intimating that such a contract, if made by a corporation, would be enforceable, because that question is not now before us, it is certain that the corporation cannot be made to perform such a contract when it did not make it, in a suit to which it is not a party.

[5] The defendants in error have assigned cross-error. A temporary restraining order was issued without notice, pending the application for a temporary injunction, restraining the defendants from transferring stock held by them. At the hearing, a temporary injunction was denied, and a demurrer was sustained to the complaint and the suit dismissed. The defendants claim that the court erred in not entering judgment on the emergency bond given when the temporary restraining order was granted. The matter of the emergency that existed for the issuance of the temporary restraining order seems to have been passed upon by two district judges adversely to the contention of defendants in error. Under such circumstances, we do not feel justified in interfering with their disposition of the matter, but will leave the parties with their unwarranted contract where the district court left them.

The judgment is affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

(58 Colo. 268)

#### GRIMM v. YATES. (No. 7856.)

(Supreme Court of Colorado. Dec. 7, 1914.

Rehearing Denied Jan. 4, 1915.)

#### 1. MINES AND MINERALS (§ 113\*)—RIGHT TO LIEN—MINERS WORKING FOR LESSEE.

Rev. St. 1908, § 4025, provides that persons performing labor on or furnishing materials for improvements on land, whether at the instance of the owner or his agent, shall have a lien, and every person having charge of the construction, etc., of any such improvement shall be held to be the agent of the owner for the purposes of the act. Section 4028 declares that the act shall apply to all persons doing work for the prospecting or development of any mine or in any tunnel, etc., but that the section should not apply to the owner of any mine, lode, etc., who should lease the same to one or more sets of lessees. *Held*, that persons working a mine under an assignee of a lessee were not entitled to a lien for their services under such sections notwithstanding the lease contained an option to the lessee to purchase.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 234; Dec. Dig. § 113.\*]

#### 2. MINES AND MINERALS (§ 114\*)—OPERATION—LIENS—NOTICE—STATUTES—CONSTRUCTION.

Rev. St. 1908, § 4029, provides that any tunnel constructed with the knowledge of the owner or reputed owner of the land shall be held to have been erected at the request of such owner so far as to subject his interest to a lien

therefor, unless, within five days after he shall have obtained notice of the same, he shall have given notice that his interest shall not be subject to any lien for the same, provided that the section should not apply to any owner claiming any interest in such property who shall have contracted for any erection, structure, or improvement mentioned in the act. *Held*, that the purpose of such section was to require an owner of land in possession of another making improvements, which by the terms of the agreement for possession the possessor was without authority to make, to give notice to those performing labor or furnishing materials that his interest was not to be subject to a lien; and hence where a mine was in possession of the assignee of a lessee, and none of the work performed by the assignee's employes was unauthorized by the lease but was contemplated as a part of the operation of the mine, the owner was not required to give such notice in order to protect his property in the mine from lien.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

Hill, J., dissenting.

En Banc. Error to District Court, Boulder County; H. P. Burke, Judge.

Action by Louis Yates against J. M. Grimm. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

The question presented is the right of defendant in error to a lien under the mechanic's lien act (section 4025 et seq., R. S. 1908) awarded him by the trial court upon the Herald Mining Claims, the property of plaintiff in error. For convenience we shall refer to the latter as "defendant," and the former as "plaintiff"; that being their relation in the court below.

About July 1, 1908, defendant entered into a written agreement with John M. Yates, whereby he agreed to sell the latter the property involved for a sum specified, and to execute and deposit with the First National Bank of Boulder in escrow a deed conveying the property to Yates, which was to be delivered on the payment of the purchase price. In this contract, plaintiff was designated the party of the first part, and Yates as party of the second part, and provided that:

"Whereas the said party of the first part has further agreed to place the said party of the second part or his assigns in full and peaceable possession of said property, to mine, remove and sell ore therefrom; the said party of the second part or his assigns to commence work on said premises before the fifteenth day of July, A. D. 1908, and thereafter to work the same continuously in a thorough and workmanlike manner, employing at least two (2) men underground, working at least twenty-five (25) shifts to the man each calendar month, and to permit the party of the first part to have access to all parts of said property at all times and to allow no person not in privity with the parties hereto to take or hold possession of said property or any part thereof under any pretense whatever, and during the continuance of this bond and lease to deposit in said First National Bank to the credit of said party of the first part twenty (20) per cent. of the net smelter or mill returns of all ore taken from said property as and when received, said sum so deposited to be a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



part payment of said purchase money, and to deposit in connection therewith a duplicate copy of mill and smelter settlement sheets for all ore shipped from said property, within ten (10) days from the date of such shipment. All shaft work done in connection with this contract to be substantially timbered in a workmanlike manner, and all drifts shall be timbered when reasonably necessary. \* \* \* Now, therefore, the condition of the above obligation is such that if said party of the second part, or his assigns, shall fail to comply with the terms of the aforesaid agreement or any of them, time being of the essence hereof, and if the said party of the first part shall well and faithfully perform the same, then this obligation shall be null and void, otherwise remain in full force and effect, and in case of such failure all sums deposited as aforesaid shall be retained by the said party of the first part as liquidated damages and the party of the second part shall forthwith surrender possession of said premises."

Under this agreement Yates worked the properties from July 1, 1908, to the 19th day of April, 1910, when he assigned it to the Herald Mines Company, a corporation, which at once entered into possession of the mines, and worked them until February 11, 1911. Plaintiff, and others who assigned their accounts to him, worked in and upon the mines for this company. These accounts not having been paid, plaintiff filed his lien statement, claiming a lien upon the mining property. In his complaint to foreclose plaintiff alleged that between dates named, which vary from the 12th day of December, 1910, to the 11th day of February following, his respective assignees, including himself, rendered services for the Herald Mines Company in working, operating, and developing the property under bond and lease, and stated the sum due each for this work. He further alleged that during these periods the Herald Mines Company operated the property with the full knowledge and consent of the defendant, and that he did not give the notice required by section 4029, R. S. 1908. The answer put in issue the allegation of the knowledge of defendant that the property was being operated by the Herald Mines Company, or that it was developing or improving the property, and set out *hæc verba* the instrument to which we have referred. The replication of plaintiff alleged that the property was improved by the Herald Mines Company by means of shafts, tunnels, inclines, adits, drifts, and other improvements thereon, and that plaintiff and his assignors performed labor upon these improvements.

At the trial it was admitted that the notice mentioned in section 4029 was not given by the defendant. The testimony, in addition to the execution of the bond and lease, established that the work for which the lien was claimed was performed by the plaintiff and his assignors, at the instance of the Herald Mines Company in the different capacities of engineer, trammer, operating machine drills, timbering, working on the hoist, blacksmithing, sorting ore, superintending, stopping or breaking down ore above the two

levels, drifting on the vein for an ore chute, making an up-raise for ventilation, a cross-cut in the foot wall, and a station. The ore broken was sorted and sold. In short, all the work performed by the plaintiff and his assignors was of the character usually done in the ordinary course of mining for commercial purposes.

It appears that all drifting was in and along the vein at the 150-foot level. What is termed an up-raise was nothing more than a stope, except possibly in one place a connection was made between the roof of the stope and the level above by an excavation for ventilation which extended a few feet from the top of the stope. The timbering was in the stope.

The character of the work during the period for which the lien is claimed is described by the witness Yates as follows (quoting from the abstract):

"I am familiar with all the work that was done on this property from December 1st, to February 11th. It was what I consider ordinary mining work, drifting and stoping. Practically all that was done was just such work as was necessary to reach and remove the ore that was taken out by the Herald Mines Company."

Harry E. Kelly and Charles H. Haines, both of Denver, for plaintiff in error. F. G. Folsom, of Boulder, for defendant in error.

GABBERT, J. (after stating the facts as above). Section 1 of our Lien Act (Session Laws 1899, p. 261, being section 4025, R. S. 1908) provides, so far as material to consider, that:

"Mechanics, materialmen, contractors, sub-contractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, \* \* \* tunnel, \* \* \* or any other structure or improvement, upon land, \* \* \* shall have a lien upon the property upon which they have rendered service or bestowed labor \* \* \* for the value of such services rendered or labor done \* \* \* whether at the instance of the owner, or of any other person acting by his authority or under him, as agent, contractor, or otherwise; for the work or labor done or services rendered \* \* \* by each respectively, whether done or furnished or rendered at the instance of the owner of the building or other improvement, or his agent; and every contractor, architect, engineer, sub-contractor, builder, agent or other person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

Section 4 of the act, being section 4028, *Id.*, provides:

"The provisions of this act shall apply to all persons who shall do work \* \* \* as provided in section 1 of this act, for the working, preservation, prospecting or development of any mine, lode or mining claim or deposit yielding metals or minerals of any kind or for the working, preservation or development of any such mine, lode or deposit, in search of any such metals or minerals; and to all persons who shall do work \* \* \* upon, in or for any shaft, tunnel, mill or tunnel site, incline adit, drift or any draining or other improvement

of or upon any such mine, lode, deposit or tunnel site; \* \* \* and, provided, further, that this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift or other excavation, who shall lease the same in small blocks of ground in areas, whether of surface or beneath the surface, not to exceed 150 feet in length by the width of the claim and for a depth of 150 feet or less to one or more sets of lessees."

Liens of the character under consideration are purely creatures of statute. They neither exist nor can be enforced, except in cases falling within its purview, and only those persons whom the statute plainly gives the right to a lien can acquire it. Such has been the uniform ruling of this court and the Court of Appeals.

[1] Section 8 of the Lien Act as it existed prior to the act of 1899, and as amended (Session Laws 1895, p. 202), was substantially the same as section 4028, *supra*. Under that section it was held, in *Wilkins v. Abell*, 26 Colo. 462, 58 Pac. 612, that the purpose of section 8, when read in connection with other provisions of the lien act, of which it formed a part, was to give a lien on mining property upon the same conditions that a lien attaches to other property for services rendered the owner, or some one of the enumerated persons acting for him, as his agent, but that the lessee of a mining claim was not one of such persons, for the reason that the lessee is not employed by the lessor to do any work for him, as by the demise to the lessee he acquires a qualified interest in the property leased, which entitles him to work the same for his own benefit. This ruling was followed in *Antlers Park R. M. Co. v. Cunningham*, 29 Colo. 284, 68 Pac. 226, and *Williams v. Eldora Enterprise G. M. Co.*, 35 Colo. 127, 83 Pac. 780. In the latter case *Maher v. Shull*, 11 Colo. App. 322, 52 Pac. 1115; *Schweizer v. Mansfield*, 14 Colo. App. 236, 59 Pac. 843, and *Little Valeria M. & M. Co. v. Ingersoll*, 14 Colo. App. 240, 59 Pac. 970, where substantially the same ruling was announced, were cited with approval. In the *Wilkins* Case, it was also contended that by virtue of the proviso included in section 8, passed in 1895, the owner of the fee was liable for work performed at the instance of the lessee unless the lessor leased the mine "in small blocks of ground to one or more sets of lessees." Passing upon this question, it was held that:

"The office of a proviso is not to enlarge or extend, but rather to put a limitation or restraint upon the language which the lawmaker has used in the body of the act. It excepts something from, but adds nothing to, the act."

And therefore the proviso of itself could not be construed to give any lien that did not exist by virtue of the affirmative provisions of the act.

Following the cases above cited, we think it is clear that under section 4028 a lien in favor of the plaintiff cannot be established, because the work he and his assignors performed was done at the instance, and for the benefit, of

the Herald Mines Company, whose relation to the defendant was that of lessee only, and that the proviso in that section cannot be construed to give a right to a lien in such circumstances. Neither does the fact that the instrument, executed by the defendant, was a bond and lease change the situation. The mines company was not in possession by virtue of the option to purchase, but under a contract of leasing and solely for the purpose of working the property under the lease, at a stipulated rent in the nature of royalty. The portion of the instrument which may be denominated a bond or option to purchase did not require the vendee to make any improvements. The only condition imposed upon the lessee by the lease was that work should be commenced within a time specified, and thereafter work the property continuously, in a thorough and workmanlike manner, employing not less than two men underground, working at least 25 shifts to the man each calendar month, and that all shaft work done should be substantially timbered in a workmanlike manner, and all drifts timbered when reasonably necessary. According to the testimony, the work performed by the plaintiff and his assignors was of the character usually done in the ordinary course of mining. A lessee of a mine must at least do ordinary development work in order to extract the ore it contains, and to extract it necessarily requires work to be done upon the mine. This character of work, when performed at the instance of the lessee, does not, under the sections of the lien act so far considered, give the parties performing such work any right to a lien upon the fee of the lessor. Such is the ruling in the *Williams Case*, where that question is fully discussed.

[2] This brings us to a consideration of the question of whether the failure of the defendant to give the notice mentioned in section 4029, R. S. 1908, subjects his interest in the property to a lien in favor of the plaintiff. That section provides:

"Any \* \* \* tunnel, \* \* \* and every structure or other improvement mentioned in the preceding sections of this act, constructed, altered, added to, \* \* \* or repaired, either in whole or in part, upon or in any land, with the knowledge of the owner or reputed owner of such land, \* \* \* shall be held to have been erected, constructed, altered, \* \* \* repaired, or done at the instance and request of such owner or person, but so far only as to subject his interest to a lien therefor as in this section provided; \* \* \* unless such owner or person, shall, within five days after he shall have obtained notice of the erection, construction, alteration, removal, addition, repair or other improvement, aforesaid, give notice that his interests shall not be subject to any lien for the same, by serving a written or printed notice to that effect, personally, upon all persons performing labor or furnishing skill, materials, machinery or other fixtures therefor, or shall, within five days after he shall have obtained the notice aforesaid, or notice of the intended erection, construction, alteration, removal, addition, repair or other improvement aforesaid, give such notice as aforesaid by posting and keeping posted a written or printed notice to the effect

aforsaid, in some conspicuous place upon said land or upon the building or other improvement situate thereon. Provided, that this section shall not apply to co-owners of unincorporated canals, ditches, flumes, aqueducts, and reservoirs not (nor) to the enforcement of chapter 116 of the Session Laws of Colorado of 1893; and, provided, further, that the provisions of this section shall not be construed to apply to any owner or person claiming any interest in such property who shall have contracted for any erection, structure or improvement mentioned in this act."

The important question is: In what circumstances must the owner of property give the notice required by this section in order to protect his fee from being subjected to a lien for the character of improvements therein mentioned? Clearly, if the owner has entered into a contract to have such improvements constructed, which under the provisions of the lien act would subject his fee to a lien therefor, he cannot prevent the lien attaching by giving notice that his interest in the property shall not be subject to a lien for such improvements. That would defeat the very purpose of the lien act, which, by preceding provisions, care has been taken to prevent. Evidently the purpose of the section is to require an owner, where another in possession of his property is making improvements, which by the terms of the agreement between the owner and the party in possession the latter is without authority to make, to give notice to those performing labor, or furnishing materials for such improvements, within five days after he shall have obtained knowledge that they are being constructed, that his interest in the property, upon which such improvements are being placed, shall not be subject to any lien therefor, and that his failure to do so renders his interest subject to a lien for such improvements. That this is the manifest purpose of the section is plain from its provisos, which are to the effect that it shall not apply to an owner who has contracted for such improvements, nor the owners of unincorporated canals, ditches, flumes, and reservoirs, nor to the enforcement of chapter 116, Session Laws of 1893. Turning to that chapter, we find it provides that co-owners of unincorporated ditches, except as therein limited, shall pay for the necessary cleaning and repair of such ditches, in the proportion that their respective interests bear to the total expenses incurred in doing that character of work, and that the owners performing such work shall have a lien upon the interest of a delinquent co-owner for his proportion of such cost and expenses. These provisos make it clear that by the section it was not intended to allow an owner, by posting notices, to relieve his property from a lien attaching for improvements, when, by virtue of his contract with the person making them, his property under the lien act is subject to a lien therefor, and that its object was to estop the owner from asserting that unauthorized improvements were not made at his instance

and request, if constructed with his knowledge, unless he gives the notice required by the section. In brief, the purpose of the section was to give a lien for improvements not authorized by any contract between the owner and the person at whose instance they are being constructed, when by his seeming acquiescence through silence it would be inequitable to relieve his property from a lien for such improvements. Such, in effect, is the construction given the section under consideration by our Court of Appeals in *Fisher v. McPhee-McGinnity Co.*, 24 Colo. App. 420, 185 Pac. 182. In that case, one French, agent for the lessees, was in possession of property under a lease from Mrs. Fisher, and made improvements on the property which were not authorized by the lease. The lessor, however, through her agent had knowledge that such improvements were being made, and failed to give the notice required by section 4029. The parties making these improvements or furnishing materials therefor sought to enforce liens against the premises upon two grounds: (1) Because the owner, expressly or impliedly, through a tenant, contracted for the materials furnished and the labor performed; and (2) that the improvements upon the premises for which liens were claimed could be enforced upon the fee of the owner because they were made with her knowledge and she failed to notify the lien claimants that her interest would not be subject to the liens. Speaking to the first point, the court, through King, J., said:

"Unless so provided by the terms of the lease, the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor for the lessor, within the contemplation of the lien statute. The owner of property cannot be bound, nor his property charged with a lien by the unauthorized act of the lessee in having improvements made on the leased property"—and concluded by stating in substance that, as the improvements were unauthorized, liens would not attach under the general provisions of the mechanic's lien act.

Speaking to the second point, which involved a construction of section 4029, it was said:

"This section charges land with a lien for the cost of any building constructed thereon or altered, added to or improved, with the knowledge of the owner, if he shall not have contracted therefor, but from which lien so charged he may be relieved by compliance with the statutory requirements as to notice."

None of the work performed by plaintiff and his assignors was unauthorized by the instrument executed by the defendant under which the mines company was working the mines. Hence the defendant was not required to give the notice mentioned in section 4029, and his failure to do so did not subject his interests to the lien claimed. All work was performed at the instance of the Herald Mines Company, whose interest in the properties involved, and relation to the defendant Grimm, was that of lessee only, and was of that character in fact, and by the terms of the lease, for which a lien will not attach to

the fee of the owner. Consequently, it follows that plaintiff is not entitled to any lien upon the interest of Grimm in the mines.

Counsel for plaintiff rely upon *Pike v. Empfield*, 21 Colo. App. 161, 120 Pac. 1054, and *Clark Hardware Co. v. Centennial T. M. Co.*, 22 Colo. App. 174, 123 Pac. 322. The former case is based upon the ground that, as between the owner and the party at whose instance the work was performed, for which the lien was claimed, the relation of vendor and vendee existed, as the latter bound himself to purchase the property, and hence the case was ruled by *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108. In the *Clark Hardware Case* the decision was based upon the allegations of the complaint to the effect that the materials furnished the lessee were used for the working, preservation, prospecting, and development of the property involved, thereby enhancing its value, with the knowledge of the owner, who failed to post the notice mentioned in section 4029. To this complaint a general demurrer had been interposed, and it was held that as against such demurrer the complaint stated a cause of action for a lien under the provisions of section 4029. The case is so construed by the same court in *Milwaukee Gold Mining Co. v. Tomkins-Crisley Hardware Co.*, 141 Pac. 527.

Other questions are argued in the briefs of counsel for defendant, which it is not necessary to consider. Cross-errors are also assigned on behalf of plaintiff; but, as none of the questions thus presented are material to the grounds upon which our decision is based, they need not be passed upon.

The judgment of the district court, in so far as it awards a lien upon the fee of the defendant, is reversed, and the cause remanded with directions to dismiss the action as to him.

Judgment reversed and cause remanded, with directions.

HILL, J., dissents.

(58 Colo. 186)

COMSTOCK, State Engineer, et al. v. LARIMER & WELD RESERVOIR CO.  
(No. 7582.)

(Supreme Court of Colorado. Dec. 7, 1914.  
Rehearing Denied Jan. 4, 1915.)

1. WATERS AND WATER COURSES (§ 247\*)—  
SUIT TO DETERMINE RIGHTS—NECESSARY  
PARTIES.

To a suit, by an appropriator of water for storage purposes, to have the year divided into two separate and distinct seasons, during one of which water is to be stored, and during the other used for direct irrigation, it is not enough to make the water officials defendants, but the direct irrigators of the whole water division, and not merely those of a single water district thereof, are necessary parties defendant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 814; Dec. Dig. § 247.\*]

2. PLEADING (§ 8\*)—CONCLUSION—WATER  
RIGHTS ACTION—COMPLAINT.

The complaint barren of facts showing that defendant water officials, in making and enforcing an order as to distribution of water, are acting contrary to law, is not aided by the statement, a mere legal conclusion, that they are so acting.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

3. WATERS AND WATER COURSES (§ 247\*)—  
APPROPRIATION FOR DIRECT IRRIGATION—  
PERIOD OF USE—QUESTION FOR JURY.

Appropriators of water for direct irrigation are not, as matter of law, limited to the period from April 15th to September 15th of each year, for diversion and use of water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 814; Dec. Dig. § 247.\*]

4. WATERS AND WATER COURSES (§ 247\*)—  
ENJOINING USE—SUIT BETWEEN APPROPRI-  
ATORS—COMPLAINT.

To entitle an appropriator of water to maintain an equitable action against the use of water by another appropriator, the complaint must show plaintiff has a dominant and superior right, both in point of time and necessity of use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 814; Dec. Dig. § 247.\*]

5. WATERS AND WATER COURSES (§ 240\*)—  
BENEFICIAL USES—RIGHT OF PREFERENCE.

The right of preference to beneficial use of water depends on priority of appropriation and necessity of use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 240.\*]

6. CUSTOMS AND USAGES (§ 8\*)—VALIDITY—  
CONTRARY TO STATUTE.

A custom and usage, by consent of appropriators of water, to use the water for direct irrigation only between certain days of the year, and give it over to storage for the remainder of the year, being directly contrary to the statute, cannot be established for any purpose.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 8-10; Dec. Dig. § 8.\*]

7. WATERS AND WATER COURSES (§ 240\*)—  
PRIORITIES—AGREEMENTS—EFFECT IN OTH-  
ER DISTRICTS.

Custom, usage, or agreement between appropriators of water in one water district, as to use of waters of a stream therein, tributary to a river in other districts of the same water division, can bind neither the water officials nor the appropriators from the river in other districts of the same division; the division, and not each district, being the unit for determining and administering priorities.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 240.\*]

8. WATERS AND WATER COURSES (§ 243\*)—  
IRRIGATION—DIRECT AND STORAGE USES—  
SEASONS.

The use under a valid appropriation for direct irrigation, as for any other beneficial purpose, being, as to time, limited, subject simply to priorities, only by necessity, the question of division of the year into direct irrigation and storage seasons is not one for the courts.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 308; Dec. Dig. § 243.\*]

9. WATERS AND WATER COURSES (§ 247\*)—  
SUIT TO ESTABLISH RIGHTS—QUESTIONS  
DETERMINABLE.

The suit being merely to have the time of use of waters of a stream for irrigation pur-

poses divided into two seasons, during one of which they may be used for direct irrigation and the other for storage, the questions of non-economical and wasteful use may not be considered, as in a suit to restrain waste or enforce economical use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

Garrigues, J., dissenting.

En Banc. Error to District Court, Larimer County; Harry P. Gamble, Judge.

Suit by the Larimer & Weld Reservoir Company against Charles W. Comstock, as State Engineer, and others. Decree for plaintiff, and defendants bring error. Reversed and remanded, with directions.

James W. McCreery and Donald C. McCreery, both of Greeley, and L. C. Stephenson and Stoten R. Stephenson, both of Ft. Morgan, for plaintiffs in error. L. R. Rhodes and R. W. Fleming, both of Ft. Collins, for defendant in error.

BAILEY, J. The Larimer & Weld Reservoir Company, a corporation, defendant in error here, plaintiff below, on October 26, 1910, filed its complaint against the State Engineer, the Division Engineer of Water Division No. 1, and the Water Commissioner of Water District No. 3. Later, after sundry preliminary steps, an amended complaint was filed, setting forth the right of plaintiff to divert water for storage purposes from the Cache la Poudre river, under an appropriation dated the 3d day of June, 1890, for 225,000,000 cubic feet of water, and one of date the 1st day of April, 1895, for an additional 100,000,000 cubic feet of water, decreed October 28, 1909, in Water District No. 3, by the Larimer County District Court; that at the time of filing the complaint large quantities of water were passing the headgate of its inlet canal; that no requirement existed for the use of this water for direct irrigation, either in Water District 3 or elsewhere; that plaintiff was entitled to store such water under its appropriation in its reservoir; that the official defendants arbitrarily refused to allow it to do so. It was further alleged in the complaint:

"That in Water District 3 there are, and for more than twenty years have been, two well defined and recognized periods of time each year for the use of water flowing in the Cache la Poudre river and its tributaries; \* \* \* that the use of water for direct irrigation commences on or about the 15th day of April of each year and terminates on or about the 15th day of September of each year, and from the 15th day of September of each year until the 15th day of April of the following year the water of said river and its tributaries can only be used economically for storage; \* \* \* that for more than twenty years preceding the commencement of this action, the waters of said river and its tributaries have been, by common consent, so used; that all rights of appropriation of any of said waters for any purposes other than for storage, ceased and determined on the 15th day of September, 1910; and that

such other rights have not been, and will not be, in force and effect until the waters of said river and its tributaries are needed and required to irrigate crops planted and growing during the coming season of 1911."

It was further alleged:

"That on May 28, 1910, Division Engineer Cogswell issued an order to J. L. Armstrong, Water Commissioner for Water District No. 3, as follows: 'Water is needed for direct irrigation in districts numbered 8, 2, 1 and 64; you are hereby ordered to cease all storing of water in your district until further notice from this office. Water must not be wasted into reservoirs at the lower end of ditch when the reservoir is not entitled to storage water, but the excess water should be shut off the ditch at the headgate. In case of heavy rains or floods report to this office immediately by phone at my expense.'"

The complaint further states, in effect, that this order was renewed on the 1st day of September, 1910, and was then in full force and effect; that at no time covered by said order was there any demand in said district for such order, or for the delivery of water, but that such order was uncalled for and an assumption of authority and power on the part of said defendants; that if there is any person, company or association making any claim or demand whatever for water for direct irrigation, such claim and demand is illegal and unjust; that since the 15th day of September, 1910, there has been, and until the 15th day of April, 1911, there will be, no need or demand for water for direct irrigation in either Water District No. 1 or 64 and that any such use of such water would be wasteful and not an economical or beneficial use, and would be contrary to law.

The complaint concludes with a prayer for a perpetual injunction against the official defendants and their successors in office, restraining them from enforcing the order complained of, and also for a decree to the effect that in Water District No. 3, the Cache la Poudre river and its tributaries, the direct or immediate irrigation period commences on the 15th day of April of each year, and extends to the 15th day of September of each year, and that the storage season therein commences September 15th of each year and ends April 15th of the succeeding year.

The original defendants, the water officials, answered, alleging that they are public officers charged with the distribution of water of the public streams, according to the order of priority as fixed by judicial decrees; that in the exercise of their official duty they had conformed, as advised, to the law in all respects without favor or discrimination; that the Division Engineer had made the order set forth in the complaint; that said order was in full force and effect, but subject at all times to change and modification when advised that the flow of water in the streams would permit storage, and that they, and neither of them, were parties in interest in the proceedings, were neither owners nor appropriators of water of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the streams, but were acting solely in the exercise of the police power conferred by statute in that behalf, and pursuant to previous orders of the court; that appropriators of water for direct irrigation in Water Districts 1 and 64 were claiming and demanding the right to use the water in the South Platte river under and by virtue of their several prior appropriations. All other averments of the complaint were denied on information and belief.

The plaintiffs in error here, who are direct irrigators, made defendants by order of court, filed answer to the amended complaint, setting up several defenses: First. That their rights as appropriators of water from the Platte river in Water District No. 1 are superior in point of time and use to the appropriation of the plaintiff for storage purposes; their present needs of the same for direct irrigation; their use and enjoyment of water under and pursuant to their several decrees, and admitting the issuance of the order complained of, as set forth in the complaint; they denied the alleged superior rights of plaintiff, and also the existence of a custom or law fixing a storage season anywhere as against a diversion of water by prior appropriators for beneficial uses; Second. That the amended complaint does not state facts sufficient to constitute a cause of action, or show the priority of the appropriation claimed and set forth by plaintiff or the appropriations of the several answering defendants, and also that the court was without jurisdiction to proceed to the determination of the cause, because the appropriators of water for direct irrigation in the several other water districts of that division are not joined as defendants, being necessary and indispensable parties; and, Third. For an affirmative answer and defense, that they are direct irrigators in Water District No. 1, from the Platte river, setting forth fully and specifically their rights and dates of decreed appropriation, and the use of all water that could be obtained under their several appropriations at all seasons of the year for direct and beneficial use in the irrigation of their lands and crops, and that they had been in such enjoyment and use of their respective appropriations and rights ever since their said several appropriations were made and decreed. By replication issue was joined upon all new matter set up in the answer.

A careful analysis of the allegations of the complaint leads to the irresistible conclusion that the real object of the action was to have the court enter a decree dividing the year into two seasons, one for direct irrigation, and the other for the storage of water, and the court gave relief substantially as prayed. The effect of the decree was to declare and fix, in the territory involved, the season in which direct irrigation, so called, might be practiced, and the season, or portion of the year, when waters flowing in the natural streams must be wholly surrendered by di-

rect irrigators to storage purposes. In short, the suit was a proceeding to compel by injunction the official defendants to furnish water for storage, regardless of the priorities or actual necessities of appropriators for direct irrigation, on the ground that in any event all right to the distribution of water for direct irrigation ceases during the period from the 15th day of September of each year to the 15th day of April next thereafter. Upon a full consideration of the averments of the complaint it is impossible to reach any other conclusion than that this was not only the primary, but the sole object of the action.

The sufficiency of the amended complaint was challenged on the grounds: First. That necessary and indispensable parties were not joined as defendants; Second. That no facts were pleaded by which it was made to appear that the official defendants were acting in excess of the authority conferred upon them by law; and, Third. That no facts were pleaded from which it appeared that the priority of appropriation claimed by plaintiff was prior to or dominated the rights of plaintiffs in error and other appropriators of water for beneficial uses within Water District No. 1, and in other water districts embraced in Water Division No. 1.

[1] Since, as we have seen, the prime object of the action was to obtain a decree of court, dividing the year into irrigating and non-irrigating seasons, designating the season in which direct irrigation, so called, might be practiced, and the season or portion of the year when the waters flowing in the stream must be surrendered to storage purposes, and which during that time could only be diverted and employed for the latter purpose, it is manifest that all appropriators of water for direct irrigation from the South Platte river watershed forming a portion of Water Division No. 1, embracing Water Districts Nos. 1, 2, 3, 4, 5, 6, 7, 8, 23 and 64, would of necessity be affected by any such decree; indeed, the effect of the findings and judgment of the court was to declare that direct irrigation in that water division could not, during the period from the 1st day of October of each year to the 15th day of April of each succeeding year, be lawfully carried on, and to permanently deny that such right existed during such period. If direct irrigators in Water Districts 1 and 64 were necessary and indispensable parties, as held by the trial court, upon like reasoning it follows that all other direct irrigators in the division, especially those with senior rights to those of the plaintiff, were equally interested in the subject and object of the action and likewise necessary and indispensable parties.

Under statutory provisions, and the decisions of this court, the river with its tributaries must be administered by the water officials as a whole, and all the decrees and appropriations of the water division of which Water District 3 is a part, collated, tabulated

and combined for the purposes of such administration according to priorities. It follows that all priorities of appropriation for direct irrigation in the several districts comprising that division would necessarily be affected by the proposed decree, for it prescribes new methods and new rules, binding upon water officials, for the distribution of water throughout such division, methods and regulations totally different from those prescribed by law, under which the water officials, the original defendants herein, had theretofore acted in such distribution between the several and respective appropriators and users of water, for beneficial purposes in that drainage. The water officials are nominal parties only. The broad and sweeping relief asked, if competent at all, clearly could be awarded only against actual appropriators and users of water for direct irrigation in the division, as they were the real parties in interest. They alone were interested in the subject-matter of the suit and its object; the proposed decree would materially affect their rights. They were, therefore, not only proper, but necessary parties, and without having them before the court no binding or effective decree, such as was sought and in fact rendered, can be upheld. In *McLean v. Farmers' H. L. C. & R. Co.*, 44 Colo. 184, at page 194, 98 Pac. 16, at page 19, speaking to a proposition closely akin to the one now being considered, the court said:

"The relief demanded by the complaint could not be granted against the water officials without prejudice to the rights of these consumers; neither could their rights be saved in their absence, for the obvious reason that they were the parties who would be directly affected by the judgment demanded. \* \* \* Necessary parties are all who have an interest in the subject and object of the action, and all persons against whom relief must be obtained in order to accomplish the object of the suit."

It is obvious that a division of the year into two separate and distinct seasons, during one of which water is to be stored and during the other to be used for direct irrigation, which is plainly in conflict with statutory provisions providing for the distribution of water, materially changes the situation of direct irrigators throughout the whole division, and could not therefore be properly decreed in any event, without giving all persons so interested and affected opportunity to be heard. The objection, therefore, that necessary and indispensable parties had not been brought in was sound, and the court ought not to have proceeded without having all such parties before it.

[2] The objection that the complaint sets forth no facts showing or tending to show that the water officials were acting contrary to law was also good. The allegations of the complaint as to the water officials in this respect are substantially as follows:

"That said defendants Cogswell, Comstock and Armstrong refused and still refuse to allow this plaintiff to receive from the said river and its tributaries said water, and plaintiff states

that the acts of said defendants and their refusal to allow plaintiff to receive such waters through the headgate of its inlet canal for storage are unwarranted, illegal and in violation of plaintiff's decreed rights."

In paragraph 20 of the complaint the plaintiff sets out the order of the Division Engineer complained of, and concludes that paragraph in the following language:

"That such order was uncalled for, and the assumption of a power and authority on the part of said defendants, Cogswell and Comstock, that they as public officials, have no legal authority to assume or make; that it was an assumption of power and authority not conferred in any manner upon them, by or under the laws and statutes of this state."

This order shows upon its face that it was made in precise accord with the police statutes of the state, governing the method of distribution of water between various appropriators, in the discharge of their public duties in the distribution of water to ditches and consumers according to their respective rights and priorities. In *McLean v. Farmers' H. L. C. & R. Co.*, supra, speaking to this point it is said:

"By section 2448, 1 Mills' Statutes, it is made the duty of the superintendent of irrigation to distribute the waters in his division in accordance with the rights of priority of appropriation as established by the judicial decrees entered in the several water districts included in such division, and that he shall have general control over the water commissioners of the districts embraced in his division. The several decrees of the water districts within a water division are to be treated as one, and the water distributed accordingly. \* \* \* It is charged, however, that the acts of the defendants in closing down plaintiffs' headgates were wholly unauthorized, illegal and unlawful. \* \* \* This statement does not aid the complaint, because it is but a statement of a mere legal conclusion without any statement of facts upon which to base it. \* \* \* In short, none of the averments of the complaint to which we have referred, nor all taken together, state any cause of action against the defendant water officials, for the reason that it appears that they were only acting in their official capacity, and no facts are pleaded from which it is made to appear that they were acting in excess of the authority conferred upon them by law."

That is precisely the situation which confronts the court in this case. The complaint is barren of facts which in any way show that the water officials were acting beyond, or contrary to, the authority conferred upon them by law. From anything that is made to appear by the averments of the complaint, they were clearly acting within their power and doing only that which the law enjoined upon them, as such officials, to do.

[3,4] It is further urged against the complaint that it does not state facts sufficient to state a cause of action against the direct irrigators who were made defendants in the suit. It was incumbent upon the plaintiff in this connection to show affirmatively by proper allegations that it had a superior right to these defendants to divert the water of the Cache la Poudre river for storage during the period named. It is not sufficient in a case of this kind for the plaintiff to show



that it has made an appropriation of water for storage and has obtained a decree therefor. It must go further and show that the right so decreed is relatively prior to that claimed by the parties in interest against whom relief is sought. In other words, the plaintiff should have shown by the averments of its complaint, in order to state a cause of action, that its alleged rights dominated the rights of the direct irrigators whose right of use it undertook to have denied. Since the complaint failed to do this, it is in that respect insufficient.

The supposed cause of action is based upon the proposition that on the 15th day of September of each year the season for direct irrigation ends, and that none of the defendant appropriators of water for direct irrigation could, after that date, nor until the 15th day of April of the following year, as against one claiming water for storage, although junior in point of time, lawfully divert water to be applied to the direct irrigation of land or crops. This proposition is fundamentally wrong, and is in conflict with the provisions of our Constitution to the effect that the water of every natural stream not heretofore appropriated within the state of Colorado is declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided; that the right to divert the unappropriated water of any natural stream to beneficial uses shall never be denied, and that priority of appropriation shall give the better right as between those using water for the same purpose. Plaintiff, by the averments of its complaint, relies for relief upon the bare fact that the defendants, who are direct irrigators, are, as matter of law, limited in the diversion and use of water to the period from April 15th to September 15th of each year, without reference to the date of their several priorities, and that, as is alleged, any use of water for direct irrigation by them outside of this period is an unlawful use, which interferes with the right of plaintiff. It is solely because of such supposed limitation upon the right of use by the defendants, direct irrigators, that plaintiff claims its appropriations are superior to theirs. These allegations, since only conclusions of law, based upon and following false and erroneous assumptions, as stated, are insufficient to make out a cause of action against the defendants, who are direct irrigators. In order to entitle an appropriator of water to maintain an equitable action against the use of water by another appropriator, it must be shown by allegations of fact that the one seeking such relief has a dominant and superior right, both in point of time and necessity of use. Nothing of this sort is made to appear in the complaint, but by necessary inference and implication the very opposite is shown.

In *Carroll v. Vance*, 39 Colo. 216, 88 Pac. 1069, upon the question of the sufficiency of the complaint to entitle one appropriator to restrain an alleged unlawful diversion of water by another, this was declared:

"A complaint, in an action by a senior appropriator to restrain an unlawful diversion of water, which merely alleges that plaintiff has a priority superior to that of the defendant, with which the defendant is interfering, is but a mere conclusion of law, and is not a sufficient statement of ultimate facts constituting a prior appropriation, but it is necessary to state the facts which show such appropriation and its priority."

In *McLean v. Farmers' H. L. C. & R. Co.*, supra, it was said:

"The object of the action was to prevent these officers from causing water to flow down the stream for the use of appropriators in district No. 2, and in order to effect this end it was necessary that the rights of plaintiffs to the subject-matter of controversy be adjudged superior to those of these appropriators."

Surely unless facts are set forth in the complaint which show such superiority of right no cause of action is stated, and in the absence of such averments no superiority of right could be adjudged.

[5] Beginning with the first application of water in Colorado to beneficial uses, the right of preference to such use between respective claimants has been made to depend upon prior appropriation and necessity of use. This doctrine has become thoroughly entrenched in our jurisprudence, through constitutional and statutory provisions, and by a uniform and unbroken line of judicial decisions. The complaint is framed upon a theory in direct conflict with this well settled doctrine, and to hold that it states a cause of action would completely overturn and nullify this primary and fundamental rule.

[6, 7] The further allegations in the complaint to the effect that for more than twenty years preceding the commencement of this action, in Water District No. 3, the waters of the Cache la Poudre and its tributaries have by common consent of the water appropriators therein been used and employed for direct irrigation during the period from the 15th day of April of each year to the 15th day of September of each year, and that from the 15th day of September of each year to the 15th day of April of the following year these waters have been given over to storage, are relied upon to constitute a cause of action. If it be true that such custom and usage has thus prevailed in this particular water district, it is directly contrary to the statute, and cannot therefore be established for any purpose. 12 Cyc. 1054; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452. Furthermore, the Cache la Poudre river, which comprises Water District 3 of Water Division 1, is a tributary of the South Platte, and its waters are waters of the South Platte, and they can no more be interfered with adversely to the rights of other consumers in the several other districts in that division, by junior reser-



voir appropriators, than can the waters of the South Platte proper, immediately adjacent to their headgates. And even if the custom and usage alleged were fully and satisfactorily established by competent proof, it would not bind either the water officials, or consumers of water from the same streams in the several other districts of the same water division.

In *McLean v. Farmers' H. L. C. & R. Co.*, supra, it was said:

"With priorities settled it became necessary to appoint officials whose duty it is to distribute the waters of a stream according to the decreed priorities therein. Their functions and authority cannot be interfered with without ignoring adjudication decrees, and the statutes relating to the distribution of water thereunder, which would bring about the conditions that existed prior to the time when we had any statutes on the subject relating to the adjudication of rights to the use of water or its distribution by officials in accordance with such adjudication. The laws of the state providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters, and to prevent breaches of the peace which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them."

In *Water Supply & Storage Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 87, 53 Pac. 386, it was held in substance and effect that the tributary from which a junior appropriator takes must first answer to a senior appropriator from the main stream. In *McLean v. Farmers' H. L. C. & R. Co.*, supra, on authority of *Lower Latham Ditch Co. v. Loudon Canal & Reservoir Co.*, 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80, speaking to this point, it was said:

"The several decrees of the water districts within a water division are to be treated as one, and the water distributed among them. It is the duty of the superintendent of a water division to make such distribution by direction to the water commissioners under his control."

The foregoing states the lawful method by which water is to be distributed to users throughout a division, that is according to priorities, not for a single water district, but for the entire drainage, as the statute provides. Priorities are not to be administered by regulations resting on custom, use or agreement between irrigators of a particular district, where their enforcement would interfere with the rights of other users in other water districts of the same division. That is, users and consumers of waters for irrigation in one district cannot make and apply regulations in the administration of their priorities according to their own interpretation of them, and to meet their needs as they think they should be met; but the waters of a division must be distributed to all consumers under the uniform rule provided by law.

The demurrer to the complaint on the ground that facts sufficient to constitute a cause of action against the defendants, who are direct irrigators, are not stated, should therefore have been sustained.

[8] It follows from what has already been said that the judgment under consideration must be reversed, but as the case was tried upon its merits it is not only proper, but to the interest of all parties that we express ourselves more fully and directly upon the main features of the case.

From the evidence, and the record as a whole, it is disclosed that the decrees of the defendants, direct irrigators in Water District 1, were and are prior in time and use to that of the plaintiff, and that such decrees are without limitation as to time of use. The question being one of necessity of use, the matter of season alone cannot be controlling. While that may be a factor bearing upon such necessity, it is not, and cannot be made, the sole consideration. To permit courts to arbitrarily fix a definite season when water for direct irrigation may be used would be to allow them to fasten a limitation upon a vested right not attached to it by the decree itself, or by any constitutional or statutory provision or decision of this court. It appears that all these decrees have been in force for years, and that water has been diverted and used under them at any and all times. To now judicially declare that the users thereunder can divert and apply water for the irrigation of their lands and crops from April 15th to October 1st of each year only, is in effect a modification of decrees vesting property rights, which have been used and enjoyed, without such limitation, for upwards of 25 years. No lawyer would contend for, and no court would now permit, such a modification in a direct proceeding for that purpose. This being true, how can it be held lawful and proper for the court, by the indirect method of dividing the year into seasons for direct irrigation and for storage, respectively, to accomplish such result? It is a universally accepted legal maxim that courts may not do indirectly that which they are without power or authority to do directly. These decrees had no time limit within which use could be made of them when awarded. Where, and with what tribunal, does the power and authority now lie, after such a lapse of time, to arbitrarily attach to them such limitation? We are confidently of the opinion that courts have no such power, and that the question of the division of the year into direct irrigation and storage seasons is not a judicial one. In the very nature of things no season can be judicially fixed for the use of water for domestic purposes, or for the use of water for power or manufacturing purposes. In this respect the law discloses no distinction between appropriations for agricultural and for domestic and manufacturing purposes. The use of

water for all these purposes, when a valid appropriation has been made, is limited only by the law of necessity. Appropriations for each of these beneficial uses take effect and may be enjoyed by the rule of priority, and under the Constitution none of them yields to the other in regard to date by reason of the character of use. In fifty years of experience in practical irrigation in this state neither the Legislature nor this court has attempted to fix an arbitrary season for direct irrigation. Whether the Legislature might do so is not before us, and therefore not only is not, but could not now properly be, determined. That question is, therefore, left entirely open and unaffected by this decision.

In the light of the history and development of this all important industry, consideration being given to the different altitudes of the different parts of the state, and even in the different water divisions thereof, where agricultural pursuits are carried on, varying climatic conditions, changes in the character and nature of the seasons from year to year, difference in soil and variety of crops grown, it would be impossible for the courts to lay down a uniform rule definitely fixing such a season, which could fairly be said to afford parties interested equal protection of the law. If courts may arbitrarily fix a season covering the period from April 15th to October 1st of each year, why may they not with equal propriety designate a much shorter season, or an entirely different one? If the matter is to be left to the courts at all, seasons of varying length, covering different periods, according to the experience, observation, environments, moods and caprice of each particular judge, having such question under consideration, would inevitably follow, resulting possibly in injustice and inequality, and certainly in endless conflict and confusion, with attendant strife and interminable litigation.

[8] Much argument has been indulged respecting noneconomical and wasteful use of water. As we view the allegations of the complaint, these questions are not properly before us. For, as already indicated, and as shown by the decree of the court, this was a suit to have the time of use of the waters of the Cache la Poudre river and its tributaries for irrigation purposes divided into two seasons, during one of which they might be employed for direct irrigation and the other for storage. There is no pretence that the suit was one to restrain waste, or to enforce economical use. No such relief was sought or given. This action in fact is not, and cannot be, one for these purposes. An action of such a character could only be maintained against the person or company guilty of unlawful conduct in that respect, or against those who jointly participate in such infractions of the law. Individuals, companies or corporations guilty of separate or independent offenses of this character

could not properly be joined in an action for relief, as was done here. Each separate offender, or those acting jointly, would be held to answer for his or their own wrong in independent actions. In this connection it may not be amiss to state that it is not intended by this opinion to indicate that direct irrigators are to be allowed to take, have or receive water, under their decrees, in excess of their needs, nor are they to be permitted to use water in such a noneconomical way as to amount to waste. In all such cases a right of action by a junior appropriator, injured by that character of use, may be maintained and relief granted, upon proper allegations and proofs, when water officials fail or decline to give proper protection.

This court recognizes the urgent and ever increasing necessity for the enforcement of the doctrine of economical use of water for irrigation, as it has consistently done in the past, and urges upon the officers of the law, the courts and users and consumers of water themselves, ready acquiescence therein and an efficient enforcement thereof. Whenever there is a wasteful, or other unnecessary or unlawful use of water, it should be promptly and efficiently dealt with under the law. By this opinion the rights of the direct irrigator are in no sense enlarged or broadened, but they are only declared as they now exist, and have existed since the entry of their respective decrees.

It is also urged that this court has recognized the fact that there may be a limitation as to the time of use upon decreed appropriations of water for irrigation, which is true, but this has occurred only when the decree itself fixed the limitation, or where in a proper action it had been shown, by competent evidence, that the actual use had been in fact so limited. Upon the whole record, including the decrees submitted and the proofs adduced respecting the diversion and use of water under them, the situation here appears to be precisely contrary to that shown to have been present in cases where such limitation was recognized.

Other matters of moment and engaging interest have been most ably presented in the briefs of opposing counsel, but they are not of a character to affect or alter the views of the court as already indicated upon the fundamental and controlling questions presented, and we refrain, therefore, from consideration of, or comment upon, them.

The judgment is reversed and the cause remanded to the trial court with directions to dismiss the complaint.

GARRIGUES, J., dissents.

WHITE, J., concurs in the reversal of the judgment, for the reason that the complaint was subject to the demurrer interposed by plaintiffs in error upon the grounds assigned therein. He expresses no views upon mat-

ters discussed in the opinion, after it had once been determined that the complaint failed to state a cause of action.

HILL, J., not participating.

(58 Colo. 185)

**SOUTH PLATTE DITCH CO. et al. v. LARIMER & WELD RESERVOIR CO. (No. 7530.)**

(Supreme Court of Colorado. Dec. 7, 1914. Rehearing Denied Jan. 4, 1915.)

En Banc. Error to District Court, Larimer County; Harry P. Gamble, Judge.

Suit by Larimer & Weld Reservoir Company against the South Platte Ditch Company and others, impleaded with Charles W. Comstock, State Engineer, and others. Decree for plaintiff, and said defendants bring error. Reversed and remanded.

Allen & Webster, of Denver, for plaintiffs in error. L. R. Rhodes and R. W. Fleming, both of Ft. Collins, for defendant in error.

BAILEY, J. The action was brought by the defendant in error against the State Engineer and other water officials, in which plaintiffs in error, direct irrigators in Water District No. 64 of Division No. 1, were afterward made defendants. The complaint is the same as that in cause No. 7582, Charles W. Comstock, State Engineer, et al., Plaintiffs in Error, v. Larimer & Weld Reservoir Co., Defendant in Error, 145 Pac. 700, decided at the present term of this court. A general and special demurrer by plaintiffs in error to the complaint was overruled. They elected to stand upon the demurrer, and a decree, as prayed, was rendered by the court against them with costs, and they bring the case here for review. The complaint in the case cited was held obnoxious to a like attack, and the reasons there given are controlling here. Therefore, upon the authority of that decision, the judgment is reversed and the cause remanded with directions to dismiss the complaint.

Reversed and remanded.

GARRIGUES, J., dissents. HILL, J., not participating.

(58 Colo. 344)

**GENERAL FILM CO. v. McAFEE, Sheriff. (No. 8188.)**

(Supreme Court of Colorado. Jan. 4, 1915.)

JURY (§ 67\*)—IMPANELING—DUTY OF SHERIFF.

Rev. St. 1908, § 1298, declaring that the coroner shall serve and execute all process when the sheriff is a party, is mandatory, and where the sheriff, who was defendant, summoned a panel, the panel should be dismissed and a new venire, to be summoned by the coroner, ordered.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 291-302, 306; Dec. Dig. § 67.\*]

En Banc. Error to Weld County Court; Herbert M. Baker, Judge.

Action by the General Film Company against S. J. McAfee, Sheriff of Weld County, begun in justice court and appealed to the county court. There was a judgment in the county court for defendant, and plaintiff brings error. Reversed and remanded.

Dana & Blount, of Denver, and Mann & Mann, of Greeley, for plaintiff in error.

BAILEY, J. On May 10, 1912, the General Film Company brought suit in a justice's court of Weld county against S. J. McAfee, as sheriff, and recovered judgment for possession of certain personal property, which the latter held in his custody under levy of an execution theretofore issued to him upon a judgment entered in a court of record in an action between other parties.

The defendant appealed the case to the county court. Plaintiff moved in that court to dismiss a special panel of jurors which had been theretofore summoned by the defendant, as sheriff, to try the cause, and also moved that a special venire issue, directed to the coroner of the county to summon jurors, upon the ground, among others, that the sheriff was a party to the action. This motion was overruled, whereupon plaintiff declined to appear further. Defendant moved for judgment, which, after evidence as to the value of the property, was rendered in his favor. Plaintiff brings that judgment here for review.

Whether it was error for the court to refuse to dismiss the panel of jurors which the defendant, as sheriff, had summoned, and direct a special venire to the coroner, pursuant to the motion of the plaintiff, is the sole question to be determined. Section 1298, R. S. 1908, reads as follows:

"Every coroner shall serve and execute process of every kind and perform all other duties of the sheriff when the sheriff shall be a party to the case, \* \* \* and in all such cases he shall exercise the powers and proceed in the same manner as prescribed for the sheriff, in the performance of similar duties."

The sheriff was the defendant in the action. The statute provides, in clear terms, that in such case the coroner shall execute process of every kind and perform all other duties of the sheriff. The statute is mandatory, and when the court's attention was directed to the fact that the sheriff was the defendant, it should have dismissed the special venire and issued a new one, directed to the coroner to summon a jury to try the case, as by statute expressly provided.

The judgment is reversed and the cause remanded with directions to try the question of title to the property in dispute according to law, and in conformity with the views herein expressed.

Reversed and remanded.

(58 Colo. 313)

**DENVER TRACKAGE & IMPROVEMENT CO. v. COLORADO & S. RY. CO. (No. 7754.)**

(Supreme Court of Colorado. Jan. 4, 1915.)

1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting testimony cannot be disturbed on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

## 2. DEEDS (§ 118\*)—PROPERTY INCLUDED—EVIDENCE.

In a suit to quiet title by plaintiff holding under a tax deed against defendant holding under a valid deed, evidence held to sustain a finding that plaintiff's deed did not embrace the property in controversy included in defendant's deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.\*]

## 3. ADVERSE POSSESSION (§ 79\*)—COLOR OF TITLE—TAX DEED.

Rev. St. 1908, §§ 4089, 4090, providing that every person in the actual possession of lands under color of title made in good faith, and who shall for seven successive years continue in the possession and pay all taxes, shall be adjudged the legal owner, etc., supersede Mills' Ann. St. 1891, §§ 2923, 2924, providing that every person in the peaceable possession of lands who, under color of title made in good faith, shall pay all taxes for five successive years, shall be adjudged the owner, but a tax deed which does not include premises in controversy is not color of title as to them.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

## 4. TAXATION (§ 804\*)—TAX TITLE—STATUTORY PROVISIONS.

Rev. St. 1908, § 5733, providing that an action for land sold for taxes shall not lie unless brought within five years after the execution and delivery of the tax deed, does not apply where a tax deed relied on by plaintiff to quiet title to land does not embrace the land held by defendant under a valid deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.\*]

Error to District Court, Denver County; Harry C. Riddle, Judge.

Action by the Denver Trackage & Improvement Company against the Colorado & Southern Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Thomas & Thomas, of Denver, for plaintiff in error. E. E. Whitted, A. S. Brooks, and T. M. Stuart, all of Denver, for defendant in error.

GABBERT, J. A dispute having arisen between the parties to this proceeding over the ownership of a tract of land, plaintiff in error brought an action to enjoin defendant in error from taking possession of the property and to quiet title. The judgment was in favor of defendant, declaring it to be the owner of the premises and entitled to the possession thereof.

Plaintiff deraigned title through a tax deed, from which it appears the tract was assessed, sold for taxes, and conveyed by the tax deed under the following description:

"That part of block 2, not subdivided, lying southeast of lot 21 and north of the line of the congressional grant, in block 2, in Kasserman's addition to the city of Denver."

Defendant deraigned title by deed containing the following description:

"Beginning at a point where a line drawn through the center of the easterly pier of the Fifteenth street bridge intersects the line of Fifteenth street on the south side, and running

thence in a line at right angles to Fifteenth street to a point where said perpendicular to Fifteenth street intersects the south line of section 28, township 3 south, of range 68 west; thence from said point of intersection with said south line of said section 28 to the intersection of said south line with the said south line of Fifteenth street; thence along said south line of Fifteenth street to the point of beginning."

[1, 2] Both deeds appear to be regular and valid, and the crucial question is whether the description in each covers the same tract. If they do, plaintiff is the owner of the tract involved, and entitled to its possession; otherwise not.

In February, 1871, Steven D. Kasserman was the owner of the E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 28, township 3 south, range 68 west, which, according to the plat on file in the office of the county clerk of the city and county of Denver, he laid out and platted into lots, blocks, and unsubdivided portions, under the name of Kasserman's addition to the city of Denver. The South Platte river runs diagonally across the southeasterly portion of the 80 in question, and the tract in dispute lies south of the river. The land conveyed by defendant's deed is definitely described by metes and bounds, without reference to lot, block, or addition. The description in the deed of plaintiff is also definite, and embraces the tract in dispute, if block 2 extends across the river to the line of the congressional grant; so that the question upon which the rights of the parties must be determined is to ascertain the southerly line of block 2. It is clear from the plat that all blocks platted east of Fifteenth street, which runs through the addition, only extend to the northwest or left bank of the river, that is to say, they are wholly located on the north side of the river, and we think from the same source it is equally clear that the south boundary line of block 2 is the same as the other blocks, namely, the northwest or left bank of the river, and does not include any land on the south side of the river, because it appears from the plat that the left bank, which is the southerly line of all the blocks mentioned, is definitely fixed by a meander line indicating the left bank of the stream. There is a further reason, however, which is conclusive upon this court in determining the southerly line of block 2. The trial court found, as a fact, from oral testimony in connection with the plat, that this boundary was the left bank of the river. Each side produced witnesses, some of whom, from an inspection of the plat, testified that the southerly line of the block was the left bank of the river, and others, the line of the congressional grant. This testimony was introduced upon the theory that the southerly line of block 2 was not definitely fixed by the plat. We think the plat shows that this line is the left bank of the river, as previously stated, but, assuming that the plat was so indefinite

and uncertain that the question of the southerly boundary line of block 2 was a subject upon which it was competent to hear oral testimony, then the finding of fact by the trial court upon the conflicting testimony cannot be disturbed on review. In nearly all of our reports cases may be found wherein it is announced that a finding of fact, in such circumstances, is conclusive upon this court.

Plaintiff and his predecessor have acted entirely in good faith, but the purchaser at the tax sale and the assignee of the certificate of sale have been misled by the action of the assessor, who in 1883 assumed to replat a part of block 2, as shown by a copy of the block book prepared for that year. According to the plat filed by Kasserman, the southerly line of lot 21 in block 2 was the meander of the left bank of the river. The assessor, however, assumed that the southerly line of lot 21 was another line not appearing upon the plat, which would make the width of the west front of that lot the same as others in the block, and in his block book drew this imaginary line, which left a small triangular piece between that line and the river, the southwest corner of which was the north line of the congressional grant. The tax sale, under which plaintiff claims the property, was for the delinquent taxes of 1883, but, in the circumstances above narrated, it is clear that the tract sold was the triangular piece above mentioned, which, in fact, was a part of lot No. 21 in block 2. In other words, it appears from the block book that the assessor in 1883 assessed the triangular piece shown by the block book for that year, lying between what he assumed to be the southerly line of lot 21 and the river, as the unsubdivided part of block 2, lying southeast of lot 21, and, inasmuch as it is apparent from the plat filed by Kasserman that the southerly line of block 2 was the left bank of the river, it follows that it was this triangular tract which was sold for the taxes of 1883. Another significant fact is that, had it been the intention of the assessor to assess the premises in dispute, he would not have assumed to plat the triangular tract to which we have referred, but would have assessed it as that portion of block 2 not subdivided, lying south of lot No. 21, without reference to the congressional grant line.

[3] Plaintiff relies upon the provisions of sections 2923 and 2924, Mills' Statutes 1891, which provide, in substance, that every person in the peaceable and undisputed possession of lands, under claim and color of title, made in good faith, or whenever any person having color of title made in good faith to vacant lands, shall pay all taxes legally assessed thereon for five successive years, he shall be deemed and adjudged the owner of such land to the extent and according to the purport of his paper title. These sec-

tions were repealed in 1893, and, in lieu thereof, what are now sections 4089 and 4090, R. S. 1908, enacted. *Ballard v. Golob*, 34 Colo. 417, 83 Pac. 376. So far as any question is involved, they require the payment of taxes for seven successive years under color of title made in good faith, but, in the circumstances of this case, do not aid plaintiff in establishing his title to the disputed premises, for the reason that the tax deed, under which plaintiff claims did not include these premises, and hence did not constitute color of title to them. *Laughlin v. City of Denver*, 24 Colo. 255, 50 Pac. 917.

[4] Neither does section 5733, R. S. 1908, which provides that an action for the recovery of land sold for taxes shall not lie, unless brought within five years after the execution and delivery of the tax deed, have any application, because the subject-matter of controversy was not sold for the taxes of 1883. In other words, the rights of the parties are not dependent upon the validity of the tax deed, but whether it embraces the premises involved.

In brief, as previously stated, the right of plaintiff to the premises in dispute depends upon whether block 2 extends south of the river, and, as it does not, none of the sections of the statute of limitations considered are applicable, and cannot be made the basis upon which plaintiff can assert title.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

(27 Colo. A. 419)

LAUER v. KAUFMAN. (No. 4077.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

JOINT ADVENTURES (§ 5\*)—SETTLEMENT—EVIDENCE.

In a suit involving a settlement of land transactions between plaintiff and defendant, evidence held insufficient to show that the land received by defendant was more valuable than that received by plaintiff.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.\*]

Error to District Court, Rio Grande County; Chas. C. Holbrook, Judge.

Action by Ferdinand H. Lauer against Charles W. Kaufman, who counterclaimed. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Jesse Stephenson, of Monte Vista, for plaintiff in error. Corlett & Corlett, of Monte Vista, for defendant in error.

MORGAN, J. Action was commenced by Mr. Lauer, March 30, 1913, in the lower court, for contribution in the amount of one-third of what he had been compelled to pay on some promissory notes signed by him and the defendant Kaufman, on a two-thirds and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

one-third liability, respectively. Defendant admitted his liability to the plaintiff in the amount sued for, but pleaded, by way of counterclaim, that plaintiff was indebted to him in a much larger sum, on account of certain transactions, or joint dealings, in lands. The issues therefore came on upon the contentions of the parties in reference to a settlement of such transactions. The lower court, sitting without a jury, found that plaintiff owed the defendant \$2,000 on a just settlement of their land transactions, and that defendant owed the plaintiff \$555.43 on the notes; and, on such finding, entered judgment against the plaintiff for the difference, \$1,444.57, and apportioned the costs equally between them. Plaintiff sued out the writ of error.

The plaintiff and defendant, owning some lands in Colorado (the plaintiff an undivided two-thirds and the defendant an undivided one-third interest therein), traded the same for some lands and other property in Kansas. The notes upon which the suit is based were given in payment to some real estate agents for commissions, the plaintiff being liable for two-thirds and the defendant for one-third thereof, and about which there was no dispute. The defendant refused to pay his part of these notes because of a dispute over a settlement and division of the proceeds of the property which they traded for, which consisted of cash and securities, and two sections of land, in different counties, and one piece of town property; the conveyances of the land being made whereby one section and the town property were conveyed to the plaintiff and the other section to the defendant. Both admitted that the town property was conveyed to the plaintiff to hold for the use of both of them on the one-third and the two-thirds basis, and the dispute arose as to the purpose and intention in conveying the two sections, one to each of them respectively. The plaintiff claims that they agreed to take one section, each, and hold the same in absolute ownership, and that each section was so received and taken by each of them as a credit upon, or partial distribution of, their joint interests, at a valuation of \$12,800, to each of them; and, in all of the plaintiff's statements of account, upon which some settlements had been made between them, the plaintiff charged the defendant with having received, as part of his interest in the proceeds of their joint property, the sum of \$12,800 (the trade value of the section conveyed to him), and charged himself with the same amount for the section he had taken. Both admitted that the two sections of land were taken, in the trade, upon an inflated value, much greater than the actual value thereof. It may be seen that a loss would be sustained in so taking and accepting these two sections at a valuation of \$12,800 which loss would be the difference between the actual and the trade value. The defendant contends that the two sections were so conveyed, for

convenience only, and that each of them held the same upon the one and the two thirds basis; and objected to being charged with having received \$12,800, by way of the section of land so conveyed to him, because he would thus lose one-half instead of one-third of the difference between the trade value and the actual value thereof.

The settlements made between the parties, prior to the suit, were made upon a long itemized statement, made out by the plaintiff, which was presented at the trial, and agreed upon, except a charge against the defendant of \$12,800, on account of the section of land so conveyed to him. This item was disputed by the defendant, for the reason heretofore stated.

The lower court took defendant's view of the dispute, and found that the two sections were conveyed to the parties, separately, for convenience, only; that the actual value was just one-half of the trade value; that they were conveyed and held for the joint use of both, according to the one and the two thirds interest; and that the plaintiff should sustain two-thirds of the loss and the defendant one-third thereof. There is no conclusive evidence against these findings, and, as these were the only issues in the case, the findings thereupon are decisive of the controversy. The lower court, in rendering the judgment, permitted each party to retain the sections so conveyed at a valuation of one-half of the trade value, and thereby, necessarily, found that the amount charged in the settlement against the defendant of \$12,800, as having been received by him, was erroneous. The court then adjusted the settlement, as heretofore stated, by finding that the plaintiff owed defendant an estimated amount of \$2,000, by reason of the incorrect charge, and then deducted from this the \$555.43, which defendant admitted he owed plaintiff on the notes, and gave defendant judgment for the difference of \$1,444.57.

The only error counsel for plaintiff contends that the lower court made (aside from the finding that the title was taken, individually, for convenience, only) is that the court erred in not finding the actual value of both these sections before adjusting the loss between the parties, claiming that the evidence shows that the section defendant obtained was of greater value than the other. There is no evidence that one section was of any greater value than the other, except a statement claimed to have been made by the defendant, at the time the two sections were conveyed, that he received the better one of the two. However, the plaintiff testified that he and the defendant valued the two sections at about one-half of the amount at which they were taken in the trade. The defendant testified that the two sections were both of the same value. Two other witnesses testified that the valuation of the two sections was about \$10 an acre (which was one-half of the trade value), but neither of them

testified that one was of any greater value than the other. The lower court was therefore justified in finding that both sections were, practically, of the same value, and in estimating the actual value thereof at one-half of the trade value. It appears therefore that the claim of the plaintiff that the defendant received \$12,800 by taking his section is not justified; the defendant would be mulcted in a loss of the difference between one-half and one-third of the loss incurred, by reason of being charged with the full trade value, which was twice the actual value of the land. The total loss to both was \$12,800, and defendant's loss should be only one-third of this sum, or \$4,266 $\frac{2}{3}$ , while plaintiff's charge against him made him lose \$6,400, or a loss of over \$2,000 more than he should lose; and, as there was no dispute over the other items in the plaintiff's statement of the account between him and the defendant, the court allowed the defendant judgment against the plaintiff for such \$2,000, and, after deducting the amount owing by the defendant to the plaintiff on the notes, entered judgment in defendant's favor for the balance. This was a fair and reasonable conclusion, and, being based upon the evidence, it must be sustained.

Judgment affirmed.

(26 Colo. A. 500)

PEOPLE ex rel. HUNTER v. CANON,  
County Treasurer. (No. 4182.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

APPEAL AND ERROR (§ 781\*)—MOOT QUESTIONS—DISMISSAL OF WRIT.

Where plaintiff in error made no application for a supersedeas, or for a further stay of execution, and, after the stay granted had expired, paid the debt the collection of which was sought to be enjoined, leaving no live issue for adjudication, the writ would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Error to District Court, Mesa County; Thomas J. Black, Judge.

Action by the People, on relation of John B. Hunter, against Benton Canon, Treasurer of Mesa County, Colorado. Judgment for defendant, and plaintiff brings error. Motion to dismiss sustained.

William Weiser, Geo. Bullock, and L. L. Morrison, all of Grand Junction, for plaintiff in error. John H. Fry and Wilbur F. Denious, both of Denver, and John F. Halderman, of Grand Junction, for defendant in error.

PER CURIAM. It appears from the motion to dismiss the writ of error herein and the affidavit filed therewith, and from the oral argument and typewritten brief of the defendant in error, and from the record itself, that the plaintiff in error, although a stay of execution for 30 days was granted in the lower court, has made no application for

a supersedeas, or for a further stay of execution, and that the said 30 days has long since expired. It appears further that the defendant, after the 30 days' stay of execution expired, paid the indebtedness sought to be enjoined and prevented, thus leaving no live issue for adjudication.

For these reasons the motion to dismiss the writ of error is hereby sustained, and the writ dismissed.

(26 Colo. A. 488)

PAULSEN v. ROURKE. (No. 4107.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

1. BROKERS (§ 88\*)—COMPENSATION—ACTION—DIRECTED VERDICT.

In an action for a broker's commission, it was improper to direct a verdict for defendant at the close of plaintiff's testimony on the ground that the agency had been revoked by a sale through another agent, where the only evidence of that fact was plaintiff's testimony that defendant's excuse for failure to perform was that he had sold through another, since the burden of proving revocation was upon the defendant, and testimony that he had stated that he had sold through another was not proof of that fact.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

2. BROKERS (§ 49\*)—RIGHT TO COMPENSATION—COMPLIANCE WITH CONTRACT.

Where the written memorandum of a real estate broker's agency contract provided that the purchaser should pay a certain sum in cash, but the owner told the broker to take all the cash he could get, the procuring of a purchaser who agreed to pay one-half of the purchase price in cash, which was more than the stated amount, was a sufficient compliance with the terms of the brokerage contract to entitle the broker to his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

3. BROKERS (§ 63\*)—ACTIONS FOR COMPENSATION—DEFENSES.

A landowner cannot defeat an action for a broker's commission by a claim that the contract with the proposed purchaser was unsatisfactory, where his only excuse for not accepting it was that he had already sold to another.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.\*]

4. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—SUFFICIENCY OF EVIDENCE—ABILITY OF PURCHASER.

The uncontradicted testimony of a prospective purchaser that he had sufficient collateral from which to make the cash payment required is sufficient to take to the jury the question of his ability to perform the contract so as to entitle the broker to his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

5. BROKERS (§ 14\*)—AGENCY—EXCLUSIVE AGENCY.

Where the owner of land gave a broker a definite time within which to procure a purchaser, the broker had an exclusive agency, even if the owner could make a sale himself, and is entitled to his commission if he procured a purchaser within the stated time, though after the owner had sold the land through another broker, especially where the owner stated in reply to a question, that the broker was the only agent who had the land listed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 13; Dec. Dig. § 14.\*]

**6. TRIAL (§§ 139, 168\*)—TAKING CASE FROM JURY—DIRECTED VERDICT—NONSUIT.**

The trial court should never direct a verdict or grant a nonsuit in a doubtful case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365, 376-380; Dec. Dig. §§ 139, 168.\*]

Error to District Court, Prowers County; A. Watson McHendrie, Judge.

Action by Claus Paulsen against John A. Rourke. Judgment for the defendant, and plaintiff brings error. Reversed.

Granby Hillyer, of Lamar, for plaintiff in error. C. C. Goodale, of Lamar, for defendant in error.

**CUNNINGHAM, P. J.** Plaintiff in error, a real estate agent, as plaintiff below, commenced his action in the district court to recover from the defendant in error a commission, which plaintiff alleged was due him by virtue of a listing contract or agreement whereby plaintiff was to find a buyer for certain farming land belonging to the defendant. At the close of plaintiff's testimony the trial court directed a verdict for the defendant. The pleadings are in the usual form in such cases, and the essential facts will be stated as we proceed. There is no contention as to the amount due plaintiff, if there be anything due him. The defendant bases his defense principally upon three grounds, which we shall now proceed to consider.

[1] 1. Defendant contends that he had revoked the plaintiff's authority to find a purchaser before the latter had produced one. This contention can be summarily disposed of under the rule that the burden of proving revocation rests upon him who alleges it—the defendant in this case—and, not having introduced any evidence whatever, defendant's contention of revocation cannot be allowed. Defendant's revocation, so far as we can gather from his answer and the testimony given by plaintiff, is based upon the contention that, through another agent, he had sold the land before plaintiff had produced a purchaser. The plaintiff testified that this was the excuse which the defendant made for not carrying out his arrangement with him. But, it is clear, the mere fact that defendant so stated to plaintiff constitutes no proof from which we may consider that he had, in fact, sold the land. We shall later on further consider the question of revocation raised in this case.

[2, 3] 2. Defendant insists in his brief that plaintiff had arranged with the purchaser which he produced to pay one-half of the purchase price in cash, whereas by the agreement which he (the defendant) had with plaintiff the purchaser was to pay but \$7,000 cash—a far less sum of money than one-half of the selling price. This, defendant contends, was not a performance of the contract. There are two sufficient answers to

this contention: (a) Plaintiff testifies on the stand unequivocally that, although \$7,000 was named in a certain memorandum evidencing the agreement between plaintiff and defendant, yet the defendant had authorized and instructed the plaintiff to take all the cash he could get; (b) the defendant at the time plaintiff advised him that he had found a buyer did not refuse to close the deal on the ground the terms were unsatisfactory, defendant's only excuse made for not carrying out the contract which he had made with the plaintiff being that he had already sold the land. *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882.

[4] 3. Defendant further contends that there was no sufficient showing made by the plaintiff of the ability of the customer which plaintiff produced to make the purchase on the terms agreed upon. The proposed purchaser produced by the plaintiff testified on this point as follows:

"Q. Now, at the time that you wrote that letter [meaning a letter which he wrote to the plaintiff, the pertinent portion of which reads as follows: 'Wayland, Mo. August 29, 1912. Mr. Claus Paulsen, Lamar, Colorado—Dear Sir: The proposition in regard to the Rourke land will be accepted as we agreed upon, one-half to be paid down and balance to be as you stated'], you say you were willing to buy the property on the terms you have stated, what was your ability to buy the property? A. I had collateral; I suppose I had the money to pay for it. Q. You had the money at that time to make this deal? A. Equivalent there; yes, sir. Q. Cash payment? A. Yes, sir."

While this testimony is in some respects similar to that given in *Fox v. Denargo Land Co.*, 37 Colo. 203, 86 Pac. 344, upon which defendant relies, we have examined the record in that case and find the testimony before the court in the *Fox* Case was substantially different on the point here under consideration from the testimony quoted above. The proposed buyer in the *Fox* Case made no attempt to show that he was able to purchase the land. The purchase of the land in that case required the payment of a very large sum of money at an early date, but the contract which the purchaser testified that he was willing to carry out required the payment of very little cash except as he disposed of portions of the land, which was a large tract platted into town lots. In other words, Porter, the proposed purchaser in the *Fox* Case, agreed to do nothing except to accept the privilege of buying, if he should see fit to do so. The defendant in the case before us made no attempt to rebut the testimony offered by the plaintiff as to the ability of Schmid, the proposed buyer, to take the land upon the conditions specified. Indeed, the witness was not even cross-examined upon this point. It is not necessary, in order to show the ability of a proposed purchaser to make a purchase, to prove that he had the amount necessary to close the deal in actual cash at the moment he agrees to purchase.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



If it is shown that the purchaser has sufficient collateral, or the equivalent to cash which he could readily convert into cash, that is sufficient. Plaintiff offered sufficient evidence on this point to take the case to the jury.

[5] 4. In view of another trial, we deem it our duty to consider certain other contentions which have been urged in the briefs. The evidence tends to establish that the defendant gave plaintiff 90 days in which to produce a purchaser. Plaintiff produced a purchaser within the prescribed time; indeed, within a very few days after this agreement had been made. Defendant insists that, notwithstanding he gave the plaintiff a definite length of time within which to produce a purchaser, this does not give plaintiff exclusive authority to sell the land; that under such circumstances, by implication, the defendant retained the right to make a sale at any time; and that such sale so made by the defendant constitutes a revocation of plaintiff's agency. The trial court appears to have taken this view, and from the remarks made in passing upon plaintiff's motion to dismiss the case it is clear that the trial court granted the same solely upon this theory. In so doing the trial court committed manifest error, for two reasons: First, because, as we have already pointed out, there was no proof that the defendant had sold the land at all; second, by the allegations of his verified answer the defendant did not sell the land—that is, did not find a buyer for it—for therein he alleges:

"That on the 2d day of September, 1912, the said A. A. Gorham [another agent with whom defendant alleges he had listed the land] procured a purchaser for the property satisfactory to defendant, and that defendant sold said property to —, the said purchaser procured by the said A. A. Gorham."

Some authorities distinguish between exclusive agency and exclusive authority, and hold that, while a specific time given a real estate agent in which to procure a purchaser may constitute an exclusive agency which prevents the owner from selling the land within the prescribed time through another agent, it does not prevent the owner from himself finding a buyer, and, where the owner himself does find a buyer before the agent has produced one, the latter is remediless. It is not necessary for us to express an opinion upon this attempted distinction, since, as we have pointed out, the owner of the property in the instant case makes no attempt to show that he had himself found a buyer for the property. His answer shows a contrary state of facts, and the plaintiff on the stand testified that, when he advised the defendant that he had found a buyer for his land, the defendant then informed

plaintiff that he had sold the same, through the efforts of another agent. While there may be authorities to the contrary, we are of opinion that, where the principal gives his agent a definite time in which to find a purchaser for his property, the principal may not during such time make a sale through another agent without becoming liable to the first agent, if the first agent produces a buyer within the time fixed. Many well-reasoned cases hold that the principal may not, without becoming liable to the agent for his commission, where the latter produces a buyer within the time ready, able, and willing to purchase, sell the land himself. In other words, these authorities hold that an agency for a definite length of time confers exclusive authority as well as exclusive agency; but for the reason already stated it is not necessary for us to determine more than that it constitutes an exclusive agency. See *Blumenthal & Co. v. R. E. Bridges*, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279; *Hardwick v. Marsh*, 96 Ark. 23, 130 S. W. 524; *Levy v. Rothe*, 17 Misc. Rep. 402, 39 N. Y. S. 1057; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; *Green v. Cole*, 127 Mo. 587, 30 S. W. 135; *Lane v. Albright*, 49 Ind. 275; *Cloe v. Rogers*, 31 Okl. 256, 121 Pac. 201, 38 L. R. A. (N. S.) 366; *Clark & Skyles on Agency*, vol. 2, §§ 159, 160.

An especial reason exists in this case why, upon the record now before us, it should be ruled that plaintiff's authority constituted an exclusive agency, we refer now to the testimony of the plaintiff, who said that he made special inquiry of the defendant, at the time the agency agreement was made, whether the land was listed with another agent, and was advised by defendant that it was not so listed; that defendant "said I was the only one had it. I ask him—I wanted to be sure I had this land—if I was the only one."

The defendant, at the close of plaintiff's testimony, moved that the case be dismissed. Upon this motion the trial court appears to have directed a verdict, but, as neither party has made a point of the court having instructed a verdict where a dismissal was asked for, further comment is unnecessary.

[6] We believe it not out of place for us to here call attention to the fact that much unnecessary litigation has come to this court by reason of trial courts having improvidently directed verdicts and granted motions for nonsuit. Great caution should be exercised by trial judges when motions of this character are made, and they should never be granted in doubtful cases.

For the reasons given above, the judgment is reversed.

Judgment reversed.

(28 Colo. A. 483)

**MILLER v. DAVIS.** (No. 4065.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

**1. MECHANICS' LIENS (§ 136\*)—ESTABLISHMENT—LIEN STATEMENT—DESCRIPTION OF PROPERTY—MISTAKE.**

A mechanic's lien statement described the property as, commencing at a point on the center line of section 13, township 3 south, range 69 west, 440 feet south of the intersection of said center and the north line of said section "6," south 440 feet, thence north 440 feet, etc., but designated the owners or reputed owners as "P. and M., who hold some contracts for the purchase of the same," as well as defendant M. Held, that the use of the word "six" in place of "thence" was a clerical error, but, the description otherwise being sufficient to identify the property, the false call did not invalidate the statement, under the rule that a false description does not vitiate an instrument or make it inoperative, provided the thing intended is otherwise sufficiently described.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 213-224; Dec. Dig. § 136.\*]

**2. MECHANICS' LIENS (§ 136\*)—LIEN STATEMENT—DESCRIPTION OF BUILDINGS.**

The failure of a mechanic's lien statement to describe the buildings apart from the land on which they were located was not a fatal defect, the statute not expressly requiring such description.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 213-224; Dec. Dig. § 136.\*]

**3. MECHANICS' LIENS (§ 59\*)—INTEREST SUBJECT TO LIEN—INTEREST OF VENDOR.**

Where a contract for the sale of land required the vendee to erect the buildings for which a mechanic's lien claimant furnished materials, the vendor's interest was subject to a lien therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 75, 76; Dec. Dig. § 59.\*]

**4. MECHANICS' LIENS (§ 78\*)—STATUTES—EFFECT—APPLICATION.**

Rev. St. 1908, § 4029, providing that any building, etc., constructed, altered, etc., on land with the knowledge of the owner shall be held to have been erected, constructed, etc., at his instance and request so far as to subject his interest to a lien, unless within five days after obtaining notice of such erection he shall give notice that his interest shall not be subject to a lien, etc., does not apply to improvements made pursuant to a contract direct or indirect with the landowner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 111; Dec. Dig. § 78.\*]

Error to District Court, Jefferson County; H. S. Class, Judge.

Action by A. L. Davis against David Z. Miller. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert R. Rose, of Kemmerer, Wyo., for plaintiff in error. George B. Campbell, of Denver, for defendant in error.

**KING, J.** Judgment was rendered against the plaintiff in error, by which a mechanic's lien was established and ordered foreclosed, under the following circumstances: D. W. Coulter, being the owner of a certain five-acre tract of land in section 13, township 3

south, range 69 west, agreed to sell the same to F. J. Penna and D. A. McPherson in consideration of the payment of \$2,000 to be made in installments, and in further consideration of the agreement on the part of the vendees to provide all material for and erect on said land one stone barn and one milkhouse, to be commenced within 18 days and completed within one year from the date of said agreement. Three days after the foregoing agreement was entered into, Coulter conveyed the said premises to Miller, plaintiff in error, for a nominal consideration, subject to the contract of sale and purchase aforesaid. The agreement and the deed were recorded. Thereafter defendant in error sold to Penna and McPherson building materials to be used, and which were used, in the erection of the buildings mentioned in the agreement. The improvements were erected with the full knowledge of Miller. A lien statement was filed in due time, naming Penna, McPherson, and Miller as the owners or reputed owners of the land; thereafter Miller enforced the forfeiture clause in the agreement of sale and purchase, ejected Penna and McPherson from the premises, and took possession thereof.

Two principal questions are argued by plaintiff in error, which he insists are sufficient to reverse the judgment: (1) That the statement of lien does not contain a description of the property to be charged therewith "sufficient to identify the same"; (2) that the written contract of sale was, in legal effect, a mortgage, and being of record before the materials were furnished by the lien claimant, constitutes a lien prior and superior to that of the defendant in error.

[1] 1. The statute provides that the lien statement filed for record shall contain, *inter alia*, "a description of the property to be charged with the lien, sufficient to identify the same." The parcel of land sought to be charged with the lien was described in the lien statement by metes and bounds, as follows:

"Commencing at a point on the center line of section 13, township 3 south, range 69 west, 440 feet south of the intersection of said center and the north line of said section *six*, south 440 feet, thence east 495 feet, thence north 440 feet, thence west 495 feet to the point of beginning, being five acres more or less, \* \* \* all situate in Jefferson county, Colorado."

The insertion of the number "six" was a clerical error. The description given in the agreement and the deed, and the correct description, of the starting point, was as given above, with the exception that in the deed the word "thence" took the place of the word "six" as found in the lien statement. It is obvious that there is no point at which the center line of section 13 intersects the north line, or any line, of section 6, so that the designated starting point, if the word "six" be given effect, cannot exist. For

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that reason it is contended that there is and can be no identification of the premises from the instrument itself. It is plain that the land attempted to be described is a part of section 13, as its initial point is on the north and south center line of said section, 440 feet south from the north line of some section. It is equally plain that such point could not be at the intersection of the said center line of section 13 with the north line of section 6, or any other section than 13.

A false description does not vitiate an instrument, or make it inoperative, provided the thing intended is otherwise sufficiently described. "*Falsa demonstratio non nocet, cum de corpore constat.*" *Broom's Legal Maxims*, p. 470; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921. Both reason and authority support us in holding that a false "call" so obvious as that found in this instance may and should be rejected. There is no pretense that plaintiff in error was misled or in any manner injured by the erroneous description. It does not appear that either he or Penna and McPherson were the owners of any other real estate in that vicinity to which the lien statement could apply. The lien statement designated the owners or reputed owners of the property as Penna and McPherson, "who hold some contracts for the purchase of the same," as well as Miller, plaintiff in error. This statement has some weight in aiding the description, and, with other indicia of ownership and location found in the statement, we think was sufficient to furnish identification to any one willing to be advised rather than hoping to be deceived.

[2] Plaintiff in error also contends that the description is wholly insufficient because it does not attempt to describe the buildings into which the material furnished was incorporated. It cannot be doubted that it is the intention of the lien act to give a primary lien on the structure for which materials are furnished or on which labor has been bestowed; and that such lien is only extended to cover so much of the lands on which the building, structure, or improvement has been made as may be necessary for the convenient use and occupation of the building, in order to effectuate the primary lien, and for that reason the contention of counsel that a statement which does not contain some description of the buildings is defective is correct. *Warren v. Quade*, 3 Wash. 750, 29 Pac. 827. But it is often, and, we think, generally, held that unless the statute requires the building, as distinguished from the land, to be described, or the building is to be removed after sale, a description of the land will include the buildings on it, and the lien will attach to both, although the buildings are not described. 27 Cyc. 163, and cases cited. A descrip-

tion of the buildings would very materially aid in the identification of the property intended to be subjected to the lien, and while it should have been included, we cannot say that the omission is fatal. Moreover, the lien statute (section 4043, R. S. 1908) says: "The provisions of this act shall receive a liberal construction in all cases." Keeping in mind this requirement, and in view of the equities disclosed by the evidence, we think the lien claimed should not fail because of the clerical error noted.

[3] 2. Under the written agreement of purchase and sale, the vendees were not only permitted, but were required, to erect the very buildings for which the lien claimant furnished the materials. Under such conditions, it is settled law in this state that the interest of the vendor in the real estate, as well as the interest of the vendee is subject to the lien of those furnishing material for the construction of the improvements under the contract of sale. *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Colo. Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942; *Pike v. Empfield*, 21 Colo. App. 161, 120 Pac. 1054. Therefore, it must be held that as between Coulter, the vendor, and the lien claimant, the lien would attach. It is conceded that by the terms of the deed from Coulter to Miller, the plaintiff in error merely took the place of Coulter, and became subject to the same liability, if any resulted, so far as the lien claimed is concerned. Such a contract of purchase and sale is frequently held to be a mortgage, and is generally so held where necessary to do equity and preserve substantial rights; but the circumstances of this case do not present a condition calling for such construction of the instrument or the application of that principle. The lien on the land is sustained upon the contractual relation between the vendor, the vendee, and the lien claimant, and not upon the provisions of section 5 of the lien act (section 4029, R. S. 1908).

[4] The last-named section has no application to improvements made pursuant to contract, direct or indirect, with the owner of the land. *Fisher v. McPhee & McGinnity Co.*, 24 Colo. App. 420, 135 Pac. 132; *Grimm v. Yates*, 145 Pac. 696, decided December 7, 1914; *Stewart et al. v. Talbott et al.*, 146 Pac. 771, decided January 4, 1915.

The questions presented by counsel for plaintiff in error are not free from difficulty. If the circumstances of the case called for strict construction of the act, or a different application of the rules, in order to do equity, his contention might prevail; but, upon the showing made, we are satisfied that the judgment should be affirmed.

Affirmed.

(26 Colo. A. 475)

**WHITE v. HARTMAN.** (No. 4009.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

**1. BANKRUPTCY (§ 433\*)—MORTGAGES (§ 27\*)—EQUITABLE MORTGAGE—EFFECT OF DISCHARGE OF MORTGAGOR.**

A deed executed on October 1, 1902, to W. as trustee for a voluntary association, retained a vendor's lien and provided that the deed should become absolute when the purchase-money notes were paid. The vendor and vendee on, October 16, 1902, signed and recorded a recognition of the vendor's lien. In 1907, W. received a discharge in bankruptcy. On January 31, 1910, W. conveyed the property as trustee to himself in person. In 1912, after the commencement of an action to foreclose the vendor's lien, W. indorsed on the margin of the deed to himself a notice of claim of homestead. The purchase-money notes were executed by W. as trustee of the association. *Held*, that the reservation of a vendor's lien in the deed, when construed with the recorded recognition of such lien, constituted an equitable mortgage and specific lien on the property purchased, and constituted an indebtedness of the association and not of W., and hence W.'s discharge in bankruptcy did not relieve such property from liability for the purchase money thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808-823; Dec. Dig. § 433; \*Mortgages, Cent. Dig. §§ 43, 45-53, 55; Dec. Dig. § 27.\*]

**2. ASSOCIATIONS (§ 15\*)—USE OF SEAL.**

Evidence *held* to show that a seal, impressed on the deed from the association to W. and on the notes executed by the association when it made the original purchase, was the official seal of the association.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 19-25; Dec. Dig. § 15.\*]

**3. ASSOCIATIONS (§ 4\*)—NECESSITY OF SEAL.**

A voluntary association is not required by law to possess a seal.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 3; Dec. Dig. § 4.\*]

**4. NAMES (§ 10\*)—USE OF ASSUMED NAME.**

A person is bound by a contract into which he enters under an assumed name.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 7; Dec. Dig. § 10.\*]

**5. HOMESTEAD (§ 90\*)—GENERAL AND SPECIFIC LIENS.**

A homestead filing is superior to a general lien on the real estate selected, but such filing does not defeat a specific lien.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 128, 130-135; Dec. Dig. § 90.\*]

Error to District Court, Denver County; Greeley W. Whitford, Judge.

Action by Lucy W. Hartman, as administratrix of the estate of James W. Wier, deceased, against Franklin P. White. Judgment for plaintiff, and defendant brings error. Affirmed.

John P. Brockway, of Denver, for plaintiff in error. Wm. B. Tebbetts and Herbert M. Munroe, both of Denver, for defendant in error.

BELL, J. [1] On the 1st day of October, 1902, the Ancient Order of Emethachavah, a communistic corporation, through Franklin P. White, C'Chief and its sole trustee, purchased from James W. Wier of Denver, Colo.,

lots 16 and 17 in block 2 in Wier addition, state of Colorado, for \$1,200, and gave 70 serial notes in payment therefor. The said Wier executed and delivered a warranty deed conveying said lots to Franklin P. White as sole trustee and C'Chief of the Ancient Order of Emethachavah. The deed contained the following notice of intention to hold a lien on the property for the purchase money:

"A vendor's lien, however, is hereby expressly retained by said first party on the above-described property, until all of said notes, aggregating twelve hundred dollars, are fully paid, when this deed shall become absolute."

Three hundred and sixty dollars of the purchase price was afterward paid to Wier, leaving some \$840 evidenced by that series of said notes from 27 to 70, both inclusive, unpaid, with interest thereon. On the 10th day of January, 1908, said White as sole trustee of the Ancient Order of Emethachavah, by quitclaim deed, for \$1 and other consideration, conveyed said lots to his principal, the Ancient Order of Emethachavah. On the 31st day of January, 1910, the said Franklin P. White, sole trustee and C'Chief of the Ancient Order of Emethachavah, conveyed said lots from himself as trustee to himself as an individual for the consideration of \$1 and other valuable considerations. Said Franklin P. White as an individual did on the 9th day of February, 1912, long after the commencement of this suit, enter on the margin of the record of his said quitclaim deed, in the recorder's office, a claim of homestead, and avers: First, that the promissory notes given for the purchase money of said lots were the personal notes of said White, and denies that the Ancient Order of Emethachavah ever assumed to pay or become responsible for the payment thereof; second, that he holds a homestead on said premises, which is superior in right to the claim of the defendant in error; third, that on the 25th day of November, 1907, he was, by a United States bankruptcy court, in Denver, Colo., discharged and released from all of his debts, and asks that the defendant in error be restrained and enjoined from selling said lots for the payment of the purchase money, for the reasons aforesaid. A reply denied the allegations in the answer of plaintiff in error, and set up much new matter. Judge Whitford of the Denver district court took the evidence and, upon the final hearing, denied the relief prayed for by the plaintiff in error, and entered judgment for the defendant in error and a decree ordering said lots sold for the purchase money, interest, and cost of suit to be paid therefrom, etc. During the distincter days of this ancient order, these notes were treated and intended to be the notes of the Ancient Order of Emethachavah. It was the ancient order that purchased the lots. It was its sole trustee, manager, and C'Chief that made the purchase and executed and delivered the notes. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

deed which the C'Chief accepted and under which the ancient order claims title states on its face that the purchase money was not paid, and the grantor expressly retained a "vendor's lien" on said property until all of the said notes were paid, "when this deed shall become absolute." It is manifest from the deed given and accepted that it was the intention of the grantor and the grantee that the deed should not become even absolute until all of these notes were paid. On the 16th day of October, 1902, the grantor and grantee, under the title of Franklin P. White, trustee, gave notice and made ample covenants in writing, which were duly executed, acknowledged, delivered, and recorded in said recorder's office, wherein said conveyance is alleged to have been made without the payment of the purchase money. The said agreement states that the grantee, the Ancient Order of Emethachavah, by its trustee, gave his promissory notes therefor and describes these notes and states in writing that a vendor's lien was reserved and retained by the grantor until said notes and each of them, together with the interest thereon, is fully paid, and further states that, in case the same or any part thereof shall not be paid within 30 days of the time that they may become due, the grantor reserves the right and privilege of foreclosing such lien by an appropriate suit in court, "and on behalf of the grantee in said deed, it is hereby agreed, that all the reservations, rights and privileges aforesaid mentioned or claimed by said grantee (evidently meaning grantor), including the said vendor's lien and the right to foreclose the same are hereby granted and conceded to him pursuant to justice and equity and the law in such cases provided." This instrument was signed by James W. Wier, grantor, and by Franklin P. White, trustee.

Taking the original deed of these lots with the above instrument, and the purpose seems self-evident to create an equitable lien for the purchase money for these lots. All of the defenses to the enforcement of this equitable mortgage or lien are purely technical, contrary to equity and fair dealing, and untenable in a court of equity.

The evidence discloses that the Denver Fraternity of Emethachavah, a voluntary association, was organized in 1898, and the same was incorporated on the 18th day of March, 1901, under the name of the Ancient Order of Emethachavah. The articles of incorporation provide that the Ancient Order of Emethachavah shall be the chief organization, and all other organizations shall be subordinate to it and shall be under its jurisdiction and control. The articles provide for a C'Chief, who shall hold his office during his natural life, or until his successor is appointed and qualified, and shall be manager of the corporation, and all the title to the property of the corporation shall be vested in him

as sole trustee. He is given power to appoint his own successor and advisory director, and is the sole trustee of the organization. The only other officer provided for by the articles of incorporation is an advisory director, without power other than as advisory. The articles further provide that all members of the corporation taking the holy covenant degree of the order shall, upon taking such degree, yield up, grant, convey, remise, release, quitclaim, assign, and transfer to the C'Chief all of the property of such member so taking such degree, of every name or nature, real, personal, and mixed, which said property shall thereupon become the property of the C'Chief to be held by him in trust for this corporation as aforesaid. The C'Chief is given sole power to provide by-laws for the corporation. The articles also provide that no organization bearing the name of Emethachavah or words equivalent to it shall be organized or founded except upon the approval and under the direction of the C'Chief of this corporation, and shall be under the jurisdiction and control of such C'Chief. He has sole power to convey its property, etc. After the incorporation of the order, there seems to be no evidence showing an organization of a fraternity as provided for in the articles of incorporation. However, it seems that the C'Chief continued to use the name of the Denver Fraternity of Emethachavah until the latter part of 1904, when the corporation ceased active operations. The bank account of the corporation was kept in the name of the fraternity, its bills were paid by checks issued in the name of the fraternity, and it did its general business in the name of the fraternity. It would seem that, by virtue of the incorporation, the preliminary organization would be merged in the corporation, and that, under the articles, any subordinate organization existing after the filing of the articles of incorporation had to be organized under the jurisdiction of the corporation and under its directions with the approval of the C'Chief. However, the C'Chief seemed to be given absolute power, by the articles of incorporation, as trustee, and he assumed absolute power, it would seem, in the fraternity, and always signed his name as sole trustee of the Denver Fraternity of Emethachavah. He seems to have used the names of the Ancient Order of Emethachavah and the Denver Fraternity of Emethachavah, after the filing of the articles of incorporation, as interchangeable and as meaning one and the same thing. The C'Chief took the deed to the lots in controversy in the name of the Ancient Order of Emethachavah, and gave notes for the payment of the purchase money in the name of the "Denver Fraternity of Emethachavah, by Franklin P. White, sole trustee." A few days later, he joined the grantor in the execution of an agreement giving the grantor, James W. Wier, an equitable mortgage, in which agree-

ment it is stated that the grantee in the deed gave his promissory notes referring to himself as the trustee of the Ancient Order of Emethachavah, then he specifically grants, in behalf of the grantee named in the deed, a lien for the payment of these promissory notes.

[2] When he executed the notes, he impressed a metallic seal thereon with the lettering: "Emethachavah, Founded Cosmon 50, Official Seal." He afterward attempted to transfer from himself as trustee of the Ancient Order of Emethachavah said lots, by warranty deed, to himself as an individual, and placed the same seal on the deed as the seal of the Ancient Order of Emethachavah. He testified, when this case was being tried in the county court of Denver county, that the seal above described was the only one owned by the Ancient Order of Emethachavah or by the Denver Fraternity of Emethachavah. In the trial of the same case later in the district court, he testified that they had two seals at one time, but that the corporation seal was made over into a notary seal.

[3] It is quite unusual, and it is not required by law, that a voluntary association shall possess a seal. On the other hand, the statutes recognize a seal for an incorporated company. If, by mistake or lack of information, these organizations provided two seals when but one is usual, it is difficult to see why the C'Chief should have mutilated the one generally used and have preserved the useless one and have used the same as the corporate seal. The attending circumstances strongly indicate that the C'Chief stated the actual condition when he testified that the seal placed on the notes and deed was the only seal owned by either association until after this suit was commenced. However, when the identity of this seal became an important question in this case, the C'Chief had a second seal manufactured and impressed it upon the deed from the Ancient Order of Emethachavah to himself long after said deed had been executed under the old seal and delivered and recorded. The C'Chief sometimes signed instruments for the corporation: "The Ancient Order of Emethachavah, by Franklin P. White, C'Chief and Sole Trustee"—as he did in the case of the deed from himself as trustee of the corporation to himself as an individual. He sometimes signed instruments for the corporation: "Denver Fraternity of Emethachavah, by Franklin P. White, Sole Trustee"—as he did when he executed said notes for the purchase money of said lots. He sometimes signed instruments for the corporation: "Franklin P. White, Trustee"—as he did when he executed the equitable mortgage, as trustee of the Ancient Order of Emethachavah on said lots, to secure the purchase money to the grantor. The different titles assumed

by him were self-confusing. He testified that he took the holy covenant degree of the order and divested himself of all property and vested the same in the C'Chief of the corporation in trust for it. He testified that he was still a member of the order; that he had paid \$10,000 in cash for these lots. When cross-examined, he admitted that he had meant by that that he had paid \$10,000 into the corporation during the past 7 years, and said that he paid the one dollar in cash mentioned in the deed as the consideration for the lots. When quizzed by the court, he testified that he did not pay a cent; that he simply made a minute of it; that he did not see how he could hand a dollar to himself; that he was C'Chief of the corporation at the time of the trial; that, at the time he took the deed, he was sole beneficiary member of the corporation; that these lots were the only property he ever owned of a real nature. He testified that all property of the fraternity belonged to the corporation substantially; that all of the funds of the corporation were kept in the fraternity's name at the bank, and that all of the debts and obligations of the corporation were paid by check by the C'Chief on the fraternity account.

The evidence is convincing that, after the incorporation of the Ancient Order of Emethachavah, the C'Chief adopted and generally used the name "Denver Fraternity of Emethachavah" as the business designation or name in which the corporation did business up until late in the year 1904, when conditions made it desirable for him to use the name the "Ancient Order of Emethachavah."

[4] A person may adopt or assume any name in which he prefers to do business, or may consummate an individual transaction in any name he may adopt, and will thereafter be responsible in the assumed name. *Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17-21, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792.

[5] It is insisted by counsel that a homestead filing takes preference of a general lien on real estate, and we are cited to authorities holding that, where the abstract of a judgment of a court of record is filed in the recorder's office as a general lien on the real estate of the judgment debtor, the general lien must give way to the proper filing of a homestead on a specific piece of property to the value of \$2,000. That is quite true. If it were otherwise, the holder of a general lien might maintain the same against property many times the value of its incumbrance and wait for years before making a levy on a specific piece of property for the satisfaction of his claim, and thereby postpone the rights of those entitled to a homestead during the continuance of his lien. However, if a lienholder neglects to subject a specific piece of property to a levy immediately upon the filing of a general lien covering all of the

property of a judgment debtor, then one entitled to a homestead right may defeat his lien in part, at least, by filing a claim of homestead preceding such levy. *Weare v. Johnson*, 20 Colo. 366, 367, 38 Pac. 374; *Jones v. Olson*, 17 Colo. App. 144, 67 Pac. 349.

The lien in this case, however, is not general, but specific and fastened upon the lots purchased and for the purchase money. Claims for purchase money on real or personal property make the equities of the holder of such claims doubly strong, and such claims are usually excepted by statute from the exemption laws. 21 Cyc. 509.

Under the conditions of this record, we think it clear that these notes were intended to be, and were, the notes of the Ancient Order of Emethachavah; that the notice of a vendor's lien in the deed and written agreement constituted a valid equitable mortgage in favor of the defendant in error on the specific lots in dispute; that the notes, being those of the Ancient Order of Emethachavah, were not discharged by the order in bankruptcy discharging the plaintiff in error from the payment of his debts; and that the homestead filing of the plaintiff in error on the lots in question is subordinate to the equitable lien thereon for the purchase money.

Finding no reversible error in the record, the judgment and decree of the trial court is hereby affirmed.

Affirmed.

(26 Colo. A. 494)

JEWEL TEA CO. v. WATKINS. (No. 4120.)

(Court of Appeals of Colorado. Jan. 11, 1915.)

1. CONTRACTS (§ 117\*)—CONTRACT IN RESTRAINT OF TRADE—VALIDITY—EXTENT OF RESTRAINT—"OR OTHER MERCHANDISE."

A provision in a contract employing defendant as a salesman of teas, coffees, etc., over established routes, that defendant would not, while in such employment, or within 12 months thereafter, take orders for teas, coffees, extracts, "or other merchandise," to any of plaintiff's customers, was not invalid as an unreasonable restraint of trade; the words "or other merchandise," under the doctrine *ejusdem generis*, having reference to goods of the nature of those enumerated.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554-569; Dec. Dig. § 117.\*]

2. CONTRACTS (§ 143\*)—CONSTRUCTION AS A WHOLE.

A contract must be construed as a whole, effect being given to all its parts and provisions, when that can be done without injustice.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 723, 743; Dec. Dig. § 143.\*]

3. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENT OF PARTIES.

The court may put itself in the place of the parties when they executed a contract, and consider what they intended by its terms, which intention, when manifest, will control.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

4. CONTRACTS (§ 169\*)—CONSTRUCTION—CIRCUMSTANCES—PARTIES.

The circumstances surrounding the making of a contract and affecting its subject-matter may be resorted to in determining its meaning.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.\*]

5. CONTRACTS (§ 153\*)—CONSTRUCTION TO UPHOLD CONTRACT.

Courts should effectuate contracts, and should give them a rational and equitable interpretation, which is just and legal.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.\*]

6. CONTRACTS (§ 156\*)—CONSTRUCTION—GENERAL AND SPECIFIC WORDS—EJUSDEM GENERIS.

In a contract employing defendant to sell and distribute teas, etc., on plaintiff's established trade routes, a provision that defendant would not, during the contract or within a year thereafter, engage in the business of selling teas, coffees, "or other merchandise," the quoted phrase, under the rule *ejusdem generis*, is restricted in meaning to goods of the same kind as those specifically mentioned, where a broader construction might restrain trade.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 737; Dec. Dig. § 156.\*]

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by the Jewel Tea Company against C. E. Watkins. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. Foster Symes, of Denver (Ivor O. Wingen, of Denver, of counsel), for plaintiff in error.

CUNNINGHAM, P. J. [1] Plaintiff and defendant entered into a contract whereby the latter became an employé of the former as a salesman. The plaintiff corporation was engaged in selling teas, coffees, and other culinary articles, from wagons driven by its employes over well-established trade routes in this state. The sole question presented for our consideration is as to the validity of a certain paragraph in the written contract entered into by the parties, which reads as follows:

"Party of the second part (defendant in error and defendant below) further agrees that he will not at any time while in the employ of the party of the first part, nor within a period of twelve months after leaving the services of the party of the first part, for any cause, for himself or any other person, persons or company, solicit or take orders from, or deliver orders for teas, coffees, baking powder, extracts, spices, cocoa, or other merchandise to any of the customers of the party of the first part, and especially agrees not to interfere with the trade or business of the party of the first part as now transacted or carried on with its customers in the territory in which the party of the second part has been working.

"Party of the second part further agrees that he will not directly or indirectly, through himself or others, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its said customers in said territory within twelve months after leaving.

"Party of the second part further agrees, as a condition precedent, that he will not engage

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for himself or any other person, persons or company in the tea and coffee business, nor will he offer for sale any teas, coffees, baking powder, extracts, spices, cocoa or other merchandise during the life of this contract, nor during a period of twelve months after leaving the employ of the first party, for any cause, whether before or after the termination of this contract, in the cities of Denver, Longmont, Lafayette, Louisville or Erie."

We have italicized what we understand to be the phrase which has occasioned the dispute in this case. The aforesaid contract was dated September 15, 1913, and provided that it might be terminated by either party on giving the other two weeks notice. The contract was terminated on the 10th day of January, 1914, and thereupon, according to the allegations of plaintiff's bill, the defendant engaged in the business of selling and delivering orders for goods of the same general character as those referred to in the contract and to the customers of plaintiff on its established trade routes. The trial court sustained a general demurrer to plaintiff's bill, for the reason that in the opinion of the court:

"The restriction against soliciting for tea, etc., 'or other merchandise,' and in forbidding defendant to offer for sale teas, etc., 'or other merchandise,' is unreasonable, because going beyond what is necessary for the protection of the plaintiff, and the contract being unreasonable, in that respect, cannot be enforced in equity."

At the time of sustaining defendant's demurrer to the bill the trial judge further stated that "if the contract contained the words 'of a similar nature,' as stated in the complaint, it would not be open to this objection," referring to the objections set forth in that portion of the court's remarks which we have quoted. Thus it will be seen there is left for our determination but a single question, viz.: Is the contract in question, by reason of the clause which we have already quoted from it, vicious for the reason stated by the trial court? This question we think must be answered in the negative.

[2] "A contract must be construed as a whole, effect being given to all its parts and provisions, when that can be done without working an injustice to either party, and when doubt exists, and the contract is susceptible of two constructions, the one working an injustice and the other consistent with the rights of both parties, the one which upholds the rights of the parties should be adopted." *C. B. & Q. R. Co. v. Provoit*, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; *Chicago, R. I. & P. Ry. Co. v. Denver & Rio Grande R. Co.*, 143 U. S. 596, 12 Sup. Ct. 479, 38 L. Ed. 277; *Parsons on Contracts* (9th Ed.) vol. 2, p. 661 et seq.; *Page on Contracts* (1905) §§ 1120, 1121; *Beach on Contracts* (1896) vol. 1, §§ 708, 709, 717.

[3] "The primary rules for the construction of contracts are that the court may put himself in the place of the contracting parties, and then, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their agreement, and that when the intention is manifest it will control in the interpretation of the instrument, regardless of inapt expressions and technical rules of construction." *Tillitt v. Mann*, 104 Fed. 421, 43

C. C. A. 617; *Messenger v. German American Ins. Co.*, 47 Colo. 448, 107 Pac. 643; *Parsons on Contracts* (9th Ed.) vol. 2, p. 655; *Page on Contracts*, § 1123; *Beach on Contracts*, §§ 712, 719.

[4] "The circumstances surrounding the making of the contract and effecting the subject to which it relates form a sort of context that may properly be resorted to \* \* \* in determining the meaning of the words and provisions of the contract." *McKeesport M. Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53, 94 Atl. 18, quoted with approval in *Messenger v. German Am. Ins. Co.*, supra; *Farrell v. Garfield M. M. & S. Co.*, 49 Colo. 159, 111 Pac. 839; *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819; *Page on Contracts*, § 1106; *Beach on Contracts*, § 711.

Considering the contract before us in its entirety, it is quite apparent that the object and purpose of the contract was to restrain the defendant from quitting the employ of the plaintiff and thereafter on his own behalf, or as the salesman for another, to avail himself of the advantage of acquaintances he had made with plaintiff's customers while in the employ of plaintiff, and thus divert from plaintiff trade which it had built up. The recitals in the contract make its object and purpose perfectly apparent. In part they read as follows:

"Whereas, said party of the second part desires to enter the employ of the party of the first part, and by virtue of such employment will be enabled to discover and acquire full knowledge of the methods used by the party of the first part in conducting its business in the buying, selling, testing, keeping and distributing teas, \* \* \* and other merchandise, \* \* \* and will necessarily become acquainted with the customers and residences along and in such territory (commonly known as trade or delivery routes) as may be entrusted to him from time to time: Now, therefore, in consideration of the premises and of the mutual covenants and agreements herein contained the parties hereto covenant and agree as follows:" Etc.

It is proper in the interpretation of deeds or written agreements to look to the recitals thereof. These sometimes have great influence in the interpretation of the other parts of the instrument. *Broom's Legal Maxims* (1900) p. 428; *Parsons on Contracts* (9th Ed.) vol. 2, p. 669; *Beach on Contracts*, § 711.

[5] Another wholesome rule of construction requires courts to construe the words of parties so as to effectuate their deeds and contracts, and not to destroy them, for contracts should be supported rather than defeated. *Parsons on Contracts*, 659; *Page on Contracts*, §§ 1120, 1121; *Beach on Contracts*, §§ 708, 709, and 717; *Broom's Legal Maxims* (1900), p. 398.

"Where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made." *Parsons on Contracts*, p. 661; *St. Louis & Denver Land & Mining Co. v. Tierney*, 5 Colo. 582; *Wyatt v. Larimer & Weld Irrigation Co.*, 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280.

[8] Thus far our discussion of the contract has proceeded upon the theory that the same was rendered ambiguous or of doubtful va-



lidity by reason of the phrase, "or other merchandise," which we have italicized in our quotation from the contract. There is abundant authority supporting a contrary view.

"The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply. Thus general words following particular or specific terms are restricted in meaning to those things or matters which are of the same kind as those first mentioned." 9 Cyc. 584, 585.

To give to the phrase "and other merchandise" the broad meaning claimed for it by the defendant would be to invest it with power by which it might defeat what seems to have been the main purpose of the contract. This rule of construction will not ordinarily be applied where by so doing the contract is destroyed and the purpose and object of the parties to it thwarted.

"It is a general rule that whensoever the words of a deed, or of the parties without deed, may have a double intentment, and the one standeth with law and right, and the other is wrongful and against law, the intentment that standeth with law shall be taken." Coke on Littleton, 42, 183; Archibald v. Thomas, 3 Cow. (N. Y.) 284; Riley's Adm'r's v. Vanhouten, 4 How. (Miss.) 428; Many v. Beekman Iron Co., 9 Paige (N. Y.) 188.

"Where there are recitals of particular claims or considerations, followed by general words of release, the general words shall be restrained by the particular recital. Thus, if a man should receive £10 and give a receipt for this sum, and thereby acquit and release the person of all actions, debts, duties, and demands, nothing would be released but the £10; because the last words must be limited by those foregoing." 2 Roll. Abr. 409; Paylor v. Homersham, 4 M. & S. 426; Lyman v. Clark, 9 Mass. 235; Rich v. Lord, 18 Pick. (Mass.) 322, 325; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Bellamy v. Bellamy's Adm'r's, 6 Fla. at page 107.

Where, in a statute, general words follow particular ones, the rule is to construe them as applicable to subjects ejusdem generis, and we know of no reason why the rule as applied to statutes may not be with equal propriety applied to the interpretation of contracts.

"According to Lord Bacon, 'all words, whether they be in deeds or statutes, if they be general and not express and precise, shall be restrained into the fitness of the matter and the person.'" Beach on Contracts, note to page 862.

"As was well stated by Black, C. J., in Sharpless v. Philadelphia, 21 Pa. St. 161, 59 Am. Dec. 759, ' \* \* \* it is a universal rule of construction, founded in the clearest reason, that general words in any instrument \* \* \* are strengthened by exceptions and weakened by enumeration.'" Wisconsin Central R. Co. v. Taylor County, 52 Wis. at page 90, 8 N. W. 833.

No contention appears to have arisen or been made as to the legality of the contract here in question, aside from that which we have already discussed, and the terms both as to time and territory embraced seem eminently reasonable.

For authority on the question of the enforceability of contracts of the character here

under consideration, see Barrows v. McMurry Mfg. Co., 54 Colo. 432, 131 Pac. 430, and Freudenthal v. Espey, 45 Colo. 488, 102 Pac. 280, 26 L. R. A. (N. S.) 961.

Judgment reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

(50 Mont. 134)

STATE ex rel. SMITH v. DISTRICT COURT OF THE FOURTEENTH JUDICIAL DIST. IN AND FOR BROADWATER COUNTY et al. (No. 3595.)

(Supreme Court of Montana. Dec. 18, 1914.)

1. STATES (§ 30\*)—LEGISLATIVE DEPARTMENT—MEMBERS OF LEGISLATURE—CONTEST—STATUTES.

Corrupt Practices Act 1912 (Laws 1913, p. 593) provides for contesting nominations or elections by actions in the district courts, and section 49 declares that, in case of a contested nomination or election for senator or representative in the Legislative Assembly, the court shall forthwith certify its findings to the secretary of state, to be by him transmitted to the presiding officer of the body in question. Held that, if such act be construed as conferring on the district court power to decide which of two legislative candidates has been elected, it is to that extent violative of Const. art. 5, § 9, providing that each house of the Legislative Assembly shall judge of the elections, returns, and qualifications of its members.

[Ed. Note.—For other cases, see States, Cent. Dig. § 39; Dec. Dig. § 30.\*]

2. CONSTITUTIONAL LAW (§ 61\*)—DEPARTMENTS OF GOVERNMENT—DUTIES OF JUDICIARY—INFRINGEMENT BY LEGISLATIVE DEPARTMENT.

Corrupt Practices Act 1912, § 49, provides that, in case of a contested nomination or election for senator or representative in the assembly, the district court shall forthwith certify its findings to the secretary of state, to be by him transmitted to the presiding officer of such body. Held, that such provision was unconstitutional, as an attempt by the legislative department of the government to make the judicial branch its agent to gather evidence and make findings therefrom, without binding force.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.\*]

3. ELECTIONS (§ 288\*)—CONTEST—PETITION—AMENDMENT.

Where a written petition to institute a legislative election contest was filed under an unconstitutional statute, it was not amendable so as to initiate a contest in a different forum under another law after the time prescribed for such latter contest had expired.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 280-283; Dec. Dig. § 288.\*]

4. STATES (§ 30\*)—LEGISLATIVE OFFICES—CONTEST.

The method of instituting a contest for a legislative office provided by Rev. Codes, § 82 et seq., is not exclusive, but the power conferred on each house of the Legislature by Const. art. 5, § 9, to try a contest of the seats of members, is a continuing one, and may be exercised at any time during the member's term, so that the rights of the contestant are not abridged by his failure to commence proceed-

ings within the 20-day period fixed by section 83.

[Ed. Note.—For other cases, see States, Cent. Dig. § 39; Dec. Dig. § 30.\*]

Certiorari by the State, on the relation of Charles W. Smith, against the District Court of the Fourteenth Judicial District in and for the County of Broadwater and John A. Matthews, judge thereof. Demurrer and motion to quash sustained, and proceeding dismissed.

Gael G. Wilson, of Helena, for appellant. O. W. McConnell and R. Lee. Word, both of Helena, for respondents.

**HOLLOWAY, J.** At the general election held on November 3, 1914, Charles W. Smith was the Republican candidate, and Charles S. Muffy was the Democratic candidate, for state senator for Broadwater county. The canvassing board returned that Muffy received the highest number of votes, and a certificate of election was issued to him on November 6th. On November 25th Smith commenced an action in the district court of Broadwater county contesting Muffy's election. On December 3d the contestant secured leave of the court to amend his petition or complaint by striking therefrom:

"In the District Court of the Fourteenth Judicial District of the State of Montana, in and for the County of Broadwater.

"Charles W. Smith, Contestant, v. Charles S. Muffy, Contestee.

"Petition.

"To the Honorable John A. Matthews, Judge of the District Court of the Fourteenth Judicial District of the State of Montana in and for the County of Broadwater:

"The petition of contestant, above named, alleges"

—and substitute therefor the following:

"In the Matter of the Contest of Election of Charles S. Muffy to the Office of Senator for the County of Broadwater, State of Montana.

"Charles W. Smith, Contestant, v. Charles S. Muffy, Contestee.

"Statement of Contest.

"Charles W. Smith, contestant, presents and files this his statement of contest and alleges"

—and by striking out the prayer that the court determine that Muffy was not elected and that contestant was, that a citation issue to Muffy requiring him to appear and answer, and that the ballots used at the election in precincts 1 to 13 be produced in court and counted, and that a certificate of election be ordered to issue to contestant, and to substitute therefor:

"Wherefore contestant prays, that the clerk of the district court of the Fourteenth judicial district of the state of Montana, in and for the county of Broadwater, issue a commission directed to two justices of the peace of said county to meet at a time and place specified in such commission, in accordance with law, for the purpose of taking the depositions of such witnesses as the above-named parties to the above-entitled contest may wish to examine, and that such other proceedings may be had

for the determination of said contest as are authorized by law and by the statutes of the state of Montana."

On the same day a paper designated "Statement of Contest" was filed with the clerk of the court, and application made for a commission to two justices of the peace to take testimony. The clerk having refused to issue the commission, proceedings in mandamus were instituted in the district court to compel the performance of that duty. The court refused to issue the writ, and this proceeding in certiorari was instituted to review the court's action. Upon the return, counsel for the respondent interposed a demurrer and a motion to quash, and the matter is before us for determination upon the complete record of all prior proceedings. Technically, all of these proceedings were not before the district court, and it is urged are not now before us. But nothing is before us which we would not have required upon a hearing upon the merits, and nothing has been excluded which could have come before us properly. We shall therefore disregard the technical objection made, and consider the record as a whole.

[1] Sections 48, 49, 52, and 53 of an act approved at the general election in 1912 (Laws 1913, pp. 612, 613), under the initiative power reserved to the people by our state Constitution, and familiarly known as the Corrupt Practices Act, provide for contesting nominations or elections by actions in the district courts. Section 49, among other things, declares:

"In the case of a contested nomination or election for senator or representative in the Legislative Assembly, \* \* \* the court shall forthwith certify its findings to the secretary of state to be by him transmitted to the presiding officer of the body in question."

Article 6, pt. 3, tit. 1, Revised Codes (sections 82 and 92), provides methods for securing and perpetuating testimony in a contest of an election of a member of either house of the Legislative Assembly. The first method requires, as a condition precedent, that within 20 days after the certificate of election has been issued a statement of contest shall be filed with the clerk of the district court of the county where the contest arises, whereupon the clerk must issue a commission to two justices of the peace of his county, who shall take the depositions of the witnesses produced by either the contestant or contestee, report the same to the clerk, who shall forward the evidence to the secretary of state, by him to be transmitted to the presiding officer of that branch of the Legislature before which the contest is to be tried. The second method (section 91) provides for depositions to be taken in the manner and under the rules applicable in civil cases; and section 92 provides:

"The house before which the contest is pending may take such other evidence in the case as it deems material."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

While the Corrupt Practices Act is in force by virtue of a vote of the people, it has no greater efficacy as a statute than if it had been enacted by the Legislature; in other words, it cannot affect any provision of the Constitution. If by this act it was sought to confer upon a district court power to decide which of two legislative candidates has been elected, it is to that extent, and for that reason, invalid. Section 9, art. 5, of our state Constitution provides:

"Each house (of the Legislative Assembly) shall \* \* \* judge of the elections, returns, and qualifications of its members."

A like provision is found in the Constitution of the United States and in the Constitution of every state in the Union, so far as we know. Speaking generally, our state Constitution is a limitation of powers, but the provision in section 9 above is an exception to that rule. This is a distinct grant of power by the people to each branch of the Legislative Assembly, a power necessary to the existence and independence of each house as an instrumentality of government. This power, emanating from the sovereign people, cannot be delegated by either house or both acting together; and likewise neither house possesses the power to divest itself of the authority thus conferred upon it. *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. 283; *State v. Holland*, 37 Mont. 393, 96 Pac. 719. So long as our Constitution stands as it is now written, no officer, individual, court, or other tribunal can infringe upon the exclusive prerogative of each house to determine for itself whether one who presents himself for membership is entitled to a seat.

In considering a like provision of the Constitution of Kansas, Mr. Justice Brewer said:

"The Constitution declares (article 2, § 8) that: 'Each house shall be judge of the elections, returns, and qualifications of its own members.' This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each house acts for itself, and by itself, and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members. By section 5 of the same article acceptance of a federal office vacates a member's seat. He ceases to be qualified, and of this the house is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature (and so as to any other disqualification) exclusive, and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer." *State ex rel. v. John S. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189.

[2] But section 49 of the Corrupt Practices Act probably does not attempt to confer upon

the court power to determine the relative rights of legislative contestants to office. It requires only that the court make findings which are to be transmitted to the secretary of state, to be by him delivered to the house which tries the contest. If the findings made by the court pursuant to this section could, under any possible set of circumstances, become binding, the power thus attempted to be conferred upon the court would be in its nature judicial, and no valid objection could be urged against the legislation. But the constitutional injunction to each house to determine the elections, returns, and qualifications of its own members—which is mandatory and prohibitory in its character—precludes the possibility that the court's findings can ever have any binding force or effect. The function performed by the court is nothing more than that of an agent of the Legislature—just such a function as might be performed by a referee or notary public. Under our Constitution the powers of government are distributed among the legislative, executive, and judicial departments, which are declared to be distinct and are co-ordinate, and "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted." Article 4, § 1.

In *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962, we said with reference to this provision:

"Its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally a violation of the people's confidence. Indeed, the distinction goes so far as to require each department to refrain from in any way impeding the exercise of the proper functions belonging to either of the other departments."

The jurisdiction of the district court is defined and limited by section 11, art. 8, of the Constitution. Every power therein enumerated is judicial in character; and that the lawmaking branch of government cannot compel a court to act as its agent, or the agent of either house of the Legislature, merely to gather evidence and make findings therefrom which have no binding force or effect, or for any other purpose, follows from the very character of the judiciary as an independent, co-ordinate branch of government. The provision of section 49 of the Corrupt Practices Act above quoted is invalid for this reason, and the contest pro-

ceeding instituted in the district court of Broadwater county on November 25th was a nullity, and the complaint or petition was of no more effect than a piece of blank paper, and therefore was not the subject of amendment.

[3] It is idle to suggest that contestant intended his original petition, filed in court on November 25th, to constitute a statement of contest under the Code provisions above. It was filed in court, entitled in court, and appealed to the court for relief. The paper filed on December 3d meets the requirements of section 83, Revised Codes, but it was not filed within 20 days after the certificate of election had been issued to the contested, and for that reason was not effective for any purpose (15 Cyc. 400), and did not call for any action on the part of the clerk.

[4] It may be observed in passing that the method of instituting a contest provided by sections 82 et seq., above, is not exclusive. Those provisions merely contemplate a convenient method of securing speedily the testimony of witnesses who might, by leaving the state, avoid service of process. The power conferred by section 9, art. 5, of the Constitution, above, is a continuing one, and may be exercised at any time during the term of the member. The rights of a contestant are not abridged in any respect, then, by his failure to commence his proceedings within the 20-day period designated in section 83, above. Such failure operates only to preclude him from having depositions taken in the manner and at the time provided in sections 84 to 87, but leaves him every other facility for a hearing.

Because the proceeding instituted on November 25th was ineffectual, and the proceeding commenced on December 3d was too late, this relator is not entitled to any relief in this court. The demurrer and motion to quash are sustained, and the proceeding is dismissed.

Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

(50 Mont. 119)

STATE ex rel. SMOTHERMAN v. DISTRICT COURT OF TWELFTH JUDICIAL DIST. IN AND FOR BLAINE COUNTY et al. (No. 3583.)

(Supreme Court of Montana. Dec. 18, 1914.)

# 1. JUDGMENT (§ 106\*)—FILING ANSWER—SERVICE.

Under Rev. Codes, § 6537, providing that upon the overruling of a demurrer to an amended complaint the defendant must answer within 20 days or such time as the court may direct, or judgment may be entered against him by default, the defendant must file his answer within the time set by the court; service of it upon plaintiff's counsel not being sufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.\*]

## 2. JUDGMENT (§ 106\*)—FILING ANSWER—SERVICE.

Under Rev. Codes, § 6537, providing that judgment may be entered by default against a defendant for failure to file his answer to an amended complaint, demurrer to which has been overruled, within a specified time, service of answer on counsel of plaintiff within such time does not preclude such counsel from having the default judgment entered against defendant after expiration of time for filing answer, in the absence of any act or statement of his misleading opposing counsel to the belief that he would not take advantage of the delay in filing answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.\*]

## 3. JUDGMENT (§ 131\*)—DEFAULT JUDGMENT—GROUNDS.

Under Rev. Codes, § 6719, the clerk of the district court must enter a default judgment when the time fixed by Rev. Codes, § 6537, for filing an answer to an amended complaint, demurrer to which has been overruled, has expired.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 245; Dec. Dig. § 131.\*]

## 4. JUDGMENT (§ 139\*)—DEFAULT JUDGMENT—SETTING ASIDE—STATUTES.

Under Rev. Codes, § 6538, a judgment, entered by default by the clerk of a district court after defendant's time had elapsed for filing his answer to an amended complaint, after demurrer overruled, may be set aside by the court in its discretion and upon proper showing, and the answer allowed to be filed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

## 5. APPEAL AND ERROR (§ 113\*)—DECISIONS REVIEWABLE—OPENING DEFAULT—STATUTES.

Where a final judgment has not been entered in the case, an order of the lower court striking from its file a default judgment entered under Rev. Codes, § 6537, cannot be reached on appeal, under Rev. Codes, § 7098, providing that no appeal lies from an order striking from the files a pleading or other part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.\*]

## 6. CERTIORARI (§ 5\*)—GROUNDS.

When final judgment has not been entered in a suit, in which the plaintiff objects to an order of the court striking from the files a judgment given against defendant by default, certiorari is the proper mode of review.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

Action by W. D. Smotherman against Charles Christiansen. Default judgment was entered against defendant which the lower court set aside, and plaintiff brings certiorari. Order annulled.

W. B. Sands, of Chinook, for appellant. O'Keefe & Kuhr, of Chinook, for respondent.

BRANTLY, C. J. Certiorari. On August 26, 1912, W. D. Smotherman commenced an action against Charles Christiansen in the district court of Blaine county. Thereafter he filed an amended complaint. The amended pleading alleged 12 separate causes of action for damages for trespass upon lands belonging to plaintiff. The defendant interposed separate demurrers to the several causes

es of action. On March 16, 1914, Hon. Frank N. Utter presiding, the court after argument sustained the demurrers to the first, second, and fourth causes of action; it overruled the others and allowed defendant 10 days in which to answer. On the morning of March 27th, the defendant having failed to file his answer, counsel for plaintiff filed with the clerk his praecipe for a default. The default was entered immediately by the clerk by filling out and signing a printed blank kept by him for that purpose, and attaching it to the complaint by a stapling machine. On November 10, 1914, the court, on motion of counsel for defendant, ordered the default stricken from the files on the ground that the clerk was "without authority in law to enter it." At the argument of the motion in the district court it was admitted by counsel for the plaintiff that, on the afternoon of the day before the default was entered, counsel for defendant had served upon him a copy of the answer he intended to file in the action. The purpose of this application is to have the order striking out the default annulled on the ground that the court exceeded its jurisdiction and the relator has no appeal nor other speedy or adequate remedy. Appearance was made in this court for the respondents by motion to quash the writ, on the ground that the facts alleged in the affidavit did not warrant its issuance by this court, and that the petitioner has an adequate remedy by appeal. Upon this motion the application was submitted for final judgment.

[1-4] It is provided by section 6537 of the Revised Codes that, upon the overruling of a demurrer to an amended complaint, the defendant must answer within 20 days or such other time as the court may direct. Judgment by default may be entered for failure to answer, as in other cases. In the case of Smotherman v. Christiansen the court directed the answer to be filed in 10 days. It was incumbent upon the defendant to file his answer within this time. A service of it upon counsel for plaintiff was not equivalent to filing it with the clerk. Nor did the service preclude counsel from having default entered on the following day, in the absence, of course, of a showing of some act or statement on his part misleading counsel for the defendant into the belief that advantage would not be taken of his lack of promptness in filing the answer. The answer not having been filed, counsel for plaintiff had the right to have default entered, and it became the duty of the clerk upon his application to enter it. Rev. Codes, § 6719. After it had been entered, the court might, in its discretion and upon a proper showing, but not otherwise, have set it aside and permitted the answer to be filed. Rev. Codes, § 6589. Evidently, the court was of the opinion that, inasmuch as service of the answer had been

made, this was sufficient to preclude the entry of default. This conclusion was erroneous. The relator could not arbitrarily be deprived of the advantage gained by entry of default.

[5, 6] Since final judgment had not been entered when the order was made, the relator is without remedy by appeal. No appeal lies from an order striking from the files a pleading or other document constituting a part of the record of the case. Rev. Codes, § 7098. Nor has he any other adequate remedy.

The order was in excess of jurisdiction, and is therefore annulled.

Order annulled.

HOLLOWAY and SANNER, JJ., concur.

(16 Ariz. 338)

WHITE SEWING MACH. CO. v. BRADLEY  
et al. (No. 1376.)

(Supreme Court of Arizona. Jan. 11, 1915.)

1. TRIAL (§ 139\*)—DIRECTION OF VERDICT—SUFFICIENCY OF EVIDENCE.

It is only where the court can find no evidence which, in its deliberate and ultimate judgment, is entitled to be weighed that a verdict should be directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

2. INDEMNITY (§ 15\*)—BONDS—EVIDENCE.

In an action on a bond to secure payment of notes given for the price of sewing machines, evidence held sufficient to take the question of the execution of the bond and the existence of indebtedness on the notes to the jury.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.\*]

3. BONDS (§ 120\*)—EXISTENCE OF EXACTLY SIMILAR BOND—EFFECT.

It is no defense to an action against the parties to a bond that there is another bond outstanding, executed by the same persons, for the same purpose, and containing exactly the same conditions.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 139-147; Dec. Dig. § 120.\*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

Action by the White Sewing Machine Company, a corporation, against J. Taylor Bradley and others. From a judgment directing a verdict for defendants, plaintiff appeals. Reversed and remanded.

David Benshimol, of Douglas, for appellant. Doan & Doan, of Douglas, for appellees.

CUNNINGHAM, J. Appellant commenced this action upon a bond given by J. Taylor Bradley as principal and the other appellees as sureties, under date of October 8, 1907, binding themselves jointly, severally, and individually to the appellant in the penal sum of \$2,500, with 10 per cent. in case of

suit on the bond, to be paid upon the following condition only:

"The condition of the above obligation is such that if the above bounden \* \* \* heirs, executors, or administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred on the part of the said J. Taylor Bradley to the White Sewing Machine Company, or its assigns, whether such indebtedness or liability shall exist in the shape of book accounts, notes or leases, renewals or extensions of notes, accounts or leases, acceptances, indorsements, consignments of property, or merchandise, failure to deliver or account for the same, or any part thereof, or otherwise, and whether such indebtedness shall be incurred under any contract between said White Sewing Machine Company and said J. Taylor Bradley or otherwise, and whether the same shall arise out of the purchase and sale of sewing machines, or otherwise, hereby waiving presentment for payment, notice of nonpayment, protest and notice of protest, and diligence upon all notes, accounts or leases, now or hereafter executed, indorsed, transferred, guaranteed or assigned by the said J. Taylor Bradley to the White Sewing Machine Company, its agents or assigns, then this obligation to be void, but otherwise to be and remain in full force and effect."

Further provisions are made in the bond relating to matters of signature, notice of acceptance by the company, other agreements for discharge or release of the signers, and agreements arising that do and that do not have the effect to discharge the obligation. The instrument is literally set out in the complaint. The complaint alleges that:

"During the year of 1907, defendant Bradley purchased from the plaintiff various sewing machines and sewing machine supplies, and in payment therefor, made, executed and delivered to plaintiff his promissory note in favor of plaintiff, in the sum of \$2,094.63 in words and figures following, to wit"

—setting out the note dated October 30, 1907, due 18 months after date, with interest at 8 per cent. per annum from maturity, and providing for 10 per cent. attorney's fees to be added in case of suit, signed by J. Taylor Bradley. Plaintiff admits credits have been allowed upon the note, and alleges:

"That the sum of \$736.45 is now due on said note, and that the same is the whole indebtedness due from defendant Bradley to plaintiff."

Plaintiff alleges that:

"Defendants have wholly failed and neglected to pay said indebtedness, or any part thereof, though demand has been made on them for such payment, and said indebtedness has not been paid by said defendant Bradley \* \* \* or any other persons."

Plaintiff claims 10 per cent. on the amount alleged to be due as attorneys' fees as provided in the bond.

The defendants Overlock and Pelronnet answered alone. The defenses interposed by these answering defendants consist of demurrers, of a denial that J. Taylor Bradley executed and delivered the note pleaded and deny that there was any consideration for the note; deny that at the time of the maturity of the note, or at any time since, that there was due the plaintiff anything from Bradley. They deny that they made

and executed the bond sued on, and deny that demand for payment has been made, and allege that on information and belief all sums of money due from Bradley to plaintiff have been paid. These defenses are verified. The cause was tried before a jury, and upon the close of the evidence of all parties the court instructed a verdict for the defendants, and rendered judgment accordingly. Plaintiff moved for a new trial, which motion was denied. This appeal is prosecuted from the judgment and from the order refusing a new trial.

[1] Appellant assigns as error the instruction of the court directing a verdict for defendants, "because there was substantial evidence to sustain the plaintiff's case." This assignment is the equivalent of the allegation that the evidence does not sustain the verdict and judgment. Such allegation was one of the grounds assigned as reasons for a new trial in the motion. The purpose of action is to enforce the obligation of the bond. The right to recover depends upon whether J. Taylor Bradley is indebted to the plaintiff in any amount, and whether such indebtedness arose by reason of any of the things specified in the bond. If he is indebted by a note and neither he nor the sureties on the bond have paid the amount owing, the condition of the bond is broken, and plaintiff is entitled to recover. If it be a fact that J. Taylor Bradley is not indebted to the plaintiff, evidenced by the note, because the note was made by him without consideration, if in fact these defendants did not make, execute, and deliver the bond sued on, or if all the indebtedness represented by the note has been paid, any of these facts appearing, defendants are not liable, and the obligation of the bond is not enforceable against them. The condition of the bond has been performed or the obligation never existed, as the case may be. The issues raised by the pleadings are whether defendants made, executed, and delivered the bond set forth in the complaint. If so, did J. Taylor Bradley make the note pleaded to the plaintiff, and was such note made upon a consideration? Is any part of that note due and unpaid? These are the questions presented for trial as raised by the defense. In order to recover the plaintiff must satisfy the jury from a preponderance of the evidence that the defendants made, executed, and delivered to the plaintiff an obligation in effect such as is pleaded; that before the commencement of the suit J. Taylor Bradley was indebted to the plaintiff in some manner contemplated by the bond and to some amount; that he gave plaintiff his promissory note in effect such as is set forth in the pleadings; that the note was given for a consideration; that the note or some part of the note is due and unpaid. The question is, Does the record contain substantial evidence tending to prove these facts,

and such as would support a verdict for the plaintiff? The plaintiff introduced the testimony of H. S. Smith, a witness, who testified: That he prepared the bond on an approved blank form of bond furnished him by plaintiff, by filling in the blanks and making other notations on the instrument. That he saw all the defendants sign their names to the bond, and he signed his name as a witness to such signatures of all the defendants except that of J. G. Dixon, and that he saw Dixon sign the instrument, and saw the witness to his signature also sign it as such witness. The instrument is otherwise identified. That the instrument was made as one of three instruments closing a sale of sewing machines by the witness for the plaintiff to defendant Bradley. That the other two instruments consisted of an order for the goods by Bradley and a contract between Bradley and plaintiff bearing on the matter of the sale of the goods. The witness says:

"I got Bradley's order for the machines and contract, and I went with him to the other people who signed the bond, and I saw them sign it, and I signed the bond myself as a witness. The White Sewing Machine Company approved the contract, order, and bond and shipped the machines."

Plaintiff then introduced C. A. Hawkins, who testified: That he was the general manager of plaintiff company in October, 1907; that the contract, order, and bond was received by plaintiff company, and he as general manager for the company approved the contract and order, and the car load of machines was shipped. The order and contract are produced as a part of this witness' testimony. He testifies that letters were caused by him to be sent by registered mail to each of the parties signing the bond, notifying them that the plaintiff company had accepted the bond. A copy of the letters and return register receipts appear in the evidence. That upon notice from Bradley that the goods had been received, he was furnished three notes to execute and return to the company to cover the full account payable to the company. The total sum due for the car load of sewing machines was \$5,415. That another small order was given by him and the freight advanced. All aggregated, including the machine account, \$6,283.91. That the three notes were all dated October 30, 1907. One was due April 30, 1908, one October 30, 1908, and the third and last was due April 30, 1909. The first two notes were for the sum of \$2,094.64, and the last one was for the sum of \$2,094.63.

"The consideration for the notes was the car load of machines \* \* \* and the freight on the machines from Cleveland, Ohio, to J. Taylor Bradley in Arizona. \* \* \*"

The witness goes into detail regarding the sums paid on account of the notes, admitting that the first two notes have been paid and furnishing a statement of the account.

The witness states:

"I have the last of said notes, which I have referred to as note No. 103. \* \* \* The balance due from J. Taylor Bradley on August 13, 1911, was \$800.59, and the interest due at said time was \$111.69."

This is substantial evidence tending to prove every essential fact necessary to establish a prima facie case. Without further evidence, if submitted to the consideration of a jury and a verdict should have been returned for the plaintiff, such verdict would not be unsupported by the evidence.

[2] In *Kroeger v. Twin Buttes R. R. Co.*, 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A, 1289, we adopted and approved the rule announced in 38 Cyc. 1567, 1568, as follows:

"It is only where a court can find no evidence which in its deliberate and ultimate judgment is entitled to be weighed that the jury should be instructed in terms that there is no evidence to support the burden of proof which rests upon the party."

We adhere to this rule as one supported by reason and authority.

[3] In view of another trial we deem it proper to notice one other matter that has been the subject of a close contest in the trial of this case, viz., the question of another bond, made by these same defendants for the same purpose of insuring to plaintiff the payment of any sums that J. Taylor Bradley might become indebted to plaintiff but fail to pay. Such a bond was mentioned in the evidence, and it was virtually admitted by plaintiff's counsel that such bond had been made by the defendants and forwarded to plaintiff. There is some evidence tending to show that such bond was in effect the same form of bond sued on. The bond in suit contains the following paragraph of agreement:

"Each one signing this bond is bound according to the purport of it without any regard to any understanding that any person should also sign this instrument; and the person to whom this is intrusted has absolute authority to deliver it, and no notice of its acceptance by said company shall be required, and the same is made and shall be construed without reference to any other instrument or agreement whatsoever, and any claim of any arrangement or agreement with any of the signers hereof to discharge or release them or any of them, shall be void and of no binding effect upon the White Sewing Machine Company unless this bond shall be delivered up or discharged in writing by the said White Sewing Machine Company, over the signature of its president or secretary of the company, and it is to continue in full force until so delivered up or discharged."

Conceding that the prior bond did contain a provision in effect the same as above quoted, the defendants argue, and the court apparently accepts the argument as sound, that, such agreement being in the prior bond, that bond only is a binding obligation upon these defendants, and by reason of the existence of such prior binding obligation these defendants are not liable on this subsequent bond. In the first place no such defense is set up by the defendants, and the validity of the prior bond is not involved in this case.

In the second place a free, competent person may obligate himself by written or oral agreement as many times as he chooses, without one obligation entered into by him disqualifying him from entering into another, in the identical terms of the former obligation. If we are to hold that a man can bind himself but one time in one form of bond, such holding would be revolutionary in the extreme, and would have the effect to nullify all manner of contracts. When suit is commenced to enforce the prior bond mentioned in the evidence in this case, its binding effect may then be determined. It has no place in this action under the issues joined. Besides the evidence allowed on that fact tends to prove, if the question was one for consideration, that that bond was never accepted, and was returned and declared by plaintiff to be void. Plaintiff claims no rights under the prior bond.

The judgment is reversed for this reason: The court erred in directing a verdict for defendants when substantial evidence was before the jury tending to establish all the essential facts of plaintiff's alleged cause of action.

Reversed and remanded.

ROSS, C. J., and FRANKLIN, J., concur.

(25 Cal. A. 784)

**SAM AFTERGUT CO. v. MULVIHILL**  
(Civ. 1408.)

{District Court of Appeal, First District, California. Nov. 19, 1914. Rehearing Denied Dec. 19, 1914. Denied by Supreme Court Jan. 18, 1915.)

**1. SALES (§ 29\*)—REQUISITES OF CONTRACT—EXECUTION.**

Where it was the express intention of the parties that their oral agreement for the sale of milk should be reduced to writing and signed by them, and where the seller had no knowledge that it had been reduced to writing and left with their agent for his signature, and did not see the written contract or consent to its terms, it was not binding on either party.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 56; Dec. Dig. § 29.\*]

**2. WORK AND LABOR (§ 28\*)—ACTION FOR PRICE—QUANTUM MERUIT.**

Where defendant admitted that the milk was received and used by him in view of a contract to be entered into covering such delivery, and that the price claimed in the complaint was the reasonable value of the milk delivered by plaintiff, plaintiff was entitled to recover on a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.\*]

**3. BROKERS (§ 13\*)—AUTHORITY—ACCEPTANCE OF CONTRACT.**

A broker who brought parties together, drew up a written contract, expressing their oral agreement, and, after it was signed by the buyer, kept it to be signed by the seller, was not an agent of the seller to the extent that his possession of the contract was the seller's possession, so as to estop the seller to claim that it was not signed by him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 12; Dec. Dig. § 13.\*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge. Action by the Sam Aftergut Company against Joseph Mulvihill. Judgment for defendant, and plaintiff appeals. Reversed.

Hankins & Hankins, for appellant. Louis Ferrari, of San Francisco, for respondent.

**PER CURIAM.** This is an appeal from a judgment in favor of the defendant and against the plaintiff upon a nonsuit granted upon motion of the defendant.

The action is one to recover the sum of \$1,474, the value of milk sold and delivered by plaintiff to defendant. The facts of the case are briefly as follows: After some negotiations, the parties to this action agreed orally that the plaintiff should sell, and that the defendant should purchase, a certain quantity of milk a day for a fixed price for a period of six months; and one of the stipulations of the oral arrangement was that the agreement thus arrived at should be reduced to writing and signed by both parties. It was accordingly reduced to writing, signed by the defendant, and left with McGuire & Son, milk brokers, to be signed by one Sam Aftergut, the president of the plaintiff corporation, some time when he should happen to be at the office of McGuire & Son. The contract, however, was never signed by Aftergut, nor by any one on behalf of the plaintiff, nor is it shown that the plaintiff even knew that it had been signed by the defendant. After delivering milk to the defendant for five or six weeks in the quantity specified in the contract, the plaintiff, for some reason not disclosed by the record, refused to make further deliveries; and, the defendant having failed to pay for the milk delivered, plaintiff commenced this action.

The complaint is in two counts; one for the reasonable value of the milk; and the other for the agreed price. Defendant contended in the court below, and contends here, that a recovery cannot be had on either count, for the reason that, if under the circumstances of the case the contract must be regarded as executed by the parties, the plaintiff cannot recover on the theory of an implied contract; and, on the other hand, if the contract is to be regarded as binding on both parties, then the plaintiff, not having shown any reason for discontinuing the delivery of the milk, cannot recover on the contract.

[1, 2] We think the court erred in granting the motion for a nonsuit. Plaintiff never consented to the terms of the contract, nor was it even read by any of its officers; and as it was the expressed intention of the parties that it should be reduced to writing and signed by them, certain it is that, this stipulation not having been performed, the contract cannot be regarded as binding on either of the parties (*Spinney v. Downing*,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



108 Cal. 668, 41 Pac. 797); but, on the other hand, it having been admitted that the milk was received and used by the defendant in view of a contract to be entered into covering such delivery, and that the price claimed in the complaint was the reasonable value of the milk delivered, the plaintiff, it must be held, was entitled to recover on quantum meruit.

The authorities sustain the view that the oral agreement between the parties, not having been reduced to writing and signed by the plaintiff, as contemplated by the parties, did not constitute a contract. This is especially true where, as here, the proposed contract contained reciprocal covenants. In *Spinney v. Downing*, supra, it appeared that the understanding and agreement between the plaintiff and the defendant was that the proposed contract should be reduced to writing and signed by both parties. This, for a reason not disclosed, was not done; and the court therefore held that it never became a binding and subsisting obligation upon either party, and in that connection said:

"It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of the contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other"—citing cases.

[3] The defendant also asserts that McGuire & Son were the agents of the plaintiff, and hence he claims on some theory of estoppel that plaintiff could not be heard to say that the contract was not signed by it. But the evidence does not show that McGuire & Son were any more the agents of the plaintiff than of the defendant. They, as brokers, brought the plaintiff and defendant together; they drew up the contract in question, and, as arranged, the defendant was to sign it and leave it with the brokers, who, some time when convenient, would have the plaintiff sign it also. This did not constitute them the agents of the plaintiff to the extent that their possession of the contract under the circumstances of this case would be equivalent to plaintiff's possession of it, and so give rise to a question of estoppel.

The judgment is reversed.

(26 Cal. A. 13)

FASSETT v. CALDWELL. (Civ. 1413.)

(District Court of Appeal, First District, California. Nov. 20, 1914. Rehearing Denied by Supreme Court Jan. 18, 1915.)

EVIDENCE (§ 419\*)—ADMISSIBILITY—PAROL EVIDENCE RULE.

Parol evidence that a demand in the form of an "I O U" executed by defendant was in reality a receipt for money delivered to defendant in payment of corporate stock, which plaintiff had the right to investigate before finally ac-

cepting, is admissible to show that there was no consideration; plaintiff having accepted the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

Appeal from Superior Court, City and County of San Francisco; George L. Jones, Judge.

Action by Howard H. Fassett against E. J. Caldwell. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernest K. Little, of San Francisco, for appellant. Henry J. Brodsky and Wm. M. Madden, both of San Francisco, for respondent.

PER CURIAM. This is an appeal by plaintiff from a judgment in favor of the defendant in an action brought to recover on a demand in the form of an "I O U" executed by the defendant to the plaintiff's assignor, who is the father of plaintiff.

In November, 1911, plaintiff's assignor inquired of defendant concerning a location where his son could open a store. A few days later defendant called his attention to a business conducted under the name of "Our Store, Incorporated," in which defendant was interested, and requested him to investigate it, advising him to invest \$1,500 in it, if he found it a good proposition, by purchasing 300 shares of the capital stock of the corporation. Defendant took plaintiff's assignor to the store, introduced him to different persons connected with the business, requesting them to help him make a thorough investigation. After plaintiff's assignor had made a partial investigation of the business, and after, according to the evidence introduced by the defendant, he had stated that the proposed investment looked like a good one, plaintiff's assignor, at the request of the defendant, advanced \$200, and two days later, on December 4, 1911, money being urgently needed in the business, advanced a further sum of \$1,300. On December 6th following 300 shares were issued by the corporation in the name requested by plaintiff's assignor and delivered to him, and were subsequently receipted for by him on the books of the corporation.

Plaintiff's assignor testified that the understanding between him and the defendant was that if, after a thorough investigation of the affairs of the concern, he was satisfied to make the investment, the \$1,500 was to be regarded as payment for the stock; otherwise defendant was to return the money to him—in other words, the defendant was to guarantee the investment and the "I O U" was given for this purpose. Defendant, on the other hand, introduced evidence tending to show that the understanding was that Fassett, Sr., should make a thorough examination of the business, and, if he concluded it could be made a paying proposition, he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would buy 300 shares of the stock of the corporation; that he did make such investigation, declared himself satisfied, and subsequently the money was paid, and the stock delivered as just stated, and Mr. Fassett became a director and officer of the corporation. The defendant also testified that, upon receiving the second payment of \$1,300, he himself suggested that he give to Mr. Fassett some memorandum showing the receipt of the money until the stock was delivered, and that he thereupon signed and gave him the "I O U" which is the basis of this suit; that he did not guarantee the purchaser against loss; that he did not personally deliver the stock; and that he forgot to demand the return of the "I O U" after such delivery.

On January 4, 1912, the business in question went into the hands of a receiver, and ultimately the creditors received 20 cents on the dollar.

This is the history of the case as disclosed by the record, and plaintiff's sole point is that all the evidence above narrated, which tends to show that the instrument was in the nature of a receipt, was inadmissible, for the reason that it was an attempt to vary the terms of a written contract. The evidence was admitted on the theory that it tended to show that there was no consideration passing from the plaintiff to the defendant for the "I O U," and that it was but an acknowledgment of the receipt of the \$1,500. We think that for this purpose the evidence was clearly admissible. *Brady v. Henry*, 71 Cal. 481, 483, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; *Muir v. Hamilton*, 152 Cal. 634, 93 Pac. 867; 9 Ency. of Evidence, p. 382.

From the evidence introduced on behalf of the defendant it appears that the "I O U" was merely a memorandum for the receipt of the money advanced by the plaintiff's assignor pending his determination to make the proposed investment, and upon his conclusion to make the investment (which the court evidently considered was satisfactorily shown) the defendant was under no obligation to return the money, but was entitled to the cancellation or return of his "I O U."

Judgment affirmed.

(35 Cal. A. 787)

**FOOTE v. SAN FRANCISCO PRODUCE CO.** (Civ. 1402.)

(District Court of Appeal, First District, California. Nov. 19, 1914. Rehearing Denied Dec. 19, 1914. Denied by Supreme Court Jan. 18, 1915.)

**1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.**

Where the evidence is conflicting, the court's findings will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**2. SALES (§ 372\*)—RIGHTS OF SELLER—MEASURE OF DAMAGES—STATUTORY CONDITIONS.**

Where a contract called for the sale of a crop of grapes, and the time between the buyer's refusal to perform and the spoiling of the crop by frost was only a few days, the seller had not time to fix his measure of damages in the manner required by Civ. Code, §§ 3311, 3353, by sale of the grapes in open market, since, after their spoiling, they had no market value, so that the buyer could not defeat the seller's claim for damages because of the failure so to do.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1089; Dec. Dig. § 372.\*]

Appeal from Superior Court, Alameda County; K. S. Mahon, Judge.

Action by R. M. Foote against the San Francisco Produce Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Frick and Charles Quayle, both of Oakland, for appellant. Thomas M. Diviny, of San Francisco, and Law T. Freitas, of Stockton, for respondent.

**PER CURIAM.** This is an appeal from a judgment and order denying the defendant's motion for a new trial in an action for damages for the alleged breach of a written contract for the sale and purchase of a crop of grapes.

The record shows that the defendant, through its duly authorized agent, visited the plaintiff's vineyard at Linden, San Joaquin county, on October 9, 1909, and there inspected the latter's ripened crop of grapes, and thereupon, and after such inspection, entered into a written contract for the purchase of the entire crop, by the terms of which the buyer was to furnish the boxes, and the seller was to pick and deliver the grapes f. o. b. at Peters, a nearby station, for transportation to the defendant at its place of business in Oakland. On October 15th and 16th two car loads of grapes were shipped from Peters to Oakland, which arrived at their destination on or about the 19th of October. Thereupon a telephone communication occurred between the defendant and plaintiff, in the course of which the former told the latter not to ship any more grapes at that time. A few days later further talks over the telephone were had, as to the details of which the evidence is conflicting. The plaintiff testified that on these occasions he was demanding more boxes in which to pick and ship the grapes, and the defendant was objecting to the quality of the first two car loads already shipped and received, and was also instructing plaintiff not to send any more grapes until notified by the defendant so to do. The finding of the court was in favor of plaintiff's statement of the substance of these conversations, and such finding, in view of the conflict, will not be disturbed by this court.

Upon being thus advised by the defendant not to send on the rest of his crop, the plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff ceased picking his grapes for several days, at the end of which time he received a notification from the defendant to send on more grapes. In the meantime, however, the remainder of the unpicked crop had been ruined and rendered by rain and frost unmarketable and unfit for anything but feed for hogs. The plaintiff thereupon sold the grapes on the vines for hog food, realizing only a small part of their former value, and then sued the defendant in two counts to recover the purchase price of the two car loads of grapes which had been shipped and received by the defendant, and to also recover by way of damages the contract value of the rest of the grapes, less the modicum received upon their sale as hog food. Upon the trial of the cause the defendant conceded that the first two car loads of grapes were sound and merchantable, and that as to them the plaintiff was entitled to recover; but as to the rest of the grapes, and the plaintiff's claim of damages for their loss, the appellant makes two main contentions:

First, that the evidence does not sustain the findings of the court in favor of the plaintiff as to the circumstances and terms of the defendant's refusal to receive any more grapes after the first shipment and before the time when it was too late to pick and save the rest of the crop.

[1] As already stated, however, the evidence is in conflict on this point, and the findings therefore will not be disturbed.

[2] The second contention of the appellant is that, this being an executory contract between plaintiff and defendant for the sale of these grapes, the defendant's liability for its breach thereof is to be arrived at and fixed under the terms of sections 3311 and 3353 of the Civil Code. These are the Code sections prescribing that it is the duty of the seller of personal property, upon breach by the buyer of the contract of sale, to proceed to resell the property with reasonable diligence in the nearest open market and in the manner provided for sales of pledged property, and by so doing to fix the amount of detriment caused by the buyer's breach of the contract. This the appellant contends the plaintiff did not do; but in this respect we think the evidence sufficiently shows that the plaintiff did not have time to put into effect this method of fixing the amount of his damages after it was definitely known that the defendant would not abide by its contract and accept the grapes, and before the remainder of his unpicked grapes had been ruined by rain and frost; and that, after they were so ruined, they had no market value which could by any diligence or effort on the part of the plaintiff be so ascertained. This being so, we think the appellant was not entitled to rely upon the aforesaid sections of the Civil Code to defeat the plaintiff's claim of damages.

We further find that there is no merit in the appellant's objection to the amount of interest allowed to plaintiff by the terms of the judgment.

The judgment and order are affirmed.

(26 Cal. A. 18)

HERRON v. GEAR. (Civ. 1394.)

(District Court of Appeal, First District, California. Nov. 20, 1914.)

1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS.

In an action on a note, wherein the evidence was conflicting on the issue whether defendant's note, given for stock of a corporation, was given to the president as an officer of the corporation as contended by plaintiff, or to the president individually, in payment for his personal stock, a finding for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. CORPORATIONS (§ 116\*)—SALE OF STOCK—INDORSEMENT—CONSTRUCTION.

In such action, an indorsement on the certificate of stock issued to defendant that it was to be paid for by the note sued on, which was delivered on condition that the certificate should not be sold until the payment was completed and a certificate thereof indorsed by the president or secretary of the corporation, construed with findings that the stock was not the property of the corporation and that it had no interest in the note given for its purchase price, did not show that defendant was entitled to pay the note to the corporation and be thereby discharged from further liability, but was only a requirement that before the stock was transferred upon the books of the corporation its officers should be able to certify that it had been fully paid for by the payment of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. § 116.\*]

3. BILLS AND NOTES (§ 383\*)—PAYMENT TO PERSON NOT IN POSSESSION—EFFECT.

Defendant, in an action on a note given to the president of a corporation in payment for its stock, who at all times knew that the president individually, and not the corporation, was the owner and possessor of the note, and that in making payment thereon to the corporation he was paying to one not in a position to deliver the note when paid, made such payments at his peril, and they were no defense to an action on the note by the president's indorsee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 956; Dec. Dig. § 383.\*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by William F. Herron against Lewis S. Gear. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Thunen, of San Francisco, for appellant. William F. Herron and Weinmann, Wood & Cunha, all of San Francisco, and Le Roy M. Edwards, of Los Angeles, for respondent.

PER CURIAM. This is an action to recover the sum of \$2,313 and interest, alleged

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to be due upon a promissory note executed by the defendant for said sum, payable six months after date to the order of himself, indorsed by him in blank, and delivered to one Wilkie L. Edwards. This note was given by the defendant in payment of a balance due upon the purchase price of 3,000 shares of the capital stock of the Pacific Slope Securities Company, a corporation, of which at the time of the transaction said Wilkie L. Edwards was president. At some time after its execution Wilkie L. Edwards indorsed and transferred the note to Lula Edwards Chase, who in turn indorsed and transferred it to the plaintiff in this action.

[1] Practically the only questions arising upon this appeal turn upon the issues presented by the pleadings as to the nature of the transaction in the course of which the note was given, and as to the real parties in interest therein. The appellant asserted in his answer and insisted upon the trial that the transaction for the purchase of the stock of the Pacific Slope Securities Company, in part payment of which this note was given, was one between himself and the Pacific Slope Securities Company, and that the part which Wilkie L. Edwards took in that transaction was simply that of president and representative of that corporation; that he received the note in question in that capacity and in none other, and that the stock which was issued to the defendant and in part payment for which this note was given was the stock of the Pacific Slope Securities Company, owned by it at the time and issued to the defendant as its purchaser; and the defendant follows up these pleadings and proofs with the showing that before the note was due he went to the office of the corporation and there paid the whole amount of this note, which said payment the said corporation accepted, as he contends, either as payment in full of the amount due upon the sale of its stock, or as the trustee of Wilkie L. Edwards or his successors in ownership of this note; and that by such payment the liability of the defendant on account of this note has been fully discharged.

These contentions on the part of the defendant were resisted by the plaintiff upon the trial, in the course of which evidence was presented on behalf of the plaintiff tending strongly to show that the original transaction was one between Wilkie L. Edwards individually and the defendant, that the stock transferred to the latter was the personal stock of Edwards, and that he was and was understood by the defendant to be the real party in interest in the matter, and as such the owner of the note. The evidence upon this subject being clearly conflicting, and the trial court having resolved such conflict in favor of the plaintiff's contention, this court will not undertake to disturb its findings in that respect.

During the course of the trial the defendant offered in evidence a certain indorsement

upon the certificate of stock issued to him in the following words:

"This certificate of stock is sold to Lewis S. Gear upon the following terms of payment: Promissory note for \$2,313.00, dated May 13th, 1909, due November 15th, 1909, with interest at the rate of six (6%) per annum—and is delivered upon the express condition that the same shall not be sold, transferred, hypothecated, or otherwise disposed of, until the foregoing conditions of payment are fully met and completed, and a certificate of the same endorsed hereon by the president or secretary of this corporation; the above conditions subject, however, that any portion of this may be transferred upon the payment of a proportionate amount of money of said indebtedness.

"[Signed] F. C. Ballentine, Secretary.

"[Signed] Lewis S. Gear."

The defendant insisted at the trial, and here insists, that the terms of this indorsement establish two things: First, that the transaction was one with the corporation; and, second, that by the terms of this indorsement the defendant was required, and hence entitled, to pay the sum due upon his note to the corporation, and that having done so he was thereby discharged from further liability upon his obligation.

As to the first of these contentions, it is disposed of by the findings of the court.

[2] As to the second, it appears that the indorsement does not upon its face purport to require that any money shall be paid to the corporation, or that it shall be entitled to demand or receive any, but only requires that before the stock is transferred upon the books of the corporation its officers shall be placed in a position to certify that the stock has been fully paid for through the payment of the promissory note which had been issued for a portion of its purchase price. That this is the proper construction to be placed upon this document would seem quite clear when it is read in connection with the testimony of the officers of the corporation and the findings of the court to the effect that this stock was not the property of the corporation, and that it had no interest in the promissory note which had been issued for a portion of its purchase price.

[3] The court further finds, and the evidence is sufficient to sustain it in so doing, that the defendant knew at all times that Wilkie L. Edwards and not the corporation was the owner and was in the actual possession of this note, and that in making whatever payment he did make on account of this note to the corporation, or to any person other than its holder, he was paying the amount due on the note to a person or persons not in or entitled to its possession, and hence not in a position to deliver up to him his note when paid. One who pays a negotiable note before its maturity to another not its possessor does so at his peril; and this seems from the evidence and findings in this case to be what the defendant has done.

We find no error in the record sufficient to justify a reversal of the case.

Judgment affirmed.

26 Cal. A. 22)

Ex parte CRANE. (Cr. 560.)

District Court of Appeal, First District, California. Nov. 23, 1914.)

CONSTITUTIONAL LAW (§ 83\*)—MASTER AND SERVANT (§ 69\*)—PERSONAL RIGHTS—IMPRISONMENT FOR DEBT.

St. 1911, pp. 1268, 1269, providing for the time of payment of wages by employers, and making a violation of the act a misdemeanor punishable by a fine, is contrary to Const. art. 1, § 15, forbidding imprisonment for debt in any civil action, unless in cases of fraud, since a defendant charged with the offense thereby created may be arrested, and, if unable to give bond, be committed to jail until his trial.

[Ed. Note.—For other cases, see Constitution-1 Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 3; \* Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. § 69.\*]

Application by Arthur Crane for a writ of habeas corpus. Petitioner discharged from custody.

James W. Cochrane, of San Francisco, for petitioner. Albert T. Roche, of San Francisco, for respondent.

PER CURIAM. The court is prepared to render its decision from notes made at the argument.

In this proceeding the petitioner seeks by habeas corpus to be released from the custody of the chief of police of the city and county of San Francisco, who held and confined the petitioner in the city prison under warrant of arrest which was issued out of the police court of said city and county upon complaint which charged the petitioner with the commission of a misdemeanor in this, that he had violated the provisions of section 1 of an act entitled "An act providing for the time of payment of wages." The provisions of the act in question are as follows:

"Section 1. Whenever an employer discharges an employé the wages earned and unpaid at the time of such discharge shall become due and payable immediately. When any such employé or resigns his employment the wages earned and unpaid at the time of such quitting or resignation shall become due and payable five days thereafter.

"Sec. 2. All wages other than those mentioned in section 1 of this act earned by any person during any one month shall become due and payable at least once in each month and no person, firm or corporation for whom such labor has been performed, shall withhold from any such employé any wages so earned or unpaid for a longer period than fifteen days after such wages become due and payable; provided, however, that nothing herein shall in any way limit or interfere with the right of any such employé to accept from any such person, firm or corporation wages earned and unpaid for a shorter period than one month.

"Sec. 3. Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars.

"Sec. 4. None of the provisions of this act shall apply to any county, city and county, in-

corporated city or town, or other municipal corporation."

Stats. 1911, pp. 1268-9.

It is the contention of the petitioner that the act above quoted is unconstitutional in this, that it, in effect, permits an imprisonment on mesne process for debt, and that therefore his arrest and detention by the respondent pending a hearing of the charge in the police court is illegal.

In our opinion, this contention is sound, and must be sustained. Section 15 of article 1 of our state Constitution provides in part that:

"No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud. \* \* \*"

By this constitutional provision the right of a creditor to control and confine the person of his debtor by the process of arrest, which the law at one time gave the creditor for the enforcement of his debt, has been abolished, and, happily, is prohibited in this state, save and except that the body of a debtor may be seized and confined in cases where it is made to appear that the indebtedness was fraudulently contracted, or that there has been an attempted fraudulent disposition of the property of the debtor with the intent to delay or defeat the payment of the debt.

In the exceptional cases noted it will be observed that fraud must exist before a debtor may be subjected to arrest and imprisonment, and that in such cases the arrest and imprisonment permitted by various statutes do not fall within the inhibition of the Constitution, for the obvious reason that the penalty prescribed is not for or on account of the failure to pay the creditor's demand, but solely because of the fraud alleged to have been committed in the creation of the debt or in a subsequent attempt to delay or defeat its satisfaction, by a transfer, removal, or concealment of the property of the debtor.

It will be noted that the statute in controversy does not involve the element of fraud as an essential of the offense defined therein. True, the statute does not provide imprisonment as the penalty for the failure of an employer to pay a debt due to his employé. The statute, however, is silent as to the process by which the magistrate before whom complaint is made of an alleged violation of the statute may obtain jurisdiction of the person of the offender. In the case at bar jurisdiction was attempted to be obtained by a resort to the provisions of sections 812 and 813 of the Penal Code, which authorize the issuance of a warrant of arrest when the magistrate is satisfied from the deposition presented to him that the offense complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it. By this

process and under our system of procedure a defendant unable to give bail is jailed and restrained of his liberty until such time as a hearing can be conveniently had of the charge made against him. It will thus be seen that the statute in controversy was attempted to be enforced by the issuance and execution of a mesne process which, in the case at bar, resulted in the temporary imprisonment of the petitioner, and the cause of his imprisonment is to be found primarily in the fact that he is unwilling or, perchance, unable to discharge a debt which was not conceived or contracted in fraud of his creditor. To this extent the arrest of the petitioner necessarily is in conflict with the fundamental law of the state, and therefore illegal.

For the reasons stated, it is ordered that the petitioner be, and he is hereby, discharged from the custody of the respondent.

(25 Cal. A. 790)

**LOWENBERG v. L. JACOBSON'S SONS.**  
(Civ. 1300.)

(District Court of Appeal, Third District, California. Nov. 19, 1914.)

**1. ATTACHMENT (§ 25\*)—GROUNDS FOR ATTACHMENT—NONRESIDENCE.**

Code Civ. Proc. § 537, subd. 1, provides for attachment in an action on a contract for the direct payment of money, while subdivision 2 authorizes attachment upon a contract against a defendant not residing in the state. *Held* that, where a nonresident agreed to pay plaintiff a stipulated commission on sales, payments to be made within the state, attachment could be issued for the amount due as the contract was one for the payment of money.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 61-72; Dec. Dig. § 25.\*]

**2. ATTACHMENT (§ 92\*)—AFFIDAVITS—SUFFICIENCY.**

Code Civ. Proc. § 538, subd. 2, provides that the affidavit for attachment shall recite that the defendant is indebted to plaintiff, specifying the amount, and that the defendant is a nonresident. An affidavit for attachment averred that, over and above all legal set-offs and counterclaims upon an express contract for the payment of money, defendant was indebted to plaintiff in a named sum, which indebtedness was not secured by any mortgage or lien, and that defendants were nonresidents. *Held*, that the affidavit was sufficient, for, while going further than the statute, it was not vitiated by reason of surplusage.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 238, 239; Dec. Dig. § 92.\*]

**3. APPEAL AND ERROR (§ 662\*)—RECORD—TRANSCRIPT—CONCLUSIVENESS.**

The recitals of the transcript are conclusive as to the happenings at trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.\*]

**4. ATTACHMENT (§ 122\*)—AFFIDAVIT—AMENDMENT.**

Under Code Civ. Proc. § 558, providing that, upon application to dissolve a writ of attachment, if improperly or irregularly issued, must be discharged, but shall not be discharged if at or before hearing the writ or the affidavit or the undertaking shall be amended so as to

conform to law, the court may, after application to discharge a writ of attachment, but prior to adjudication, allow the affidavit to be amended so as to conform to law.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.\*]

**5. ATTACHMENT (§ 129\*)—UNDERTAKING—SUFFICIENCY.**

Where the action was really against only one defendant, and plaintiff was uncertain whether it constituted a partnership or a corporation, an undertaking payable to the defendant which had a plural name instead of to the several defendants is sufficient to support an attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 356-359; Dec. Dig. § 129.\*]

**6. APPEAL AND ERROR (§ 190\*)—OBJECTIONS NOT MADE BELOW.**

The undertaking for an attachment cannot first be attacked on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216-1220; Dec. Dig. § 190; Attachment, Cent. Dig. § 898.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by H. Lowenberg against L. Jacobson's Sons. From an order refusing to dissolve an attachment, defendants appeal. Affirmed.

Lloyd S. Ackerman, of San Francisco, for appellants. Harry C. Morrison, of Oakland, for respondent.

**BURNETT, J.** The appeal is from an order refusing to dissolve an attachment. The complaint set forth that the defendants are residents of the state of New York; that they are engaged in the business of selling clothing and wearing apparel to the trade; that their principal place of business is located in said state; that each of them has been continuously absent from the state from September, 1907, up to and including the month of December, 1911; "that during the month of September, 1907, said plaintiff and said defendants entered into an agreement in writing, made and executed in the state of California, whereby it was understood and agreed that said plaintiff should handle defendants' lines of goods in that territory located west of Denver, Colo., selling the same by sample, on a basis of 7½ per cent. commission on all orders checked and shipped, deducting all returns, commissions to be paid from the 1st to the 10th of each month for goods shipped during the previous month; that said plaintiff's headquarters were located in the state of California; that said agreement was in full force and effect continuously from the said month of September, 1907, up to and including the month of December, 1911." Then followed allegations that during all of said time there existed between said parties an open, mutual, and current account; that defendants had withheld from plaintiff commissions to which he was and is entitled, and that erroneous charges against plaintiff had been made by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants in said account; "that the aforesaid commissions, so withheld as aforesaid, and the charges so made and entered as aforesaid, amount to the sum of \$460, in excess of any and all credits or sums of money due, owing, or coming to said defendants from said plaintiff; that said plaintiff has made many demands upon said defendants for said sum of \$460, but that said defendants have refused, failed, and neglected to pay to said plaintiff said sum of \$460; \* \* \* that no part of said sum of \$460 has been paid, and there is still due, owing, and coming to said plaintiff from said defendants the sum of \$460."

[1] We entertain no doubt that the cause of action thus stated constitutes the legal basis for the issuance of a writ of attachment as provided by our statute. The said complaint, in connection with the affidavit thereafter filed, clearly discloses that the action was upon an express contract "for the direct payment of money," and that the said contract was made in this state, and was not "secured by any mortgage or lien upon real or personal property, or any pledge of personal property. The situation is therefore entirely within the contemplation of subdivision 1 of section 537 of the Code of Civil Procedure. But the provision of the statute applicable to this case is even more circumscribed. It is found in subdivision 2 of said section, as follows:

"The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached: \* \* \* 2. in an action upon a contract, express or implied, against a defendant not residing in this state."

As we have seen, the defendants, at the time of the beginning of the action, were residents of the state of New York, and it is positively averred that they entered into a written contract to pay plaintiff a certain commission for sales of merchandise, and that so much money was due and owing to plaintiff under said contract. It is not necessary that the contract itself should specify the total amount of money to be paid. That, of course, in this case depended upon the number and extent of the sales that should be made by plaintiff. The requirement of the statute is satisfied when the contract furnishes the measure of liability or the information from which the amount due can be ascertained. This is not at all the case of unliquidated damages for which an attachment cannot be had. The distinction is clear, and it is pointed out in several decisions of the Supreme Court. In *De Leonis v. Etchepare*, 120 Cal. 410, 52 Pac. 718, it is said:

"Nor is it necessary, in order to give a right of attachment, that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined. It often happens that the amount due under a contract does not appear from the contract

itself. 'Our Code does not require that the amount due on the contract shall appear from the contract itself (Code Civ. Proc. § 537), but that the amount of the indebtedness shall be shown by affidavit (Code Civ. Proc. § 538). Attachment may issue in an action for damages for the breach of a contract. *Donnelly v. Struven*, 63 Cal. 182. And this, where proof is necessary at the trial to show the amount of damages. *Drake on Attachment*, §§ 13, 23. But there must exist a basis upon which the damages can be determined by proof.' *Dunn v. Mackey*, 80 Cal. 107 [22 Pac. 64]. Where the contract does not furnish the measure of the liability of the defendant, and the damages are unliquidated, an attachment cannot be had, and the language quoted by appellant from *Hathaway v. Davis*, 33 Cal. 161, means no more than that."

As to the cases from other states, cited by appellants, we may appropriately adopt the following comment from *Kohler v. Agassiz*, 99 Cal. 12, 33 Pac. 742:

"The attachment laws of the several states differ in so many particulars that, without the utmost caution in comparing their provisions with our own, we are in constant danger of being led astray, or unduly influenced by decisions apparently in point, but in reality resting upon a different basis. Even our own adjudicated cases, many of them growing out of questions applicable to resident debtors, have no proper application to the different status occupied by nonresidents."

[2] There is no ground for any criticism of the sufficiency of respondent's amended affidavit, which was formally executed and contained the following averments:

"That the above-named defendants are, and were on the 13th day of September, 1912, indebted to said plaintiff in the sum of \$460, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit, for commissions due plaintiff from said defendants for selling and disposing of said defendants' goods; that such contract was made and executed in this state, and that the payment of the same was not and has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property; that the said defendants are, and were on the said 13th day of September, 1912, nonresidents of the state of California, to wit, residents of the state of New York; that the said sum for which the attachment was and is asked and sought herein was and is an actual bona fide existing debt due and owing from the said defendants to the said plaintiff; that the said attachment was and is not sought, and the said action was and is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendants, or any creditor or creditors of either of said defendants."

How completely and punctiliously plaintiff thus complied with the demands of the statute is made apparent by a reading of section 538 of the Code of Civil Procedure. Indeed, he exceeded the requirement of subdivision 2 of said section, which is applicable to the present case. His redundant averments, however, did not vitiate nor impair the affidavit, nor interfere with its operation as a legal step in the statutory process of obtaining a writ of attachment.

[3, 4] There is some question, however, as to whether the amended affidavit was filed in time. The record shows that, on the 15th day of November, 1912, the court submitted

the motion to dissolve the attachment, and that the amended affidavit was not filed until December 20th following. It was filed, though, before the court passed upon said motion. It is stated by respondent that "said matter was not finally submitted on said 15th day of November, 1912, for both attorneys for appellants and respondent filed points and authorities thereafter," but the recital of the transcript must be accepted as conclusive. Section 558 of the Code of Civil Procedure provides that, upon application to dissolve a writ of attachment, if it satisfactorily appears that it "was improperly or irregularly issued it must be discharged; provided, that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." We think there is a substantial compliance with the requirement of this provision where the amended affidavit is filed before the actual determination of the motion to dissolve the attachment. Although not shown by the record, it may be, as stated by respondent, that:

"On the 1st day of November, 1912, when the motion to dissolve attachment came on regularly for hearing, the respondent, through his attorney, moved the court for permission to amend the writ of attachment or the affidavit or undertaking upon which such attachment was based to conform to all the requirements of chapter 4, tit. 7, pt. 2, of the Code of Civil Procedure of this state, the court at that time informed the attorneys for appellants and respondent that if it was found that the action was one in which an attachment could properly issue, and that amendments to any of the requirements were necessary, that such permission would be granted."

We may assume that the proceeding was as thus indicated, and we think that the court had authority to allow the amended affidavit to be filed after the application was made, but prior to the adjudication of the motion to discharge the attachment.

[5] Appellants also question the sufficiency of the undertaking, and direct their attack particularly at the expression of the obligation of the surety in the following language:

"Does hereby undertake and promise to the effect that, if the said defendants or either of them recover judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendants and all damages which they may sustain by reason of the said attachment, not exceeding the sum of \$200, and that, if said attachment is discharged on the ground that plaintiff was not entitled thereto, under section 537 of the Code of Civil Procedure, the plaintiff will pay all damages which defendant may sustain by reason of the said attachment, not exceeding the sum of \$200."

The point is that the obligation should have been assumed and declared in favor of each of the defendants, but by said undertaking liability was imposed upon the surety only for damages that might be suffered by all the defendants collectively. It is claimed that the same rule in this respect applies to

the undertaking as to the affidavit and reference is had to *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 732, 95 Pac. 911, wherein it was held that:

"Where the writ of attachment was against the maker and indorsers of a promissory note, an affidavit for the writ, merely stating 'that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendants,' without adding the words, 'or any creditor of either of said defendants' is fatally defective, and a motion to discharge the writ on that ground should have been granted."

See, however, *Nichols v. Davis*, 23 Cal. App. 67, 137 Pac. 41.

But, passing that point, while the complaint here is somewhat loosely drawn, we think it sufficiently appears that the action was really against only one defendant—that is, *L. Jacobson's Sons*—the plaintiff being uncertain whether defendant constituted a partnership or a corporation, and it may be stated that there was no prayer for an individual judgment against the members of the association.

[6] Besides, the record does not show that any attack was made upon the amended undertaking; the notice of motion to dissolve having been addressed to the original bond. Indeed, it is declared by respondent in his brief that the attorney for appellants stated in open court that he did not rely upon any objection to the undertaking, and that he so stated to the judge of the lower court and to the attorney for respondent upon the settlement of the bill of exceptions; the attorney for the respondent requesting that a statement to that effect be inserted in said bill. It was not so inserted, but it may be said that it does not affirmatively appear that at the hearing of said motion any objection was made to said undertaking, and appellants have not denied nor questioned the accuracy of said statement in respondent's brief.

No sufficient reason has been presented for interfering with the action of the lower court, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(26 Cal. A. 26)

SOUTHERN PAC. CO. v. CITY OF SANTA CRUZ. (Civ. 1400.)

(District Court of Appeal, First District, California. Nov. 23, 1914. Rehearing Denied Dec. 22, 1914.)

1. LIMITATION OF ACTIONS (§ 183\*)—PLEADING—SUFFICIENCY—STATUTE.

Under Code Civ. Proc. § 458, providing that in pleading limitations it shall not be necessary to state the facts showing the defense, but the plea may state generally that the action is barred by a provision of the statute cited, and that if the special allegation is controverted the pleader must establish facts showing a bar, a plea "that said action is barred by the statute of limitations" was insufficient.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 683-695; Dec. Dig. § 183.\*]



## 2. APPEAL AND ERROR (§ 194\*)—SUFFICIENCY OF PLEADING—WAIVER OF OBJECTION.

In an action for the price of merchandise, wherein the sole defense of limitations was insufficiently pleaded, plaintiff, who on the trial treated it as sufficient and stipulated for judgment on that issue, waived any objection to the plea, and could not be heard upon appeal to urge its insufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 94.\*]

## 3. MUNICIPAL CORPORATIONS (§ 1022\*)—ACTIONS ON CLAIMS—LIMITATION.

A claim against a city, whose charter (St. 875-76, p. 193, § 11) provided that every claim should be filed with the city clerk and presented to the common council, and if so allowed should be presented to the mayor for approval, and if he failed or refused to approve it within 10 days must again be allowed by the council, did not ripen into a cause of action prior to its presentation and rejection, and an action thereon brought within the statutory period thereafter might be maintained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2193; Dec. Dig. § 922.\*]

## 4. STIPULATIONS (§ 14\*) — CONSTRUCTION — ENTRY OF JUDGMENT.

In an action for the price of merchandise sold, where the only defense was that it was barred by limitations, a stipulation that if the court determined that the action was not barred should render judgment for plaintiff, and that if the action was barred it should render judgment for defendant, a reversal of judgment or the defendant entitled plaintiff to a direction by the trial court to enter judgment in its favor or the amount of its claim.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

## 5. SALES (§ 187\*)—ACTION FOR PRICE—LIQUIDATED DAMAGES—INTEREST.

Where the parties had agreed that the total price for goods sold should be the sum of \$1,628, plaintiff on a recovery was entitled to interest at the statutory rate from the commencement of his action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 499; Dec. Dig. § 187.\*]

Appeal from Superior Court, Santa Cruz county; Lucas F. Smith, Judge.

Action by the Southern Pacific Company against the City of Santa Cruz. Judgment of nonsuit, motion for new trial denied, and plaintiff appeals. Judgment and order reversed, with direction to another judgment for plaintiff.

Chas. M. Cassin, of San Jose (James L. Attridge, of San Jose, of counsel), for appellant. J. Leslie Johnston, of Santa Cruz, for respondent.

**PER CURIAM.** This is an action brought to recover the sum of \$1,628.59, and interest, alleged to be due upon an account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant at its special instance and request. The defendant in its answer denied the indebtedness and also pleaded that the action was barred by the statute of limitations. The essential facts of the case, as disclosed at the trial, are these: In the month of December, 1906, the plain-

tiff sold to the defendant 231 feet of new water pipe at a price which was not then fixed, but which was thereafter to be agreed upon. In February, 1907, the plaintiff made a further sale of old water pipe to the defendant, and it was then agreed between the plaintiff and the defendant through the duly authorized agents of each that the total price for both lots of pipe sold should be \$1,628.59. In October, 1907, the plaintiff duly filed with the clerk and presented to the common council of the defendant its claim and demand in due form for the allowance and payment of the sum of \$1,628.59 due upon this account, which claim the said council at some date in the month of October, 1907, by vote of its members rejected. This action was commenced on April 2, 1909. At the close of the plaintiff's case, in which the foregoing facts were proven, the defendant moved for a nonsuit, upon the sole ground that the cause of action was barred by the statute of limitations. During the course of the argument of this motion, the trial court inquired of counsel for the defendant if he proposed to offer any evidence in defense of plaintiff's case, to which counsel for the defendant responded that the defendant had no witnesses and did not propose to offer any testimony or evidence in defense. It was thereupon stipulated that the jury in attendance should be dismissed, and that, if the court determined upon the pending motion for nonsuit that the cause of action was not barred by the statute of limitations, it should render judgment for plaintiff for the amount due upon its claim, but that, if it should determine that the cause of action was barred by the statute of limitations, judgment should be for the defendant. The cause having been submitted upon this stipulation, the court held that the cause of action was barred by the statute of limitations, and a judgment of nonsuit was entered. It is from this judgment and from an order denying its motion for a new trial that the plaintiff prosecutes this appeal.

[1, 2] The first contention of the appellant is that the plea of the statute of limitations as a bar to this action was ineffectually presented in the answer of the defendant. The form of said plea is simply "that said action is barred by the statute of limitations." It is conceded by the respondent that a plea of the statute in this general way is insufficient to satisfy the requirement of section 458 of the Code of Civil Procedure; but it is further contended by the respondent that not only did the plaintiff fail to raise the question of the insufficiency of this portion of the answer by a demurrer thereto, but that, upon the trial, its plea of the statute was treated as sufficient, and that in point of fact the only question in the case presented to the court by the stipulation of the parties upon the motion for nonsuit was the question as to whether the plaintiff's cause of action was or was not

barred by the statute of limitations. The record in the case bears out this contention, and justifies this court in holding that the plaintiff, having treated the defendant's plea of the statute as sufficient upon the trial, must be held to have waived its objection to it and cannot be heard upon appeal to urge its insufficiency. *Churchill v. Woodworth*, 148 Cal. 669, 84 Pac. 155, 113 Am. St. Rep. 324; *Mullenary v. Burton*, 3 Cal. App. 263, 84 Pac. 159.

[3] The appellant further contends that the trial court was in error in holding that the plaintiff's cause of action was barred by the statute of limitations upon the undisputed facts before it. The question of law involved in this contention is this: The charter of the city of Santa Cruz (Stats. of California, 1875-76, p. 193, § 11) provides as follows:

"Every claim and demand that shall arise against the city of Santa Cruz shall be filed with the city clerk, and presented to the common council, and, if found correct, shall be allowed and ordered paid by a majority vote of the councilmen elected; and, when so allowed, shall be presented to the mayor for approval, and if he approves such allowance, he shall endorse his approval upon such claim or demand, and if he fail or refuse to approve such allowance within ten days, the said claim or demand, in order to render the same payable, must be allowed and ordered paid by the votes of three councilmen."

The question is as to whether the plaintiff, prior to its presentation of its claim and demand to the city clerk and common council of the city of Santa Cruz in the manner provided by this section of its charter, had a ripened cause of action upon the account in question here, upon which it could and therefore should have commenced and maintained an action within the statutory period after the date of creation of the claim. Under the authorities from this and other states construing similar statutes and charters requiring the presentation of claims and demands to the officials of a city as a prerequisite to their payment, we are constrained to hold that in this case the plaintiff's claim and demand against the city of Santa Cruz had not ripened into a cause of action upon which it could have begun and maintained a suit prior to the date of the presentation and rejection of its claim. *Bancroft v. City of San Diego*, 120 Cal. 432, 52 Pac. 712; *Sheridan v. City of Salem*, 14 Or. 925, 12 Pac. 925; *Stackpole v. School District*, 9 Or. 508; *Yavapai County v. O'Neill*, 3 Ariz. 363, 29 Pac. 432.

The respondent herein cites the case of *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 as laying down a different rule; but an examination of the record in that case discloses that the charter of the city of Oakland as it stood at the time that case arose contained no provision for the presentation of claims to the council of the city before payment, and further discloses that the plaintiff in that case did in fact present his claim to the auditor of the city, as required by its charter, and only brought his suit after the failure or re-

fusal of the proper officials of the city to take action thereon. We think that the contention of the appellant must therefore be sustained.

Counsel for the respective parties discuss in their briefs another point as to the nature of the account sued upon; but, in the light of the views last above expressed by the court as to the time when the plaintiff's claim first ripened into an actionable cause, it becomes unnecessary to pass upon the particular nature of the plaintiff's account, for, whatever its quality as an open or stated or simple account, the action upon it was brought within the time required by the statute.

[4, 5] The appellant claims that in the event of a reversal of the judgment it is entitled to have a direction to the trial court to enter judgment in its favor for the amount of its claim, together with interest at the statutory rate from the date of the commencement of the action. The right of the appellant to the entry of a judgment for the amount of its claim seems covered by the stipulation; and as to the allowance of interest upon a claim of this character, the action of the court is controlled by the case of *Martyn v. Western Pacific Railway Company*, 21 Cal. App. 589, 132 Pac. 602.

The judgment and order are reversed, and the cause remanded, with direction to the trial court to enter a judgment in favor of the plaintiff for the sum of \$1,628.59, with interest thereon at the rate of 7 per cent. per annum from April 2, 1909, until the date of entry of such judgment.

(26 Cal. A. 16)

#### MACHADO v. MACHADO. (Civ. 1511.)

(District Court of Appeal, First District, California. Nov. 20, 1914. Rehearing Denied by Supreme Court Jan. 18, 1915.)

#### 1. APPEAL AND ERROR (§ 1111\*)—REVERSAL OF JUDGMENT—POWER OF COURT.

Under Code Civ. Proc. § 53, providing that the Supreme Court of the state may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had, and under Const. art. 6, § 4, providing that all statutes in force allowing, providing for, or regulating appeals to the Supreme Court should apply to appeals to the District Courts of Appeal, the District Court of Appeal has full authority to affirm, reverse, or modify the judgment or order of the trial court in any case before it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411-4420; Dec. Dig. § 1111.\*]

#### 2. DIVORCE (§ 186\*)—APPEAL—REVERSAL OF JUDGMENT—NECESSITY OF NEW TRIAL.

Where, in an action for divorce, it is apparent on appeal, from an inspection of the record, that the judgment cannot be reconciled with the findings, either on the theory that the trial court made a miscalculation based on the facts, or mistook the law, the power of the District Court of Appeal is not limited to a modification of the judgment to accord with the findings, but it is the court's duty to reverse the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment and remand the case for correction by new trial.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 574; Dec. Dig. § 188.\*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action for divorce by Maria Machado against Frank B. Machado. From a judgment awarding to the parties their respective proportions of the community property, plaintiff appeals. Reversed and remanded.

Joseph Rafael, of San Francisco, for appellant. A. M. Free and C. L. Witten, both of San Jose, and R. V. Burns, of Mountain View, for respondent.

**PER CURIAM.** This is an appeal from the judgment of the trial court in an action for divorce upon the ground of cruelty on the part of the offending spouse; the portion of the judgment which is assailed upon this appeal being that wherein the court undertook to award to the parties their respective and rightful proportions of the community property. The case is presented for review upon the judgment roll, and it is practically conceded by the respective parties that the judgment in the respect in question is not in accord with the findings and therefore cannot stand.

The only serious dispute between the parties is as to the power and duty of this court in the premises. The appellant contends that in appeals of this character it is the proper function and only duty of the court to modify the judgment so as to make it conform to the findings in the case, and her counsel cites numerous cases showing that this has been the frequent practice of courts of last resort in appeals involving as their only issue the disagreement between the judgment and the findings in the case.

[1, 2] We can well understand that in many cases where the court has made a miscalculation as to the proper amount of a money judgment, or has been mistaken as to the law applicable to the facts as found, it would be the plain and simple duty of the appellate court to modify the judgment so as to correct the mistake or conform to the law of the case; but we do not understand or agree that the power of this court upon appeal is limited in this class of cases to that form of relief. The Code provides that the Supreme Court of this state may "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." Code Civ. Proc. § 53. The Constitution, in the creation of the District Courts of Appeal, has expressly provided that "all statutes now in force allowing, providing for, or regulating appeals to the Supreme Court, shall apply to appeals to the District Court of Appeal." Const. art. 6, § 4. Under the

plenary grant of power with which this court has thus been invested, we have no doubt as to our full authority to either affirm or reverse or modify the judgment or order of the trial court in any case before us, and we are further satisfied from an inspection of the record of this case that it is a proper one for reversal and for remission to the lower court for a new trial.

A comparison of the findings and judgment in the case made in the light of the express language and direction of section 146 of the Civil Code, defining the power and duty of the trial court in the matter of the proper division of community property in actions for divorce upon the ground of cruelty, leaves no doubt in our minds that the trial judge in this case either acted inadvertently in the adoption of the findings and determination of the proper judgment to be given thereon, or that he had other facts and circumstances in mind in rendering the judgment than those which the findings contain or the record discloses. In other words, it is impossible to reconcile this judgment with the findings, upon the theory either of a miscalculation based upon the facts found or upon a mistake in the terms of the law. This being so, it is clearly the duty of this court to reverse this judgment and remand the case to the trial court for the correction by it upon a new trial of the manifest error in its findings or its judgment, or both.

Judgment reversed, and cause remanded for a new trial.

(26 Cal. A. 81)

WAITE v. BRENDLIN. (Civ. 1636.)

(District Court of Appeal, Second District, California. Nov. 24, 1914.)

#### 1. ELECTIONS (§ 273\*)—CONTEST—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1112, providing that the misconduct of the election officers specified in section 1111, subds. 1 and 4, must be "such as to procure the person, whose right to the office is contested, to be declared elected, when he had not received the highest number of legal votes," one who has been recalled from his office of city trustee cannot contest the right of another to succeed him, who has received all the votes cast for a new incumbent in case the contestant should be ousted; no attack being made on the legality of such votes, even though the election board refused to count certain legal votes against the recalled contestant.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 249; Dec. Dig. § 273.\*]

#### 2. ELECTIONS (§ 271\*)—CONTESTS—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1114, to be good ground for contesting an election, it is necessary that illegal votes shall have been counted for the one declared elected, and that he would not have been elected but for such votes, so that one recalled from an office by the illegal exclusion of votes in his favor in contesting the right of his successor elected without aid of illegal votes cannot rely on the statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 8. ELECTIONS (§ 303\*)—CONTESTS—STATUTORY PROVISIONS.

Code Civ. Proc. §§ 1111-1127, prescribing the judgment which the court may render in election contest, is not applicable to a contest by one recalled from office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 815; Dec. Dig. § 303.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Election contest by David Waite against Edward Brendlin. Judgment for contestant, and contestee appeals. Reversed.

Carlton W. Greene, of Paso Robles, for appellant. Alex Webster, of Paso Robles, for respondent.

**SHAW, J.** Election contest. David Waite, contestant, was a duly elected and qualified member of the board of trustees of the city of El Paso de Robles, when a proceeding was instituted for his recall and removal as such member of said board. At said election the contestee, Edward Brendlin, was the only candidate for election to said office in the event of a vacancy therein occurring by reason of a majority of the votes cast by the electors favoring the recall of Waite. The result of the election, as declared by the board of canvassers, was that upon the question, "Shall David Waite be recalled from the office of member of the board of trustees?" 345 votes were cast "yes" thereon, and 344 votes cast "no" thereon, and that Edward Brendlin received as a candidate for said office to succeed David Waite 304 votes; whereupon it was declared that Waite had been recalled and Brendlin elected to fill the office for the unexpired term. Thereupon Waite instituted this contest, and the proceedings had thereon were in accordance with the provisions of title 2, part 3, of the Code of Civil Procedure relating to the contesting of certain elections. Section 1111 of said title provides:

"Any elector \* \* \* of a \* \* \* city \* \* \* may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes: (1) For misconduct on the part of the board of judges, or any member thereof. \* \* \* (4) On account of illegal votes."

The grounds of the contest, as alleged in the statement, are the first and fourth as above stated, namely, that the judges of election refused to count certain legal ballots voted against the recall of Waite, contestant herein, and did count and make return of certain illegal ballots voted in favor of his recall; it being further alleged that, had said illegal ballots counted in favor of the recall been rejected and said uncounted legal ballots against the recall counted, the result of the election would have been against the recall of contestant. The court upon trial found the number of votes cast "yes" on said proposition for the recall of Waite to have been 338, and those cast against

said proposition to have been 341, and that the majority of the votes cast upon the proposition were against the recall. Judgment for contestant followed, from which the contestee appeals upon the judgment roll.

[1-3] Both by demurrer, which was overruled, and an answer the allegations of which were found to be untrue, the contestee alleged the insufficiency of the statement to constitute a cause of contest, want of legal capacity in contestant to maintain the contest, and further alleged that the court had no jurisdiction of the subject of the proceedings, which was the removal of Waite from office and not the election of Brendlin to fill the vacancy. The question presented, therefore, is whether or not the provisions of said title relating to the contest of certain elections can be invoked by one removed from office by means of the recall provisions of the statute. If misconduct, without any limitation or qualification on the part of the board of judges, or the reception of illegal votes in favor of the recall, were grounds of contest, it might well be said that the provisions of title 2, part 3, Code of Civil Procedure, were applicable to a case of this kind. But the effect of these two specified grounds for recall is limited by other sections of the Code. Thus in section 1112, Code of Civil Procedure, it is provided that the misconduct of the election officers specified in section 1111 must be "such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." It thus appears that this ground of removal can only be invoked in a case where the contestee, or party declared elected, did not receive the highest number of legal votes. It is conceded that Brendlin, being the only candidate to succeed Waite in case of his recall, received all the votes cast, and no attack is made upon the legality of the votes so cast for him. Hence, having received the highest number of legal votes, no right of contest upon such ground is accorded to Waite. The fact that the board refused to count legal votes against the recall, while misconduct, is not made a ground for contest, since it is conceded that Brendlin did receive the highest number of legal votes for the office. And so with the reception of illegal votes, which, under section 1114, Code of Civil Procedure, constitutes no ground for contest unless the result would have been different and another candidate elected. It is not alleged that any illegal votes were cast for Brendlin; the alleged illegal votes were cast in favor of the recall of Waite. But, under the limitation provided in said section 1114, this is not made a ground for contest, since the illegal votes must have been counted in favor of the one declared elected and who would not have been so declared except for the counting in his favor of such votes. Other sections pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

scribing the judgment which the court may render clearly show that the provisions of the act are not applicable to a contest by one recalled from an office. As stated, the subject of the proceeding set forth in the statement is not misconduct affecting the election of Brendlin, or the counting of illegal votes in his favor; but the allegations relate solely and alone to the action of said board in so far as it brought about the recall of contestant. The provisions for removal of an official by recall proceedings are the subject of quite recent legislation, while the provisions for contesting an election were enacted in 1872 and have continued without material change down to the present date. Clearly it was not the intention of the Legislature that said provisions should apply to a recall election. And it is equally clear, when the language of said title is construed in accordance with the plain import of the language used, that said provisions have no application to such case.

"The right to contest an election is purely statutory, and must be determined in accordance with the terms of the statute." *Powers v. Hitchcock*, 129 Cal. 325, 61 Pac. 1076; *Austin v. Dick*, 100 Cal. 201, 34 Pac. 655.

Conceding that illegal votes were cast and counted in favor of contestant's recall, and that he has suffered in being wrongfully ousted from office by another, his remedy is not a proceeding by contest pursuant to the provisions of title 2, part 3, Code of Civil Procedure.

Respondent insists that, conceding there be no statutory provision giving the right of contest in a recall election, such right nevertheless exists by implication. This by reason of the fact that the Constitution provides for an election and makes no provision for contesting the same. In answer to this we may repeat that this proceeding is pursuant to the provisions of title 2, part 3, of the Code of Civil Procedure, which is a statutory proceeding for the summary determination of the right to an office, limited and restricted to cases only mentioned therein and upon the grounds specified therein. Since this case does not fall within those provisions, it cannot be said that contestant has any right by implication to invoke the same.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 35)

BRUNNER v. TITLE INS. & TRUST CO.  
(Civ. 1536.)

(District Court of Appeal, Second District, California. Nov. 24, 1914.)

# 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

An appellate court will not disturb the findings below where supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

## 2. HUSBAND AND WIFE (§ 246\*)—CONVEYANCE FROM HUSBAND TO WIFE.

Where a husband put property into the hands of his wife in Missouri so as to give her no title thereto, on their removal to California the property remained his unless parted with by gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. § 246.\*]

## 3. EVIDENCE (§ 155\*)—CONVEYANCES FROM HUSBAND TO WIFE—ADMISSIBILITY OF EVIDENCE.

Where the allegations of a cross-complaint, seeking the recovery of property from a wife and another, as having been purchased with money received from the husband, did not reach back farther than the year 1904, but the plaintiff herself had testified to the receipt of moneys as gifts prior to 1904, it was proper for the trial court to admit testimony as to conversations between the parties as to investments of money in St. Louis property prior to 1904; it further appearing that the St. Louis property was in part the result of the investment of the moneys received, according to the wife, as gifts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445-458; Dec. Dig. § 155.\*]

Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Louisa Brunner against Herman Brunner for divorce, in which defendant filed a cross-complaint. Decree for defendant, from which and an order denying a new trial, plaintiff appeals. Pending the appeal, defendant died, and the Title Insurance & Trust Company, his special administrator, was substituted. Affirmed.

Earl Rogers, W. H. Dehm, and Waterman, Westover & Green, all of Los Angeles, for appellant. H. A. Massey and Hunsaker & Britt, all of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff Louisa Brunner, one of the appellants herein, sought to obtain a decree of divorce from the defendant Herman Brunner, and to compel him to provide for the maintenance of plaintiff and the minor children of the marriage. In addition to his defense, Herman Brunner filed a cross-complaint against the plaintiff and their daughter Theresa Brunner (in whose name the plaintiff had placed certain personal property). By his cross-action the plaintiff's husband sought to establish his ownership of real and personal property in California, described in the cross-complaint, which property had been purchased by her from the state of Missouri, where these parties formerly resided. Herman Brunner alleged that all of this money was his own separate property, although held in the name of plaintiff. The plaintiff, while admitting that the entire estate was originally in the form of money earned by the defendant or acquired as profits of his business, alleged that all of this money had been received by her in various sums as gifts from the defendant, or was money derived by her from the sale of property which she had pur-

chased with sums of money received by her as gifts from the defendant. The findings of the court were in favor of the defendant on the issues tendered by the complaint, and were also in his favor with respect to the cause of action stated in the cross-complaint. By the decree as entered it was adjudged that the transfers made by the plaintiff to Theresa Brunner were made without consideration and were fraudulent as against Herman Brunner and were declared to be canceled and annulled; that the plaintiff holds all right, title, interest, and possession acquired by her in said property (with certain exceptions not necessary to discuss) in trust for Herman Brunner as his separate property. The usual provision appropriate to such cases was made requiring conveyances and assignments of the property to the cross-complainant. After entry of the judgment and after appeal therefrom by the plaintiff, and while her motion for a new trial was pending in the superior court, Herman Brunner died, and the respondent was appointed special administrator of his estate. The motion for a new trial having been denied, an appeal was taken from the order denying that motion.

Appellant contends that the evidence is insufficient to justify sundry specified findings of fact, and particularly urges that the evidence is insufficient to justify the finding that the moneys received by her from Herman Brunner were not delivered to her as gifts from him. According to the laws of the state of Missouri, where all of the money above mentioned was acquired by the defendant, that money and the proceeds thereof in any form, in the absence of any gift thereof by the husband to the wife, remained his separate property. It is true that "property conveyed to the wife, but paid for by the husband, is prima facie a gift from him to her" (*Pitkin v. Mott*, 56 Mo. App. 401; *Richardson v. Lowry*, 67 Mo. 414); and the presumption is that such conveyance is made as a provision for and settlement upon the wife for her own benefit, and not as a resulting trust for the husband (*Ilgenfritz v. Ilgenfritz*, 116 Mo. 435, 22 S. W. 786). But this presumption is not conclusive and may be overcome by evidence that the gift to the wife or separate provision for her was not so made. *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259. Evidence of declarations and of acts of the wife is competent to show that the intention of the parties was that the wife should hold for the husband, and the finding of the jury as to the fact is conclusive. It was so held in *Seibold v. Christman*, 75 Mo. 308, affirming 7 Mo. App. 254, wherein, at page 256, the court said:

"Though upon the trial parol evidence was introduced to prove the intention of Charles Seibold and his wife, there is here no question of an express trust proved by parol. As the evidence tended to show that the lot was purchased with the money of one person, and the legal title taken in the name of another, there

was the usual implication of a resulting trust. Coming more closely to the facts, it appears to be the case of a husband causing the deed to be taken in the name of his wife, and thus the usual presumption of a resulting trust is rebutted, and a prima facie case made out that the husband intended the conveyance to be a provision for his wife. This prima facie case may, however, in its turn, be rebutted by evidence, establishing the fact that it was the intention of the parties that the wife should hold for the husband; and this fact the jury here found. \* \* \* There was ample evidence to sustain the finding of the jury; nor was there any error in the instructions given. The presumption of a provision for the wife was rebutted, and the ordinary implication of equity prevailed of a trust resulting for the benefit of the person who paid the consideration-money for the land. The evidence was competent, not as creating a trust by parol, but as showing the intention of the parties at the time. \* \* \* Nor is it for the plaintiffs to object to matters which go to the weight of evidence, after the whole case was submitted to a jury without objection on their part."

It often has been declared that the evidence of an implied or resulting trust, such as that claimed by the cross-complainant in this case, "must be clear, strong, unequivocal and so definite and positive as to leave no room for doubt in the mind of the chancellor." *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990. But the determination of the fact is primarily with the judge who tried the case.

"It is clear that there can be no executed gift in the absence of any intention to give on the part of the donor. It is true that the facts and circumstances of a transaction may be such as to practically compel the conclusion that a gift was intended, and to render worthless any subsequent statement to the contrary on the part of the donor. But no such effect, we are satisfied, must necessarily be given to the mere fact that, in the case of the purchase of real property with community funds, the husband has directed that the deed shall run to the wife as grantee. There is nothing in the nature of such a fact that renders it consistent only with the theory of gift, and other facts and circumstances may so tend to show another reason than the desire and intent to make a gift as to furnish ample warrant for a conclusion that no gift was intended, and therefore that there has been no 'executed gift.'" *Fanning v. Green*, 156 Cal. 279, 282, 104 Pac. 308, 310.

And in an action of this character, involving on one side the claimed right to a divorce and on the other side claims of property rights by the husband, the court is entitled to consider all of the evidence, including that upon the cause of action for divorce, in determining the weight of evidence and the credibility of the parties as witnesses. *Della v. Della*, 98 Ark. 540, 136 S. W. 927.

[1] In this case it is not necessary to set forth an abstract of the evidence concerning the disposition made from time to time by these parties of money acquired by the husband and held in possession by the wife as bank credits, or held in the form of investments made in her name. This evidence is included in several hundreds of pages of transcript containing the testimony of sundry witnesses. The defendant testified (contrary to plaintiff's testimony) that he did not make

a gift of the money to plaintiff, and did not intend any such gift, and that he never stated that he was making or had made any such gift. The circumstances relating to the various transactions were extensively developed by testimony of witnesses and by documentary evidence. That there is a substantial conflict in the evidence cannot successfully be denied. That there is much evidence inconsistent with the theory of a gift of these funds or their proceeds by the husband to the wife is also clear from the record. We are of opinion that the facts found by the trial court after hearing this conflicting evidence should be accepted by us as the facts in the case, and that we would not be justified in disturbing these findings. An appellate court "will not disturb the finding of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect." *Title Insurance & Trust Co. v. Ingersoll*, 158 Cal. 474, 484, 111 Pac. 360, 364.

[2] It being thus established that the cross-complainant was the equitable owner of the money and property in question in the state of Missouri at the time that it was transferred to the state of California, it retained that character as his separate property in California; it being further shown that in connection with the investments in California there was no gift made to the plaintiff of the property purchased here. *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488.

[3] Appellant claims that the court erred in overruling her objections to certain testimony of the witness Hermina White concerning conversations of date prior to 1904 between plaintiff and defendant (who were her mother and father) about the investment of money in property at St. Louis. The objection was based upon the fact that the allegations of the cross-complaint limited to the years 1904, 1905, and 1906 the claim of cross-complainant that he had entrusted these moneys to the plaintiff. But it appears that the plaintiff had previously testified to the receipt of moneys as gifts from the defendant during years prior to 1904, and that the property here in question was in part the result of investments of that money. On that state of the record the testimony objected to was correctly admitted.

Assuming that the court erred in permitting L. D. White to testify to certain statements made by Mr. Brunner to Mrs. White out of the presence of Mrs. Brunner, and further erred in permitting defendant's counsel to ask leading questions of the witness Shelteln, we think that the errors so committed are of minor importance in relation to the entire case and do not appreciably affect the merits.

Counsel for appellants present in their brief an argument based upon a supposed appeal from an order made by the superior court vacating and setting aside an earlier order

of that court requiring the payment of alimony pendente lite. The transcript fails to show any appeal taken from that order, and it is not involved in the appeal from the judgment. For that reason no ruling is made upon the question presented.

The judgment and order denying motion for a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

(22 Wyo. 492)

TAYLOR v. STOCKWELL et al. (No. 774.)  
(Supreme Court of Wyoming. Jan. 18, 1915.)

1. PARTIES (§ 88\*)—MISJOINDER—ISSUES—EVIDENCE.

Where, in an action by S. and W. for money found by them and paid over to defendant, claiming ownership, under threats of criminal prosecution, there was evidence that S. and W., while repairing defendant's cellar, discovered the money, that a part thereof was deposited in a bank to the credit of S., and a part to the credit of W., who already had a deposit, and a part was given to W.'s wife, and that when defendant, by threats obtained a check from S. for the amount of the deposit W. was not present, and that when defendant obtained a check from W., including the original deposit, S. was not present, and that there was no joint ownership, either general or special, in S. or W., in any of the money, the issue of misjoinder of parties plaintiff and causes of action, relied on by defendant in a demurrer to the petition, and answer, was presented, and whether S. and W. had proved a joint ownership in any cause of action, to entitle them to recover, was for the jury.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145-147; Dec. Dig. § 88.\*]

2. ACTION (§ 50\*)—MISJOINDER OF CAUSES OF ACTION—RECOVERY.

A joint recovery, when properly challenged, cannot be sustained by proof of separate, several, and independent causes of action in favor of separate plaintiffs.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.\*]

3. TRIAL (§ 203\*)—INSTRUCTIONS—MISJOINDER.

A defendant, who avails himself of misjoinder of parties plaintiff and causes of action in the manner prescribed by statute, and who introduces evidence in support of the defense that plaintiffs are not jointly interested, is entitled to an instruction submitting the defense, and refusal of a charge submitting the defense deprives him of a right to defend on statutory grounds, and is reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

4. TRIAL (§ 296\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS GIVEN.

Where, in an action by S. and W. for money found by them and paid over to defendant under threats of criminal prosecution, there was evidence of a division of the money between S. and W., though no final settlement between them as to their interests therein, the error in refusing to charge that there could be no recovery, unless S. and W. jointly owned the property, was not cured by an instruction that to authorize a recovery the jury must find that they were in the joint possession of the money, and that no final settlement thereof had been had between them, and that they had each an interest in the subject of the action and in obtaining the relief demanded, which interest had

never been divided and apportioned, but was a joint interest.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**5. EVIDENCE (§ 317\*)—HEARSAY EVIDENCE.**

It is error to permit witnesses to testify over objections to statements made, not in the presence of the party objecting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Error to District Court, Laramie County; William C. Mentzer, Judge.

Action by Reuben Stockwell and another against William Taylor. There was a judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Charles L. Rigdon, Herbert V. Lacey, and John W. Lacey, all of Cheyenne, for plaintiff in error. Wilfrid C. O'Leary, of Cheyenne, and B. F. Griffith, of Boise, Idaho, for defendants in error.

**SCOTT, J.** The plaintiff in error, who was defendant below, brings error to reverse a judgment obtained by defendants in error, as plaintiffs, against him in the court below for the sum of \$4,857.06, together with their costs, amounting to the sum of \$77.20. The case was tried to a jury on an amended petition, answer thereto, and reply. The jury found and returned a verdict in favor of plaintiffs jointly, and the judgment was rendered on the verdict as found by the jury, less \$145.93, which was remitted by the plaintiffs.

It is alleged in the amended petition: That on July 13, 1909, the plaintiffs, "while lawfully engaged in doing repair work in the cellar of and for the defendant at the town of Rock Creek, state of Wyoming, did find and discover buried in the ground in an old receptacle a large amount of coin, to wit, an amount in value and sum of \$4,177.50. That said receptacle was one glass jar; that the physical condition of said receptacle showed conclusively that it had been buried for many years, and that its contents had been undisturbed for many years; that the plaintiffs were the finders and discoverers of said buried treasure, and are now and ever since" their said discovery "have been at all times the lawful owners thereof, and lawfully entitled thereto, by reason of said finding and discovery; that the owner, loser, and depositor of said gold coin is and has been at both prior and subsequent to said finding and discovery unknown, and that said treasure did not on July 13, 1909, or at any other time, belong to the defendant, nor any part or parcel thereof." That plaintiffs took possession of the gold coin at the time of its discovery, and removed the same from the cellar, and thereafter, and on July 19, 1909, a portion of said coin was deposited as follows: \$2,235 thereof was deposited in the First National

Bank of Laramie, Wyo., to the credit of J. W. White, one of the plaintiffs, and \$1,300 thereof was deposited in the same bank by J. W. White to the credit of Reuben Stockwell, one of the plaintiffs, and \$32.50 thereof was given into the custody and possession of Alma White, wife of the plaintiff J. W. White. It is further alleged: That "thereafter, and on or about July 20, 1909, the defendant, having been informed of said discovery and finding, did falsely and fraudulently claim and represent to said plaintiffs, and each of them, and to the said Alma White, by plaintiffs jointly, that defendant was the true owner of said gold coins, and that the said gold coins discovered as aforesaid had been buried, hidden, and secreted in said cellar, the place of said finding and discovery, by the said defendant, then and there well knowing said representations to be false and untrue. That said defendant did then and there charge the plaintiffs and the said Alma White falsely with the crime of grand larceny, and threaten to immediately cause the arrest of each and all of them, and to have them and each of them sent to the state penitentiary on said false criminal charge." It is further alleged: That by means of said threats and unlawful charges they were put in great fear and duress, and acting thereunder they "did on July 20, 1909, deliver over to said defendant property to the value of \$3,732.71, being described and of the value as follows, to wit: By J. W. White, cash in amount and value \$2,235. By Reuben Stockwell, cash in the amount and value of \$1,300. By Alma White, wife of plaintiff J. W. White, cash in the amount and value of \$32.50. By J. W. White, one saddle, value \$46.50; one rifle, value of \$16; one pair of shapps, value \$19; one bridle, value \$14.65; one saddle rope, value \$1.05. By J. W. White, one order on defendant for the balance due defendant to White for labor, amounting to the sum and of the value of \$68.01. \* \* \* That said defendant has wrongfully and unlawfully retained possession, use, and control of said above-described property, being of the total value of \$3,732.71, and has at all times failed, refused, and neglected to deliver the said property, or its value, or any part thereof, to the said plaintiffs, or either of them, although repeatedly requested so to do. That by reason of the premises, and the said wrongful and unlawful conversion of said above-described property by the defendant, the plaintiffs have sustained damages in the sum of \$3,732.71, together with interest on said sum from July 20, 1909, at the rate of 8 per cent. per annum. Wherefore plaintiffs demand judgment for damages against the defendant for the wrongful conversion of said property above-described, in the sum of \$3,732.71," with interest thereon at 8 per cent. per annum from July 20, 1909, and costs.

The defendant demurred to the amended

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



petition upon the following, among other, grounds, viz.:

"(1) There is a misjoinder of parties plaintiff, in that the plaintiffs, Reuben Stockwell and Jess W. White, are improperly joined as parties plaintiff, as each of said plaintiffs has a separate action against the said defendant, and not a joint action against defendant. (2) There is a defect of parties plaintiff, in that, if said plaintiffs can be joined, Alma White, is not joined with the other plaintiffs, and is a necessary and proper party to this action, if said plaintiffs are proper parties thereto. (3) The claims of said plaintiffs and of each of them against the said defendant are several claims, and cannot be sued upon jointly, but must be sued for and upon separately. (4) The claim of said Alma White must be sued upon separately, and not with the said plaintiffs. (5) That separate causes of action and several causes of action are improperly joined in one count and in one cause of action, to wit, the claim and demand of J. W. White, one of said plaintiffs for \$2,235, and interest thereon from July 20, A. D. 1909, the claim of Reuben Stockwell, one of said plaintiffs, for \$1,300 and interest from said date last aforesaid, the claim of Alma White, who is not joined as one of said plaintiffs, for \$32.50 and interest from the date last aforesaid, and the further claim of said J. W. White, one of said plaintiffs, for the further sum of \$165.21, to wit, the matters mentioned in paragraph 3 of said amended petition, and interest thereon from the date last aforesaid, and which were not severally or collectively included in the original petition of said plaintiffs in this action filed. \* \* \* (9) That the petition does not state facts sufficient to constitute a cause of action."

The court overruled this demurrer, to which an exception was reserved. The defendant then filed his answer and cross-petition to the amended petition, in which he alleged that he built, occupied, and had exclusive possession and control of the cellar ever since he built it in 1890; that he built it for and used it continuously thereafter in connection with his store building, in which he lived and conducted a general merchandising business; that the money found by plaintiffs was owned by him; that it arose from his business, and was from time to time deposited in the jar where it was found by plaintiffs, who kept their discovery secret, and who removed it secretly from his premises and control; that they were in his employ when they found it as set forth in the petition; and that they secretly appropriated it to their own use; and he denied that he wrested it from their possession by threats, duress, or fraud. The third paragraph of the first and separate answer is as follows:

"Said defendant admits that on or about the 13th day of July, 1909, said plaintiffs did take possession of and remove said gold coin, found by them, as aforesaid from said cellar; and he admits that on or about July 19, 1909, a portion of said gold coin was deposited in the First National Bank of Laramie, Wyo., to the credit of J. W. White, by J. W. White, one of the plaintiffs herein, but defendant alleges that said sum so deposited was the sum of \$2,200 and not \$2,235, as stated in paragraph 3 of said amended petition; and said defendant admits that \$1,300 of said gold coin was deposited in the First National Bank of Laramie, Wyo., to the credit of Reuben Stockwell, one of the plaintiffs,

herein; and defendant alleges that at the time of said deposit of \$2,200 said plaintiff White had in said bank the sum of \$35 to his credit, which was not any of the proceeds of said gold coin of defendant; and said defendant further alleges and admits that \$32.50 thereof was given into the custody and possession of said Alma White, whose true name defendant alleges is Elma White, but defendant alleges that the same was given to her absolutely by plaintiffs, or one of them; and defendant further alleges that said gold coin was unlawfully, secretly, fraudulently, and feloniously divided and apportioned between and among said persons by plaintiffs, and by said plaintiff White, and that said plaintiffs ought not further to prosecute this action, because said claim of said White against this defendant unlawfully and wrongfully made in said petition as amended is his separate claim against defendant for \$2,235, with interest thereon from said 20th day of July, A. D. 1909, and not the joint claim of said plaintiffs, White and Stockwell; and that said pretended claim of said Stockwell of \$1,300, and interest thereon from said date last aforesaid is the separate claim of said Stockwell against said defendant, and not the joint claim of said plaintiffs; and that the said pretended claim of said Alma White against this defendant for \$32.50, and interest thereon from said date last aforesaid is not the joint claim of said plaintiffs, but is the separate claim of said Alma White; and that said pretended claim of said plaintiff White for one saddle, one rifle, one pair shaps, one bridle, one saddle rope, and for the balance claimed and pretended to be due to said plaintiff White for labor in the sum of \$68.01, is the separate and personal claim of said White against this defendant, and not the joint claim of said plaintiffs."

It is further alleged, for a second, further, and separate defense and cross-petition, that the defendants squandered and disposed of \$445 of said coins, and that, aside from the other property turned over to defendant in settlement, defendant accepted the note of J. W. White, dated July 20, 1909, payable one year after date, for the sum of \$263.80, together with interest at the rate of 10 per cent. per annum after date until paid, and all costs, expenses, and attorney's fees in case of suit; that said note is due and unpaid; and that in said settlement there was yet due the further sum of \$15.99, and that said promissory note and balance has not been paid, and for which judgment is prayed. The plaintiffs filed their reply to the answer and cross-petition, denying each and every allegation of new matter or thing contained therein. During the trial the attempt to recover \$32.50 alleged to have been obtained by threats and duress from Alma White was abandoned.

It thus appears from the pleadings that the gold coins were uncovered by plaintiffs on July 13, 1909, while they were in the employ and engaged in repairing defendant's cellar, and upon his premises, and while the cellar was in the exclusive possession and occupancy of defendant; that plaintiffs kept their finding secret and thereafter removed the money, each taking some of the coin and severally spending separate amounts, which aggregated \$445, and depositing \$1,300 to the credit of Stockwell, \$32.50 was given to the

wife of J. W. White, and \$2,200, the remainder of the coin, was deposited in the bank to the credit of White. The evidence shows that the cellar in which the money was found was built by defendant in 1890 by the enlargement of a small cellar 8 or 9 feet square into a cellar 29 feet 6 inches long by 11 feet 9 inches wide and 7 feet in depth; the length of the cellar running from the store outwards, and the width running along the end of and adjoining the store. It was constructed by excavating into the ground a few feet and putting up a ridge pole and log coverings, and covering them all over with earth a few feet in thickness. For a year or two after its construction there was an outside opening to the cellar, but that was, in a very short time after its construction, entirely closed up, and thereafter the only access to the cellar was through the building occupied as a store, and also by Taylor and his family as a dwelling, the entrance going from the store through a room occupied as a sleeping room. At the time of uncovering the jar of coins, the plaintiffs were cleaning out the debris and earth in the bottom of the cellar as the result of a water spout which occurred a day or two before, and which had caved and washed in the walls of the cellar, and in replacing a post which in part supported the ridgepole of the cellar. The evidence on the part of defendant tended to show—indeed, Mr. and Mrs. Taylor both testified to the fact—that owing to his place of business being 49 miles from the nearest town, and they thought they were without protection, he deposited the coins in the jar and then secreted it in the bottom of the cellar at the place where plaintiffs uncovered it; that the coins belonged to Mr. Taylor, and were put in the jar and secreted in the bottom of the cellar in 1896, with six or seven inches of dirt over it, laying the jar on its side, and in which place and condition the evidence tended to show that the plaintiffs found it.

[1] It will be observed that the question of misjoinder of plaintiffs and causes of action was raised both by demurrer and answer, and for that reason the question of misjoinder was not waived, whether upon the face of the petition it was demurrable for misjoinder or not. The question is preserved in the case and runs through the record. *Gilland v. Union Pacific Ry. Co.*, 6 Wyo. 185, 43 Pac. 508; *Mau v. Stoner et al.*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466; *Bank v. Walker et al.*, 7 Kan. App. 748, 53 Pac. 379. It arises upon the court's refusal of defendant's request to give the following instructions to the jury, to wit:

Instruction No. 22: "The jury cannot find for the plaintiffs for the amount of the check of \$2,235 given by plaintiff J. W. White, to the defendant, on the 20th day of July, A. D. 1909, if you find that the said check was drawn on the personal funds of said J. W. White and was his personal property, and not the property of said White and Stockwell jointly."

Instruction No. 23: "If the jury find from the evidence that the check for \$2,235 drawn on July 20, 1909, by the plaintiff White, in favor of the defendant Taylor, was drawn by the said White against his own personal account, and that the money represented by it was his own personal property, and not the joint property of the said White and Stockwell, then you will find for the defendant."

Instruction No. 24: "The jury cannot find for the plaintiffs in the sum of \$1,300, the amount of the check given by Reuben Stockwell, one of the plaintiffs, if they find that said check represented and was drawn on the personal funds in the bank belonging to said Reuben Stockwell, and that the said plaintiff White had no interest therein."

Instruction No. 25: "The jury cannot find for the plaintiffs for the amount of the order of \$68.01 on defendant, signed by J. W. White, if they find that the said order was drawn on the moneys due to said White personally, and not to said plaintiffs Stockwell and White jointly, and if the defendant Stockwell had no interest therein."

There was evidence tending to support the allegations of the answer with reference to the separate and individual interests, if any, of plaintiffs, and that the claims to the money deposited in the bank and other items for which recovery is sought were separate and individual, and not joint. It was a question upon the evidence as to whether Stockwell retained any interest in the \$2,200 kept by White, but we think it clearly appears from the evidence that the \$1,300 deposited in the bank to Stockwell's credit was turned over to him absolutely and became his property as between the plaintiffs. The evidence further shows that there was no joint ownership, either general or special, in any of the articles or personal property which defendant obtained from either of the plaintiffs. The evidence is undisputed that White was not present when the defendant is said to have threatened Stockwell with criminal prosecution and the latter turned over his check; but, on the contrary, Stockwell came to Laramie from Rock Creek on July 20, 1909, with defendant, went to the bank, and gave his check to the defendant for the \$1,300, that being the amount which White had deposited in the bank to his (Stockwell's) credit. This transaction occurred before anything had been said to White about finding the coins. Subsequently, and on the same day, White, having in the meantime been found, after an interview with defendant separate and apart from Stockwell, gave his check to Taylor for \$2,235.

It is not disputed in the evidence that White's check included \$35 which he had on deposit in the bank to his credit prior to and at the time of the deposit of the coin, and to that extent, at least, Stockwell had no interest in the funds represented by the check. Had proffered instruction numbered 22 been given, it would have submitted to the jury the question whether the check was drawn upon the personal funds of White, or the joint funds of White and Stockwell. It was the theory of the defendant that as between

White and Stockwell there was no joint interest in the funds represented by White's check, and we think that was an issue of fact which should have been submitted to the jury. What is here said applies with equal force to proffered instructions numbered 23 and 25, for, if given, the court would have submitted to the jury the question whether the money represented by White's check was his own personal property or the joint property of White and Stockwell. When it is remembered that upon the issues the right to recover depended upon proof of a joint and not a personal or several and independent cause of action, the error in refusing those instructions is apparent. The issue was squarely presented, and the question was one of fact, and for the jury to find from the evidence whether plaintiffs had proven a joint ownership in any cause of action. The same principle applies to proffered instruction numbered 24 with reference to the funds represented by Stockwell's check for \$1,300, and to White's order for \$68.01 on his employer for a balance due him for wages. If the funds represented by Stockwell's check were his individual property, then White had no right to any verdict, joint or otherwise, for their alleged conversion, nor had Stockwell any interest in the indebtedness represented by White's order for \$68.01.

[2, 3] The rule is well settled that a joint recovery, when properly challenged, cannot be sustained by proof of separate, several, and independent causes of action in favor of separate plaintiffs. It was so at the common law, where the question of misjoinder could be raised by a general demurrer, when the defect was apparent on the face of the petition, or where the proof failed to prove the cause of action as alleged. Our statutory provision supplants the common law, in that it requires a party who seeks to avail himself of such defect to make timely objection in the manner prescribed by statute. Upon the record here the defendant placed himself squarely within the provision of the statute, and was entitled to have the proffered instructions given upon the defense as pleaded and the evidence in support of such defense. The refusal to give the instructions as requested was error, for it in effect deprived defendant of the right to defend on statutory grounds, and we are of the opinion that the error of the court in its refusal to give each of the proffered instructions above set out was prejudicial, and that the judgment should be reversed, unless such error was covered and cured by the instructions which were given.

[4] Instruction No. 9, which was given over defendant's objection, is as follows, viz.:

"The court instructs the jury that, to entitle the plaintiffs to recover, the jury must find from the preponderance of the evidence: (1) That the defendant was not the true owner of the said

gold coin found by the plaintiffs. (2) That the plaintiffs, at the time of the alleged conversion, were in the joint possession of said gold coins so found in the cellar of the defendant; that no final settlement and division of said gold coins had been had or made by and between plaintiffs, but that, although the actual possession at the time of the alleged conversion was unequal, said gold coins had not been finally divided and the final settlement reached between plaintiffs, but were jointly owned by plaintiffs. (3) That the plaintiffs have each an interest in the subject of this action and in obtaining the relief demanded, which interest has never been divided or apportioned, but is a joint interest of the plaintiffs. (4) That the plaintiffs were required and did pay to defendant money, and did deliver personal property to the defendant, for joint protection and benefit of both, through and because of threats, if any, made by the defendant. By this instruction the court informs you that, if you find for the defendant on any or either of the counts specifically mentioned in this instruction, it is your duty to find for the defendant and to find as directed in instruction No. 13," which refers to the measure of damages; "but if you find from the evidence for the plaintiffs on each and all of the counts above specified, then it will be your duty to find in damages for the plaintiffs."

We think this instruction fell far short of the idea sought to be conveyed by the proffered instructions, and is not curative of the error of the court in refusing to give them. Upon the facts it may be conceded that defendant could not defeat plaintiff's right to the possession of the coin unless he was the owner, or otherwise had the right of possession; but we are of the opinion that the other part of the instruction tended to mislead the jury, in that it attempted to fix the liability of the defendant to plaintiffs jointly for the value of all the coins, notwithstanding the evidence showed the final division of at least a part of the coins. There is evidence from which, perhaps, it might have been found that there had been no final settlement between the plaintiffs as to the interest, if any, retained by Stockwell in and to the \$2,200 deposited in the bank to the credit of White. There is some evidence tending to show that that matter was left by them for future adjustment. The right of plaintiffs, if any, to adjust that matter as against defendant, must of necessity have rested upon proof of their ownership and right of possession as against him—a question which we do not deem necessary upon the record to discuss for the purpose of deciding this case.

[5] There are other assignments of error, only two of which we refer to. Stockwell and Mrs. White were both permitted to testify, over objection that the evidence was hearsay, to statements made not in the presence of the defendant. The rulings of the court in these respects constituted error, but whether prejudicial, so as to require a reversal of the judgment upon those grounds alone, need not be further discussed, for we apprehend that such error will not occur again. On the other grounds herein discussed, the judgment will be reversed, and the case remanded for

further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

POTTER, C. J., and BEARD, J., concur.

(22 Wyo. 512)

**KESTER v. WAGNER.** (No. 773.)

(Supreme Court of Wyoming. Jan. 26, 1915.)

**1. APPEAL AND ERROR (§ 1005\*)—REVIEW—INSUFFICIENCY OF EVIDENCE.**

Where the evidence is conflicting, and a motion for a new trial for the insufficiency of the evidence has been denied, the appellate court will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

**2. NEW TRIAL (§ 70\*)—DISCRETION OF TRIAL COURT—INSUFFICIENCY OF EVIDENCE—STATUTE.**

Under Comp. St. 1910, § 4601, allowing the trial court to grant a new trial if the verdict is not sustained by sufficient evidence, the trial court, upon the exercise of its discretion, concluding that the evidence is insufficient, is not only authorized, but required, to set the verdict aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

**3. DISMISSAL AND NONSUIT (§ 60\*)—GRANT OF NEW TRIAL.**

In an action to recover damages for a trespass on pasture lands and punitive damages on the ground that it was a wanton disregard of plaintiff's rights, where it was undisputed that defendant took his sheep upon the land by permission of one who had filed on the land and apparently had a right to its possession negating defendant's bad faith, the court properly reversed judgment for plaintiff for insufficiency of the evidence, and dismissed the case, where plaintiff refused to remit the punitive damages or to further prosecute the action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by Ernest A. Kester against William E. Wagner. Judgment for plaintiff, and, from an order granting a new trial upon his refusal to remit a certain amount, he brings error. Affirmed.

H. N. Gottlieb, of Sheridan, for plaintiff in error. Burgess & Kutcher, of Sheridan, for defendant in error.

BEARD, J. This is an action brought by the plaintiff in error against the defendant in error to recover damages for an alleged trespass upon certain lands to which plaintiff claimed the right of possession. The damages claimed consisted of the consuming of the pasture on the land and about one ton of hay by defendant's sheep. The value of the pasture was alleged to be \$100, and the value of the hay \$10. It was further alleged in the petition that in the commission of the unlawful acts complained of the defendant acted vindictively and maliciously and in

wanton disregard of plaintiff's rights, and he claimed \$900 additional punitive or exemplary damages. The case was tried to the court and a jury. The court charged the jury that:

"The plaintiff was entitled to the possession of the land during all of the time complained about. The defendant admits that he went upon the land with his sheep. Therefore your verdict must be in any event for the plaintiff, and it is your duty to find the actual damage sustained by him through said acts of trespass."

On the question of punitive or exemplary damages the court charged the jury as follows:

"The plaintiff further claims that the damages sustained by him were committed willfully by the defendant and in a wanton disregard of his rights in that respect. On this account he asks for punitive or exemplary damages. For the purpose of inquiring whether he is entitled to such damages, you have a right to consider the fact, which is not disputed, that the defendant took his sheep upon the land with the permission of Maud Binford, who apparently, though not really, had a right to the possession of the land, and you have a right to consider this fact in determining whether you shall allow exemplary damages to the plaintiff; and if you should find that the defendant acted in good faith, believing that he had a right under the terms of his lease from Maud Binford to enter upon this land, you will allow no further damages against the defendant than that which is sufficient to compensate the plaintiff for the actual loss suffered by him."

The jury found for plaintiff, and assessed his damages in the sum of \$550, and judgment was entered for that amount and costs. In due time the defendant moved the court to set aside the verdict and judgment and grant a new trial on numerous grounds, among which was that the verdict was not sustained by sufficient evidence. The court in its decision of the motion for a new trial found and held that none of the grounds alleged for a new trial were well founded, except the ground relating to the assessment of punitive or exemplary damages, and, as to that ground, that the evidence did not warrant or justify the assessment of such damages against the defendant; that the evidence warranted a verdict and judgment in favor of the plaintiff for \$160 for the actual damages sustained by the plaintiff by reason of the trespass; that the verdict was susceptible of severance into the elements of \$160 actual damages and the balance for punitive or exemplary damages. The court then entered an order that, if plaintiff would remit the excess of the judgment over \$160, the motion for a new trial would be overruled; otherwise it would be sustained and a new trial granted. The plaintiff refused to enter a remittitur, whereupon the verdict and judgment were set aside and a new trial granted. The plaintiff having announced his intention to rely upon his exceptions to the finding of the court that the evidence did not warrant the assessment of punitive damages, and to the order granting a new trial

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on that ground, declined to further prosecute the action in that court; whereupon the court entered final judgment dismissing the action at plaintiff's costs.

The only question properly before this court, and which it is necessary to determine, is whether there was error in granting a new trial. It appears that in September, 1908, the plaintiff made a desert entry on the land, and thereafter made some improvements thereon, and at the time of the trespass, June 28, 1911, had about 18 acres in crops and some hay on the land. It further appears that his entry, through some mistake or misunderstanding of the officers of the local land office, was shown on the records of said office to have been canceled on May 27, 1911, and was so understood by said officers. On June 11, 1911, Maud Binford applied at said office and was permitted to, and did, make a desert filing or entry on said land, and it was by her permission that defendant went upon the land with his sheep. It further appears that he instructed his herder not to allow the sheep to go upon the crops then on the land, or to destroy the hay, but on one or more nights they did go upon the hay and ate and destroyed about a ton thereof. There was also evidence to the effect that defendant had contested a prior homestead entry of the land by one Jones, which entry was relinquished and canceled prior to the entry made by plaintiff, and that it was upon defendant's application or protest that the entry of plaintiff was marked canceled upon the records of the local land office. In subsequent proceedings in the land office brought by plaintiff against Maud Binford, her entry was on February 16, 1912, held for cancellation subject to the right of appeal, which was not taken, and her entry was therefore canceled and plaintiff's entry reinstated as of the date of its cancellation.

Counsel for plaintiff in error has argued the case on the theory that, if there was any competent evidence sufficient to take the case to the jury on the question of punitive or exemplary damages, the court was without authority to disturb or set aside the verdict. But we do not think that is the law. The statute provides that the verdict shall be vacated and a new trial granted by the district court on the application of the party aggrieved for any of the causes enumerated in the section, affecting materially the substantial rights of such party. One of the causes so enumerated is that the verdict is not sustained by sufficient evidence. Section 4601, Comp. Stat. 1910.

[1, 2] The correct rule on the question is concisely and clearly stated in the case of *Dewey v. Chicago, etc., R. Co.*, 31 Iowa, 373, as follows:

"We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trial in the nisi prius courts.

This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals), that where the evidence is conflicting and the nisi prius court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, that we will not interfere. And this because: First, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and endorsement to the verdict; and, third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but generally only the substance of their testimony, and often in the language of the attorneys interested in the cause." (In this court we have the evidence at length as given on the trial.) "A mention of these considerations upon which the rule for the appellate courts is (in part) founded is sufficient to show that the rule ought not and does not have any application whatever to the nisi prius courts. Those courts ought to independently exercise their power, to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted."

This rule is supported by many decisions and clearly shows the difference in the functions of trial and appellate courts with respect to setting aside verdicts on the ground that they are not sustained by sufficient evidence. *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760, and notes; *McMahon v. Rhode Island Co.*, 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1223, and notes. It is to the trial court that the application for a new trial must be made, and it is the judgment of that court that must be invoked, at least in the first instance; and, when the statute declares that a verdict shall be set aside and a new trial granted because the verdict is not sustained by sufficient evidence, it imposes on the trial court the duty of determining, in the light of its superior knowledge of the law and the application of legal principles to the evidence in each particular case and with due regard to the finding of the jury, whether or not substantial justice warrants the verdict. If after such consideration and in the exercise of sound discretion the trial court concludes that the evidence is insufficient, it is not only authorized, but it is its duty, to set the verdict aside; and unless it be made to appear to the appellate court that the trial court abused its discretion, or that its conclusion was manifestly erroneous, its judgment will not be reversed.

[3] In this case we think the court was warranted, notwithstanding the verdict to the contrary, in concluding that the evidence was insufficient to establish a wanton

disregard of plaintiff's rights, or that the defendant acted vindictively or maliciously. As said by the court in its instructions to the jury, the fact was not disputed that the defendant took his sheep upon the land with the permission of Maud Binford, who apparently, though not really, had a right to the possession of the land, thus negating any inference of bad faith on the part of defendant. The court proposed to allow the judgment to stand for the highest amount of actual damages testified to by any witness, which offer plaintiff declined and insisted upon something more by way of punishment of defendant. The court concluded that the evidence was insufficient to warrant the recovery of punitive or exemplary damages, and with that conclusion we agree. The judgment of the district court is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(22 Wyo. 523)

### FRANCIS v. BROWN et al.

(Supreme Court of Wyoming. Jan. 26, 1915.)

#### 1. APPEAL AND ERROR (§ 265\*)—OBJECTION BELOW—NECESSITY.

Where the action of the trial court, in denying specific performance is not objected and excepted to by the purchasers, the issue whether they are entitled to such relief is affirmatively established upon the record in the vendor's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.\*]

#### 2. SPECIFIC PERFORMANCE (§ 127\*)—DEFAULT BY BOTH PARTIES—RELIEF IN EQUITY.

Where both parties to a contract are in default, a court of equity will place both in statu quo.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.\*]

#### 3. CONTRACTS (§ 324\*)—BREACH—REMEDIES OF INJURED PARTY.

On breach of contract, the party without fault may elect to sue for damages or to recover back what he has paid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.\*]

#### 4. VENDOR AND PURCHASER (§ 351\*)—BREACH OF CONTRACT BY VENDOR—MEASURE OF DAMAGES.

The measure of damage for failure to convey land for a stipulated price is the difference between the value of the land at the time set for conveyance and the contract price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

#### 5. VENDOR AND PURCHASER (§ 351\*)—VENDOR'S BREACH OF CONTRACT—MEASURE OF DAMAGES.

On breach of a contract for sale of land, where the purchasers neither allege nor offer any evidence tending to show the value of the land at the time when the transfer should have been made, their measure of damages must be limited to the amount which they have paid under the contract, with interest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

#### 6. PAYMENT (§ 73\*)—PAYMENT BY PURCHASER—EVIDENCE.

Where one of two purchasers gave the vendor a check for his share of a payment due, which the vendor accepted without protest, the mere fact that the check, before it was cashed, found its way back into the hands of the maker does not disprove the fact of the payment, there being no question of fraud in the case; the question of any conversion of the check by the maker in a transaction after the payment being one for decision in another action.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 220, 222-225, 232-238; Dec. Dig. § 73.\*]

#### 7. TENDER (§ 12\*)—SUFFICIENCY—AMOUNT.

A tender of less than the full amount due is insufficient.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 21-28; Dec. Dig. § 12.\*]

#### 8. VENDOR AND PURCHASER (§ 351\*)—BREACH OF VENDOR—MEASURE OF DAMAGES.

Where one of the purchasers under a contract for the sale of realty deposited \$4,000, his share of the purchase money, in bank subject to the vendor's order on the vendor's refusal to perform in a suit by the purchasers against the vendor, interest on the \$4,000 in bank from the time deposited to the date of judgment was not recoverable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

Error to District Court, Laramie County; David H. Craig, Judge.

Action by John Brown, Edwin Delahoyde, and E. D. Cotton against Edward Francis, to reverse a judgment for \$6,043.04. Defendant brings error. Modified and affirmed.

W. E. Mullen, of Cheyenne, for plaintiff in error. H. Donzelman, of Cheyenne, for defendants in error.

SCOTT, J. The plaintiff in error, who was defendant below, and will, for convenience, be hereafter referred to as defendant, brings error to reverse a judgment for damages in the sum of \$6,043.04 and costs obtained against him by defendants in error, who were plaintiffs, and who will be here referred to as plaintiffs, for an alleged breach of a written contract to sell and convey to them certain described lands of which defendant was the owner and occupant. The action was for specific performance of the contract and damages, and was tried to the court, which made and separately stated its findings of fact and conclusions of law. A motion for a new trial was made upon several grounds, which was overruled, and such ruling is here assigned as error. The agreement in *hæc verba*, omitting signatures and caption, is as follows:

"This agreement, made this first day of July, A. D. 1907, by and between Edward Francis, of Cheyenne, Laramie county, Wyoming, party of the first part, and John Brown and Charles E. Cotton of Cheyenne, Laramie county, Wyoming, party of the second part:

"Witnesseth: the said Edward Francis hereby promises, covenants and agrees to and with the said John Brown and Charles E. Cotton that on the first day of May, A. D. 1908 he will convey to them by good and sufficient war-

ranty deed accompanied by abstract of title all of the following described tracts and parcels of land lying and being situate in the county of Laramie in the state of Wyoming, and particularly described as follows, to wit: All of section seven (7), the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , the N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  section eighteen (18), the N. W.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  section twenty (20), all section twenty-nine (29) except right of way of county road, in township fourteen (14) north, of range sixty-eight (68) west and all section one (1), the S. E.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  section two (2), all section three (3), all section ten (10) except the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , all section eleven (11), the W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , S. W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  section twelve (12) in township fourteen (14) north, of range sixty-nine (69) west of the sixth principal meridian and containing four thousand, nine hundred six and no/100 (4,906.00) acres more or less according to the government survey of said land (excepting the right of way of the Cheyenne and Northern Railway) together with all the appurtenances and all the water rights thereunto belonging. In consideration of the foregoing, the said John Brown and Charles E. Cotton covenant, promise and agree to and with said Edward Francis as the purchase price for said land the sum of nineteen thousand, six hundred twenty-four and no/100 dollars (\$19,624.00) in manner as follows, to wit: three thousand, six hundred twenty-four and no/100 dollars (\$3,624.00) in hand paid July first, 1907, receipt of which is hereby acknowledged; nine thousand, five hundred and no/100 dollars (\$9,500.00) cash May first, 1908, and assume a mortgage of six thousand, five hundred and no/100 dollars (\$6,500.00) with interest from May first, 1908, said mortgage being now on record and is a lien on the said lands.

"It is mutually agreed by and between the parties hereto that the said warranty deed shall be delivered to said John Brown and Charles E. Cotton and \$9,500.00 the balance of said purchase money shall be delivered to said Edward Francis at the Stock Growers' National Bank at Cheyenne, Wyoming, on said first day of May, A. D. 1908, and this agreement fully performed at said time and place.

"It is fully agreed that in the event that said John Brown and Charles E. Cotton shall fail or refuse to carry out and perform their agreements, before set forth, after said Edward Francis shall have signed this contract, they shall and will forfeit all payments made on this agreement.

"Said parties respectively bind their heirs, assigns and legal representatives to the faithful performance of the terms of this agreement.

"In witness whereof, the said parties have hereunto set their hands the day and year first above written."

It is further alleged and admitted that on August 5, 1907, Charles E. Cotton, one of the parties to the contract, E. D. Cotton and Edwin Delahoyde, two of plaintiffs, entered into a contract in writing by the terms of which Charles E. Cotton for value assigned them all his interest in and to said contract and the lands described therein. It is admitted by the pleadings that the date of making the final payment was extended by two separate written agreements to May 1, 1910. It is further alleged in the petition that plaintiffs performed all the conditions of the contract to be by them performed, and that they have always stood ready, able, and willing to do so, and that defendant has wholly failed and refused to execute a conveyance of the land

as by his contract he was bound to do, and that \$3,624 was paid to Francis on July 1, 1908, as recited in the contract. It is further alleged, for a second and further cause of action, that since May 1, 1910, defendant has taken, received, and enjoyed all the rents and profits of the land continuously which were reasonably worth the sum of \$4,800, to their damage in that sum, for which judgment is prayed, together with the further sum of \$500 attorney's fees and costs, and for a specific performance of the contract.

The defendant for answer and cross-petition admitted the ownership of the land and the execution of the contracts of July 1, 1907, August 5, 1908, and of May 1, 1909, extending the time to make final payment to May 1, 1910; that he paid the mortgage indebtedness thereon of \$6,500 and accrued interest as alleged in the petition and denied each and every other allegation set forth in the first cause of action pleaded in the petition; he further admits that he received and used the profits and income of said lands from May 1, 1910, to the commencement of this action as alleged in plaintiffs' second cause of action.

For a further answer to plaintiffs' first cause of action defendant alleged: That said John Brown and C. E. Cotton violated the conditions of the contract of purchase of the land, and refused to comply with its conditions, in this: That after defendant had signed said contract and said contract had been deposited in escrow in the Stock Growers' National Bank at Cheyenne, Wyo., plaintiffs failed and refused to make payment of the sum of \$3,624, as stipulated, acknowledged, and receipted thereon, but paid only \$1,812, and after granting the extension of time within which to make full payment under the terms of the contract, they on May 3, 1910, and not on April 30, 1910, offered to pay an additional sum of \$14,188, and demanded that defendant accept the same in full settlement of the balance of the purchase price or the sum of \$16,000, which would be \$3,624 less than the purchase price stipulated, which was \$19,624, and that defendant refused to accept the same, no other or greater sum having been tendered. That notwithstanding Cotton and Brown in and by their contract agreed to and did assume to pay as a part of said purchase price the mortgage lien of \$6,500 with interest thereon from May 1, 1908, they wholly failed to do so, but credited defendant with the principal sum of said lien, but failed and refused to pay the accrued interest of \$910, nor was said interest ever tendered him. That defendant on May 31, 1910, tendered a return or repayment of \$1,812, and accrued interest to C. E. Cotton and Brown amounting to \$2,254, which was refused. For a further defense it is alleged that at the time of the execution of the contract of July 1, 1907, he was a married man, residing with his wife and family on and occupying the land as a homestead, and continued to do so



up to the present time, which fact was well known to Brown and Cotton, and that his wife did not join in said contract, and that she has not assented thereto nor is she a party to this suit.

Defendant for a further answer and cross-petition alleges that plaintiffs procured the contract and two extensions of the time within which to complete said contract to be recorded in the office of the county clerk of Laramie county, Wyo., that being the county in which the land is situated, in furtherance of their attempt to purchase said land at a price less than agreed upon, thereby creating a cloud on said title, the removal of which is prayed.

Plaintiffs filed their reply, in which they deny the new matter alleged in the answer, except as otherwise admitted; admit that they agreed to assume the payment of the mortgage of \$6,500, and allege that they are yet ready and willing to pay the same upon defendant carrying out the provisions and performing the conditions of the contract to be by him performed; deny that defendant was occupying the land as a homestead, and if so they would concede to him the right of selection which he has failed to do, and that they would accept the balance of the land, or that remaining outside of the homestead section of 160 acres.

The court upon request made and numbered its separate findings of fact and conclusions of law; and, while some of the admissions in the pleadings are included in the findings of fact and though quite lengthy, we deem it best to set them all out here to show the theory on which the case was tried and decided. They are as follows:

"(1) That plaintiffs and defendant entered into contract pleaded by plaintiffs in their petition, on the 1st day of July, A. D. 1907.

"(2) The court doth find that by said contract the said defendant agreed to convey to John Brown and Charles E. Cotton, by good and sufficient warranty deed, accompanied by abstract of title, all the described tracts and parcels of land described in plaintiffs' petition filed herein, upon the payment to the said defendant of the sum of \$19,624, same being the purchase price stipulated to be paid in said contract, to which finding defendant at the time duly excepted.

"(3) The court doth further find that John Brown and Charles E. Cotton did agree, under said contract with the said Edward Francis, defendant, to pay said purchase price in manner following, to wit, the sum of \$3,624 on the 1st day of July, A. D. 1907, and that said date was the date upon which the said contract was entered into, and to pay the balance of the purchase price, to wit, \$16,000, on the 1st day of May, A. D. 1910, to which finding defendant at the time duly excepted.

"(4) The court doth further find that the said John Brown and Charles E. Cotton did pay to Edward Francis, the defendant, the said sum of \$3,624 on said 1st day of July, A. D. 1907, and that said sum of \$3,624 has been in the possession of the said Edward Francis, defendant, ever since said 1st day of July, A. D. 1907, to which finding defendant at the time duly excepted.

"(5) The court doth further find that the said Charles E. Cotton, on the 5th day of August, A. D. 1907, made an assignment of his interest

in the said contract to Edwin Delahoyde and E. D. Cotton, two of the above-named plaintiffs.

"(6) The court doth further find that the date stipulated in said contract on which final payment was to be made thereunder to Edward Francis, the defendant, same being the 1st day of May, A. D. 1908, was, by mutual agreement between the parties thereto, extended until the 1st day of May, A. D. 1910.

"(7) The court doth further find that said plaintiffs, John Brown, Edwin Delahoyde, and E. D. Cotton, on the 30th day of April, A. D. 1910, and in the Stock Growers' National Bank of Cheyenne, same being the place designated in said contract in which the aforesaid final payment was to be made to the said defendant, Edward Francis, did tender to the said Edward Francis, defendant, the sum of \$16,000, the balance of the purchase price stipulated to be paid in said contract, and offered thereby to fulfill their obligation under said contract to the said defendant, to which finding defendant at the time duly excepted.

"(8) The court doth further find that on the said 30th day of April, A. D. 1910, and ever since said date, the said defendant, Edward Francis, did refuse, and yet doth refuse, to make and deliver his warranty deed for the lands described in the aforesaid contract to the said plaintiffs, as he had agreed to do in said contract, to which finding defendant at the time duly excepted.

"(9) The court doth further find that said defendant, on July 1st, A. D. 1907, same being the time when the aforesaid contract was entered into, was a married man, the head of a family, and was residing upon and occupying a portion of the lands described in said contract as a homestead with his wife and family, and has continued to reside upon and occupy the same up to the present time.

"(10) The court doth further find that the wife of defendant did not join in the execution of the aforesaid contract, and has not assented thereto.

"(11) The court doth further find that, said defendant having claimed that said contract was null and void by reason of the fact, as aforesaid, that defendant was occupying a portion of said land with his wife and family as a homestead, as set out by defendant in the second defense in his answer and cross-petition filed herein, and that plaintiffs having, by way of reply to defendant's said second defense in defendant's answer, alleged that they were, at all times, willing to let defendant select his said homestead to the extent of 160 acres from the body of the lands described in the aforesaid contract, because of no evidence having been offered designating metes and bounds, or by any description, the lands claimed by defendant as his homestead, the court therefore is unable to make a finding, designating, from the body of the lands described in the contract in suit here, any particular 160 acres of said lands to be set aside as a homestead to said defendant, and to exclude from the lands described in said contract.

"(12) The court doth further find that the said defendant has been, and yet is, in the continued and undisputed possession of all the lands described in said contract since the 1st day of July, A. D. 1907, and has enjoyed the rents and profits of the same since said date.

"(13) The court doth further find that Edwin Delahoyde, on the 30th day of April, A. D. 1910, as his portion of the final purchase money under said contract, deposited in the Stock Growers' National Bank of Cheyenne, Wyo., the sum of \$4,000, to be paid to defendant herein, making up the final payment under said contract, and that said \$4,000 is yet, and up to this date, held by the said Stock Growers' National Bank of Cheyenne, Wyo., and that said Edwin Delahoyde has been deprived of the use of said \$4,000 ever since said 30th day of April, A. D.



1910, to which finding defendant at the time, duly excepted."

"Conclusions of Law.

"And as and for its conclusions of law, the court doth find:

"1. That by reason of the fact of defendant having refused to convey to plaintiffs by good and sufficient warranty deed the lands described in the aforesaid contract, on the 30th day of April, A. D. 1910, thereby the said defendant has violated the terms and conditions of said contract to be fulfilled on his part, to which finding defendant at the time duly excepted.

"2. The court doth further find that by reason of said defendant having failed to comply with the terms and conditions of said contract, upon the tender to him by plaintiffs of the purchase price due thereunder by the plaintiffs on the 30th day of April, A. D. 1910, defendant has become liable to damages to the said plaintiffs, to which finding defendant at the time duly excepted.

"3. The court doth further find that the measure of damages for which defendant is liable in this case to the plaintiffs herein is the interest on the sum of \$3,624 paid by John Brown and Charles E. Cotton on the 1st day of July, 1907, together with the sum of \$3,624, to which finding defendant at the time duly excepted.

"4. The court doth further find that under the measure by which damages are assessed by the court in this case the said Edwin Delahoyde is entitled to interest at the rate of 8 per cent. per annum on the said \$4,000 from the 30th day of April, A. D. 1910, to which finding defendant at the time duly excepted."

Judgment was rendered as follows:

"It is therefore ordered, adjudged, and decreed the court:

"First. That the plaintiffs do have and recover judgment against the said defendant, Edward Francis, for the sum of \$3,624, together with interest at 8 per cent. per annum on said sum from the 1st day of July, A. D. 1907, and for the sum of \$952.56, same being interest at 8 per cent. per annum on the sum of \$4,000 from the 1st day of May, A. D. 1910, making a total \$6,043.04.

"Second. It is further ordered, adjudged, and decreed by the court that upon payment of the aforesaid sum of money to plaintiffs herein by the said defendant, the said plaintiffs be ordered and adjudged and decreed to cancel, at once, on the records in the county clerk's office of Ramsey county, the contract in suit here, together with its assignment and the extensions of said contract, and that upon such payment of the aforesaid judgment money by the defendant plaintiffs herein, said contract be, and the same is, hereby canceled.

"Third. It is further ordered that the defendant pay the costs of this action incurred. To which judgment the defendant at the time duly excepted. To all of which findings and judgment the plaintiffs then and there duly excepted."

[1-4] 1. It is assigned as error that the findings of fact, conclusions of law, and judgment are not sustained by the evidence and are contrary to law. It will be observed that the court upon the issues and proof denied plaintiffs a specific performance of the contract, but awarded them damages for its alleged breach. The action of the court in denying a specific performance of the contract is not complained of by the plaintiffs, and whether the court erred in that respect need not be here considered other than to say that this ruling of the court, in the absence of objection and exception by plain-

tiffs, affirmatively established that issue upon the record in favor of defendant. The case then presents the question as to what amount of recovery for breach of a contract is permissible where one or both parties to the contract are in default. In *Smith v. Krall et al.*, 9 Idaho, 535, 75 Pac. 263, an action was brought on a written agreement and a supplementary one to sell certain described real estate at a stipulated price, part of which was paid in cash and the balance in promissory notes. The terms and conditions were mutual, and the court found that both parties were in default, and that in such case a court of equity will place the parties as nearly in statu quo as possible. This rule obtains as a right to cancel a contract, and is found in section 688 of *Pom. Eq. Rem.*, and is supported by abundant authority. It is an application of the rule that in equity the party asking relief must come into court with clean hands and good faith. It is elementary that a contracting party who is without fault upon breach of the contract by the other party may elect to sue and recover damages for a breach of the contract, or he may recover back money paid as upon a consideration which has failed. *Reusens v. Mexican Nat. Const. Co.* (C. C.) 22 Fed. 522. Where damages are sought for the refusal or failure to sell land pursuant to the terms of a contract for a stipulated price, the measure of damages, in the absence of an agreement to the contrary, is the difference between the contract price and the value of the land at the time appointed for the completion of the sale.

[5, 6] In the case before us it is not alleged, nor is there any evidence, as to the value of the land which was the subject of the contract at the time the deeds were to be executed. It follows that plaintiffs' right to recover and the amount, if any, to which they were entitled must be limited to a recovery back of the amount which they had paid, together with interest. The evidence is undisputed that part of the purchase price was paid, and upon the facts the plaintiffs were plainly entitled to recover back the amount so paid. Such amount, that is to say, the amount paid on the contract was in dispute, and that question comes up for consideration of plaintiffs' exception to the fourth finding of fact, wherein the court finds that John Brown and Charles E. Cotton paid to Edward Francis the sum of \$3,624, the amount of the first payment on the contract on July 1, 1907, the day of its execution. The evidence is undisputed that one-half of this sum was paid by Brown's check, and that Charles E. Cotton wrote and signed his individual check for the sum of \$1,812, payable to order of and handed it to Francis, who accepted it as one-half of the first payment. Subsequently, or shortly thereafter, and before this check had been cashed, it again came into the possession of

Charles E. Cotton, who testified that it was turned over to him as part payment of the amount due him upon a contract for services in making the deal, and to which Francis assented. Francis denies this in his testimony, but the evidence tends to show that at no time did he claim to plaintiffs that the first payment had not been made in full until after he had refused to execute the deed, basing such refusal solely on the ground that his wife who was not a party to the contract would not sign the deed as it would take away her homestead right. It will be observed that the evidence upon the question of this payment is in sharp conflict, and we must accept the finding thereon. Bearing in mind that the defense here is not based upon fraud or conspiracy to defraud, and none is alleged in the answer, nor was Brown a party to the return of the check, the evidence as to what became of the check after its acceptance by Francis tends to support no issue in this case, and if there be a cause of action in favor of Francis against Charles E. Cotton for converting the check, that is a matter that can be settled between them by an appropriate action. The trial court having found upon this evidence in favor of the plaintiffs, this court cannot say that the finding was wrong, or that it was not supported by the evidence, for it was within the power of Francis to treat the check as property and apply it to the payment of his individual indebtedness to Cotton, instead of cashing it at the bank and applying the cash to the payment of such indebtedness. We limit what we here say to the fact whether the check was received by Francis as a joint payment by Charles E. Cotton and Brown, and treat the question as to what finally became of the check as not within the issues of this case, but as a matter between Charles E. Cotton and Francis.

[7] The defendant, before plaintiffs commenced this suit, tendered to and through Brown to plaintiffs the sum of \$1,812 and interest from the date of the contract to the date of the tender, claiming that this was all that plaintiffs were entitled to. The tender was refused by plaintiffs; and, in view of the issues and the finding of the court as to the amount to which plaintiffs were entitled to recover, and which finding is supported by the evidence, the plaintiffs were under no legal obligation to accept the tender, for it was less than they were entitled to. *Fidelity Savings Ass'n v. Bank*, 12 Wyo. 315, 75 Pac. 448. We are therefore of the opinion that the trial court's finding and judgment thereon for the sum of \$3,624, with interest, ought not to be disturbed.

By its fifth and sixth findings of fact the court found that Charles E. Cotton, on August 5, 1907, made an assignment of his interest in the contract to Edwin Delahoyde and E. D. Cotton, two of the plaintiffs in this suit, and that the date stipulated in the contract on which to make final payment, to

wit, May 1, 1908, was by mutual agreement between the parties extended until May 1, 1910.

[8] The seventh finding of fact is to the effect that on April 30, 1910, plaintiffs, John Brown, Edwin Delahoyde, and E. D. Cotton, duly made proffer and tender of \$16,000, the balance due under said contract to the defendant, Edward Francis, and by its eighth finding the court finds that on April 30, 1910, and ever since said date, the said Francis did refuse and yet doth refuse to make and deliver his warranty deed for the land, as he had agreed to do in the contract. This finding must be considered in connection with the thirteenth finding of fact, to the effect that Edwin Delahoyde on the same day as his portion of the final payment of the purchase money under the contract deposited in the Stock Growers' National Bank of Cheyenne, Wyo., the sum of \$4,000 and that said sum has been, from that day up to the date of the judgment, held by said bank, and that Edwin Delahoyde has been deprived of the use of said money, and in connection with the fourth conclusion of law, to the effect that said Delahoyde is entitled to interest on said sum of \$4,000 at the rate of 8 per cent. per annum from and after April 30, 1910. The judgment includes an item for this interest of \$952.56. We think the court erred in allowing this interest as an item of damages. According to the findings of fact the contract was broken when Francis refused to make the deed and accept the final payment on April 30, 1910. The cause of action, if any, accrued for breach of the contract at that time. There is no theory upon which a standing tender can be sustained in this case. In so far as Delahoyde's remedy is concerned, that had accrued; and, as we have already seen, he and the other plaintiffs upon this record were entitled to maintain this action to recover back the money paid upon the contract, with interest thereon from the date of such payment.

It is unnecessary to consider the other assignments of error. The questions discussed and the conclusions reached require a modification of the judgment limiting the amount thereof to the sum of \$3,624, and interest thereon from July 1, 1907, to the date of the entry of the judgment complained of, and the judgment will be so modified and, as so modified, will be affirmed.

POTTER, C. J. (concurring). I concur in the disposition to be made of this case. The trial court having found that the plaintiffs had complied with their contract, and the plaintiffs not complaining of the failure of the court to grant specific performance, the ground upon which that relief was not granted is, perhaps, immaterial, but I think it is to be gathered from the findings that it was not granted for the reason that the wife of the defendant had not signed the contract

and the court was unable to designate and set apart any part of the land as a home-  
stead. Upon the theory that the plaintiffs  
had complied with the contract, and that the  
defendant, with or without fault on his part,  
was unable to convey the property, or, being  
unable, refused to do so, then in either case, in  
the absence of specific performance, the plain-  
tiffs were entitled at least to be reimbursed  
for the money which had been paid to the  
defendant upon the purchase price. And  
that appears to have been the measure of  
damages adopted by the trial court. Indeed,  
there was no other evidence of damages, ex-  
cept that there was some testimony relating  
to rents and profits which plaintiffs were  
seeking to recover if they were found entitled  
to specific performance.

It is undisputed upon the evidence that  
Brown, one of the parties to the contract  
and one of the plaintiffs in the action, paid  
one-half of the amount that was required to  
be paid on the date of the contract. On the  
same day C. E. Cotton, the other party to  
the contract, handed his check for a like  
amount to Mr. Francis to complete said first  
installment. That check afterwards came  
back into the possession of Mr. Cotton with-  
out having been cashed. The evidence as to  
the manner in which that occurred is in di-  
rect conflict. Mr. Cotton testified that Fran-  
cis came back into his office after having re-  
ceived the check, and handed the check to  
him, saying that he handed it back to him  
in what he, Francis, owed him on the deal;  
the exact language of his testimony in that  
respect being as follows:

"My statement is that the day the contract is  
dated, the day it was signed, was the day and  
date the checks were turned over to him at my  
office, and he accepted them and went out.  
\* \* He brought the check back, indorsed it,  
and took credit for it. He brought the check  
back to me after having gone to the Citizens'  
bank with Mr. Brown. He brought the check  
back and said: 'Take this back on what I owe  
you on the deal.' \* \* \* After the check was  
turned over, we all went to the Stock Growers'  
bank and put the contract in escrow."

He further testified that when the check  
was returned to him Francis took a receipt  
for the amount thereof as part of what was  
owing to him, Cotton. Francis denies that  
Cotton obtained the check in the manner tes-  
tified to by him, and gave a different version  
of the transaction from which it is contended  
that the check had never been delivered to  
Francis or accepted by him in such a manner  
as to constitute the transaction a payment of  
Cotton's one-half part of the first installment  
of the purchase price required by the con-  
tract to be paid at the date thereof and ac-  
knowledgeed therein to have been paid.

The question whether the first payment  
had been made was within the issues, for if  
that payment had not been made, then the  
plaintiffs had not complied with their part  
of the contract. Whether it was made or  
not depended upon the view to be taken of  
the evidence respecting the manner of deliv-

ery and acceptance of Cotton's check. Upon  
the conflicting evidence concerning that mat-  
ter, the trial court found that the payment as  
required by the contract was made. If the  
first payment was made, then the proper  
amount to complete the purchase price was  
tendered. The evidence as to the payment of  
one-half of the amount of the first installment  
that was to be paid by Cotton, being, as above  
stated, in direct conflict, the finding of the trial  
court on that matter should not be disturbed,  
and we must consider the case from the  
standpoint that the first payment was made.  
The first required payment having been made,  
a fact which we accept as established in the  
case, the return of Cotton's check to him  
was equivalent to handing him the amount  
thereof in money, and whether, as between  
him and Francis, he thereby received some-  
thing to which he was not entitled is not  
within the proper issues of this case.

It is very clear that the amount allowed  
for interest on the sum tendered by Dela-  
hoyde is not recoverable by the plaintiffs as  
damages. We suppose that it was allowed  
on the theory that it was necessary to keep  
the tender good. I am not satisfied that  
the evidence sufficiently shows that the  
amount was deposited and retained in the  
bank in such a manner as to keep the tender  
good and deprive Delahoyde of the use of  
the money. But aside from that question, if  
it was necessary for the plaintiffs to keep  
the tender good beyond asserting, in the peti-  
tion in the action, a readiness to pay the  
balance of the purchase price, it does not  
appear that any other part of the price ten-  
dered was so held, retained, or deposited as  
to keep good the tender of the whole amount  
of the purchase price. Upon the theory,  
therefore, that it was necessary to keep the  
tender good, we do not understand that keep-  
ing good the part of the amount which was  
to be paid by Delahoyde would have been  
sufficient. But under the circumstances of  
the case, the defendant having refused to ac-  
cept the money when tendered and refused to  
convey the property, it was unnecessary for  
Delahoyde to keep the money on deposit in  
the bank subject to the acceptance of Fran-  
cis, but it was sufficient for the plaintiffs to  
allege in the petition, after showing that the  
balance of the purchase price had been ten-  
dered, that they were ready, able, and will-  
ing to pay the amount thereof, or they could  
have deposited the same in court. We can-  
not agree, therefore, with the conclusion of  
the trial court that Delahoyde was deprived  
of the use of the money by the defendant's  
refusal to accept it when tendered or to  
convey the property. Whether, by keeping  
the tender good, if necessary, he would have  
been entitled to interest upon the amount is  
a question upon which I express no opinion.

BEARD, J., concurs in the conclusions  
reached in the foregoing opinions.

(22 Wyo. 522)

**ENGEN v. OLSON. (No. 791.)**

(Supreme Court of Wyoming. Jan. 26, 1915.)

**1. PLEADING (§ 403\*)—INDEFINITENESS—CURE BY ANSWER.**

In an action to recover rent claimed to be due for certain real estate based on a written agreement between plaintiff and defendant, that defendant "rents my place S. W.  $\frac{1}{4}$  sec. 11 know is the Stinhoff place on same grown is in preveas contract and the same consideration two Hundred a year," wherein defendant by answer pleaded such other contract, any uncertainty as to the contract referred to was thereby made certain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

**2. LANDLORD AND TENANT (§ 22\*)—LEASE—CONSTRUCTION — REFERENCE TO OTHER LEASE.**

In such action where it appeared that defendant had held under a formal lease from one R. to himself, which premises had been purchased by plaintiff during the term and the lease assigned to him, it clearly appeared that such other lease was the one the parties had in mind and to which they referred.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

**3. LANDLORD AND TENANT (§ 231\*)—ACTION FOR RENT—SUFFICIENCY OF EVIDENCE.**

In an action for rent wherein defendant claimed damage to certain water rights, evidence held to show that plaintiff had not violated the contract as to water rights, or by withholding possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.\*]

**4. APPEAL AND ERROR (§ 918\*)—REVIEW—AMENDMENT.**

Where the court stated in its judgment that plaintiff in an action for rent was granted leave to amend his petition, so as to show the correct date on which the lease commenced, although the record did not show that the amendment was in fact made, it would be so considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3710-3712; Dec. Dig. § 918.\*]

**5. LANDLORD AND TENANT (§ 230\*)—ACTION FOR RENT—"MATERIAL VARIANCE."**

In an action to recover rent, where the petition alleged that the term of the lease commenced April 12th, the court's finding that the correct date was May 8th, with judgment accordingly, was not a "material variance" within Comp. St. 1910, § 4591, providing that no variance between allegations and proof shall be material unless it has actually misled the adverse party to his prejudice, and that, when it is alleged that a party has been so misled, that fact and the respect in which he was misled must be shown.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 904-925; Dec. Dig. § 230.\*]

For other definitions, see Words and Phrases, First and Second Series, Material Variance.]

Error to District Court, Albany County; V. J. Tidball, Judge.

Action by Charles Olson against Nels J. Engen, with counterclaim by defendant. Judgment for plaintiff, and defendant brings error. Affirmed.

Cassius M. Eby, of Laramie, for plaintiff in error. M. C. Brown, of Laramie, for defendant in error.

BEARD, J. In this case Olson, who was plaintiff below, recovered judgment against Engen in the district court for rent claimed to be due for certain real estate. The trial was to the court without a jury. Engen assigns error.

The action was based upon the following written agreement:

"Centennial, Wyo., May 8, 1911.

"This is a Egrement between Charles Olson the first party and Nils Engen the second party that Nils Engen rents my plase S. W.  $\frac{1}{4}$  sec. 11 know is the Stinhoff plase on same grown is in preveas contract and the same concideration two Hundred a year.

"Charles Olson.  
"Nels J. Engen."

The contract or lease which the plaintiff claims was referred to in the writing and which he claims, with said writing, constituted the lease, and which was made part of his petition, is a formal lease from one Richardson to Engen for said premises for a term commencing April 12, 1910, and ending April 12, 1911, at the rental of \$200, payable on or before the expiration of the term. The petition was demurred to on the grounds that it did not state facts sufficient to constitute a cause of action, and that the writing was void for uncertainty. The demurrer was overruled, and defendant answered, admitting the execution of the writing and denying the other allegations of the petition. For other answer he alleged that he had leased the premises from Richardson for the previous year by the lease attached to the petition, and that certain water rights were appurtenant thereto which he had used during the term of said lease; that he was deprived of the use of said water and was kept out of possession of said premises during the time in controversy, and for which deprivations he claimed damages. Alleged that the writing of May 8, 1911, is so vague, indefinite, and uncertain as to be wholly void. Many other matters were alleged at great length, but the foregoing is sufficient to present the questions discussed in this court. The court found that defendant entered into a written lease with the plaintiff for the property described in the petition, said lease to commence May 8, 1911, and terminate May 8, 1912; that under said lease defendant agreed to pay plaintiff \$200; and that no part of the same had been paid, and gave judgment accordingly.

[1, 2] Whether the writing of May 8th on its face sufficiently identified the Richardson lease as the contract referred to, we need not determine, for the defendant by his answer pleaded that lease and alleged that he had sustained damages on account of the alleged failure of plaintiff to comply with its terms during the period for which he claimed rent.

If there was any uncertainty as to the contract referred to in the writing, it was made certain by the answer. Not only so, but from the instrument itself, considered in the light of the circumstances attending its execution, as shown by the evidence, we are clearly of the opinion that it was the Richardson lease which the parties had in mind and to which they referred. Engen was the lessee under that lease, and the premises had been purchased by Olson during the term and the lease assigned to him, and it was to him that Engen paid the rent. Olson testified, and it is not denied, that Engen dictated, and that he (Olson) wrote, the contract as dictated. It further appears by a letter dated April 25, 1912, written by direction of Engen to the attorney of Olson, that the Richardson lease was the one referred to, as in that letter he states that the written contract between himself and Olson calls for the same right and privileges as under the lease from Richardson. That lease was for the land and appurtenances, and it contains no statement that there was any water right appurtenant to the land.

[3] Engen testified that Olson had not interfered with his possession or the use of water; that he made no effort to use water because his father-in-law, Wolbul, told him not to do so. He called Wolbul as his witness, and he testified that there was no water right belonging to the land; that his ditch ran through the land, and when he had more water than he needed he had in previous years allowed some of it to be used on the Steinhoff tract. Without further referring to the evidence, we are satisfied that the conclusion of the court that Olson had not violated the contract with respect to water is sufficiently sustained by the evidence. The same is true of his claim that he was never put in possession. He testified that he got some pasture from the land.

[4, 5] It is further contended that there is a variance between the findings of the court and the pleadings, in that the allegation of the petition is that the term of the lease commenced April 12th, and the court found the correct date to be May 8th. The court states in its judgment that plaintiff asked and was granted leave to amend his petition in that respect, and, while it does not appear by the record that the amendment was made, the court treated it as made, and it will be so considered here. However, if it be not so considered, it is not shown to be material. The statute provides that no variance between the allegations in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and, when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what re-

spect he has been misled. Section 4501, Comp. Stat. 1910. No showing of prejudice has been made in this case.

Numerous other alleged errors are assigned, but a careful examination of the entire record convinces us that the case was fairly tried and a correct conclusion reached by the district court. Such being the case, the judgment should be affirmed, and it is so ordered.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(11 Okl. Cr. 266)

# OKLAHOMA CITY v. TUCKER

(No. A-2065.)

(Criminal Court of Appeals of Oklahoma. Jan. 20, 1915.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW (§ 1024\*)—MUNICIPAL CORPORATIONS (§ 642\*)—VIOLATION OF ORDINANCE—RIGHT OF APPEAL.

(a) The right of the state to appeal from an adverse judgment rendered in a criminal prosecution is controlled by statute, and exists only by specific statutory authority.

(b) The right of the state to appeal on a question reserved by the representatives of the state in the trial court is based on section 5090, Revised Laws of 1910; but this statute does not confer the same right on municipalities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024; \* Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.\*]

## 2. CRIMINAL LAW (§ 1024\*)—MUNICIPAL CORPORATIONS (§ 642\*)—VIOLATION OF ORDINANCE—RIGHT OF APPEAL.

A legislative act granting the state the right to appeal does not by implication grant the same right to municipalities existing under state law, unless such right is specifically conferred. The right of the sovereign to appeal must be clearly authorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024; \* Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.\*]

## 3. MUNICIPAL CORPORATIONS (§ 642\*)—VIOLATION OF ORDINANCE—APPEAL—DISMISSAL.

An appeal which is not authorized by law will, upon proper motion, be dismissed by this court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. § 642.\*]

Appeal from County Court, Oklahoma County; John W. Hayson, Judge.

Howard A. Tucker was convicted of violating an ordinance of Oklahoma City. On appeal to the county court the complaint was set aside, and the City appeals. Dismissed.

J. W. Johnson, Municipal Counselor, and V. V. Hardcastle, Asst. Municipal Counselor, both of Oklahoma City, for plaintiff in error. Wright & Blinn, of Oklahoma City, for defendant in error.

ARMSTRONG, J. [1, 2] This action was begun in the police court in Oklahoma City in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

May, 1913, by the filing of a complaint in the name of said city against Howard A. Tucker, charging, or attempting to charge, the violation of a city ordinance. A judgment was given adverse to Tucker and an appeal taken by him to the county court of Oklahoma county, as provided by law. When the cause came on for hearing in the county court, a motion to set aside the complaint was filed on behalf of Tucker and sustained by the court. From this judgment of the county court the city of Oklahoma City has attempted to appeal to this court. A motion to dismiss the appeal was filed by counsel for the defendant in error Tucker on the ground that the law in this jurisdiction does not confer the right on the city of Oklahoma City to appeal from an adverse judgment of the court below. Other grounds are set out in the motion, but they are without merit. The only question presented is: Has the city of Oklahoma City the right to maintain the appeal under the law as it now exists in this state?

Section 5990, Revised Laws 1910, is as follows:

"Appeals to the Criminal Court of Appeals may be taken by the state in the following cases and no other: First. Upon judgment for the defendant on quashing or setting aside an indictment or information. Second. Upon an order of the court arresting the judgment. Third. Upon a question reserved by the state."

This section of the statute specifically grants to the state the right to appeal in certain cases, but fails to confer any such rights on municipalities. It is a well-settled rule of law that the state has no right to appeal from adverse judgments unless such right is specifically granted by either constitutional or legislative provisions. Except for the foregoing statute, the state itself would not have the right to appeal in this jurisdiction. This provision, however, does not authorize the municipalities existing under state law to exercise the right of appeal from adverse judgments rendered in prosecutions of persons charged with violating any provision of city ordinances.

Counsel for the plaintiff in error urge this court to construe section 1819, Rev. Laws 1910, to authorize this appeal. This section of the statute is as follows:

"Appeals and proceedings in error shall be taken from the judgments of county courts direct to the Supreme Court and Criminal Court of Appeals in all cases appealed from justices of the peace, and in all cases appealed from the police judges, and in all criminal cases of which the county court is vested with jurisdiction, and in all civil cases originally brought in the county court, in the same manner and by like proceedings as appeals are taken to the Supreme Court from judgments of the district court."

We are unable to read into this provision language granting any such right. The purpose and intent of this section is clear, and a construction thereof which would grant authority to cities to appeal from adverse judgments in cases prosecuted under city ordinances is in no wise warranted. The Legislature may pass such a law, but this court

has no power to do so. This section of the statute was not intended to confer any special power or right upon municipalities. It confers no right on the state to appeal. It simply declares the law allowing appeals to litigants and persons charged with violating city ordinances. It clearly did not contemplate anything else. Under this provision of the statute the state would have no right to appeal from an adverse judgment. The state's right rests wholly on section 5990, *supra*.

It appears to be a well-settled rule that, although the statute may authorize the state to take an appeal in certain cases, this right cannot be exercised by cities or municipalities in prosecutions under municipal ordinances unless the statute specifically so provides.

In *People v. Jackson*, 8 Mich. 78, the Supreme Court of Michigan said:

"Although the recorder of Detroit may have power to reserve for our opinion questions which arise upon the trial of offenses against the general laws of the state, he has none to reserve such as arise upon the trial of complaints for the breach of city ordinances."

The question here under discussion was considered by the Supreme Court of Kansas in the case of *City of Salina v. Wait*, 56 Kan. 283, 43 Pac. 255. In this case Wait was prosecuted in the police court of Salina for violating an ordinance regulating the use of hacks, etc. He was convicted in that court, and from the judgment he appealed to the district court. In that court he challenged the validity of the ordinance, and upon his motion the district court quashed the complaint, and discharged him from custody. We quote at length from that court, as follows:

"Does an appeal lie, and has this court jurisdiction to review the ruling of the district court? A negative answer must be given to both of these questions. The defendant is entitled to take an appeal to the district court from the judgment of the police court (Gen. St. 1889, Par. 854), but we find no provision authorizing the city to appeal from the judgment of the police court. In prosecutions by the city for an act of a criminal nature, and which is an offense against the laws of the state, the defendant may appeal to the Supreme Court from any judgment rendered against him in the district court. Cr. Code, § 281. We have no statutory provision, however, expressly giving the right of appeal to a city in any prosecution brought in its name. Appeals to the Supreme Court can only be taken by the state in three cases: 'First, upon a judgment for the defendant, on quashing or setting aside an indictment or information; second, upon an order of the court arresting judgment; third, upon a question reserved by the state.' Id., § 283. Without this provision no appeal could be taken by the state, and we find no such provision authorizing an appeal by the city. It has been assumed that the city might appeal in cases where the act sought to be punished was an offense against the public at large, criminal in its nature, and such as might be or is punishable under the criminal laws of the state. Whether such right exists in the city without express legislation to that effect it is unnecessary to determine at this time. The prosecution in this instance is for the violation of a mere municipal regulation. There is no provision which expressly or impliedly gives the city a

right to an appeal in such cases, and, without a statutory authority, no right of appeal exists. This court is therefore without jurisdiction to review the ruling of the district court, and therefore the appeal will be dismissed."

See, also, *City of St. Louis v. Marchel*, 99 Mo. 475, 12 S. W. 1050; *City of St. Louis v. White*, 99 Mo. 477, 12 S. W. 1050.

[3] We are of opinion that the city of Oklahoma City is granted no right to appeal from an adverse judgment rendered in a prosecution for the breach of its ordinances.

It follows therefore that the motion to dismiss should be sustained, and the appeal dismissed. It is so ordered.

DOYLE, P. J., and FURMAN, J., concur.

11 Okl. Cr. 270)

HARRIS v. STATE. (No. A-1955.)  
(Criminal Court of Appeals of Oklahoma.  
Jan. 27, 1915.)

*(Syllabus by the Court.)*

**LEWDNESS (§ 10\*)—ADULTERY—PROOF.**

In a prosecution for adultery, positive evidence of the direct fact is not required. The act of carnal intercourse may be inferred from circumstances that lead to it by fair inference as a necessary conclusion.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. § 15; Dec. Dig. § 10.\*]

**LEWDNESS (§ 10\*)—LIVING IN ADULTERY—SUFFICIENCY OF EVIDENCE.**

In a prosecution for open and notorious adultery, the evidence considered, and conviction affirmed.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. § 15; Dec. Dig. § 10.\*]

*(Additional Syllabus by Editorial Staff.)*

**LEWDNESS (§ 1\*)—ELEMENTS OF OFFENSE—"LIVING TOGETHER IN OPEN AND NOTORIOUS ADULTERY."**

The courts, when called upon to determine what constitutes the state of "living together in open and notorious adultery," have defined it as the state of cohabiting. In other words, the parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them. There must be an habitual illicit intercourse between them.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

Appeal from District Court, Garving County; R. McMillan, Judge.

Sam Harris was convicted of adultery and appeals. Affirmed.

R. T. Jones and Carr & Field, all of Pauls Valley, for plaintiff in error. Chas. West, Atty. Gen., C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Sam Harris, and Eva Baker, were jointly informed against, and by a verdict of a jury found guilty of adultery. Said crime was alleged to have been committed by living together in open and notorious adultery. The jury fixed the punishment of plaintiff in error at a term of two years in the state penitentiary and the punishment of Eva Baker at a fine

of \$1. From the judgment and sentence entered against him, Sam Harris appeals.

[1, 2] There is but a single question presented by the record for our determination; that is, the sufficiency of the evidence to support the verdict. The evidence shows that Eva Baker was the stepdaughter of Sam Harris, who married her mother when she was about 6 years of age. In 1906 or 1907, Eva Baker gave birth to an illegitimate child. In December, 1911, she gave birth to another illegitimate child.

Ed Parks testified, in substance:

"I live southwest of Pauls Valley; have charge of the road camp; was formerly deputy sheriff and county commissioner. Sam Harris and Eva Baker lived together from June, 1911, until January in a house on the Taylor place; saw Eva Baker about the 1st of October, and she looked as if she would be confined in a month or two. Never saw Mrs. Harris around there."

Wash Lemmons testified that he knew Sam Harris and his family. Eva Baker and her child were living with them in 1911. Harris bought a spring crop on the Taylor place, about three miles from his home place, and moved enough furniture to keep house with, and Eva Baker went to live there. Harris spent about one-fourth of his time there; did not see Mrs. Harris there; noticed that the woman was in a delicate condition.

John McCarty testified that he had a store at McCarty, and was a farmer and stock raiser. Mrs. Harris was in the store one day and said that she and Sam had separated.

J. A. Dunn testified that six years ago Sam Harris and his family lived on his place, and Harris had another place about three miles away, where Eva Baker stayed, and at times Harris stayed at both places; that in 1911 Harris bought the crop on the Taylor place, and he and Eva Baker moved on and lived there for several months; that he heard all kinds of talk about them, and heard different people say they were living together as man and wife; that he heard remarks about Harris keeping two or three houses around there; and that it looked strange that these women could not all live in one house.

Pink Duncan testified to substantially the same facts.

Dr. E. Sullivan testified that he was a practicing physician; that in December, 1911, he met a woman who gave her maiden name as Eva Baker; that on a phone message he went to the Taylor place, and there delivered a woman of a child. He made a memorandum of the woman's age, maiden name, number of children, and place and date of birth; the woman gave her name as Harris; maiden name as Eva Baker; age 26 years; that the memorandum is on file at the state board of health at Oklahoma City. Sam Harris was there and said that he was the father of the child, and that the woman was his wife.

For the defense Sam Harris' sister, Allie

Halstead, and her son Arthur, Sam Harris' wife, the mother of Eva Baker, and Henry Tucker, son-in-law of Sam Harris, testified that they had never noticed any improper conduct on the part of Sam Harris and Eva Baker, or conduct indicating improper relations.

Sam Harris, as a witness in his own behalf, testified that his family consisted of his wife and six children and a stepdaughter, Eva Baker; that he was married 20 years; that when Eva Baker was 20 years old she gave birth to an illegitimate child, and that he did not know who was the author of her ruin; that 6 years later, on the Taylor place, she gave birth to another child; that Dr. Sullivan waited on her, and he paid him for his services. He denied stating that he was the father of the child, and denied having had improper relations of any kind, at any time, or at any place with his stepdaughter, Eva Baker.

The prosecution in this case was not commenced upon the complaint of the wife of the plaintiff in error, Sam Harris. It is insisted that the verdict and judgment is not supported by the evidence, in that there was no evidence tending to show that the defendants were "living together in open and notorious adultery." The statute in question provides that:

"Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery." Section 2431, Rev. Laws.

A careful consideration of the testimony satisfies us that it cannot reasonably be said that there was no evidence tending to prove that the defendants were "living together in open and notorious adultery." In *Kitchens v. State*, 10 Okl. Cr. 603, 140 Pac. 619, it is said:

"In a prosecution for adultery, positive evidence of the direct fact is not required. To require positive evidence alone would be to give immunity to practically all offenders. Usually presumptive evidence alone is obtainable, and the fact of carnal intercourse is inferred from circumstances that lead to it by fair inference as a necessary conclusion."

[3] The courts, when called upon to determine what constitutes the state of "living together in open and notorious adultery," have defined it as the state of cohabiting. In other words, the parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them. There must be an habitual illicit intercourse between them. The plain and manifest purpose of the Legislature in the enactment of the provision of the Penal Code defining adultery and prescribing the manner in which prosecutions therefor may be commenced was to guard and protect the public morals by erecting barriers which vicious, lewd, and

lascivious married persons may not safely pass. The object of the proviso was to prohibit the public scandal and disgrace of the living together of such persons notoriously in illicit intimacy, which outrages public decency by providing that any person other than the husband or wife of either party may make complaint. In the case at bar the defendants did, as we think the evidence shows, live together in open and notorious adultery.

It follows that the judgment should be and the same is hereby affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(47 Okl. 1)

MOSS v. HUNT. (No. 6057.)

(Supreme Court of Oklahoma. Oct. 13, 1914.  
Rehearing Denied Jan. 9, 1915.)

(Syllabus by the Court.)

1. ELECTIONS (§ 295\*)—CONTEST—BALLOTS—EVIDENCE.

In a contest proceeding involving the legality of certain votes cast in precinct 5 in Wagoner county, evidence was introduced showing such disregard of the law and irregularity by the election officials in making and signing the certificate of returns as to warrant the court in permitting the ballots introduced in evidence. *Held*, there were sufficient facts and circumstances tending to identify the ballots in question to warrant the court in permitting the same introduced in evidence for the purpose of counting.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 297-299; Dec. Dig. § 295.\*]

2. ELECTIONS (§ 295\*) — CONTEST — COUNTY JUDGE—SUFFICIENCY OF EVIDENCE.

In a contest proceeding over the office of county judge of Wagoner county, it was contended by plaintiff that at the general election of 1913 the total vote cast at said election in precinct 5 for all candidates for said office was 88; that he received 37 and defendant received 39, and the Socialist candidate 11 votes; that there was one mutilated ballot. Plaintiff's evidence strongly tends to sustain his contention. Defendant contended there were 98 votes cast; that he received 52, plaintiff 36, and the Socialist 10. The ballots were introduced in evidence, and after a recount thereof, in connection with the examination of the ballot stubs, the court found defendant's contention to be true. *Held*, there was sufficient evidence reasonably tending to sustain the finding of the court, and its judgment will not be reversed on appeal.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 297-299; Dec. Dig. § 295.\*]

3. ELECTIONS (§§ 194, 295\*) — "MUTILATED BALLOT"—SUFFICIENCY OF EVIDENCE.

In precinct 7 in said county, there were 25 votes cast for plaintiff and 5 for defendant, upon which no names of candidates for the offices of justice of the peace and constable on the Republican ticket were printed. At the suggestion of one of the election officers, the voters of these ballots wrote the names of one Taylor and Clark for the offices of justice of the peace and constable, respectively. The court found that, in pursuance to a common understanding, that said votes were cast for a person for each of said offices who was not entitled to run in said election, and with the purpose and intention of so marking and distinguishing their ballots, that they would be counted in violation

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



of law for a person who was not entitled to have said ballots so counted. That part of section 3086, Rev. Laws 1910, relative to mutilated ballots, reads: "Ballots bearing any mark as a distinguishing mark shall not be counted." *Held* that, when the facts and circumstances show that any voter so marks or writes on his ballot with the intention of distinguishing it, the same becomes mutilated, within the purview of said section, and should not be counted. *Held*, further, there are sufficient facts and circumstances reasonably tending to sustain the finding of the court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167, 297-299; Dec. Dig. §§ 194, 295.\*]

Error from District Court, Wagoner County; Summers Hardy, Judge.

Quo warranto by W. B. Moss against W. T. Hunt. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 40 Okl. 20, 135 Pac. 282.

Robert F. Blair, of Wagoner (Henry M. Brown, of Wagoner, of counsel), for plaintiff in error. Thomas H. Owen and Joseph C. Stone, both of Muskogee, for defendant in error.

**RIDDLE, J.** This case presents error from the district court of Wagoner county, where in judgment was rendered in favor of defendant in error, defendant below, in a quo warranto proceeding, involving the office of county judge and sheriff. Plaintiff, in substance, alleged in his petition that he was a candidate for the office of county judge of said county as nominee of the Republican party; defendant was a candidate for said office as nominee of the Democratic party; that E. L. Moore was a candidate for the nomination of the Socialist party; that at the election held November 5, 1913, there were cast for said office of county judge 2,332 votes, of which plaintiff received 928, defendant 917, and Moore 483; that plaintiff was duly and legally elected to said office; that, notwithstanding plaintiff's election to said office, the county election board wrongfully and unlawfully declared defendant to be elected, and issued to him a certificate of election. He alleges that the certificate made and returned by the precinct election board in precinct No. 5 fails to state the truth in regard to the votes cast at said precinct; that Precinct Inspector F. B. Wertz caused the counters to sign the certificate required by law in blank before the votes were counted, and required them to leave the certificates and tally sheets in his possession in this condition; that said Wertz wrongfully, fraudulently, and unlawfully did change and cause to be changed said tally sheets and certificates, and did write into them a false return of the votes cast in said precinct, showing 34 votes for plaintiff, when in truth and in fact he received 37, and by showing 50 votes for defendant, when in truth he received only 39; that said county election board canvassed said returns as thus shown. He prays that

he have judgment of the court, declaring him duly elected county judge of said county. Defendant filed his answer, consisting of a general denial, and alleging that in precinct 7 a large number of ballots were mutilated and were counted in favor of plaintiff, when in truth and fact said ballots were illegal and should not have been counted. To this answer, a reply was filed. Upon the issues thus made, the case proceeded to trial before the Honorable Summers Hardy, special judge, on November 22, 1913. A large volume of testimony was introduced, including the ballots from several precincts, among them being precincts Nos. 5 and 7, two of the principal precincts in controversy. By agreement of all parties, the contest over the office of sheriff of said county was, in effect, consolidated with this cause; and the evidence, in so far as applicable, should apply to the issues in that case.

[1-3] At the conclusion of the evidence, the court made separate findings of fact and of law, finding both issues in favor of defendant. The propositions, as stated by counsel for plaintiff, submitted for our consideration for reversal of this cause, are:

"(1) The evidence establishes beyond controversy that plaintiff received 37 votes and defendant received 39 votes at precinct 5, and the court committed reversible error in refusing to so find and decide. (2) The court committed reversible error in permitting counsel for defendant to introduce in evidence the ballots from precinct 5, without first requiring him to establish by a burden of the proof that said ballots were the same ballots which had been cast and in the same condition when offered in evidence as when cast by the electors and counted by the counters. (3) There is no legal evidence in this record reasonably tending to support the findings of the court that plaintiff received 36 votes and defendant received 52 votes and the Socialist candidate received 9 votes, and the court committed reversible error in so finding."

These propositions require the consideration of the evidence. We have carefully read the excerpts of the testimony in the briefs of counsel for both parties and have read the entire record upon the contested points. The first question presented for our consideration is as to whether or not there is any evidence tending to sustain the court's ruling in admitting the ballots in evidence from precinct No. 5; in other words, whether or not said ballots had been sufficiently identified as the ballots cast at said box. While the testimony is anything but satisfactory, yet, from the facts and circumstances before the trial court, we are of the opinion that there was sufficient evidence to warrant the ruling of the court in holding that the ballots sought to be introduced and counted from precinct 5 were the identical ballots cast for the office of county judge in said precinct. We must presume that the ruling of the court in this respect was correct; and the burden is on the party challenging the correctness of this ruling; and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as we say, from the facts and circumstances before the trial court, we are not prepared to say that there was not sufficient evidence before the court to warrant the action of the court. The court, having admitted the ballots in evidence for the purpose of counting them, the question arises: Is the finding of the court upon this contested point reasonably sustained by the evidence?

There were many facts and circumstances, including some physical facts, which indicate to us that the ruling of the court in this regard was against the weight of the evidence. Were we authorized to weigh the evidence, we should be inclined to find this issue in favor of plaintiff. The contest over this precinct was as to whether or not the entire vote cast was 88 or 98. It is admitted that the total vote cast for the office of Corporation Commissioner, including the Democratic, Republican, and Socialist votes in precinct No. 5, was 90; that the total vote cast for the office of United States Senator by the three parties was 90; that the total vote cast for the office of Congressman at large by the three parties was 90; and there are other circumstances tending to show that 88 or 90 votes were all that were cast in said precinct. This was, in effect, the testimony of Mr. Thompson, the judge of said precinct, and one Lomax, the Socialist watcher. Notwithstanding this testimony, which seems to us to be reliable and somewhat of a conclusive effect, the court had before it the ballots and the stubs from which they had been torn, together with all the witnesses; had an opportunity to observe their demeanor on the witness stand, their manner of testifying, their interest or lack of interest; and from all the facts and circumstances, in evidence, the court held that there were 52 votes cast for defendant and only 36 for plaintiff. It must be admitted, under the record in this case, that there is sufficient evidence reasonably tending to sustain the finding of the trial court, and under the settled rule of this court we are not at liberty to disregard the finding of the court. By adding to the number of votes which it is conceded the respective parties received, the vote which the court finds from the evidence that the respective parties received in precinct 5, would show defendant to have been elected by one majority. This case was before this court (Moss v. Hunt, 40 Okl. 20, 135 Pac. 282) upon appeal from a judgment of the trial court sustaining a demurrer to plaintiff's evidence. In an opinion by Chief Justice Hayes, the judgment of the trial court was reversed. The court uses the following language:

"The irregularities of the election officers in precinct 5 relative to the handling of these ballots after they were counted by the official counters in connection with all the circumstances of this case are, in our view, sufficient to discredit their character as the best evidence. We think, under the circumstances, they may be considered; but it is a question of

fact for the jury or the court sitting as a trier of the facts to determine whether they are the identical ballots cast by the voters of this precinct, and to determine whether the greater weight shall be given to the ballots or the evidence of the election judges and the bystanders, who testified as to the result either as ascertained by them from the tally sheets, or as stated by the election inspector at the close of the canvass. Upon a demurrer to the evidence, the weight of conflicting evidence cannot be weighed, and for this reason we think the trial court committed error in sustaining the demurrer to the evidence, and the judgment of the trial court is reversed, and the cause remanded for further proceedings in accordance with this opinion."

It seems that the trial court has conformed to the opinion rendered therein, and has weighed the evidence and decided in favor of plaintiff; and to fail to adhere to its judgment would, in effect, overrule many decisions of this court and disregard a settled and sound principle of procedure.

Under the last proposition, it is contended by plaintiff that the 25 ballots cast for plaintiff and the 5 cast for defendant in precinct 7 were not mutilated or distinguished by the voters, and that the court committed prejudicial error in so holding and in failing to count these ballots. The undisputed facts show that the ballots furnished this precinct had no names printed thereon for the office of justice of the peace and constable on the Republican ticket; in fact, there was no one nominated in this precinct by the Republican party for either of these offices, and for this reason there were no names of any candidates printed on the ticket for either of these offices. It seems that the question arose, after the polls had been opened in precinct 7, as to what should be done in regard to voting for a candidate for constable and justice of the peace. It appears that one of the election officers advised the voters that they could write in names of the parties to be voted for for these offices. On 25 of the ballots cast for plaintiff and 5 of the ballots cast for defendant, there were written in the blank spaces the names of Clark and Taylor, for constable and justice of the peace, respectively. The trial court excluded these ballots, and held they were mutilated and were illegal. The court made the following finding:

"At precinct No. 7 the total vote as disclosed by a recount shows as follows: Moss 37; Hunt 28; Casaver 29; Long 18. Upon a recount of these ballots it appeared that of the votes cast a great number had written on the face thereof various words, indicating an intention upon the part of the voters to vote for one Clark and one Taylor as candidates of the Republican party for justice of the peace and constable of that precinct. The names of Clark and Taylor were spelled in various ways, and one ballot, instead of containing the names of candidates, had written in pencil the words 'justice of the peace' and 'constable.' Upon the face of the recount as above outlined, the defendant Hunt is shown to have been elected to the office of county judge, and the plaintiff Casaver is shown to have been elected to the office of sheriff. If the votes in No. 7, which are called in question, be sustained as legal ballots, then the result will be as just stated. If they be de-

clared illegal, both defendants will be entitled to recover. \* \* \*

"Clark and Taylor, nor either of them, had been nominated by the Republican party, nor had their names been placed upon the ballot as nonpartisan candidates, and they were not entitled under the law to run in said election, nor to have the electors cast their votes for them. There is no proof, in fact, that any such persons existed.

"It is apparent from the testimony that the voters casting the marked ballots did so in pursuance of a common understanding between themselves and at the suggestion of one of the election officials that they would vote for a person for each of said offices who had not legally become a candidate and who was not entitled to run in said election for said office, and with the purpose and intention of so marking and distinguishing their ballots that they would be counted in violation of law for a person who was not entitled to have said ballots so counted."

The court then proceeds to construe certain provisions of the Constitution and election laws, and holds that all ballots upon which names of Clark and Taylor are written are illegal, as stated. The court construes the provisions of the Constitution and the laws enacted in pursuance thereof, providing for the nomination of candidates for all offices, to be mandatory; and that no one is entitled to have his name appear upon the ticket at the general election who was not the regular nominee of his party, or who obtained the right to have his name placed upon the ticket by reason of having been nominated by petition in the manner provided by law; and that, as neither Clark nor Taylor had been nominated in either manner, there was no authority for either of them to be a candidate, and hence writing their names upon the ballots was unauthorized and illegal. We are of the opinion that the provisions of the Constitution and the election laws passed in pursuance thereof are mandatory, and that no one can be a candidate and have a right to have his name placed upon the ticket at any general election who has not been nominated either at the primary election or by petition, as provided by law, except under certain contingencies, where the committees of the respective parties are given the power to select a nominee; and no doubt it was intended by the framers of the Constitution that these provisions should be mandatory and strictly followed and enforced. The determination of this question, however, is not controlling in the determination of the point as to whether or not the ballots in precinct 7 were mutilated and thereby distinguished, under the provision of the election law now in force and which was in force and controlling at the time of the general election in 1912. Had section 29, c. 111, p. 226, Sess. Laws 1910, become a law and had been in force, the question would be simple and easy to solve; and it would be very clear that the court was correct in excluding the ballots as mutilated. This section provides:

"No mutilated ballots shall be deposited in the ballot box and if any mutilated ballots shall be found therein, they shall not be counted, ex-

cept for the purpose of ascertaining the total number of votes cast in the precinct. All mutilated ballots shall be returned in the envelope marked 'Mutilated Ballots.' The words 'Mutilated Ballots' as used in this section shall mean any ballot upon which appears any defacement, mutilation or distinguishing mark by which it could be identified."

Under this section, it would be immaterial as to the intention of the voter, but if from any mark or word or name written upon the ballot which would have the effect to distinguish it, then it would be a mutilated ballot. In other words, by this act the Legislature has construed the act, and the court is required to follow such construction; but this section never became effective, and the law in force governing the election in question was materially different. That part of section 3086, Rev. Laws 1910, relating to mutilated ballots, provides: "Ballots bearing any mark as a distinguishing mark, shall not be counted."

We are of the opinion that, in view of this language, before a ballot should be held illegal as mutilated, the facts and circumstances should show that it was the intention of the voter to so mark it, in order that it might be distinguished; and it seems that the intent of the voter must govern. It is true that it is the province of the court, or a jury trying the case, to determine the intent of the voter from the facts and circumstances, including his acts, and the character of the mark or other writing or sign made on the ballot. In this case the court finds that the names written upon the ballots were written by the voters with the intention and for the purpose of distinguishing such ballots, so they would be counted in violation of law for a person who was not entitled to have said ballots so counted. We are unable to say that the facts and circumstances were not sufficient to sustain the finding of the court. We are therefore of the opinion that, in view of the findings of the court, the ballots in question were mutilated, and they were illegal. There is no decision of this court construing the statute in force on this point and governing this election, yet there are decisions of similar import, and we cite a few below: *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565; *McClelland v. Erwin*, 16 Okl. 622, 86 Pac. 283; *Bloedel v. Cromwell*, 104 Minn. 487, 116 N. W. 947; *Weeks v. Kip*, 64 N. J. Law, 61, 44 Atl. 856; *Chamberlain v. Wood*, 15 S. D. 216, 88 N. W. 109, 56 L. R. A. 187, 91 Am. St. Rep. 674; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270.

In none of the foregoing decisions was the statute under consideration the exact statute which is in force in this state and governed the election of 1912. It cannot be doubted, however, that the statutes which were involved and construed by the courts in the foregoing cases, as well as the statute under consideration, were all enacted for the purpose of maintaining the secrecy of the

ballot, to the end that fraud and corrupt elections might be prevented and the purity of the ballot upheld. Maintaining the secrecy of the ballot is simply one of the means to this end; that is, to prevent election frauds. The general rule is that the voter should be held, on the one hand, to a strict performance of those things which the law requires of him, and, on the other, relieving him from the consequence of a failure on the part of the election officers to perform their duty according to the letter of the statute, where such failure has not prevented a fair election. *McCreary, on Elec. § 724; Rampendahl v. Crump, 24 Okl. 873, 105 Pac. 201.* We do not hold that where election officials inadvertently, or otherwise, fail to print the names of a regular candidate upon the ticket, the writing of the names of such candidate upon the ticket, in good faith by the voter, would, under our statute, constitute a mutilated ballot and render the same illegal. But we hold that there are sufficient facts and circumstances in this case, tending to support the finding of the court; and that the court having held that the ballots cast in precinct 7 and upon which certain names were written as candidates for the offices of justice of the peace and constable were so written by the voters with the intent and purpose on their part to have said votes cast illegally, and counted for persons who were not entitled to be candidates, such holding will not be reversed. While the court does not specifically hold that such names were written on the ballots with the intention to write a distinguishing mark thereon, yet we think, from the facts found by the court, the intent may reasonably be inferred from the finding the court made.

For the foregoing reasons, the judgment of the trial court is affirmed. All the Justices concur.

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**SHARP v. CITY OF GUTHRIE et al.**  
(No. 6213.)

(Supreme Court of Oklahoma. July 14, 1914.  
Rehearing Denied Jan. 9, 1915.)

(*Syllabus by the Court.*)

**1. MUNICIPAL CORPORATIONS (§ 721\*)—PARKS—DEDICATION—INJUNCTION—ACTION BY TAXPAYER.**

Where pursuant to the Act of May 2, 1890, c. 182, 26 Stat. 81, and Act May 14, 1890, c. 207, 26 Stat. 109, the United States, acting through town-site trustees, filed with the register of deeds of Logan county, a plat of a certain tract of land surveyed into streets, alleys, lots, and blocks and known as the town site of "Capitol Hill," whereon it is shown that a part thereof embracing 10.62 acres was designated as "Capitol Park"; and where the settlers thereon thereafter obtained titles to said lots as shown upon said plat, some of which abutted on said park; and where with intent to act pursuant to Act May 2, 1890, and certain instructions from the land office said trustees on July 21, 1890, made, executed, and delivered a deed to the city of Guthrie, of which said Capitol Hill was then and still is a part, purporting to convey said park to the city; and where the city

thereafter took possession and from time to time expended a large sum of money from its public funds in improving the same as a park, and where said deed was afterwards canceled, and on April 3, 1913, with intent to effectuate the trust and pass the title to said park from the United States to the municipality, the President of the United States made, executed, and delivered to the city of Guthrie a deed thereto pursuant to said act—held, that such was in legal effect a grant by the United States to the municipality and a dedication of said 10.62 acres for park purposes, and that an action will lie in favor of a resident taxpayer of the municipality to enjoin its diversion from those purposes to a private use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1542-1544; Dec. Dig. § 721.\*]

**2. MUNICIPAL CORPORATIONS (§ 721\*)—PARKS—DEEDS—TRUST—REPUDIATION.**

Where a statute empowers a conveyance of the title to land to a municipality for park purposes and the municipality takes title there to under a deed made, executed and delivered pursuant thereto, the municipality takes in like manner as if said statute were written into the deed, and where the statute impresses the land thereby conveyed with a trust the municipality will not be heard to repudiate the trust or be permitted to divert the property to another use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1542-1544; Dec. Dig. § 721.\*]

Error from District Court, Logan County; A. H. Huston, Judge.

Action by E. G. Sharp against the City of Guthrie and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with direction.

Hepburn & Chappell and Devereux & Hildreth, all of Guthrie, for plaintiff in error. Dale & Bierer and Tibbetts & Green, all of Guthrie, for defendants in error.

**TURNER, J.** On May 23, 1913, E. G. Sharp, plaintiff in error, a resident taxpayer of the city of Guthrie, in the district court of Logan county, sued defendants in error in effect to enjoin the city from conveying what is known on the official plat of the city as "Capitol Park," to the Methodist University for the sum of one dollar. There was trial of the cause to the court and judgment for defendants, and plaintiff brings the case here.

[1, 2] He assigns that the court erred in refusing to grant him the relief prayed. The record discloses: That on December 16, 1891, the United States, pursuant to Acts of May 2, 1890, and May 14, 1890, acting through town-site trustees, on February 28, 1898, filed with the register of deeds of Logan county a plat of a certain tract of land surveyed into streets and alleys, lots, and blocks, and known as the "Town Site of Capitol Hill," which was duly recorded, whereon it is shown that a part of said tract consisting of 10.62 acres was designated as "Capitol Park." That at that time the United States was the owner in fee of all the land embraced therein; and that the settlers thereon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hereafter obtained titles to said lots as shown upon said plat, some of which abutted on said park. That said park was reserved pursuant to section 22 of the Act of May 2, 1890 (U. S. Comp. St. 1913, § 5023), the pertinent part of which reads:

"\* \* \* Provided, that hereafter all surveys or town sites in said territory shall contain reservations for parks \* \* \* and for schools and other public purposes, embracing in the aggregate not less than ten or more than twenty acres; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities."

The record further discloses: That, with intent to act pursuant thereto and certain instructions from the General Land Office, the town-site trustees of Capitol Hill on July 21, 1894, made, executed, and delivered a deed to the city of Guthrie, of which Capitol Hill was then and still is a part, purporting to convey said park to the city. The pertinent part of said deed reads:

"Now, therefore, said parties of the first part as such trustees by virtue of the power vested and conferred upon them by the terms of said act, and the aforesaid instructions from the General Land Office, by these presents, do grant, convey and confirm unto the said party of the second part all the following lands situated in the town site of Capitol Hill of Logan county, and territory of Oklahoma, described as follows: [Here the land in question is described by metes and bounds.] To have and to hold and maintain the same for the sole and separate use, benefit and purpose of a public park for public uses and no other."

That thereupon the city took possession of said park and, after the creation of a park board, expended \$2,600 of the public funds of the city, raised for that purpose, in improving the same as a park, and in 1908 voted \$180,000 in bonds, the proceeds of \$30,000 of which was used in paving the streets through and around said park and 150,000 in the construction of a convention hall within its confines. It later appearing that said deed was insufficient to effectuate the trust (22 L. D. 867) and pass the title hereto to the municipality, on April 3, 1913, a deed to said park was issued by the President of the United States to the city, the pertinent part of which reads:

"Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Guthrie, Okl., whereby it appears that pursuant to the provisions of section 22 of the Act of May 2, 1890, the city of Guthrie, Logan county, is entitled to a patent for the reservations designated as reserved for schools, block 80, containing 2.07 acres, and Capitol Park, containing 1.62 acres aggregating 12.69 acres on the official plat of the town site of Capitol Hill, now a part of the city of Guthrie. Now know that there is granted by the United States unto the said city of Guthrie the tracts of land above described; to have and to hold the said tracts of land, with the appurtenances thereof, unto the said city of Guthrie, and to its successors forever."

The record further discloses that on May 1, 1913, a contract was entered into between the city and the Oklahoma Methodist Univer-

sity in which the latter agreed to support and maintain perpetually an educational institution upon said park as a standard university of high class and grade; that thereafter the city of Guthrie, pursuant to an ordinance and referendum vote of the people of the city for the express consideration of one dollar, made and executed and placed in escrow in the Guthrie Savings Bank a warranty deed to the land embraced in said park "to be delivered to said Methodist University of Oklahoma upon the procurement by" it "of a permanent endowment fund of \$250,000 in money or securities or both," and when the same was sought to be delivered this suit was brought to enjoin the delivery of said deed and secure its cancellation. Although a dedication by a deed or other writing is unnecessary, the filing of the plat and the execution and delivery of the deeds aforesaid was conclusive proof of a dedication of the tract of land in question for park purposes and a conveyance thereof by the United States to the city in trust to the use of the public for park purposes only. In *Davenport v. Buffington et al.*, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377, the facts were that in 1870 the Cherokee Nation passed an act reserving a tract of land one mile square at every railroad station upon its lands and authorized the principal chief to appoint commissioners to locate, survey, and sell the same as sites for towns. This was done where Vinita now stands, and later lots were advertised and sold as shown on said plat, which was duly filed and approved by the National Council of said nation. Thereafter said council created "Downingville," a municipal corporation, which took possession and control of the streets, alleys, and public parks as shown on said plat and expended money on said parks, as here. After a lapse of some 23 years, to wit, on December 4, 1896, said council passed another act authorizing the town commissioners of that nation to survey and plat said parks into lots and sell them, which was done and possession yielded the purchaser. Thereafter a resident taxpayer of Downingville, among others, set forth these facts and averred the illegality of the sale and that the purchase thereunder was void and prayed and obtained an injunction against the purchaser from constructing a residence on the lot so purchased. In reviewing the action of the trial court on the demurrer to the petition, the court, in effect, held that the fact set forth was in legal effect a grant of this land in controversy by said nation for the use of the public for park purposes, and that a resident taxpayer of the municipality had a right to enjoin its diversion from those purposes to a private use. The court said:

"The designation of this land as parks or commons on the plat of the town of Downingville, which was accepted and approved by the nation in 1871, was, in legal effect, a grant of the land

for the exclusive use of the public for park purposes, and a warranty on the part of the nation, which owned it, that it would never claim or use it for any other purpose. The purchase of lots in accordance with this plat by the inhabitants and taxpayers of Downingville, and their imposition upon themselves and their expenditure of taxes to care for and improve the parks, was an acceptance of this grant and covenant. *Bell v. Atl. & P. R. Co.*, 63 Fed. 417, 419, 11 C. C. A. 271, 272; *Beatty v. Kurtz*, 2 Pet. 566, 583, 7 L. Ed. 521, 527; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540, 542; *Le Clercq v. Gallipolis*, 7 Ohio, pages 218, 221, pt. 1 [28 Am. Dec. 641]; *Princeville v. Auten*, 77 Ill. 325, 330; *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255. After the mayor and town council of the town of Downingville was incorporated by the Cherokee Nation, and after it took possession and control of these parks, this grant and acceptance became a threefold contract. It was an agreement between the nation and the public—the people for whose use the title of the parks was held—an agreement between the mayor and the town council of the town of Downingville and these people, and an agreement between the nation and the municipality; and all parties to this agreement were equally bound to hold and keep the land embraced within these parks sacred to the exclusive use of the public for park purposes.”

Defining the interest of the complaining taxpayer in the parks to be that of cestui que trust and that the suit, in effect, was to preserve and enforce a trust, the court said:

“Now, the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee Tarrant is one of the cestuis que use for whom these parks are held in trust, and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses.”

It would serve no useful purpose to cite any considerable number of authorities in support of a doctrine so well established. But see *U. S. v. Ill. Central Ry. Co.*, 154 U. S. 225, 14 Sup. Ct. 1015, 38 L. Ed. 971. In *Perry Public Library Ass'n et al. v. Lobsitz et al.*, 35 Okl. 576, 130 Pac. 919, the facts were that the city of Perry accepted a gift of \$10,000 from Andrew Carnegie on condition that the city pledge itself, which it did, to furnish a suitable site for the building and maintenance of a free library therein at a cost of not less than \$1,000 a year. After the building was erected and the library installed, the city council sought, among other things, the possession of said building and to establish therein offices of the city. In a suit by the taxpayers to restrain it from so doing, in the syllabus we held:

“That the title to said building was not absolute in the city free of any conditions and restrictions, but that the city's title to same is that of a trustee; and that it holds same for the benefit of the public; and that a court of equity has jurisdiction to compel the execution

of the trust in compliance with the terms of the gift; and that the action of the officers of the city in attempting to divert the building or a portion thereof to the above-named uses may be enjoined at the suit of resident taxpayers of the city and beneficiaries of the trust.”

We are therefore of opinion that this suit will lie in favor of the complaining taxpayer, and that the court erred in refusing to perpetually enjoin the delivery of the deed by the escrow and cancel the same as prayed. It will not do to say that the deed executed by the president of the municipality conveys the fee unimpressed with a trust, and hence the city had a right to sell and convey the land in virtue of authority granted by that part of its charter which reads:

“It shall have power to make contracts, to take and acquire property, by purchase, condemnation or otherwise, necessary for the public good within or outside of the city limits, and to own, hold, sell, lease, convey or otherwise dispose of any real or personal property within or outside of the city limits.”

This for the reason that the statute empowering the conveyance of the title to the land from the United States to the municipality provided the same should be for park purposes, and, when the municipality took title thereto under the deed, it took in like manner as if the empowering statute were written in the deed. Hence, as the empowering statute impressed the land conveyed with a trust, by accepting the deed defendant will not be heard to repudiate the trust or be permitted to appropriate the property to another use. 22 Am. & Eng. Enc. Law 1125; *Dill on Munic. Corp.* § 575. In other words, as stated in *Choate v. Trapp*, 224 U. S. 685, 32 Sup. Ct. 565, 56 L. Ed. 941: “Patents issued in pursuance of statute are to be construed in connection with the statute. \* \* \*” In that case the Curtis Act exempted to certain Indians their allotments from taxation, but the patent said nothing about it. In declaring their allotments nontaxable, the court in effect held that that part of said act exempting said lands from taxation should be considered as if written into the patent. See, also, *Allen et al. v. Trimmer, Treas.*, 144 Pac. 795, decided by this court but not yet officially reported. *Owen et al. v. City of Tulsa et al.*, 27 Okl. 264, 111 Pac. 320, relied on by defendant in error, is not in point here. There we held that, for the reason the deed to the city contained no clause limiting the title or use of the land conveyed, the same could be sold by the city in virtue of power vested in the city by its charter. Here we hold that, such clause appearing in the deed, the city has no right to sell in virtue of the terms of its charter, for the reason that the same has no application to land impressed, as here, with a trust.

The cause is therefore reversed and remanded, with direction to grant the relief prayed. All the Justices concur.

(45 Okl. 326)

**BENNETT v. MEEK et al.** (No. 5372.)  
(Supreme Court of Oklahoma. Jan. 9, 1915.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 786\*)—FRIVOLOUS APPEAL—DISMISSAL.**

Where, upon examination of the petition in error and motion to dismiss, it is clearly disclosed that the appeal is manifestly frivolous and without merit, and taken for delay, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3128; Dec. Dig. § 786.\*]

Error from County Court, Oklahoma County; John W. Hayson Judge.

Action by J. M. Meek and others against S. P. Bennett and others. Judgment for plaintiffs, and defendant Bennett brings error. Dismissed.

Harris & Nowlin, of Oklahoma City, for plaintiff in error. W. S. Pendleton, of Shawnee, for defendants in error.

**RIDDLE, J.** The parties will be designated here as they were in the trial court. Plaintiff sued defendants in the court below upon a promissory note in the sum of \$300. Judgment was rendered by default against all defendants, except S. P. Bennett, who filed an answer consisting of a general denial. Plaintiff filed a motion for judgment on the pleadings, which was by the court sustained. From the judgment thus rendered, defendant Bennett prosecutes error.

It appears from the petition in error and motion to dismiss that there is no merit in the appeal; that same is frivolous, and prosecuted for delay. It was said by this court in the case of *Skirvin v. Bass Furniture & C. Co.*, 143 Pac. 190 (not yet officially reported):

"Where, upon the examination of the petition in error and the motion to dismiss, it is clearly disclosed that the appeal is manifestly frivolous and without merit, the appeal will be dismissed." *Skirvin v. Goldstein*, 40 Okl. 315, 137 Pac. 1176.

Following the rule laid down in the cases supra, this cause should be dismissed; and it is so ordered. All the Justices concur.

(47 Okl. 13)

**LOVETT et al., Creek County Com'rs, v. LANKFORD et al.** (No. 6059.)  
(Supreme Court of Oklahoma. Sept. 29, 1914.  
Rehearing Denied Jan. 9, 1915.)

(*Syllabus by the Court.*)

**1. STATES (§ 191\*)—BANKS AND BANKING—"SUIT AGAINST THE STATE"—RIGHT TO MAINTAIN.**

Plaintiffs in error presented their claim to the bank commissioner and the banking board, demanding payment out of the depositors' guaranty fund. Payment was denied, upon the ground that such deposit was not protected by said fund. Thereupon petition for writ of mandamus was filed in the district court of Oklahoma county. Alternative writ was issued, which, on final hearing, was discharged, and error is prosecuted to this court. *Held*, that the bank commissioner and the banking board are

a part of the executive branch of the state government, and a suit in mandamus, seeking to compel said officers in their official capacity to allow and pay said claim out of the depositors' guaranty fund, is a suit in effect against the state, and cannot be maintained without the consent of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.\*]

For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

**2. MANDAMUS (§ 64\*)—OFFICIAL ACTS—EXERCISE OF DISCRETION—BANKS AND BANKING.**

The bank commissioner and the banking board constitute a part of the executive branch of the state government, and the duties devolving upon said officials require the exercise of judgment and discretion. *Held*, in the absence of allegation and proof of fraud, or arbitrary action, their decision in a matter within their jurisdiction will not be reviewed or controlled by a writ of mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 128, 129; Dec. Dig. § 64.\*]

**3. BANKS AND BANKING (§ 15\*)—GUARANTY FUND—COUNTY DEPOSITS.**

The facts in this case examined, and *held* to bring the case within the rule announced by this court in the case of *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Company*, 33 Okl. 535, 126 Pac. 556.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 12-17; Dec. Dig. § 15.\*]

(*Additional Syllabus by Editorial Staff.*)

**4. BANKS AND BANKING (§ 15\*)—"GENERAL DEPOSIT"—GUARANTY FUND.**

Deposits of a county, made pursuant to Rev. Laws 1910, § 1540, providing for ample security and directing them to be made under strict legislative safeguards, do not come within the meaning of a "general deposit," protected by the depositors' guaranty fund, created pursuant to section 298 et seq.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 12-17; Dec. Dig. § 15.\*]

For other definitions, see Words and Phrases, First and Second Series, General Deposit.]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Mandamus by Charles W. Lovett and others, County Commissioners of Creek County, against J. D. Lankford and others, composing the Banking Board of the State, and the Farmers' & Merchants' Bank of Sapulpa. Judgment for defendants, and plaintiffs bring error. Affirmed.

V. S. Decker, Co. Atty., of Sapulpa, Dale & Blier, of Guthrie, Wm. T. Hutchings, of Muskogee, and Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiffs in error. Charles West, Atty. Gen., and Jos. L. Hull, Asst. Atty. Gen., for defendants in error.

**RIDDLE, J.** This proceeding in error is prosecuted from a judgment of the district court of Oklahoma county in favor of defendants. Plaintiffs, as commissioners of Creek county, filed their petition in the district court against the state banking board and the Farmers' & Merchants' Bank of Sapulpa, praying for a writ of mandamus. Defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



\* \* \* The bank commissioner shall be chairman of said board. Said board shall have the supervision and control of the depositors' guaranty fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund."

The latter part of section 2 of this act provides that the bank commissioner shall execute a bond in the sum of \$25,000, and each member of said board shall execute a bond in the sum of \$5,000 for the faithful performance of his duty. The latter part of paragraph 2, section 6, of the amendatory act provides for a levy of certain assessments, and then provides:

"Such fund so created shall be known as the depositors' guaranty fund of the state of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act."

Certain other provisions are made, which are not material here. Part of section 300, Rev. Laws 1910, provides:

"If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all banks which have failed, having valid claims against said depositors' guaranty fund, the state banking board shall issue and deliver to each depositor having any such unpaid deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six per cent. interest."

The above section has been amended by section 6, c. 22, Sess. Laws 1913, which provides for the issuance of certificates of indebtedness, to be known as "depositors' guaranty fund warrants of the state of Oklahoma." Section 302, Rev. Laws 1910, provides:

"Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

Section 303, Id., provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 304 provides that the bank commissioner shall take charge of books, records, and assets of every description of such bank or trust company and collect debts, dues, and claims belonging to it, and upon order of court may compromise or settle such claims and sell certain property belonging to such bank and enforce a personal liability of its stockholders. In considering sections 300 and 303 together, it will be seen that the law has specifically confided to the banking board and the bank commissioner the duty and authority to determine the validity of claims against the depositors' guaranty fund. By this section it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. *Lankford v. Okla. Engrav. & Printing Co.*, 35 Okl. 404, 130 Pac. 278.

In the case of *State ex rel. v. Cockrell*, supra, this court again stated:

"The state bank commissioner, or the banking department, is a part of the executive department of the state, and is intrusted with the receipt, custody, and disbursement of funds of failed banks."

Thus, if defendants in error are part of the executive branch of the state, charged with the exercise of judgment and discretion in the administration of the law under consideration, their acts will not be controlled by mandamus. This is too well settled to now be an open question. And this is true, even where those duties require an interpretation of law, and when there are no controverted facts. The rule is clearly stated in the case of *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354, in the following language:

"The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts. *Brashear v. Mason*, 6 How. 92 [12 L. Ed. 357]; *United States ex rel. Goodrich v. Guthrie*, 17 How. 284 [15 L. Ed. 102]; *Commissioner of Patents v. Whiteley*, 4 Wall. 522 [18 L. Ed. 335]; *Georgia v. Stanton*, 6 Wall. 50 [18 L. Ed. 721]; *Gaines v. Thompson*,



7 Wall. 347 [19 L. Ed. 62]; *United States ex rel. McBride v. Schurz*, 102 U. S. 378 [26 L. Ed. 187]; *Butterworth v. Hoe*, 112 U. S. 50 [5 Sup. Ct. 25, 28 L. Ed. 656]; *United States v. Lynch*, 137 U. S. 280 [11 Sup. Ct. 114, 34 L. Ed. 700]."

See, also, *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109; *Norris v. Cross*, 25 Okl. 287, 105 Pac. 1000; *County Commissioners v. State*, 31 Okl. 196, 120 Pac. 913; *Molacek v. White*, 31 Okl. 693, 122 Pac. 523; *Dunham, City Clerk of Guthrie, v. Ardery*, 143 Pac. 331 (not yet officially reported).

Applying the doctrine stated in the quotation from the foregoing case, it renders the question presented here rather simple. Defendants in error constitute a part of the executive department of the state. They are required to pass upon the validity of the claim in question, and as to whether it was protected by section 303, *supra*, and was entitled to be paid out of the depositors' guaranty fund. They did not fail to pass upon the question presented to them; but they did decide it, and construed the law adversely to the contention of plaintiffs, holding that such claim was not protected by the depositors' guaranty fund. It was their duty to construe the law and apply it to the facts before them. They evidently followed the construction and application of the statute by this court in the case of *Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, *supra*. Their decision in this regard is upheld by us in this opinion. From the foregoing, it is clear that defendants constitute a part of the executive department of the state government, and that they were vested with the exercise of discretion and judgment in the premises; and their action cannot be reviewed or reversed in a proceeding for writ of mandamus.

[3, 4] Approaching the third question raised: The conclusion we have reached upon the other two questions renders it unnecessary to consider and determine this question, although properly before us. We have carefully read the record and all that counsel have said in discussing this point, and with much interest listened to the oral argument, and have considered all in connection with the able and logical opinion in the case of *Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, *supra*, and to our minds the facts of this case are so similar to the facts of that case that in principle there can be no distinction made.

It cannot be seriously questioned that under the bank guaranty law, as construed by this court in the *Columbia Bank & Trust Company Case*, *supra*, no state funds deposited in the manner provided by law in any bank are pro-

tected by the bank guaranty fund. The principal distinction which can be made under the law governing the deposit of state funds and that of county funds is that the State Treasurer, with the approval of the Governor and Attorney General, is to select the depositories for state deposits, and such depositories shall pay interest on the state funds at the rate of 3 per cent., and as additional security, the State Treasurer is authorized to take first mortgage bonds on farm lands, but is prohibited from taking surety company bonds; while, in making deposits of county funds, the county commissioners are to select the depositories and are permitted to accept surety bonds, but are not authorized to accept first mortgage bonds on real estate. In the deposit of state funds, the Governor, Attorney General and the State Treasurer are to approve the securities; in the deposit of county funds, a commission composed of the county judge, county attorney, and county clerk shall pass upon and approve the securities. In principle, in construing and applying this provision of the law, it will be seen that there can be no real distinction made between a deposit of state funds in a depository authorized to receive the same, and that of county funds; and this is true, whether this court in that case placed its decision upon the ground that the school fund there was otherwise secured, or on the ground that the statute providing for the deposit of the school funds was a specific provision relating to a special subject, and both acts were passed at the same session of the Legislature, or if the deposit there was a special and not a general deposit, or if it was upon all the grounds mentioned. This court, in the *Columbia Bank & Trust Company Case*, *supra*, in effect, held that the deposits of the state were not general deposits, covered and protected by the depositors' guaranty fund. So we hold in this case that the same rule applies to the deposits of Creek county, made in pursuance to the provisions of the statute, prescribing and providing for ample securities, and directing them to be made under strict legislative safeguards, does not come within the meaning of a general deposit, under section 1540, Rev. Laws 1910, protected and covered by the depositors' guaranty fund. Counsel approve the rule announced in the *Columbia Bank & Trust Company Case*, and say that it is a proper construction of the section of the statute here under consideration; and to do so is equivalent to an admission in advance that the conclusion we have reached on this point is likewise sound.

From the foregoing conclusions, the judgment of the trial court must be affirmed. All the Justices concur.

(45 Okl. 386)

NELSON et al. v. DAVIDSON. (No. 8813.)  
(Supreme Court of Oklahoma. Jan. 9, 1915.)

(Syllabus by the Court.)

**1. JUSTICES OF THE PEACE (§ 183\*)—ACTION—PLEADINGS—JUDGMENT—APPEAL.**

Where plaintiff institutes suit in a justice court on a bill of particulars which is sufficient to support a cause of action either upon an express or an implied contract, and the testimony of plaintiff shows that defendants were indebted to him upon an express contract, and where defendants deny that any express contract was made, and deny they were indebted to plaintiff, there is no inconsistency between the pleadings, testimony, or judgment prejudicial to the rights of defendants.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 705-714; Dec. Dig. § 183.\*]

**2. APPEAL AND ERROR (§ 1027\*)—REVIEW—HARMLESS ERROR.**

After an examination of the entire record, it does not appear that the errors complained of have resulted in a miscarriage of justice, or that any substantial statutory or constitutional right has been violated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by W. H. Davidson against Pete and C. C. Nelson. Judgment for plaintiff before a justice was affirmed in the superior courts, and defendants bring error. Affirmed.

Brook & Brook, of Muskogee, for plaintiffs in error.

RIDDLE, J. The parties will be designated as they were in the trial court. This action was instituted by filing a bill of particulars in a justice of the peace court of Muskogee county by plaintiff against defendant for recovery of \$165, alleged to be due, after allowing all just credits, etc. Upon judgment for plaintiff in the sum of \$65.50 and costs in the justice court, the cause was appealed to the superior court of said county. Upon a trial in the superior court to a jury, judgment was rendered for plaintiff in the sum of \$65, less a credit set up in a counterclaim of \$30. From this judgment, defendants prosecute this appeal by filing their petition in error with case-made attached. Defendants allege the following assignments: (1) Error in overruling motion for new trial; (2) error in not directing the jury to return a verdict for defendants; (3) error in refusing to set aside the verdict of the jury; (4) error in rendering judgment upon the verdict.

Plaintiff testified, in substance, that he entered into a contract with defendants, whereby they promised to pay him \$15 per month rent on a certain lot. Defendants by their testimony denied this contract, but there is nothing in their testimony to show they did not owe him rents upon an implied contract.

[1, 2] The only point raised in this court

under the various assignments of error is that, as plaintiff sued upon an express contract, and that he was permitted to recover upon a quantum meruit, therefore the judgment is not supported by the evidence and the pleadings. This contention is not sound. The bill of particulars was sufficient to support a cause of action arising upon an express contract or either upon an implied contract. If the testimony of plaintiff was true, there was an express contract. If the testimony of defendants was true, there was no express contract, but their testimony is not inconsistent with the fact that they were due plaintiff something upon an implied contract, and this is also permissible under the law. Section 6005, Rev. Laws 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

We are of the opinion that this record presents a case to which the above-quoted section of the statute is applicable and should be applied. After examining the entire record, we are clearly of the opinion that no injustice has been done; and the judgment of the trial court is affirmed. All the Justices concur.

(45 Okl. 208)

TRACY et al. v. DENNIS. (No. 6547.)  
(Supreme Court of Oklahoma. Jan. 5, 1915.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 568\*)—SETTLEMENT OF CASE—MADE—NOTICE.**

Where no notice of the time of settlement of a case-made is given or waived, and there is no appearance of the opposite party either in person or by counsel, a case-made so settled is a nullity, and no jurisdiction is vested in this court to decide any question arising thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.\*]

Error from County Court, Creek County; Warren H. Brown, Judge.

Action between Joe Tracy and another and J. M. Dennis. From the judgment, the parties first mentioned bring error. Dismissed.

Pryor & Rockwood, of Sapulpa, for plaintiffs in error. Wm. L. Cheatham, of Bristow, for defendant in error.

RIDDLE, J. Motion is filed to dismiss this appeal, on the ground that no notice was given of the time and place of allowing and settling the case-made, and that same was allowed and settled without notice to defendant in error; that defendant in error made no appearance or suggestion of amendments,

nor did he otherwise waive notice or a right to be present at the time said case-made was settled. Plaintiffs in error concede the existence of this state of facts. The motion to dismiss is sustained. *Moore v. Howard Mer. Co.*, 40 Okl. 491, 139 Pac. 524; *Wyant v. Wheeler*, 38 Okl. 68, 132 Pac. 137. All the Justices concur.

(44 Okl. 549)

LISCUM v. HENDERSON-STURGIS PIANO CO. (No. 3810.)

(Supreme Court of Oklahoma. Jan. 9, 1915.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 130\*)—JUDGMENT—CONCLUSIVENESS.

Where a judgment of a justice court appears to have been regularly obtained, and where it appears from the transcript of the justice's docket that such justice had jurisdiction over the persons and subject-matter in controversy, such judgment not appealed from is final and constitutes a bar to a subsequent action over the same subject-matter by the same parties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130;\* *Judgment*, Cent. Dig. §§ 989, 1011, 1044, 1153.]

Commissioners' Opinion, Division No. 2. Error from District Court, Pawnee County; L. N. Poe, Judge.

Action in replevin by the Henderson-Sturgis Piano Company against Fred S. Liscum. Judgment for plaintiff, and defendant brings error. Reversed.

Fred S. Liscum, of Pawnee, in pro. per. Frank C. Shoemaker, of Pawnee, for defendant in error.

HARRISON, C. The decisive question involved herein is whether the piano company is concluded by a judgment of a justice of the peace court not appealed from. One George E. Clark brought suit in the justice court against D. Frank Johnson on an account and attached the piano in controversy here. The piano company intervened and claimed the piano. When the cause came on for trial, judgment was rendered in favor of Clark and against Johnson by default; Johnson having been summoned by publication and not being present. Thereafter the issue between Clark and the piano company as to whom the piano belonged was determined by the verdict of the jury against the piano company. In due time the piano company appealed from the judgment of the justice court. The appeal was dismissed by the district court and the cause sent back to the justice court with instructions to execute the judgment. Subsequently the piano company filed a motion to reinstate the appeal, which motion was later withdrawn. The cause was sent back to the justice court with instructions to execute the judgment, which instructions the justice court followed, and the piano was sold to satisfy the judgment

in favor of Clark against Johnson. Fred S. Liscum, plaintiff in error herein, purchased the piano at the execution sale. Later on, the piano company brought this action in the district court against Liscum for the piano. Liscum answered, setting up the judgment of the justice court which had not been appealed from, as a bar to the piano company's right of action. Judgment was rendered in favor of the piano company and Liscum appealed, relying principally upon the proposition that the judgment of the justice court, not having been appealed from, was final and constituted a bar to the piano company's recovery in this action. The piano company, defendant in error here, contends that the judgment of the justice court was void for want of jurisdiction and should be treated as a nullity. This contention cannot be sustained. The transcript of the justice's docket, which is a part of this record, shows it to have been regular in all the proceedings. It shows that the suit was brought by Clark against Johnson; that summons was issued to Johnson and returned "not found"; that thereafter, upon proper affidavit, an order was made for service by publication; that service by publication was duly made, proof of same made to the justice, and thereafter judgment by default rendered against Johnson; that in the meantime, the piano company having filed an interplea claiming the piano, the issue, as to whom the piano belonged, was tried by a jury and verdict rendered in favor of Clark; upon which verdict the justice of the peace rendered judgment, and from which judgment an appeal was taken to the district court, ultimately dismissed, motion to reinstate the appeal filed by the piano company and thereafter withdrawn. Whereupon the district court sent the cause back to the justice court with instructions to execute the judgment, which instructions were followed by the justice of the peace by selling the piano and applying the proceeds to the satisfaction of the judgment and costs.

The contention that the judgment of the justice court was void for want of jurisdiction is not borne out by the record. The transcript appears regular on its face and clearly shows jurisdiction of the subject-matter, of the amount in controversy, the appraisers' report showing the piano to have been appraised at \$125, which appraisal was in no wise questioned by the piano company. It shows jurisdiction of the parties by due and proper service on Johnson by publication, and of the piano company by appearance in the justice court and participation in the trial. This being true, the piano company is concluded by the judgment. 24 Cyc. 609, 610; *Union Pac. Ry. Co. v. McCarty*, 8 Kan. 125; *Vincent v. Davidson*, 1 Kan. App. 606, 42 Pac. 390; *McCormick v. Sullivan*, 10 Wheat. 196, 6 L. Ed. 300;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Woodworth v. Town of Hennessey, 32 Okl. 267, 122 Pac. 224.

Hence the judgment is reversed, with instructions to dismiss plaintiff's action.

PER CURIAM. Adopted in whole.

(44 Okl. 552)

ROBERTS et al. v. CONVERSE. (No. 3818.)  
(Supreme Court of Oklahoma. Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. JUSTICES OF THE PEACE (§ 162\*)—APPEAL—  
"PERFECTED APPEAL"—BOND.

An appeal from the judgment of a justice of the peace is perfected upon the filing and approval of the appeal bond or undertaking within ten days from the rendition of the judgment, and when such bond, accompanied by a certified transcript of the justice's docket, together with the papers in the case, are duly transmitted to the appellate court, such court is vested with jurisdiction of the action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603, 605; Dec. Dig. § 162.\*]

For other definitions, see Words and Phrases, First and Second Series, Perfect.]

2. JUSTICES OF THE PEACE (§ 159\*)—APPEAL—  
BOND—CURE OF IRREGULARITY.

Where an appeal bond gives the proper style of the case, the court from which the appeal is taken, and the court to which it is to be appealed, and is sufficient in amount, made payable to the necessary obligees, and otherwise in substantial compliance with the statutes, but omits the condition "that the appellant will prosecute his appeal to effect and without unnecessary delay," such omission is an irregularity which may be cured by amendment or by the substitution of a new bond in the appellate court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Roger Mills County; E. E. Tracy, Judge.

Action brought by R. V. Converse in justice court against C. C. Roberts, Jr., and another. From an order of the county court dismissing an appeal by defendants, they bring error. Reversed and remanded.

T. L. Turner, of Cheyenne, for plaintiffs in error. Moore & Mouser and T. L. Mitchell, all of Cheyenne, for defendant in error.

HARRISON, C. [1] R. V. Converse recovered a judgment in the justice court against C. C. Roberts and Charles Watkins, who appealed to the county court. The county court held the appeal bond insufficient, refused to allow an amendment thereof, and dismissed the appeal. From such order the cause is brought here. The defect in the appeal bond in question was that it did not embody in specific language the condition "that appellant would prosecute his appeal to effect and without unnecessary delay." But it did give the proper style of the case, the court from

which the appeal was taken, and the court to which it was to be appealed, was sufficient in amount, and made payable to the necessary obligees, and otherwise in substantial compliance with the statutes, and from the journal entry of the justice's docket it was filed and approved and duly transmitted to the clerk of the county court. Section 5466, Rev. Laws 1910, provides:

"The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the first party with at least one good and sufficient surety, to be approved by such justice, in a sum of not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned: First, that the appellant will prosecute the appeal to effect and without unnecessary delay; and, second, that if judgment be rendered against him on the appeal, he will satisfy such judgment and costs."

Section 5467, Id., provides:

"The appeal shall be complete upon the filing and approval of an undertaking or statement and affidavit. The justice shall immediately make out a certified transcript of his proceedings in the cause, and shall, within twenty days from the rendition of the judgment, deliver or transmit to the clerk of the county, superior, or district court of his county the said transcript, the undertaking on appeal, with the papers in the cause; all further proceedings before the justice of the peace in the cause shall cease and be stayed on the filing of the undertaking with said justice. \* \* \*"

Now, it will be observed that section 5467, supra, provides that:

"The appeal shall be complete upon the filing and approval of an undertaking or statement and affidavit."

The terms "statement and affidavit" relate to appeals taken by municipalities or in cases where a municipality is a party.

In C., R. I. & P. Ry. Co. v. Moore, 34 Okl. 199, 124 Pac. 989, it was said:

"An appeal from a judgment of a justice of the peace is perfected upon the filing and approval of the appeal bond or undertaking within ten days from the rendition of judgment, and when such bond, accompanied by a transcript of the justice of the peace, and all the papers in the case, is received by the county court, said court is thereupon vested with jurisdiction of the action."

[2] In Spaulding Mfg. Co. v. Roff, 34 Okl. 309, 125 Pac. 727, Harper v. Pierce, 37 Okl. 457, 132 Pac. 667, 44 L. R. A. (N. S.) 1144, and Roberts v. Converse, 37 Okl. 169, 131 Pac. 539, it was held:

"The omission of the condition 'to prosecute the appeal to effect and without unnecessary delay,' from an appeal bond in a justice court, is a mere irregularity, and does not render the bond void. And, on motion in the county court to dismiss the appeal on account of such defect in the bond, the court, on motion of appellant, should permit an amended or substituted bond to be filed."

Upon the authority of this line of cases, the trial court erred in refusing to permit the amendment of the appeal bond or substitution of a new bond which might fully meet the requirements of statutes.

Hence the judgment is reversed, and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause remanded, with orders to reinstate the case upon execution and filing of a proper bond.

PER CURIAM. Adopted in whole.

45 Okl. 165)

YODER v. ROBINSON et al. (No. 3802.)  
Supreme Court of Oklahoma. Jan. 5, 1915.)

(Syllabus by the Court.)

MORTGAGES (§§ 295, 572\*) — FORECLOSURE — PURCHASE BY FIRST MORTGAGEE—PROTECTION AGAINST SECOND MORTGAGEE.

R., a first mortgagee, commenced suit against T., the mortgagor, and Y., a second mortgagee, wherein he prayed for a judgment against T. for the amount due him on a certain promissory note signed by T. and the foreclosure of his first mortgage which was given to secure said sum, as against T., and for the foreclosure of the junior mortgage of Y. The petition in the cause was filed on May 28, 1910. On the following day praecipe for summons was filed and summons was issued and duly served upon T., no praecipe being filed or summons issued as to Y. On the 24th day of April, 1911, an affidavit of nonresidence as to Y. was filed, and first publication of notice published on the 3th day of April, 1911; the second publication being had on May 5, 1911. On May 8, 1911, sale of the land under decree against T. as had; R. becoming the purchaser for a sum less than his debt against T., which sale was duly confirmed by the court and sheriff's deed executed and delivered to R. On the 24th day of July, 1911, Y. answered, in effect, setting up the foregoing facts. Thereafter the court below sustained a motion for judgment upon the pleadings and entered a supplemental and final decree against Y., foreclosing his equity of redemption and barring him from setting up or asserting any right to redeem said land or any part thereof from the sheriff's sale theretofore made, and from claiming or asserting any interest in or lien upon said real estate. *Held*, not error.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. §§ 815, 817-831, 1649; Dec. Dig. §§ 55, 572.\*]

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by F. K. Robinson against J. William Taylor and others. From a judgment, defendant S. T. Yoder brings error. Affirmed.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, and W. L. Johnson, of Chandler, for plaintiff in error. Burford & Burford, Guthrie, for defendants in error.

KANE, C. J. This was an action upon a promissory note and to foreclose a mortgage given to secure the same, commenced by the defendant in error F. K. Robinson, against the defendants in error J. William Taylor and Belle Taylor, who were the mortgagors, and the plaintiff in error S. T. Yoder, a second mortgagee. Service of summons was had upon the Taylors, judgment was rendered against them by default for the amount due on their note, and a decree was entered foreclosing their interest in the mortgaged premises under which a sale of said prem-

ises was had; the plaintiff Robinson becoming the purchaser for a sum less than his judgment against the Taylors, which sale was confirmed by the court and a sheriff's deed was duly executed to Robinson. No appeal was ever taken from this action of the court, so the Taylors and their interest or rights in the premises are in no wise involved herein. The petition in the cause was filed on May 28, 1910. On the following day praecipe for summons was filed and summons was issued for the Taylors, no praecipe being filed or summons issued for Yoder. On September 26, 1910, judgment and decree of foreclosure was had against the Taylors and an entry was made continuing the cause as to Yoder. On the 24th day of April, 1911, an affidavit of nonresidence as to Yoder was filed, and first publication of notice was published on the 28th day of April, 1911; the second publication being had on May 5, 1911. On May 8, 1911, sale of the land under decree against the Taylors was had and the sale thereof confirmed by the court. On May 12, 1911, the last publication was had, and on the 24th day of July, 1911, Yoder answered as follows:

"Comes now the defendant S. T. Yoder in the above-entitled cause, and in answer to the petition of the plaintiff herein, alleges and states that the above action is no longer pending in this court for the reason that heretofore, to wit, on the 26th day of September, 1910, the plaintiff F. K. Robinson took judgment in said cause against J. William Taylor and Belle Taylor for foreclosure of the mortgage set forth in plaintiff's petition executed by the said defendants Taylor, foreclosing the said mortgage; that at the time said judgment was taken this defendant, S. T. Yoder, was the owner and holder of a mortgage on the premises described in plaintiff's petition for \$720.00 with 8 per cent. interest from October 15, 1910, but he had not been served with process of summons; that pursuant to said judgment against the defendants Taylor the sheriff of Lincoln county, Okl., pursuant to due process of law, sold said premises to satisfy said mortgage and sold the same free from the lien of said mortgage, and said premises were purchased by the plaintiff F. K. Robinson, by virtue of which judgment and sheriff's sale the lien of the first mortgage upon said premises was extinguished and said action was terminated. Wherefore, premises considered, this defendant prays that said action may be abated by order of this court and that he be dismissed hence with his costs."

On the 3d day of November, 1911, the court sustained a motion for judgment upon the pleadings and rendered judgment in favor of plaintiff and against defendant Yoder, and entered a supplemental and final decree in said cause as follows:

"It is therefore ordered, adjudged, and decreed that the equity of redemption of the defendant S. T. Yoder, in and to the lands described in the petition, \* \* \* be and the same is forever barred from setting up or asserting any right to redeem said land or any part thereof from the sheriff's sale heretofore made herein, or from claiming or asserting any claim to any interest in or lien upon said real estate."

To reverse this judgment and decree this proceeding in error was commenced.

The answer filed by Yoder, the second mortgagee, raises but two questions: (1) Was the plaintiff entitled to proceed against Yoder in the original action, or was he required to commence an entirely new action for the purpose of foreclosing whatever interest the second mortgagee may have had in the mortgaged premises? (2) Upon the plaintiff, the first mortgagee, becoming the purchaser of the mortgaged premises at the sheriff's sale and the confirmation of the sale and issuance of the sheriff's deed, did his lien become merged in his fee, and hence he no longer had any cause of action resulting from his mortgage?

On the first proposition we are of the opinion that the court below committed no error in entering the judgment and the decree against Yoder in the original proceeding. Whether the action is treated as a continuation of the original proceeding, or as a new action, it is difficult to see how any of the rights of the second mortgagee in the premises which he desired to protect could not have been protected. In the present proceeding he made a general appearance and presumably set up in his answer all the defenses he had tending to defeat the plaintiff's cause of action against him. If the action had been commenced *de novo*, he could have done no more. We may assume, then, that counsel for plaintiff in error is correct in his contention that:

"While Yoder, as the holder of a junior lien, had a right at any time prior to the sale of said property to redeem said property from the lien of the first mortgage and become subrogated to the rights of the first mortgagee, he was under no legal obligation to do so. \* \* \* He had a right to stand upon his right to a foreclosure and sale for the satisfaction of his own indebtedness."

And yet, it would not strengthen their position, for even if they were entitled to the right of foreclosure, as they contend, they could as well assert such right in the original action as to require the first mortgagee to commence over again. In the answer filed they do not offer to redeem, nor do they seek to assert the right which they now claim of a foreclosure and sale for the satisfaction of their own indebtedness. Equitable principles must be applied to actions of this kind. It seems trivial to ask an appellate court to reverse a judgment and decree rendered in such a proceeding for no other reason than to afford an appellant an opportunity to assert rights in an action *de novo* which he already has had ample opportunity to set up in his answer and did not do so. Entertaining this view, it is not necessary to decide whether the second mortgagee was entitled to redeem or, as he contends, "had a right to stand upon his right to foreclosure and sale for the satisfaction of his own indebtedness."

Moreover, as the relief prayed for in the petition is not joint as between the Taylors and Yoder, service not having been had on

Yoder, and the Taylors having been served and defaulted, sections 5917 and 5619, Comp. Laws Okl. 1909, then in force, were applicable. Though not served with the process Yoder was a defendant in contemplation of these provisions, and the steps taken as to him were regular and as binding upon him; he having been brought in as if served in the first instance. The first of these sections provides that:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or proceed in the cause against the defendant or defendants served."

The second section provides:

"Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: \* \* \* Second. If the action be against defendant severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants."

We think the foregoing sections are applicable to the situation herein presented.

The second proposition of law presented by the answer is divided into two subdivisions by counsel for plaintiff in error in their brief as follows: (1) By virtue of section 4133, Comp. Laws Okl. 1909, which provides that "the sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereon," the sale of the land to Robinson extinguished his lien, "and there was for that reason, no cause of action existing on behalf of plaintiff Robinson subsequent to said sale and confirmation thereof on the 8th day of May, 1911." (2) Upon the first mortgagee becoming the purchaser of the mortgaged premises at the sheriff's sale and the confirmation of said sale and the execution of the sheriff's deed thereunder, his lien merged in his fee, and thereupon Yoder's mortgage, which theretofore had been a second mortgage, became a first mortgage which he was entitled to foreclose as such.

The statute relied upon is merely declaratory of the old doctrine of merger and is subject to the same exceptions. Of course, if a stranger had become the purchaser of the land, he would have taken it discharged of Robinson's lien; but, when Robinson purchased the land himself for a sum less than his lien, equity kept his lien alive as a protection against junior liens.

The rule, as stated by Mr. Pomeroy (2 Pomeroy's Equity Jurisprudence, § 788), is as follows:

"Where the owner of the legal estate, as for example the fee, acquires by purchase or in any other manner, a lesser equitable estate not co-extensive and commensurate with his legal estate, a distinction exists; the merger, although taking place at law, does not necessarily take place in equity; indeed, it may be said that the leaning of equity is then against any merger, and that prima facie it does not result. The settled rule in equity is that the intention of the one acquiring the two interests then controls. If this intention has been expressed by taking the transfer to a trustee, or by language inserted in the instrument of transfer, it will, of course, be followed. If the intention has not been thus expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all these circumstances to be for the benefit of the party acquiring both interests that a merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result should follow will be presumed, and equity will carry it into execution by preventing a merger, and by treating the equitable or lesser interest as subsisting, and by admitting all the consequences for the protection of the party with respect to other matters, which necessarily result from the fact of the equitable estate being left in existence."

The same rule is briefly stated by Mr. Jones (Jones on Mortgages, § 870) as follows:

"Where a first mortgagee purchases under a foreclosure sale, equity will keep his mortgage alive for the purpose of protection against a second mortgagee."

Authorities in point to the same effect are: 27 Cyc. 1377; *Stantons v. Thompson*, 49 N. H. 272; *Watson v. Dundee Mortgage & Trust Co.*, 12 Or. 474, 8 Pac. 548; *Carpentier v. Brenham*, 40 Cal. 234; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743.

There can be no doubt as to the intention of the plaintiff, the first mortgagee, in the case at bar. He made the second mortgagee a party defendant with a view of foreclosing his interest in the mortgaged premises, and that he did not abandon this purpose is made apparent by the issuance of notice for service by publication prior to the rendition of the decree under which the land was sold and thereafter due prosecution of the cause to final judgment and decree.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

(45 Okl. 201)

McCREARY, County Clerk, et al. v. LEE.  
(No. 6068.)

(Supreme Court of Oklahoma. Jan. 5, 1915.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—SCHOOL ELECTION—TAX LEVY—APPLICATION OF STATUTE—MUNICIPAL CORPORATIONS.

That part of section 7383, Rev. Laws 1910, which provides that "at the election where it is proposed to vote an additional levy above the five mills herein authorized for school purposes the election shall be held to be a legal election when thirty per cent. of the total number of

legal voters living in such school district shall participate therein," applies to each city, whether having a charter form of government or not, and to the board of education in each city.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—SCHOOL ELECTION—TAX RATE—VALIDITY OF STATUTE.

Said provision is not repugnant to the proviso of section 9, art. 10, of the Constitution, which reads: "Provided, that the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election, vote for said increase."

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.\*]

3. EVIDENCE (§ 157\*)—SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—SCHOOL ELECTION—REGISTRATION—PAROL EVIDENCE.

A taxpayer seeking to enjoin the extension of an additional tax for school purposes, purporting to be authorized by an election held pursuant to Rev. Laws 1910, § 7383, supra, upon the ground that 30 per cent. of the legal voters living in such school district did not participate therein, may establish such fact by parol evidence. The law requiring registration of voters in cities of the first class does not apply to such elections.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460-470; Dec. Dig. § 157;\* *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.\*]

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Lawrence Lee against Henry McCreary, County Clerk of Bryan County, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Hatchett & Ferguson, of Durant, for plaintiffs in error. J. T. McIntosh and McPherran & Cochran, all of Durant, for defendant in error.

KANE, C. J. This was a suit commenced by Lawrence Lee, defendant in error, plaintiff below, as a taxpayer, against the plaintiffs in error, Henry McCreary and Ed. L. Speairs, county clerk and county assessor, respectively, of Bryan county, for the purpose of enjoining the defendants from extending upon the tax rolls of said county a certain one-mill tax in addition to the five-mill tax levied by the excise board for the purpose of obtaining funds to run and operate the school in a certain school district in the city of Durant for the fiscal year ending June 30, 1914. The additional levy, it was alleged, was authorized by a majority of the voters of said district voting for said increase at an election held pursuant to section 9, art. 10, of the Constitution. Upon trial to the court the relief prayed for was granted, to reverse which action this proceeding in error was commenced.

[1, 2] The extension of the additional tax was enjoined by the court below upon the grounds: (1) That 30 per cent. of the quali-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fled electors in the Durant school district did not participate in the said election, as required by section 7383, Rev. Laws Okl. 1910; (2) no estimate of the current expenses of the school had been filed with the excise board and examined and approved prior to the time of the election; (3) the taxable valuation of the property in the district had not been determined at the time the election was called, and the excise board and the board of education had no means of determining that the additional levy was necessary. As stated by counsel for plaintiff in error in their brief:

"There are four propositions of law involved in this appeal as follows: (1) Was it necessary for 30 per cent. of the qualified electors in the Durant school district to participate in this election? (2) Did 30 per cent. of the qualified electors, as shown by the evidence, participate in the election? (3) If it was necessary for 30 per cent. of the electors to participate, and that number did not participate, then is the requirement that 30 per cent. shall participate constitutional? (4) Was it necessary for the excise board to approve the estimate of the school district before the election was called, and, if so, was such approval had?"

In our opinion, it was necessary for 30 per cent. of the qualified electors of the school district to participate in the election before it could be held to be a legal election. The contention of counsel for plaintiffs in error to the contrary is based upon the theory that section 7383, *supra*, does not apply to school districts in cities of the first class. This position is wholly untenable. Section 7383 provides:

"It shall be the duty of the school trustees in each school district to record in a book kept for the purpose, the names of all legal voters within such school district, and at the election where it is proposed to vote an additional levy above the five mills herein authorized for school purposes the election shall be held to be a legal election when thirty per cent. of the total number of legal voters living in such school district shall participate therein."

If this section alone was construed in connection with the general school laws of the state, there might be some room for counsel's contention that it was the intention of the Legislature to confine the application of section 7383 to rural school districts, but the very next section of the same article (section 7384) provides:

"The provisions of this article shall apply to each city, whether having a charter form of government or not, and to the board of education in each city," etc.

[3] With the latter section before us, there can be no possible doubt as to the intention of the Legislature in the premises. On the second proposition counsel for plaintiff in error say:

"The plaintiff showed that there were 1,287 men and women registered voters in the Durant school district, and that there were perhaps 20 and 30 men and women voters in certain annexed territory. There were 476 voters who participated in the election, more than 30 per cent. of the total number of registered voters and those who lived in the adjacent territory and were not registered. The plaintiff attempted to show over the strenuous objection of the

defendants that there were a large number of female voters in the school district, approximately 1,000, who were not registered. If the plaintiff could prove by oral testimony the number of voters in the district not registered, then he proved that the total number of voters in the district was approximately 2,200, and of course 30 per cent. did not participate. We say that it was error for the court to admit this testimony."

We cannot agree with counsel. In *State v. Barnes*, 22 Okl. 191, 97 Pac. 997, it was held that the law requiring registration of voters did not apply to a special election held in cities, but applies to primary and general elections; and, after quoting from the act of the Legislature relative to registration, the court says:

"To hold that the registration system provided by the act applies to special election in cities or in counties would be to hold that the Legislature has enacted a law requiring the voter to register before he shall be entitled to vote, and at the same time providing no means or opportunity, during a period of 20 months out of every two years, for a person, who becomes a qualified voter in any precinct subsequent to the last preceding general election, to register for the purpose of voting at any such special election, held during such period of 20 months. In the absence of express language in the act making said provisions applicable to other than primary and general elections for the purpose of nominating and electing state, county, and precinct officers, we conclude that the Legislature had no such intention, and that the registration provided in said act does not apply to the election in this case by reason of any provision of the act."

It seems clear that if the registration books did not apply to such elections that it would furnish no adequate guide as to the number of qualified electors residing in the district, and that, as the Legislature did not provide a means for determining this question of fact, it was proper to introduce oral testimony so the actual number of voters of such district might be ascertained. As we are of the opinion that 30 per cent. of the total number of legal voters living in such school district shall participate therein, the only other question necessary to decide is the constitutionality of section 7383, *supra*. The part of the Constitution which counsel contend nullifies this section of the statute is the proviso of section 9, art. 10, which reads:

"Provided, that the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election, vote for said increase."

Section 7383, *supra*, and the other sections of the article of which it forms a part, were enacted for the purpose of vitalizing the foregoing constitutional provision. In our opinion, there is nothing in the act of the Legislature repugnant to the constitutional provision. The Constitution simply provides that, at the election provided for by the Legislature for authorizing an additional levy for school purposes, a majority must vote in favor of the levy. As the constitutional provision is not self-executing, it was the duty of the Legislature to vitalize it,



and in so doing it was left entirely free to determine how the election should be held, the time and place, and the manner of holding the same, and what shall be held to constitute a legal election. *People v. Czarnecki*, 256 Ill. 320, 100 N. E. 283; *Bell v. City of Americus*, 79 Ga. 152, 3 S. E. 612. In the latter case it was said:

"The Georgia Constitution provides that no bonded indebtedness for the establishment of certain improvements shall be incurred by any municipal corporation without the assent of two-thirds of the qualified voters thereof at an election for that purpose. Held, \* \* \* that, in estimating whether or not two-thirds of the voters had voted in favor of such indebtedness, the judges of election shall base their calculation on the votes-cast at the last previous election, is constitutional."

In our judgment, the Oklahoma statute under discussion is of somewhat similar import. Instead of making the legality of the election turn upon the votes cast at the last previous election, as in Georgia, it provides that the election provided for the purpose of vitalizing the constitutional provision "shall be held to be a legal election when 30 per cent. of the total number of the legal electors shall participate therein."

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

(45 Okl. 280)

ATCHISON, T. & S. F. RY. CO. v. ETHERTON. (No. 3415.)

(Supreme Court of Oklahoma. Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. CARRIERS (§ 94\*)—ACTION FOR CONVERSION—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.

Plaintiff sued in trover for conversion of a certain wagon; the undisputed testimony shows that the property was delivered to defendant to be transported to Los Angeles, California. Upon instruction from plaintiff, the property was shipped to Kansas City, Mo., arriving September 9th. On September 16th, plaintiff arrived in Kansas City for the purpose of paying the freight and receiving the property. Defendant demanded as freight \$326, which plaintiff refused to pay, claiming same was excessive. The agent of defendant admitted it was excessive, and made an effort to have it adjusted. Plaintiff remained in Kansas City for two weeks, going to defendant's office daily, in an effort to pay the proper amount of freight and receive the property. Several weeks afterwards, defendant reduced the amount to \$146.70, admitting the former amount demanded was excessive. *Held*, the evidence was sufficient to carry the issue to the jury on the question of conversion. *Held*, further, a formal demand and a specific tender of the amount of freight were not required, under the circumstances of this case.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

2. CARRIERS (§ 94\*)—CONVERSION OF SHIPMENT—DEMAND—TENDER OF FREIGHT.

Instructions of the court examined, and *held* to fully and fairly cover the issues. *Held*, further, no error in the court's refusal to charge the jury as requested by defendant.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by A. M. Etherton against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cottingham & Bledsoe and Charles H. Woods, all of Oklahoma City, for plaintiff in error. E. S. Bessey, of Cushing, for defendant in error.

RIDDLE, J. The parties will be referred to here in accordance with their positions on the docket of the trial court.

Plaintiff filed his suit in trover in the district court of Oklahoma county for conversion of a certain peanut, popcorn, and candy wagon, claiming damages in the sum of \$700. The petition alleges substantially that plaintiff, on August 12, 1909, had delivered to defendant the wagon at Amorilla, Tex., for shipment to Los Angeles, Cal., prepaying the freight in the sum of \$31.50; that thereafter, at the request of plaintiff, said wagon was shipped from Los Angeles, Cal., to Kansas City, Mo., arriving there September 9th; that on September 16th plaintiff went to the freight office in Kansas City to pay the freight and charges thereon and to receive the wagon; and that said defendant, through its agents, refused to deliver said wagon, except upon the condition that plaintiff pay as freight the sum of \$326.92; that said amount was exorbitant and the demand unreasonable. Plaintiff offered to pay the usual and established freight and other charges and remained in Kansas City for more than two weeks, and called on defendant from day to day for the purpose of paying the freight and receiving said wagon, which was refused, except on the conditions above stated.

Defendant filed its amended answer to this petition, consisting: (1) Of a general denial; (2) admitting the shipment as alleged, and further admitting that after considerable time, it agreed to accept the sum of \$146.70, which was in accord with the legal tariff rates. It also sets up a counterclaim and asks judgment for the amount of the freight in the sum of \$146.70. A reply, constituting a general denial, was filed to this answer. Upon the issues thus made, the cause proceeded to trial to a jury, and a verdict was returned in favor of plaintiff in the sum of \$610. A remittitur was ordered, which was filed, reducing the judgment to \$533.30. Motion for new trial was filed and overruled, and defendant prosecutes error by filing his petition in error and case-made in this court. Defendant alleges the following errors:

"(1) The court below erred in overruling the motion for new trial, and upon each and every of the grounds contained in said motion.

"(2) The court erred in accepting the verdict of the jury, and in rendering judgment thereon.

"(3) The court erred in refusing to instruct the jury in accordance with certain relevant and pertinent requests of the defendant, which said instructions so requested by the defendant are found on record pages 146 to 150, inclusive, and being numbered 1 to 9, inclusive.

"(4) The court erred in instructing the jury in accordance with his general charge to the jury, which said charge is found on record pages 152 to 157, inclusive, the said charge as a whole being erroneous and each and every of the paragraphs thereof.

"(5) For errors of law occurring on trial of said cause, excepted to at the time by plaintiff in error.

"(6) Error in the court below in refusing to direct a verdict in favor of the plaintiff in error.

"(7) Because the court below erred in permitting the verdict of the jury to stand as remitted, the same being based on error in the amount of the recovery, the verdict being too large.

"(8) The court below erred in permitting the verdict of the jury to stand, the same not being based upon sufficient evidence, any evidence, and contrary to law."

The only questions raised by these various assignments necessary to be considered here, are: (1) Did the court commit reversible error in submitting this cause to the jury? (2) Did the court properly charge the jury as to the law in the case? (3) Did the court commit error in refusing to charge the jury as requested by defendant?

[1] Under the first proposition, it is earnestly insisted by counsel for defendant that the facts are undisputed, and, accepting the testimony of plaintiff as true, there was no issue of fact warranting the court in submitting the issues to the jury. We are unable to agree with counsel in this contention. This proposition presents the question as to whether or not the facts in this case are sufficient to show a conversion of the property by defendant. The law seems to be well settled that where a party delivers to a common carrier goods for shipment, such common carrier, when the goods reach their destination, is entitled to retain possession of such goods until the legal amount of freight is paid thereon, and that such carrier has a lien upon said goods for the security of the payment of said freight. This proposition is not denied by plaintiff. The law is equally well settled that a refusal of a carrier to surrender goods upon demand and the payment or tender of the legal amount of freight and other legal charges, or if such carrier refuses to surrender said goods, except on condition of the payment of an excessive and illegal amount as freight, after a reasonable time within which to investigate and ascertain the true amount of legal charges, such action will constitute a conversion, and trover will lie. It is undisputed that the goods remained at their destination in Kansas City from the 9th until the 16th of September before plaintiff arrived and made demand for same; that after his arrival, he remained in Kansas City for two weeks in an endeavor to have the proper amount of freight ascertained, for the purpose of paying same and receiving the

property; that the agents in charge of defendant's freight office at Kansas City, in effect, admitted the amount was erroneous and excessive and made efforts to have it adjusted; that several weeks after plaintiff left Kansas City, defendant admitted that the amount first demanded was excessive, and proposed to surrender the goods upon payment of \$146.70. We are of the opinion that this state of facts was sufficient to carry this issue to the jury as to whether or not, under all the facts and circumstances, it constituted conversion. It was said in the case of *Beasley v. Baltimore & Potomac R. Co.*, 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048, the syllabus reads:

"Refusal of a connecting carrier to surrender freight, at least after a reasonable time to ascertain the facts, upon tender of the rate stipulated for in the carriage contract, which is in excess of its own portion of the through rate, because of a waybill in its possession calling for a larger sum, which is substantially admitted to be a mistake, is a conversion for which trover will lie. Six days is not so clearly a reasonable time for a carrier to consume in ascertaining the correctness of a rate for shipment of freight from a point in Florida to Washington, District of Columbia, and that the court can take the question from the jury in an action to recover for conversion of the property."

Again, in the case of *Northern Transportation Co. of Ohio v. Sellick*, 52 Ill. 249, in the syllabus, it is held:

"1. If one person has the property of another in his possession, and the owner makes demand of it, and the party in possession, without right, refuses to deliver it, that will constitute a conversion of the property by the latter to his own use.

"2. So, where the owner of a carriage shipped the same by a common carrier, the amount to be charged for the transportation being first agreed upon, and, upon the carriage reaching its destination, was demanded by the owner, he offering to pay the charges as agreed, but the agent of the carrier refused to deliver it except upon the payment of a larger amount, held, this was a conversion of the property by the carrier, and the owner could maintain trover therefor. The latter discharged his duty by making demand for the carriage immediately on its arrival and offering to pay the freight agreed upon."

Other cases, in effect, sustaining this proposition, are: *Marsh v. Union Pac. Ry. Co.* (C. C.) 9 Fed. 873; *McEntee v. N. J. Steamship Co.*, 6 Am. Rep. 28; *Richardson v. Rich*, 104 Mass. 159, 6 Am. Rep. 210; *Whitlock v. Heard*, 13 Ala. 776, 48 Am. Dec. 75; *Peebles v. Boston & A. Ry. Co.*, 112 Mass. 509; *Louisville & N. W. Ry. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511; *Wright & Cotton Wire Co. v. Warn*, 177 Mass. 283, 58 N. E. 1082.

Under this proposition, the point is also made that the court should have directed a verdict for the defendant, for the reason plaintiff failed to prove a specific demand for the goods, and a tender of the proper freight. The court, in our judgment, properly charged the jury upon this issue, which we will notice later. We are of the opinion that if the evidence in this case failed, as a matter of law, to show a sufficient demand, it certainly was sufficient to carry the case to the jury.

It is shown by plaintiff's testimony, and not denied, that he went to Kansas City for the purpose of paying the freight and receiving these goods, and remained there for two weeks, and visited the office of the railway company practically every day for that length of time. It would seem that as a matter of law, this should be a sufficient demand, and it certainly was sufficient to go to the jury for its determination. We are also of the opinion that under the facts and circumstances of this case, a specific tender was not required. This issue was also submitted to the jury. It appears from the facts and circumstances reasonably certain that a tender of the amount which was actually due at the time would have availed the plaintiff nothing. It would have been a useless and vain act, for the reason it is shown that defendant, for the two weeks plaintiff was in Kansas City, was demanding something more than twice the amount of the freight, afterwards admitted to be due, and never intimated, either by word or sign, that it would accept less; and, in addition to this, defendant is insisting in this court as a reason why it cannot be liable in conversion it retained a lien upon the goods for the full amount of freight due, and it is admitted the two weeks plaintiff was in Kansas City, and for several weeks thereafter, the amount which it claimed to be due and demanded was something more than twice the actual amount due. Under these circumstances, plaintiff was relieved of making a specific tender.

[2] We will now consider whether or not the court properly charged the jury as to the law. In charge 5, the court instructed the jury upon the issue of conversion as follows:

"You are instructed as a matter of law that a common carrier of freight, which through its agents demands, as a condition precedent to its delivery to the consignee, a sum larger than the established tariff rates, and which is subsequently admitted to be a mistake or overcharge, will constitute a conversion when such mistake and overcharge is insisted upon by the carrier beyond a reasonable and sufficient time for the carrier to ascertain the facts as to the true and proper rate, and if you find from the evidence in this case that the defendant railway company demanded of the plaintiff a sum greater than the true, regular established rate, and insisted upon the same for an unreasonable time as a condition of surrendering this wagon to the plaintiff, that no tender or payment of freight is necessary on the part of the plaintiff before bringing an action for conversion."

Paragraphs 6, 7, and 8 of the court's charge should be considered in connection with this charge, which are:

"(6) You are instructed, further, that a reasonable time is a question for you to determine under all the circumstances in this case, taking into consideration the nature of the shipment, its classification, and the means available to the agents of the defendant company to ascertain the true rate.

"(7) You are instructed that the defendant was in duty bound to deliver this shipment with reasonable dispatch; and, while accidents and obstructions will excuse delay in delivery, as soon as the same can be reasonably overcome, the carrier should make delivery.

"(8) To constitute a conversion of goods by a carrier, it is necessary that there should have been an actual appropriation of the property by the carrier to its own use or benefit; but such appropriation might arise from the exercise of wrongful dominion over it to the exclusion of the rights of the owner, or withholding it from the possession of the plaintiff under a claim inconsistent with his rights, but a reasonable detention of a chattel by a carrier will not constitute a conversion, and it is for you to determine in this case whether there was or was not an unreasonable detention."

These various instructions, considered together, in our judgment properly and fully submitted the issue of conversion to the jury as applied to the facts in this case.

In paragraph 10 of the court's charge, the jury was instructed on the question of tender as follows:

"You are instructed that a formal demand for the delivery of the property converted by a carrier, or a tender of the charges for freight, may be waived by the carrier, and if you find that the actions of the defendant carrier in this case were such as to indicate to the plaintiff in advance that a tender or formal demand would be unavailing, such action would constitute a waiver and no demand or tender would be necessary as a condition precedent to the bringing of this action."

We think this is a correct declaration of the law as applied to the facts. This position is well settled by this court. *Citizens' State Bank v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118; *Brunson v. Merrill*, 17 Okl. 44, 86 Pac. 431; *Maddox v. Dowdy*, 31 Okl. 169, 120 Pac. 651; *Hutchings v. Cobble*, 30 Okl. 158, 120 Pac. 1013.

In paragraph 11 the court charged the jury in regard to the legal freight rate which is in accord with the views of counsel for defendant. In paragraphs 12 and 13 the jury was instructed as to the measure of damages, which instructions are as follows:

"(12) If you find that there was a conversion of this wagon on the part of the defendant, according to the foregoing instructions, the measure of damages will be the value of the wagon at the place of conversion at the time it was so wrongfully detained, less the true amount of freight, or other just charge, due the defendant at the time of conversion.

"(13) You are instructed that after a conversion has taken place, the owner is under no obligation to receive the property if tendered to him, unless you find that such return of the property would place the owner in practically the same situation as he was at the time of the conversion."

In our judgment, this is a correct statement of the law. It remains to be seen whether the court committed reversible error in refusing to charge the jury as requested by defendant, which requested instruction is as follows:

"If you find for the plaintiff in this case, you will assess his damage according to the following rule: You will ascertain the value of the shipment at the place and on the date at which it should have been delivered, deducting the freightage, to which the defendant would have been entitled had it completed the delivery, and in this connection, I charge you, further, that you may consider in mitigation of damages the fact that defendant in its answer has asserted that it now has the possession of the property

and tenders and agrees to return the possession thereof and deliver the same to the plaintiff. Under such circumstances, I charge you that you are authorized to consider the value of the property at the time and place it should have been delivered, and consider the value of the property in its present condition, and the difference, if any, will make up the amount of your verdict. In any event, the defendant is entitled to its proper freight charges."

We think the court committed no error in this respect, for two reasons: (1) The court properly charged upon this issue in its general charge to the jury; (2) this instruction does not correctly state the law. The plaintiff did not sue for damages for detention of the property, and this issue was not in the case, and therefore it would have been improper for the court to have so charged the jury as requested. This charge would have been inconsistent with the issues in the case, and if the defendant was liable in trover for conversion, this certainly is not a proper charge, applicable to the facts. The court did charge the jury, in effect, that defendant was entitled to an offset for the amount of legal freight and charges due. It is further insisted that the court should have charged the jury that a tendering of the property in the amended answer was proper in mitigation of damages. We are of the opinion that the facts in this case did not warrant such a charge. There may be circumstances in a suit in trover for conversion wherein a proposition involved in this charge might be proper, but we are clearly of the opinion it was not applicable to the facts and issues before the court.

The evidence in this case warranted the court in submitting all the issues to the jury; and, finding no reversible error in the instructions given and in the refusal to give said requested instructions, the judgment of the trial court must be affirmed. It is so ordered. All the Justices concur.

(45 Okl. 414)

**CITY OF MUSKOGEE v. MILLER.**  
(No. 8792.)

(Supreme Court of Oklahoma. Dec. 22, 1914.  
Rehearing Denied Jan. 26, 1915.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS (§ 764\*) — STREETS—SAFE CONDITION—DUTY.**

It is the duty of a municipal corporation to keep its streets in a reasonably safe condition for ordinary travel by the public.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1616-1620; Dec. Dig. § 764.\*]

**2. MUNICIPAL CORPORATIONS (§ 755\*)—DEFECTIVE STREETS—PERSONAL INJURIES—LIABILITY.**

Where a person is riding upon a well-broken horse ordinarily sure of foot, not at an unusual speed, and such animal, without fault on the part of the rider, becomes frightened and temporarily unmanageable, and, by reason of coming in contact with a defect in a street negligently created or permitted to re-

main therein by a city, falls and injures such rider, the municipality is liable therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.\*]

**Error from District Court, Muskogee County; R. P. De Graffenried, Judge.**

**Action by William L. Miller against the City of Muskogee. Judgment for defendant, and plaintiff brings error. Affirmed.**

S. V. O'Hare and J. C. Davis, both of Muskogee, for plaintiff in error. Thomas H. Owen and Joseph C. Stone, both of Muskogee, for defendant in error.

**BLEAKMORE, J.** This case presents error from the district court of Muskogee county, and is an action brought by the defendant in error against the city of Muskogee for damages for personal injuries sustained by reason of being thrown from his horse on a public street of the defendant city, resulting in a judgment in his favor in the sum of \$2,500, from which the city appeals. The parties will be referred to here as they appeared in the court below:

**Plaintiff alleged:**

"That Market street is one of the public streets of the said city of Muskogee, and that it is, and has been at all the times herein mentioned, the duty of said city to keep its streets in a safe condition for travel. That in violation of its duty as aforesaid, on about the 25th day of April, 1910, and for a long time prior thereto, the said city knowingly permitted a large hole, or excavation, of the width of about 10 feet, of the length of about 30 feet, and of the depth of about 2 feet, to be made and to exist on said Market street beginning about 30 feet north of Fourth street, and extending thence north, which hole or excavation was, during all of said times, full of mud and bricks, and large slick rocks, which bricks and rocks had been negligently placed in said hole by the said defendant. That on or about the 25th day of April, 1910, and for a long time prior thereto, the said city of Muskogee negligently, and with the full knowledge of the existence thereof, permitted said hole so filled with mud and bricks and rocks to remain there in the open street without placing around or in the same any safeguard or railing to give notice of the said excavation and to protect persons who might be traveling upon said street from falling upon or into said hole, and thereby being injured, though there was grave and evident danger of said injuries. That some of said rocks were about 18 inches long and 12 inches wide, and the same had smooth surfaces and were so placed and allowed to remain in said mudhole that horses could not safely pass over the same in said street in the usual course of travel. That the plaintiff did not know, and could not have known by reasonable diligence, that said brick and rocks were in said mudhole, nor did he know, nor could he have known by ordinary diligence, that the said Market street at that point was unsafe for travel, but all of these facts were fully known to the defendant. That on or about the 25th day of April, 1910, the plaintiff was lawfully riding a horse, upon which he was seated, along and over said Market street, at and near said mudhole, and without being able to see the danger of the same, and without negligence, and in the use of due care upon the part of the plaintiff, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the course of ordinary travel upon said street, the horse upon which the plaintiff was riding stepped in said mudhole and upon said stones and bricks which had been worn smooth, and dangerous to travel, and the said horse stepped upon said stones and bricks and fell in said mudhole and upon said rocks and bricks solely on account of said unsafe condition, and in falling the plaintiff's left leg was caught between the body of said horse and said stones, both bones thereof were crushed and broken at a point about three inches above his ankle, and his said leg was thereby greatly and permanently injured, and he was on that account for a long time sick, and has ever since been in great pain and in mental anguish," etc.

Defendant assigns as error: (1) Overruling the motion for a new trial; (2) admitting evidence on the part of plaintiff; (3) refusing to direct a verdict for defendant; (4) entering judgment for the plaintiff; and (5) refusing to give the following instruction to the jury:

"You are instructed that the matter of improving and maintaining given parts of a street set aside for public use pertains to the discretion of the legislative department of a city. There may be streets or parts of streets in a city which are not absolutely necessary for the convenience of the public, and which will be brought into use by the growth of the city; and there may be circumstances where it is not necessary to improve the width of streets for the requirement of travel. All that is required in such cases is that the city see that a sufficient part of the street required for use shall be in a reasonably safe condition for the convenience of travel. And if in this case you find that the street was safe and in good order in sufficient width to have been traveled by the plaintiff with ordinary care and prudence, no damage occasioned by the plaintiff's horse becoming frightened and getting outside of the usual traveled portion of the street to the spot where the accident took place can be recovered against the defendant."

The evidence disclosed that plaintiff, a policeman, was injured while riding a horse along Market street, a public street of the defendant city; that, in response to a call for an officer, he was proceeding upon a route that he considered the most direct to the place to which he had been called; that, after he had entered Market street traveling at a gallop, he met a wagon covered with a sheet or tarpaulin, which he designated as an asphalt wagon, moving toward him upon a crooked or zigzag pathway through said street; that he was unacquainted with the condition of said street at the time he entered upon the same; but that there was a hole or space some 40 feet long and 30 feet wide in said street which had been partially filled with rocks of various sizes and dimensions that were protruding from the surface; that as he approached the same the horse upon which he was riding shied at the rocks and again shied at the fluttering cover upon the asphalt wagon, and jumped among and upon said rocks, which caused it to fall with and injure plaintiff. The undisputed evidence is that the horse upon which plaintiff was riding was a well-broken animal and ordinarily sure of foot.

Plaintiff's testimony is as follows:

"A. The place was between Altamont and Fourth street, and there has been a big mudhole, and some one had filled it up with rocks, and left only a zigzag path for a wagon to go through, and on the north side there was a place where a footman went through, and as I went down there I turned off Fourth street on Market, and there was an asphalt wagon with a sheet over it to the left, and in the same track I was, and I was galloping along, and I saw that I couldn't go through there, and turned to go to the footman's path, and tried to check up my horse, and he was fractious, and as he jumped he struck the pile of rocks and fell, and, as I saw him fall, I got my feet out of the stirrups."

"A. I ran my horse around and tried to go through where the abutment was, and when the horse saw those rocks he turned and shied, and that is why he fell."

After plaintiff had testified that he had gone 30 or 40 feet upon Market street, he was asked and answered the following questions:

"Q. When you turned and got 30 or 40 feet away, you saw the condition of the street well? A. Yes, sir; when I got on it. Q. And you saw the only safe place was to go on the north side, the extreme north side of the little path? A. Yes, sir."

And again:

"Q. When you looked ahead and discovered this unsafe condition, you discovered the path to the right? A. Yes, sir. Q. You looked at that, and that looked safe? A. Yes, sir; to me. Q. And you undertook to go around that traveled path? A. Yes, sir. Q. Was that in the street? A. At the edge of the street."

The street commissioner of the city testified, upon cross-examination:

"Q. State to the jury what was the condition of that street? A. There had been a number of loads of rock dumped promiscuously into the street. Q. How much of space would it leave for people to pass? A. Just a very narrow driveway. Q. Plenty of room for a person to ride along? A. Yes, sir; plenty of room to drive through single file. Q. That street was used continuously? A. Every day or so. Q. People passed around there without any trouble? A. Yes, sir; every day I suppose. Had a very narrow driveway to pass through."

The evidence disclosed that the street had remained in the condition above described for about a year prior to the injury.

It is urged by defendant that the defect in the street was not the proximate cause of the injury; and that the same would not have occurred had plaintiff not lost control of the horse upon which he was riding when it became frightened at the cover of the moving wagon upon such street. It is also the contention of defendant that it was not bound to keep the entire width of the street in repair.

[1] The rule established in this state is that, when a city has opened or dedicated to the use of the public a street, it is incumbent upon it to keep the entire width of such street in a reasonably safe condition for ordinary travel. *City of Stillwater v. Swisher*, 16 Okl. 585, 85 Pac. 1110. And the general rule, deduced from the various authorities, is that a city may in the exercise of its municipals

powers provide that only a certain portion of a street shall be improved and used for public travel; but that, where it does so provide (if the entire street is apparently appropriated to the public use), then that certain portion must be in some manner specifically designated and defined so as not to mislead a member of the traveling public into the use of other dangerous portions to his injury. Where the entire thoroughfare is opened with nothing to indicate the purpose of the city to restrict the use thereof to a particular portion, it is the duty of the city to keep the whole in a reasonably safe condition for ordinary public travel; and a mere "zigzag" roadway through a space, covered by a number of loads of rock dumped promiscuously into the street, only wide enough to accommodate a single vehicle, does not meet the requirement of the law.

[2] Opening a street or permitting it to remain open through its entire width is an invitation on the part of a municipal corporation to the public to use the same for customary travel; and an individual using such street in the ordinary way has a right to presume that he may go thereon free from any save the usual hazards of travel. If he is exercising ordinary and reasonable care for his own safety, he may assume that the municipality has done likewise; and if, as in the instant case, he is using such street in pursuit of his lawful occupation, riding upon a well-broken horse ordinarily sure of foot, at not an unusual speed, and such animal, without fault upon the part of his rider, becomes frightened and temporarily unmanageable, and, by reason of coming in contact with an obstruction or a defect in a street negligently created or permitted to remain therein by a city, falls and injures such rider, the municipality is liable therefor.

"It is clear that if a horse of ordinary gentleness merely shies or swerves to one side so that the driver does not in reality lose control over him, and injury is caused, without fault of the driver, by his thus coming in contact with an obstacle or defect in the highway, the municipality will be liable." *Elliott on Roads and Streets* (3d Ed.) § 793; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166; *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130; *City of Emporia v. White*, 74 Kan. 864, 86 Pac. 295; *Vogelgesang v. City of St. Louis*, 139 Mo. 127, 40 S. W. 653; *Dillon v. City of Raleigh*, 124 N. C. 184, 32 S. E. 548; *City of Lacon v. Page*, 48 Ill. 499; *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763.

In *City of Hugo v. Nance*, 39 Okl. 640, 135 Pac. 346, it was said by this court in the syllabus:

"A municipal corporation is charged by law with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public." *Town of Fairfax v. Giraud*, 35 Okl. 659, 131 Pac. 159; *City of Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107.

It is also contended by the defendant that plaintiff's injury was one that could not have

reasonably been anticipated by the city, and for that reason no recovery can be had.

In *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568, it is said:

"It is not necessary, in order to constitute proximate cause, that the precise injury should have been foreseen or apprehended as certain to occur. It is sufficient if an ordinarily careful and prudent person ought, under the circumstances, to have foreseen that an injury might probably result from the negligent act."

See, also, *Hill v. Winsor*, 118 Mass. 251; *Armendal v. Stillman*, 67 Tex. 458, 8 S. W. 678; *Wilbert v. Sheboygan Light, Power & R. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931.

Again, it is insisted on behalf of defendant that there is a fatal variance between the acts of negligence alleged in the petition and the proof. In this contention there is no merit.

It was not error to refuse defendant's requested instruction set forth in the assignments of error.

The evidence was sufficient to take the case to the jury on the question of the negligence of the city and the issues involved.

We have examined the instructions given by the court, and, in our opinion, the jury were instructed as to the law applicable to the case in all particulars.

It follows that the judgment of the trial court should be affirmed, and it is so ordered. All the Justices concur.

(45 Okl. 209)

TUCKER et al. v. THRIVES. (No. 3936.)  
(Supreme Court of Oklahoma. Jan. 5, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 572\*) — CASE-MADE — FILING—EVIDENCE.

A motion is filed to dismiss this appeal on the ground that the case-made was never filed with the papers in the case in the trial court. The case-made contains no file mark or stamp of the clerk, showing the same to have been filed in the office of the clerk of the trial court. A certificate and also an affidavit of the clerk are filed with the response to said motion, which show that said case-made was deposited with the clerk for the purpose of filing and placed with the papers in the cause, and was thereafter withdrawn, to be filed in the Supreme Court. Said certificate and affidavit of the clerk are uncontroverted. *Held*, that under the law the depositing with the clerk for the purpose of filing constituted a valid filing, and this court is authorized and will receive evidence showing said case-made to have been filed. *Held*, further, the motion to dismiss should be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2554; Dec. Dig. § 572.\*]

Turner, J., dissenting.

Error from District Court, Nowata County; T. L. Brown, Judge.

Action between W. E. Tucker and another and W. V. Thrives. From the judgment the parties first mentioned bring error. Motion to dismiss overruled.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

W. J. Campbell, of Nowata, for plaintiffs in error. W. A. Sipe, of Tulsa, W. A. Chase, of Nowata, and J. A. Tillotson and W. M. Justis, both of Tulsa, for defendant in error.

RIDDLE, J. A motion is made to dismiss on the ground that the case-made was never filed with the papers in the case in the trial court. The case-made does not contain the file mark or the stamp of the clerk showing the same to have been filed. There is also presented the affidavit of the clerk to the effect that the case-made was filed with the papers in said cause. In response to this motion is presented a certificate of the clerk of the trial court, showing that on civil docket No. 3, at page 46, appears the following entries relative to said cause:

"March 28th, 1912; case-made entered, 25¢; cert. 25¢; filed 10¢; orig. withdrawn to file in Supreme Court."

There is also presented the affidavit of the clerk to the effect that the case was filed with the papers in said cause. Judgment was rendered in the trial court November 27, 1911. Case-made was settled March 26, 1912. Petition in error and case-made were filed in this court May 8, 1912.

The question arises upon the motion to dismiss: Can plaintiffs in error, under the practice in this court, be permitted at this time to show that the case-made was actually filed in the trial court? In support of the motion herein to dismiss, defendant in error cites and relies on the cases of Banks et al. v. Watson, 40 Okl. 450, 139 Pac. 306 and Gibbs v. Tanner, 143 Pac. 189. In the first case cited, this court said:

"A case-made filed in this court which does not show that it has been filed in the office of the clerk of the trial court is a nullity, and, where such a case-made remains in this court after the expiration of the statutory period in which to perfect an appeal, on motion the appeal will be dismissed."

The same rule was announced in Banks et al. v. Watson, supra. These cases, considered abstractly, might appear to be conclusive against plaintiffs in error and require a dismissal of this appeal. The language used in disposing of the motions in those cases must be considered and applied to the facts there before the court, and should not be construed as extending the rule beyond the points necessarily involved. Upon an examination of the facts in those cases, it is disclosed that the case-made had not, as a matter of fact, been filed in the office of the clerk of the trial court with the papers in said causes as disclosed by the record, and the conclusions reached and announced in those cases were correct. The rule stated by Cyc. vol. 3, p. 73, is to the effect that:

"A case or statement of facts on appeal which is not filed within the required time after settlement cannot be considered by the appellate court."

It will be noticed that the text does not state that, where the case or statement of

facts fails to have the file mark of the clerk attached or stamped thereon, it cannot be considered by the appellate court; but in clear language it is stated that, when the record is not filed with the clerk, it cannot be so considered. This is the rule followed by this court in the case of St. L. I. M. & So. Ry. Co. v. Burrow, 33 Okl. 701, 127 Pac. 478, which case is cited by the court in Banks et al. v. Watson, 40 Okl. 450, 139 Pac. 306. It was there said:

"It seems to be conceded that neither was the case-made attested by the clerk of the district court nor was the case-made filed with the papers in the case in the lower court."

After quoting from section 6074, Comp. Laws 1909, relating to amendments, approval, etc., the latter part of which section provides, "it shall then be filed with the papers in the case," the court further stated:

"Such not having been done, the purported copy attached to the proceeding in error is a nullity. \* \* \*"

This undoubtedly states the correct rule and the rule announced by the court in the two cases cited, when applied to the facts there before the court. The case-mades in those cases had not been filed with the clerk of the trial court, as disclosed by the case-made itself, and there was no attempt to otherwise show that said case-mades had been so filed; and necessarily the motions to dismiss were properly sustained. We have an entirely different state of facts before us now. The uncontradicted affidavit of the clerk of the district court filed in this court shows that the original case-made was, as a matter of fact, filed in his office with the papers in the case and was withdrawn for the purpose of filing in this court. These facts, not being disputed, must be accepted as prima facie true. It is the actual depositing in the office with the clerk of the trial court which in law constitutes the filing. When the case-made is deposited with the clerk or his duly authorized deputy, in his office with the intent and for the purpose of filing with the papers in the cause, in law it is a valid filing and effective as such, although the clerk neglects to place the file mark thereon or stamp same as filed; the purpose of which is to furnish evidence of such filing. This rule is well settled. Norris et al. v. Cross, 25 Okl. 296, 105 Pac. 1000; Eldred v. Malloy, 2 Colo. 20. In the case of Nimmons v. Westfall, 33 Ohio St. 213, the rule is stated as follows:

"The original papers and pleadings" on error to the common pleas are sufficiently filed in the district court when placed in the files of the district clerk, "without indorsing thereon additional file marks."

In the case of Schmuck v. Missouri, K. & T. Ry. Co., 85 Kan. 447, 116 Pac. 818, it is said:

"When the party appealing has complied with all that the law requires of him in order to perfect an appeal, his rights cannot be prejudiced, nor can the jurisdiction of this court be defeated, by the failure of the clerk of the trial court

to perform a duty which the statute imposes upon him."

In the case of *Aultman & Co. v. Utsey*, 33 S. C. 611, 12 S. E. 628, the court said:

"Circuit Court Rule 49 provides that, 'where a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or it shall be deemed abandoned.' Held, that the appeal will not be dismissed, under this rule, where the case or exceptions were left with the clerk for filing in apt time, though he failed to mark the same 'Filed,' and allowed the original to be taken from his office."

In *Harden v. Card*, 14 Wyo. 497, 85 Pac. 251, it is said by the Supreme Court of Wyoming:

"The bill is also assailed on the ground that it is not indorsed as filed in the court below after it was allowed and signed. \* \* \* It is apparent therefore that, after being signed, the bill was left with the clerk for filing, and his failure to indorse it as filed cannot invalidate it. It is sufficiently shown to have been filed in the clerk's office." *Board et al. v. Shaffner*, 10 Wyo. 181, 68 Pac. 14.

Evidence will not be received to contradict the record as to the service and filing of notice, but may be received to supply the omitted proof. *Heinlen v. Heilbron*, 94 Cal. 641, 30 Pac. 8; *Elder v. Frervert*, 18 Nev. 284, 3 Pac. 237; *Western U. Tel. Co. v. O'Keefe*, 87 Tex. 423, 28 S. W. 945. Failure of the clerk to do his duty is not chargeable to appellant. *Pauley v. King-Richardson Co.*, 174 Ill. App. 557. It was held in the case of *McDaniel v. Columbus Fertilizer Co.*, 109 Ga. 284, 34 S. E. 598, that causing a bill of exceptions to be actually placed in the hands of the clerk of a trial court within the time prescribed by law for filing the same in his office is all that is required of a plaintiff in error or his counsel. Where a bill of exceptions was delivered to the clerk for the purpose of being filed within the prescribed time, the omission of the file mark is not proof that it was not filed. *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372; *Eldred v. Malloy*, 2 Colo. 20; *Foster v. Hinsin*, 75 Iowa, 291, 39 N. W. 505. Evidence of filing may be shown by either order, book entry, or certificate of clerk. *Cook v. Fiedler*, 24 Colo. App. 544, 135 Pac. 1109; *Daugherty v. Reveal* (Ind. App.) 102 N. E. 381; *Hoffman v. Isler*, 49 Ind. App. 284, 97 N. E. 188.

The law is equally as imperative requiring the case-made to be served in the manner and within the time required by the statutes, or within such time as may be granted by the court, as it is that the case-made shall be filed in the office of the clerk of the trial court. A failure to do either is fatal to the validity of a valid case-made. This court has held that where it did not appear from the case-made that it had been served within the time prescribed by law, or within the time allowed by the court, extrinsic evidence would be received, showing that said case-made had been so served. *Pioneer Tel. &*

*Tel. Co. v. Davis*, 26 Okl. 205, 109 Pac. 299; *Sutter County v. Tisdale*, 128 Cal. 180, 60 Pac. 757. The same rule applies to the clerk's attaching his seal. *A. T. & S. F. Ry. Co. v. Whitbeck*, 57 Kan. 729, 48 Pac. 16; *Pierce v. Myers*, 28 Kan. 364.

From the foregoing authorities, which we believe are supported by reason and in harmony with just rules of procedure, we hold that in any case pending in this court where the case-made fails to show that same was filed in the office of the clerk of the trial court with the papers in said cause, or that the seal of the clerk has been omitted, or other formal defects in the record appear, and on account of which a motion is made to dismiss such proceeding in this court, if defendant in error, in response to such motion, shows by affidavit or other proper and legal evidence that such case-made has been filed in the office of the clerk of the trial court, and if such evidence is not controverted, this court will accept same as prima facie true, and the motion to dismiss will be overruled. In the event said evidence is controverted, if the showing is deemed sufficient, and a motion is made to withdraw the case-made to have same corrected to speak the truth, an order will be made allowing same to be withdrawn for the purpose of correction. If a satisfactory showing is made before the trial court or judge thereof that the case-made or record does not speak the truth, it will be the duty of such trial court or judge, in pursuance to the order of this court, to permit said record or case-made, upon reasonable notice, to be amended nunc pro tunc, so as to speak the truth, to the end that justice be done. In that the facts set out in the affidavit of the clerk of the trial court are not denied, it will be unnecessary for the case-made to be withdrawn for the purpose of correction by having the file mark placed thereon, as it appears as a fact and in point of law the case-made was filed with the papers in the cause in the office of the clerk of the trial court, and was then withdrawn for the purpose of filing in this court.

The motion to dismiss will be overruled. All the Justices concur, except TURNER, J., who dissents.

(45 Okl. 536)

CHICAGO, R. I. & P. RY. CO. et al. v. HOL-  
LIDAY et al. (No. 2314.)

(Supreme Court of Oklahoma. Jan. 9, 1915.)

(Syllabus by the Court.)

1. DEATH (§ 9\*)—RIGHT OF ACTION—STATUTE. Sections 4611 and 4612, Wilson's Rev. & Ann. St. 1903 (sections 5281 and 5282, Rev. Laws 1910), were adopted according to their terms, and were put in force and effect by section 2, art. 25, of the Schedule to the Constitution.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. MASTER AND SERVANT (§ 87\*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—APPLICATION.**

The act of Congress of June 11, 1906 (34 Stat. 232, c. 3073), is repugnant to the Constitution of Oklahoma and is locally inapplicable, and was not extended to and put in force in this state by section 2, art. 25, of the Schedule to the Constitution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.\*]

**3. APPEAL AND ERROR (§ 170\*)—DEATH (§ 9\*)—SCOPE OF REVIEW—FEDERAL QUESTION—RIGHT OF ACTION—WHAT LAW GOVERNS.**

Plaintiffs and defendants in the trial court proceeded upon the theory that sections 5281 and 5282, Rev. Laws 1910, were controlling. There is nothing in the pleadings or the evidence, or otherwise in the record, to bring the case within the purview of the Employers' Liability Act of April 22, 1908, c. 149, § 5 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), or to show that defendants relied upon said latter act or directed the attention of the trial court to same. No federal question was sought to be raised until after the case was brought to this court. *Held*, that the case is controlled by the state law, *supra*. *Held*, further, that defendants cannot successfully raise a federal question for the first time in this court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052, 1099, 1100; Dec. Dig. § 170; Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. STATUTES (§ 171\*)—"SUSPENSION."**

The "suspension" of a statute means a temporary stop for a time and involves a power which can be exercised only by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 251; Dec. Dig. § 171.\*]

For other definitions, see Words and Phrases, First and Second Series, Suspend.]

**5. CONSTITUTIONAL LAW (§ 24\*)—ADOPTION—EFFECT—EXISTING LAWS—"IN FORCE"—"IN EFFECT."**

As used in Const. Schedule, § 2, providing that all laws in force in the territory, and not repugnant to the Constitution, or locally inapplicable, shall remain in force, the term "in force" means in binding power, validity, and the term "in effect" which is omitted from the requirement of the schedule, means operative.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.\*]

For other definitions, see Words and Phrases, First and Second Series, In Force.]

**6. TERRITORIES (§ 18\*)—LAWS—ACTS OF CONGRESS—"SUPERSEDE"—"SUSPEND."**

To say that a federal statute "supersedes" a territorial law does not necessarily mean that all the territorial law, within the purview of the federal law, was annulled. The word "supersede" means annul, stay, suspend; and a superseded territorial law may be held to have been stayed or suspended in its operative effect, rather than annulled. The words "supersede" and "suspend" are commonly used interchangeably in this connection.

[Ed. Note.—For other cases, see Territories, Cent. Dig. §§ 14, 15; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, First Series, Supersede; also First and Second Series, Suspend.]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by Magnolia Holliday and another against the Chicago, Rock Island & Pacific

Railway Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

C. O. Blake, of El Reno, and Stevens & Myers, of Lawton, for plaintiffs in error. Al. J. Jennings and Stuart, Cruce & Gilbert, all of Oklahoma City, for defendants in error.

**RIDDLE, J.** This action was commenced April 29, 1909, in the district court of Comanche county, by Magnolia Holliday, for herself and as next friend of Joseph Holliday, Jr., to recover damages from the Chicago, Rock Island & Pacific Railway Company, W. J. Duvall, and A. H. Reed, for the wrongful death of Joseph L. Holliday, Sr., the husband of Magnolia, and the father of Joseph L. Holliday, Jr. The petition, as filed in the lower court, is substantially as follows: That defendant railway company is a railroad corporation, organized and existing under and by virtue of the laws of the state of Illinois, and as such was, at all times hereinafter mentioned, operating a line of railway into the counties of Comanche and Grady, state of Oklahoma. That said railway company maintained a division and railway yard for moving, switching, and handling engines, coaches, box cars, flat cars, and dumping cars at the city of Chickasha. That defendant W. J. Duvall is a citizen of Grady county, and was an employé and servant of said railway company at the time of the injury and death of Joseph L. Holliday, Sr., and that said Duvall was acting in the capacity of yardmaster in said defendant company's yards at Chickasha, and as such yardmaster had charge of and directed the movement and switching from place to place the trains, cars, etc., in defendant company's yards. That defendant A. H. Reed is a citizen of Grady county, and was, at all times mentioned herein, an employé and servant of defendant company, acting in the capacity of engine foreman. That it was a part of his duty as such engine foreman to move, switch, and cause to be moved, and switched from place to place, in the yards of defendant company at Chickasha, the cars, engines, etc., belonging to and used by said defendant company. That plaintiff Magnolia Holliday is a citizen of Comanche county. That she was the legal wife of Joseph L. Holliday, Sr., deceased, who, at the time of his death, was an employé and servant of defendant company, working as a brakeman on a work train belonging to defendant company. That plaintiff Joseph L. Holliday, Jr., an infant under the age of 21 years, the son of Joseph L. Holliday, Sr., now deceased, and Magnolia Holliday, resides in Comanche county. That at the time of the death of said Joseph L. Holliday, Sr., he was a resident of the state of Oklahoma, and that Joseph L. Holliday, Sr., died intestate in this state, and since his death no administrator or personal repre-

sentative of him has been appointed, and plaintiff Magnolia Holliday brings this suit for the sole benefit of herself and Joseph L. Holliday, Jr., her infant child. That on the — day of September, 1908, defendant company, W. J. Duvall, A. H. Reed, and the employees and servants of said defendant company directed and caused to be sent out a work train or construction train belonging to defendant company, under the control of Conductor P. R. Pressley, to construct and repair defendant company's track on the Pauls Valley branch of defendant company, under the control and management of the agents, servants, and employees of said defendant. That while said train was returning to the city of Chickasha, over the railroad track belonging to defendant, it collided with two or more flat cars belonging to defendant railway company, wrecking the caboose of said work train above described. That said caboose, so wrecked as aforesaid, was in an old, worn, and dilapidated condition. That said flat cars aforesaid were, by the gross neglect, carelessness, and mismanagement of defendant company, W. J. Duvall, and A. H. Reed, their servants, agents, and employees, placed on defendant company's railroad track, known as the Pauls Valley branch, and said defendants, their agents, servants, and employees, negligently, carelessly, and with gross mismanagement, placed the said flat cars on said railroad track, having full knowledge that the work train was out on the railroad track, known as the Pauls Valley branch of defendant company's railroad, and that said work train would have to come into the yards of said defendant company, situated in the city of Chickasha, upon which said defendants, their agents, servants, and employees, had so negligently and carelessly placed the said flat cars aforesaid. That said collision was caused by the gross neglect, carelessness, and mismanagement of the defendants aforesaid, their agents, servants, and employees. That by reason of the gross neglect, carelessness, and mismanagement of defendants, their agents, servants, and employees, as aforesaid, in causing said collision, Joseph L. Holliday, Sr., an employee and servant of defendant company on said work train, on the — day of September, 1908, was maimed, crushed, and killed. That by means of the mismanagement, carelessness, and gross neglect of said defendants, their agents, servants, and employees in placing the aforesaid flat cars on the railway track, causing the collision aforesaid, said Joseph L. Holliday, Sr., was maimed, crushed, and killed, and the said death of the said Joseph L. Holliday was without any default, neglect, or want of care on the part of said Joseph L. Holliday, Sr. That by reason of the death of said Joseph L. Holliday, Sr., so caused as aforesaid, the plaintiffs Magnolia Holliday and Joseph L. Holliday, Jr., an infant under the

age of 21 years, are damaged in the sum of \$50,000.

To this petition, defendants on January 24, 1910, each filed the following demurrer:

"And now comes the said defendant and demurs to the petition of plaintiffs filed herein, for the reason and upon the ground: (1) That the court is without jurisdiction. (2) That the plaintiffs have no legal capacity to sue. (3) That there is a defect of parties plaintiff and a defect of parties defendant. (4) That several causes of action are improperly joined. (5) That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant."

After the court overruled this demurrer, to which exception was saved, defendant filed its answer, consisting: (1) Of a general denial; (2) a plea of contributory negligence, in that deceased, at the time of his death, was acting in violation of certain rules and regulations of defendant company, and that the injuries resulted from the violation of such rules.

On February 7, 1910, the cause was tried to a jury. A demurrer to the evidence was overruled, exceptions saved, and a verdict returned in favor of plaintiffs for \$20,000. Motion for new trial was filed and overruled, and defendants bring error to secure a reversal of said judgment.

The petition in error contains the following assignments: (1) The court erred in overruling defendant's demurrer to plaintiffs' petition filed herein. (2) The court erred in overruling defendant's demurrer to the evidence. (3) The court erred in overruling defendants' motion for new trial.

Plaintiffs in error will be designated defendants, and defendant in error as plaintiff, in accordance with their position in the trial court.

The right of action for death wrongfully caused by another did not exist at common law; hence, if it exists in this state, it must be by reason of some constitutional or statutory provision.

[1] It is the contention of plaintiffs that sections 4611 and 4612, Wilson's Ann. St. (sections 5281 and 5282, Rev. Laws 1910), were adopted and put in force by virtue of section 2, art. 25, of the Schedule to the Constitution (section 366, Williams' Const.), and were in force at the time of the institution of this suit. Defendant contends in this court that the act of Congress of June 11, 1906, known as the "Employers' Liability Act," was in force in the territory of Oklahoma at the time of the admission of the state, and that said act rendered void and superseded the provisions of the territorial statute relied upon by plaintiffs, and that said act of Congress, being the only law in force in the territory of Oklahoma relating to the subject covered by sections 5281 and 5282, Rev. Laws 1910, was adopted and extended in force in this state by the Constitution; that, under said act of Congress, the right of action survived only to the representatives of the deceased. It is further

the contention of defendant that the act of Congress of April 22, 1908, was applicable, and that this suit was governed by said act, and, under said act, plaintiffs were not authorized to maintain this suit.

Sections 5281 and 5282, Rev. Laws 1910, read:

"5281. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must accrue to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"5282. In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

It is clear from the record that this suit was filed and prosecuted under and by virtue of the foregoing provisions of the statute, quoted supra; and it is equally clear at the defense interposed by defendant as on the theory that said statute was in force at the time of the institution and filing of said suit, and that plaintiffs' suit was prosecuted thereunder.

[2, 3] The first question presented for our termination is as to what laws, if any, were in force in this state at the time of the institution of this suit, giving a right of action to the widow or next of kin for the death of one, caused by the wrongful act or omission of another. If we find the local territorial law was in force, then the judgment of the trial court must be affirmed, unless the case, as made, comes within the purview of the federal Employers' Liability Act, date April 22, 1908, in which latter case a reversal will be required, provided defendants have availed themselves of its provisions by asserting rights under it in the trial court, or in some proper manner directed the attention of the trial court to its provisions, thereby raising this issue in that court. The Employers' Liability Act of June 11, 1906, far as applicable here, is as follows:

"That every common carrier engaged in trade commerce in the District of Columbia, or in any territory of the United States, or between several states, or between any territory and other, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent on him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or trucks.

"Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

"Sec. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

"Sec. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued."

Did the framers of the Constitution adopt, or intend to adopt and extend over the state, the federal Employers' Liability Act, of date June 11, 1906? We are clearly of the opinion they did not. The reasons for so concluding are as follows: In discussing this question, it must be remembered that, at the date of statehood, the federal Circuit Courts for the Western Districts of Kentucky and Tennessee had declared this law unconstitutional and void in toto, so far as it applied to the states, which decisions were affirmed by the federal Supreme Court January 6, 1908. The Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The ground upon which this law was declared void, briefly stated, was that it invaded states' rights. The concluding words of the court, speaking through its present Chief Justice, are:

"Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are therefore affirmed."

This law, however, in the territory of Oklahoma at the date of statehood, in all its parts, was in full force and effect, and, if adopted at all, must have been adopted in toto. That this act primarily was intended to regulate and apply to interstate, and not to intrastate, commerce, is clear from its text, as analyzed by the Supreme Court:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc.

Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business to be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do; that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."

If this law was adopted and extended in force in this state, when so adopted it became state legislation and ceased to be federal legislation. It was as clearly beyond the power of the state to legislate on subjects within federal jurisdiction as it was for Congress to legislate concerning subjects wholly within the jurisdiction of the states. If this law was adopted, it was adopted as a whole, and included that portion covering subjects relating to interstate commerce, as well as the subjects relating to intrastate commerce. The law was indivisible. On this point, the Supreme Court said:

"Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided."

That Congress may legislate legitimately concerning the subject relating to the master's liability to his servants, when applied to interstate commerce, can no longer be doubted, as said by the Supreme Court, in the case, *supra*:

"It cannot be said that because a regulation adopted by Congress as to such train, when so engaged in interstate commerce, deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete."

Thus, we see that this act was intended to and did apply exclusively to interstate carriers and primarily relate to subjects pertaining to interstate commerce, and its terms applied equally to employes who were injured while employed in interstate commerce as to those employes engaged in and perform-

ing service in intrastate commerce. That the state can pass no law directly regulating commerce or regulating and fixing the liability of the master to his servants for injuries received by the latter while actually employed in and performing service directly pertaining to interstate commerce must be conceded. Especially is this true if the federal government has taken possession of the field. *Sherlock et al. v. Alling, Adm'r*, 93 U. S. 99, 23 L. Ed. 819; *Mondou v. N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *El Paso & N. El. Ry. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106; *Labatt, Mast. & S.* (2d Ed.) § 2798. We must not be understood as holding that the state is without power to legislate fully upon this subject, when such legislation does not, upon its face, or necessarily in its operation, apply to employes while actually employed or engaged in service pertaining to and directly affecting interstate commerce. Or, to state it in another form, when such legislation does not on its face or by necessary operation enter the same field covered by and in control of federal jurisdiction, the power of the state is undoubted. This power has been too often recognized and upheld to require citation of authority. Had the act of June 11, 1906, *supra*, applied only to subjects under state control and not directly affected interstate commerce on its face, or by necessary operation, and on this ground had been declared void as federal legislation, the state could have undoubtedly adopted and continued same in force in this state. That this act of Congress must continue in force as a whole, or totally fall, cannot be doubted. Its terms covering the subject here involved were so interblended that they were indivisible. It is inconceivable that the framers of the Constitution of this state would adopt and extend in the state an act not only which had been declared void, as applied to the states as national legislation, but also which would be obviously void, if adopted as state legislation, in that the act on its face applied solely to carriers engaged in interstate commerce and did not purport to apply to intrastate carriers. Thus, it is unreasonable to presume that the makers of the Constitution had in mind this act when they inserted section 2, art. 25, of the Schedule to the Constitution.

Other reasons may be suggested, which, to our minds, are sufficient to warrant us in holding that this act was locally inapplicable and repugnant to our Constitution.

Viewing and discussing this question from the standpoint of the territory and succeeding state, a careful comparison of these two distinct statutes will show that the act of Congress impinged upon and mutilated the operative effect of the territorial statutes by

prescribing a different rule in respect to cases of death of employes of common carriers engaged in trade or commerce in the territory, as follows: (1) Instead of giving the right of action in all cases where death is caused by the wrongful act or omission of another, as formerly, it gave the right only in case of death of an employe of a common carrier engaged in trade or commerce within the territory, and where the death occurred as a result of the negligence of such employer, and under the circumstances specified in the act, leaving all other cases subject to the local statute. (2) Instead of following the local statute and naming the next of kin, after the "widow and child" (subject to our law of distribution of personal property), as the beneficiaries; it made the parents of the deceased, or, if none, the next of kin dependent upon him, the beneficiaries. (3) Instead of giving the right of action to the deceased's personal representative, or if the deceased was a resident of another state, or, being a resident of Oklahoma, had no personal representative, to the beneficiaries the right of action, it gave the right of action alone to the personal representative. (4) Instead of giving a right of action for all wrongfully caused death, including, for instance, intentionally caused death, it gave a right of action only for death negligently caused in specified respects. (5) Instead of giving a right of action within two years, it gave a right limited to one year. (6) Instead of giving a right of action subject to be defeated by contributory negligence, in accord with the general rule of law, it gave a right of action in which, if the carrier's negligence was gross and that of the deceased slight, contributory negligence would not bar the right of recovery but should result in diminution of damages in proportion to the amount of negligence attributable to the employe. (7) Instead of giving a right of action subject to the defense of assumption of risk, this defense is excluded, as well as certain other contractual defenses. (8) Instead of leaving the question of negligence and of contributory negligence to the court and jury, it made these questions for the jury and excluded the power of the court in respect thereto. (9) Instead of relieving the master from liability as formerly, for the negligence of a fellow servant of the deceased, it imputed the latter's negligence to the master.

The line of demarcation between the territorial statute and the act of Congress made the law covering the subject of wrongful death almost unthinkable incongruous and lacking in uniformity. The territorial law was in terms broad enough to comprehend the whole subject of wrongful death; but the act of Congress withdrew from its operative effect a part of that subject. When all of our constitutional provisions and statutes relating to the same subject or to kindred subjects, or affecting the same, and the incon-

sistencies therewith of the afore-specified peculiar features of the said act of Congress, are considered, we are unable to think otherwise than that the act of Congress must be deemed repugnant to this Constitution and locally inapplicable, and therefore rejected by said section 2, art. 25, of the Schedule to the Constitution. Section 7, art. 23, of the Constitution, reads:

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

This provision speaks of "the right of action" as a single thing, and does not seem to contemplate that there are two rights of action, one under an existing local statute, couched in terms of general and all-comprehending application, and another under said act of Congress limited to the specified cases in which the right is there given or declared.

Sections 46, 46(o), 51, and 59, art. 5, of the Constitution, read:

"Sec. 46. The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: \* \* \*

"Sec. 46(o) Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts. \* \* \*

"Sec. 51. The Legislature shall pass no law granting to any association, corporation, or individual, any exclusive rights, privileges or immunities within this state."

"Sec. 59. Laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted."

Section 6, art. 23, Const., reads:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

Section 36, art. 9, Const., reads:

"The common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employe of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employe shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employe or employes of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty; and when death, whether instantaneous or not, results to such employe from any injury for which he could have recovered under the above provisions, had not death occurred, then his legal or personal representative, surviving consort or relatives, or any trustee, curator, committee or guardian of such consort or relatives, shall have the same rights and remedies with respect thereto, as if death had been caused by the negligence of the master. And every railroad company and every street railway company or interurban railway company, and every person, firm, or corporation engaged in underground mining in this state shall be liable under this section, for the acts of his or its receivers. Nothing contained in this section shall restrict the power of the Legislature to extend to the employes of any person, firm, or corporation, the rights and remedies herein provided for."

It may be well to observe here that although a constitutional provision that the Legislature shall not pass laws of a certain character operates prospectively only (*Mestas v. D. C. & C. Co.*, 12 Wyo. 414, 76 Pac. 567, and the numerous cases therein cited, including *Supervisors of Calhoun County v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410), and does not prevent the adoption of such inhibited laws by such a Schedule of the Constitution as section 2 of our own, it is material to inquire and ascertain whether a prior law, claimed to have been so adopted, is prohibited by, or is inconsistent with, the constitutional provisions in order to determine whether it was in fact so adopted or should be regarded as rejected under the repugnancy or local inapplicability provisions of such section of the Schedule; and we have quoted, *supra*, from our Constitution only for the purpose of this inquiry.

It may be that employes of common carriers engaged in trade or commerce and such carriers themselves are a whole and not part of a class, and that in this aspect of the inquiry the adoption of the act of Congress of June 11, 1906, would not seem inconsistent with the foregoing constitutional provisions against the enactment of special laws; but (quoting 38 Cyc. 987-988) "the distinction between general and special laws and private and public laws depends on all the attendant circumstances, having regard to the effect rather than the form of the statute;" and when, in addition to the specification of the limited classes of persons, natural and artificial, affected by the act of Congress, its many erratic departures from our more general and in terms all-comprehending statutes relating to wrongfully caused death, as hereinbefore specified, are considered, an intent to adopt same is rendered improbable. It withheld from the operative effect of our general statutes, relating to wrongful death, a part of the subject-matter of the same and introduced into the practice in such specified cases a peculiar rule as to the trial of the question of primary negligence and possibly in other features of practice. But the question as to whether it is, if adopted, a special law, "where a general law can be made applicable," can best be considered and determined by carefully comparing each and all of its specified peculiar and differentiating features from the local law, with the above-quoted provisions of the Constitution relating to the enactment of special laws.

The adoption of the act of Congress also seems repugnant to said section 51 of our Constitution, above quoted, in that it gives common carriers exclusive privileges and immunities in that they are liable only for negligently and not every wrongfully caused death and to an action therefor brought within one year; also to said section 6, art. 23, of our Constitution, in that it modifies the defense of contributory negligence and abolishes the defense of assumption of risk; also

to said section 36, art. 9, of our Constitution, in that while the said section abrogates the common-law doctrine of the fellow servant in certain cases therein specified, but without including all common carriers, this act of Congress, if adopted, purports to abrogate that doctrine in every case of death of an employe of any common carrier engaged in interstate commerce. The section of the Constitution quoted expressly acknowledges the power of the Legislature to extend the abrogation beyond its extent in that section; but we do not think it could have been the intent of the framers of the Constitution to include in an adopted statute, such as this act of Congress is, any further abrogation than is specified in this section of the Constitution. It would seem that such further abrogation would have been made, if it had been intended. Not only is this true, but such act as that passed by Congress is not in harmony with our statutes and decisions, according to the real party in interest the right to sue in his own name. See sections 3898, 3918, Stat. 1893 (sections 4681, 4701, Rev. Laws 1910, and cases cited in notes to said sections of Rev. Laws 1910). Nor is it in harmony with the general policy of our laws in other respects indicated by the specified departures. In construing the Constitution, the intent is to be ascertained by reference to the foregoing proper sources of information. *State ex rel. Caldwell v. Hooker*, County Judge, 22 Okl. 712, 98 Pac. 964. This holding is in harmony with the doctrine stated in *Criswell v. Montana Railway Co.*, 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554. Section 30 of the Montana law, relating to domestic railroads, was involved in that case. Said section reads:

"That in every case the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, as to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

There were other acts of the Legislature permitting foreign railway companies to extend their lines into Montana; but the court held the above-quoted section applied only to domestic roads, hence was not adopted by the section of the Schedule, in that it prescribed a different liability for a domestic road from that which applied to a foreign road. Section 1 of the Schedule to the Constitution of Montana is practically the same as ours. The court in that case, speaking of the section of the Schedule involved, said:

"This provision is likewise self-executing. By it, rights were preserved. It operated of itself to keep in force a system of laws for the government of the state, unless such laws were inconsistent with the Constitution. But, as to any such repugnant statutes, it operated as an effective repeal, for, when the Constitution became the fundamental law, acts in conflict with it yielded; and when the question of a conflict is presented to the court, and the conflict clearly appears, the statute must be decided to be inoperative and void. *Cooley, Const. Lim. p. 58.* As the Supreme Court of Illinois has very recently said: \* \* \* "That a law passed,

either before or after the adoption of the Constitution, which is repugnant to its provisions, must be held to be of no valid force, and precisely as if it had been repealed before the performance of the act.' Washingtonian Home v. Chicago, 157 Ill. 414 [41 N. E. 893] 29 L. R. A. 98. We find high authority for our opinion in the case of Norton v. Brownsville Taxing Dist. Com'rs, 129 U. S. 479 [9 Sup. Ct. 322, 32 L. Ed. 774]. \* \* \* The court refers to the argument that the Constitution extended the law to the enactment of a statute, and reject the view that a law inconsistent with the Constitution when adopted is re-enacted, 'so to speak,' by a section like No. 1 of the Schedule to the Constitution of Montana. "The power of ordinary legislation," says Chief Justice Fuller, "is vested, under all our constitutions, in the legislatures, and the constitutional convention of Tennessee did not assume to exercise such power." \* \* \* And there is nothing here to justify the conclusion that section 29 of article 1 was designed to operate by way of amendment to prior laws nor can it so operate, nor the act of 1870 be held to have been kept in force, for the reasons already indicated.' Norton v. Brownsville Taxing Dist. Com'rs, 129 U. S. 479 [9 Sup. Ct. 322, 32 L. Ed. 774]. \* \* \* It also follows that by section 697 \* \* \* a greater burden was put upon appellant than was placed upon a foreign company of a similar character. The statute, therefore, being inconsistent with the Constitution, was annulled by the adoption of the Constitution."

That the Schedule of our Constitution adopts two such distinct and incongruous statutes on the single subject of death by wrongful act is unbelievable in the light of the constitutional and statutory provisions already referred to as inconsistent with that idea; and it is equally unbelievable that anything less than a law, giving the right of action for death in all cases where caused by wrongful act or omission of another, was adopted. Thus, we hold that the act of Congress is repugnant to our Constitution and locally inapplicable, and therefore was not adopted by section 2 of the Schedule.

It remains to be seen if the territorial statute was adopted as partially superseded in its inoperative effect by the act of Congress, notwithstanding the rejection of the latter act, or did the rejection of the latter act ipso facto remove the only obstacle to the operative effect of the former, and was the former statute adopted according to its terms? In our opinion, sections 5281 and 5282, Rev. Laws 1910, were adopted, not as in operative effect, but in whole, and according to their terms. It was the positive interference of the act of Congress that partially superseded the effect of the territorial statute, not any inherent deficiency in the latter; and, when the act of Congress was stricken down, what was there to interfere with the operative effect of the local statute? That Congress had plenary power to legislate for the territory of Oklahoma cannot be doubted. The territories have been characterized as young states, arriving at maturity when admitted into the Union. Section 26, Lewis'utherland Stat. Const., states:

"The very fact," says Mr. Wharton, "that territories are infant states, to be admitted into the Union on maturity, shows that they are to

be governed on the same general principles, so far as is applicable, as are states. \* \* \* Only a political change is produced by admission into the Union as a state. Congress then ceases to legislate for its people, or in regard to their internal and domestic concerns. \* \* \* The territorial laws enacted by Congress or the local Legislature continue in force so far as they are consistent with the new condition of statehood and the provisions of the state Constitution."

The Supreme Court of the United States, in the case of American Insurance Co. v. 350 Bales of Cotton, 1 Pet. 511, 7 L. Ed. 242, speaking through Chief Justice Marshall upon the subject of acquiring new territory to form states, etc., said:

"On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force, until altered by the newly-created power of the state. \* \* \* It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States."

The act of Congress of June 11, 1906, supra, as applied to the territory, superseded and for a time suspended the territorial act, so far as it covered the same field. It must be presumed, however, that Congress did not intend for it to remain in force longer than statehood. The Enabling Act authorized the framers of the Constitution and the people in adopting same to repeal this act of Congress or any other territorial act. When this act was rejected by the Constitution, it simply had the effect to repeal the same; and the repealing of said act, either expressly or by implication, removed the suspension and the territorial act became operative.

[4-6] In 36 Cyc. p. 1099, it is stated:

"The suspension of a statute means a temporary stop for a time. The power of suspending laws cannot be exercised, except by the Legislature." Jeffreys v. Huston, 23 Idaho, 372, 129 Pac. 1065; State ex rel. Holcombe v. Burdick, 4 Wyo. 290, 33 Pac. 131.

The territorial statute was in force in the territory at and before the adoption of our Constitution. Section 2 of the Schedule does not require that it must have been in operative effect as to every part of the subject within its terms as a condition precedent to its adoption; but the rejection of the act of Congress left it in full possession of the field claimed by its terms, and it was thenceforth in full operative effect as well as in force. By the term "in force," which is used in the Schedule, is meant in "binding power, validity" (the Oxford Dictionary); and by the term "in effect," which is omitted from the requirement of the Schedule, is meant "op-



erative." Within the meaning of section 2 of the Schedule, this statute was in force at the time of the adoption of our Constitution, although its operative effect had been superseded to the extent the subject was covered by the act of Congress only until this act was rejected.

For the same reason that the act of Congress of 1906, in part, was rejected as repugnant to the above-quoted provisions of the Constitution and locally inapplicable, it may be at least doubted if the territorial statute quoted, in its inoperative effect, would not be locally inapplicable and repugnant to the Constitution; and, if brought over in part, it seems almost, if not quite, necessary to hold that it was brought over in whole and according to its terms. Section 7, art. 23, of the Constitution, makes it certain that some pre-existing law, giving a right of action for wrongful death, was adopted by the Constitution, and one or both of the two statutes were certainly adopted by the same. If the territorial statute was the only one adopted, was it adopted, not only to the extent it was in force as respects the subject to which it relates, but to the extent of its plain terms? The act of Congress of June 11, 1906, did not destroy a word of the territorial statute, although it superseded its operative effect to a limited extent and suspended its force by taking away a part of the subject to which it had hitherto applied. We do not understand that the word "supersede," as used in the case of *El Paso & N. E. R. Co. v. Gutierrez*, supra, necessarily means that all territorial law, within the purview of the act of Congress there under consideration, is annulled. The word "supersede" (according to *Black's Law Dictionary*) means "annul; stay; suspend." And we assume that, where the proper considerations and circumstances justify, a territorial law should be held stayed or suspended in its operative effect, rather than annulled by such congressional act as the one under consideration. Also see *In re Macon Sash, etc., Co.* (D. C.) 112 Fed. 323; *In re Storck Lumber Co.* (D. C.) 114 Fed. 360; *In re Rogers* (D. C.) 116 Fed. 435; *Carling v. Seymore L. Co.*, 113 Fed. 483, 51 C. C. A. 1; *In re Curtis* (D. C.) 91 Fed. 737, affirmed 94 Fed. 630, 36 C. C. A. 430; *In re Sievers* (D. C.) 91 Fed. 366, affirmed sub nom. *Davis v. Bohle*, 92 Fed. 329, 34 C. C. A. 372; *In re Smith* (D. C.) 92 Fed. 135; *In re Etheridge Furniture Co.* (D. C.) 92 Fed. 329; *In re Richard* (D. C.) 94 Fed. 633; *In re Bruss-Ritter Co.* (D. C.) 90 Fed. 651; *In re Rouse, Hazard Co.*, 91 Fed. 99, 33 C. C. A. 356; *Armour Packing Co. v. Brown*, 76 Minn. 465, 79 N. W. 522; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; *Mauran v. Crown C. L. Co.*, 23 R. I. 324, 50 Atl. 331; *Harbaugh v. Castello*, 184 Ill. 116, 56 N. E. 363, 75 Am. St. Rep. 147.

Throughout these cases the words "supersede" and "suspend" are interchangeably

used as meaning the same thing; and sometimes the term "suspend the operation" is used as the same thing. In view of the fact that the congressional act of June 11, 1906, superseded only, as hereinbefore specified, the territorial statute, and that, too, in a respect in which it must have been understood that the anticipated state would desire the harmony and uniformity thus destroyed, we think the act of Congress can be held to have done no more than supersede the territorial law by staying or suspending its operative effect, pending the adoption of our Constitution. It will be kept in mind, also, that the terms of our territorial statute were broad enough to give, in addition to all other cases of wrongful death, a right of action for death wherever the act of Congress of June 11, 1906, would so give, except in case of slight contributory negligence or assumption of risk; and, in so far as the act of Congress merely gives the decedent's personal representative a right of action for the benefit of the former's widow and children, the two statutes are, in effect, identical, so that the later statute gave no new territorial right, but was affirmative or cumulative, and continued in force the former statute to that extent. *U. S. v. Barnes*, 222 U. S. 513, 32 Sup. Ct. 117, 56 L. Ed. 291; *Hendrix v. U. S.*, 219 U. S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102; *Great Northern R. Co. v. U. S.*, 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567.

Again, we have seen the federal act does not purport to give a cause of action to any person or the representative of any person injured while employed by a carrier engaged solely in intrastate commerce, but was limited to such employes as were employed only in interstate commerce. In the case of *Sturgis et al. v. Spofford*, 45 N. Y. 446, *Church, C. J.*, delivering the opinion of the court, in the second paragraph of the syllabus states:

"An act of Congress upon a subject within its jurisdiction, but upon which there has been state legislation, does not have the same effect upon the latter as would its repeal. Such act merely indicates the intention of Congress, from that time, to assume the exercise of the powers conferred by the federal Constitution. The state law becomes from that time inoperative, but is not repealed; the repeal of the act of Congress would leave the state law in full force." *Henderson v. Spofford et al.*, 3 Daly (N. Y.) 361.

In the case of *Hearn v. Brogan*, 64 Miss. 334, 1 South. 246, the Supreme Court of Mississippi, speaking through Justice Campbell, stated:

"We assume that an election has been held in Clay county under the act of 1886, and that it resulted in favor of the sale of liquors, because the record shows an attempt to comply with that act, which would be inappropriate if such election had not been held. This being so, the Code and amendments, as further amended by the act of 1886, constitute the law applicable. It is not true that an election under the late law abrogates the former law. If the result is against the sale, the former law is thereby suspended for the time, and the new law governs, with its provisions and penalties for its violation; but, if the result is for the sale, the for-



mer law remains in full force, modified by the new as to the terms on which license may be obtained. \* \* \* There is no express repeal of former laws by the late act, and, as repeals by implication are never favored, the new law must be held to displace or suspend the former only to the extent of inconsistency between them. There is nothing in the latter enactment inconsistent with the continued operation of former statutes, except as stated above in this opinion."

In the case of *Winterton et al. v. State*, 65 Miss. 238, 3 South. 735, the same court, speaking through Campbell, J., concurring, said:

"The repeal of a statute is a remission of penalties inflicted by it, because of the absence of authority to punish when the law giving it has ceased to exist. But where a law is not repealed, and is merely suspended, it still has vitality to authorize punishment for its violation before its suspension. A repeal makes the law as if it had never been. Suspending its operation for a time leaves it operative as to the past and in all respects wherein it is not abrogated by the new statute. A repealed statute is dead, and no sting can be inflicted by it, but one which still lives, although displaced for a time, as to its full effect, is not without power to vindicate its infraction before its suspension. Being still a law, there is no want of authority to punish under it for such violations of it."

Should we hold that the federal act repealed the territorial statute, instead of simply suspending its operative force, then when the federal act was rejected by the Constitution, which would have the effect to repeal that act, the territorial law would immediately become operative. It is a well-settled rule at common law that, when a repealing statute is itself repealed, the first statute is revived, without any formal words for that purpose, in the absence of a contrary intention, expressly declared. 36 Cyc. 1099; Lewis' Sutherland, Stat. Const. §§ 282, 288. From the point of view of the territory, the act of Congress was in the nature of an exception of a part of the subject from a general rule expressed in the territorial statute; and the rejection of the exception instantly left the excepted part of the subject within the operative effect of such general rule. Therefore the territorial statute in question was in force, according to its terms, when our Constitution was adopted, and was adopted by the latter as applicable to the whole subject of wrongful death. The quoted sections of the former territorial statutes have, since statehood, been frequently acted and relied upon as wholly valid; and we believe the bench and bar of this state have heretofore uniformly regarded the same as wholly valid and fully in force to the extent of its terms.

The third and last question presented is as to whether this case, as tried and as shown from the record, comes within the provisions of the act of Congress of April 22, 1908 (chapter 149, 35 Stat. 65; U. S. Comp. St. 1913, §§ 8657-8665), which in part reads as follows:

"That every common carrier by railroad while engaged in commerce between any of the several states or territories, \* \* \* shall be liable in damages to any person suffering injury while

he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employées of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

This act gives a right of action only to the personal representatives of the deceased, and in no event to the beneficiaries for whom such personal representatives are authorized to sue; and if the facts bring this case within the purview of this act, and the defendants have not waived their right to rely upon same, plaintiffs cannot maintain this action.

As we have seen, and as the record clearly shows, this case was tried in the lower court by both parties on the theory that it was prosecuted under sections 5281 and 5282, Rev. Laws 1910, and there is nothing in the record to indicate that either party suggested, or even thought, that the case was controlled by the act of Congress referred to, *supra*. The first time there was any effort made to interpose as a defense this act of Congress was after the case had reached this court. It is, in effect, admitted by counsel for defendants in their various briefs that this question was not called to the attention of the trial court, except by the demurrer. It is insisted that the second ground of demurrer, that plaintiffs have no legal capacity to sue, raises this question. The effect of the demurrer must be tested by the sufficiency of the petition. The authorities seem to be practically uniform that this ground of demurrer has reference to the legal disability of the plaintiff, such as infancy, idioy, or coverture, and does not raise the question here involved. *Dewey v. Stall*, 91 Ind. 173; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Littleton v. Burgess*, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N. S.) 49; *Weidner v. Rankin*, 26 Ohio St. 522; *Buckingham v. Buckingham*, 36 Ohio St. 69; *Farrell v. Cook*, 16 Neb. 483, 20 N. W. 720, 49 Am. Rep. 721; *Bliss*, Code Plead. (2d Ed.) 407-409; *Haskins v. Alcott*, 13 Ohio St. 210; *Hunt v. Monroe*, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249; *Jantzen v. Emanuel Baptist Church*, 27 Okl. 473, 112 Pac. 1127, Ann. Cas. 1912C, 659. On a demurrer, the sufficiency of the petition will be tested by the state law, unless the petition itself shows that the plaintiff is relying upon the federal act or that the federal act is applicable. *M., K. & T. Ry. Co. v. Neaves* (Tex. Civ. App.) 127 S. W. 1090; *M., K. & T. Ry. Co. v. Hawley* (Tex. Civ. App.) 123 S. W. 726.

Holding, as we have, that the territorial law governing the subject of a right to sue, where death ensues by virtue of the wrongful act of another, was adopted by the Constitution and was in force at the time of the

institution of this suit, it cannot be doubted that plaintiffs' petition stated a good cause of action under said provision of the law. In fact, we do not understand counsel for defendant question the sufficiency of the petition under the state law. Had plaintiff sued as administratrix to recover under the federal statute of April 22, 1908, in a federal court, and had otherwise alleged the facts as they are set out in her petition, it would have been subject to a general demurrer. Or, even had she sought to recover under said act in the state court under this petition, suing as administratrix, the petition would have been subject to dismissal on a general demurrer.

Can the defendants now for the first time in this court, when the record does not so show, insist that this case is controlled by the act of Congress, *supra*? We are of the opinion that they cannot. This has been the uniform holding of this court, as will be disclosed by the following cases: *Harris v. First Nat. Bank*, 21 Okl. 189, 95 Pac. 781; *Checotah et al. v. Hardridge et al.*, 31 Okl. 742, 123 Pac. 846; *Queen Ins. Co. v. Cotney et al.*, 25 Okl. 125, 105 Pac. 651; *Wattenbarger v. Hall*, 26 Okl. 815, 110 Pac. 911; *St. L. & S. F. Ry. Co. v. Key*, 28 Okl. 769, 115 Pac. 875; *Perry Water, Light & Ice Co. v. City of Perry*, 29 Okl. 593, 120 Pac. 582; *C., R. I. & P. Ry. Co. v. McBee*, 145 Pac. 331 (decided at this term).

This is also the uniform holding of the Supreme Court of the United States. In the case of *Louisville & N. R. Co. v. Woodford et al.*, 234 U. S. 46, 34 Sup. Ct. 739, 58 L. Ed. 1202, Mr. Justice Day, delivering the opinion of the court, discussing this proposition said:

"The case was taken by appeal to the Court of Appeals of Kentucky. After submission of the case to that court, the defendant filed a supplemental brief, urging the application of the law of the case of *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and further insisted upon such application in its brief in reply to the plaintiff's reply brief. The Court of Appeals noticed that the claim that the law of the *Croninger* Case controlled was first suggested by defendant in its supplemental brief, after submission of the case to that court, and that the case had been tried under the rule of law in Kentucky that a contract relieving a carrier from its common-law liability and limiting recovery to less than the value of the property carried is in violation of the Kentucky Constitution, and held that it was elementary that questions not raised in the trial court in an appropriate way, which by the Code of Practice of Kentucky is in writing, would not be considered on appeal, and, after detailing the proceedings in the trial court, concluded that no federal question had thus been made. The defendant, by petition for rehearing, again insisted that the federal question had been properly presented, but the Court of Appeals, admitting that state courts must take judicial notice of acts of Congress and that it was not essential that the federal question should have been raised in any special form in the trial court, held that the facts on which such question rested must be presented in the record. \* \* \* That the defendant was entitled to

make a defense under the act to regulate commerce, as amended (Act June 29, 1906, 34 Stat. at L. 584, c. 3591; U. S. Comp. Stat. 1913, § 8563 et seq.), is evidently an afterthought. The case was tried upon the theory that the Kentucky Constitution and statutes were controlling, and it was not until after the decision of *Adams Exp. Co. v. Croninger*, *supra*, that an attempt was made to claim the benefit of the bill of lading based upon schedules filed with the Interstate Commerce Commission. \* \* \* No pleading was filed by the defendant alleging compliance with the act to regulate commerce by the filing of schedules containing the limitation as to the liability upon which reliance is now placed. As we have already said, the record discloses that at the trial the defendant, instead of relying upon the limited liability now claimed, entirely ignoring such limitation, itself asked and obtained an instruction that, if the jury should find for the plaintiff, it should fix the damages in such sum as would represent the loss suffered. Of course, the request to give this instruction was entirely inconsistent with the claim of limited liability under the federal statute. If a federal question can be said to be involved at all, it was introduced into the record upon the argument of the motion for a new trial. \* \* \* The decisions of this court not only have repeatedly held that a federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice. *Schuyler Nat. Bank v. Bollong*, 150 U. S. 85, 14 Sup. Ct. 24, 37 L. Ed. 1008; *Erie R. Co. v. Purdy*, 185 U. S. 148, 22 Sup. Ct. 605, 46 L. Ed. 847; *Layton v. Missouri*, 187 U. S. 356, 23 Sup. Ct. 137, 47 L. Ed. 214."

In the case of *Chicago, Indianapolis & L. Ry. Co. v. Hackett*, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. 966, Mr. Justice Lurton, speaking for the court, said:

It is then assigned as error that the court below erred in not holding that the Indiana statute had been superseded by the federal Employers' Liability Act of June 11, 1906 (34 Stat. at L. 232, c. 3073; U. S. Comp. Stat. Supp. 1911, p. 1316). It does appear in one or more of the counts of the plaintiff's declaration that the railroad company was engaged in operating a railroad extending into two or more states, and such was the evidence. The first count might be said to declare upon the liability of the company under the act of 1906. Upon that ground the case was removed to the Circuit Court of the United States. But that court remanded it to the state court. Thereupon defendant demurred to the first count, and the demurrer was sustained. No exception was saved, and no error assigned either in the state court or in this. In no other way was any claim set up or asserted under that federal act, nor did the state court make any ruling as to the effect of that act upon the Indiana statute, and the judgment of the Illinois court was rested wholly upon the Indiana statute. Not having been specially set up in the state court and there passed upon, it is obvious that the point has not been saved."

The court held that the Employers' Liability Act of June 11, 1906, was unconstitutional and void.

Thus, we hold that both parties having tried this case on the theory that the state statute governed and no law of Congress or federal question having been suggested to the trial court, and the point being first raised in this court, and there being nothing in the

record bringing the case within the purview of that law, defendants cannot now be heard to insist that the state law does not govern this case.

From the foregoing, the judgment of the trial court must be affirmed. It is so ordered. All the Justices concur.

(45 Okl. 334)

OSAGE & OKLAHOMA CO. v. MILLARD,  
County Treasurer, et al. (No. 6099.)

(Supreme Court of Oklahoma. Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. TAXATION (§ 362\*)—ASSESSMENT OF OMITTED PROPERTY—COUNTY OFFICERS.

Section 7449, Rev. Laws 1910, does not purport to confer authority upon the county officers, or any one with whom the county commissioners may contract, to assist in the discovery of property not listed and assessed, or to assess property of a railroad or other public service corporation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 601; Dec. Dig. § 362.\*]

2. TAXATION (§ 317\*)—ASSESSMENT—JURISDICTION—PROPERTY OF PUBLIC SERVICE CORPORATION.

That part of section 21, art. 10, of the Constitution which provides that the state board of equalization shall assess all railroad and public service corporation property confers exclusive jurisdiction on such board; and the Legislature is without power to vest authority in any other person or officer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 525, 526; Dec. Dig. § 317.\*]

Riddle, J., dissenting.

Original action for writ of prohibition by the Osage & Oklahoma Company against Ret Millard, County Treasurer of Osage county, and another. Writ granted.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff. Stuart, Cruce & Cruce and Ledbetter, Stuart & Bell, all of Oklahoma City, for defendants.

RIDDLE, J. This is an original proceeding in this court, instituted by plaintiff against defendants, praying for a writ of prohibition. Plaintiff, in substance, avers that defendant Ret Millard is county treasurer of Osage county; that C. H. Pittman is the special tax auditor of said county, engaged in attempting to discover property, personal and real in said county not theretofore listed and assessed for taxation under the laws of this state; that plaintiff is a public service corporation, and that it owns its franchise in the city of Tulsa for the distribution and sale of gas to its inhabitants; that it maintains a pipe line in a gas field in Osage county and in the city of Tulsa, and maintains and operates a distributing plant in the city of Tulsa under a franchise granted by said city. Plaintiff further states that during all times mentioned its property, under the Constitution and laws of the state, was subject

to assessment by the state board of equalization; that it has for each of the years hereinafter mentioned filed with the state auditor a list of all its property, real, personal, and mixed, as the same existed on the 1st day of February in each year, as required by article 4, c. 72, Rev. Laws 1910; that said C. H. Pittman, as special tax auditor of Osage county, has filed a report with said county treasurer giving a list of property belonging to plaintiff for each of the years named; that the same consists of gas leases, and the value thereof for each of said years is alleged to be as follows, to wit: 1908, \$156,000; 1909, \$134,000; 1910, \$863,000; 1911, \$1,033,000; 1912, \$1,423,000; 1913, \$2,216,000. Plaintiff states that afterwards, on February 9, 1914, said county treasurer notified plaintiff to appear at his office on February 20, 1914, and show reason, if any, why said property should not be added to the tax rolls and taxes collected thereon for the years and respective amounts above stated. It is further alleged that its gas, oil, and minerals are part of the real estate and are assessable and taxable as such; that the gas leases, if property, constitute an investment of the capital of plaintiff; and that all the money and capital of plaintiff was included in the various reports made to the state auditor and considered and assessed by the state board of equalization; that the state board of equalization is vested with the sole and exclusive jurisdiction to assess the property belonging to plaintiff; that defendants have no authority or jurisdiction under the law to assess the property of plaintiff and place the same upon the tax rolls of Osage county. It is then alleged that defendants, if not prohibited by this court, will proceed to assess said property, and that the same will be extended upon the tax rolls by the treasurer. Plaintiff prays that defendants be restrained.

Defendants filed their answer to the petition, the first part of which was in the nature of a general demurrer. It is then alleged that plaintiff is indebted to Osage county for taxes for the years set out in the petition, and that no offer has been made to pay any of the taxes for said years. It is denied that the report made by plaintiff to the board of equalization for the respective years contains a list of all the property owned by plaintiff. It is further alleged that at the time plaintiff filed with the state auditor its report for the years aforesaid, it was the owner of valuable gas leases, amounting to the values stated in plaintiff's petition, and that plaintiff purposely and wrongfully refused to include said leases or to include said property in such report so filed with the state auditor; that plaintiff has not paid to the state or to the officers of said county any tax upon said leases, nor has it at any time

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

offered to pay any such tax; that by reason of the failure of plaintiff to furnish the state board of equalization a list of the various leases which plaintiff owned during the years before mentioned, it deprived said state board of equalization of the knowledge that it owned said property, and deprived said board of the power to assess same, and plaintiff has waived its right to insist that such property must be assessed by such board. There was no reply filed to this answer, but defendants filed a motion for judgment on the pleadings. The issue as thus made is presented for our determination.

On a reargument of this case upon a petition for rehearing and a further consideration of same, the other four members of the court have reached the conclusion that the original opinion in this case is not in harmony with the weight of authority, and that a rehearing should be granted, the former opinion vacated, and a writ of prohibition granted as prayed.

[1, 2] Defendants are proceeding to assess and extend on the tax rolls for taxation plaintiff's property under section 7449, Rev. Laws 1910, which reads:

"The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent. of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the county court for the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court."

It is the contention of plaintiff: (1) That, it being a public service corporation, under article 10, § 21, of the Constitution, the state board of equalization has exclusive jurisdiction to assess all public service corporation property; and (2) that section 7449, Rev. Laws 1910, supra, does not on its face purport to confer jurisdiction on the tax ferret or the county officers to assess property belonging to public service or railroad corporations, and it is contended that, if said provision of the statute is broad enough to cover property belonging to public service or railroad corporations, to that extent the same is in conflict with article 10, § 21, supra. So far as applicable here, said section of the Constitution, supra, referring to the state board of equalization, provides: "And they shall assess all railroad and public service corporation property."

It is the conclusion of the majority of the court that this contention must be upheld; that the language of the Constitution in vest-

ing power in the state board of equalization necessarily excludes the power of the Legislature from conferring authority upon any other person or officer to assess any property belonging to such corporation; that this language is equivalent to saying that the power is vested in the state board to assess all railroad and public service corporation property; and that this power shall not be vested in or exercised by any other official. The case of *Adams v. Tonella*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 348, would seem to sustain this construction. In the *Mississippi Case* it is shown that the Constitution of that state of 1869 provided in section 1, art. 5:

"A sheriff, coroner, treasurer, assessor and surveyor shall be elected in each county by the qualified electors thereof, who shall hold their offices for two years, unless sooner removed."

It is held by the court in that case that the Constitution, in providing the office of assessor and confining the office of territorial limits of his county, divided the state into as many taxing districts as there were counties; that the office of assessor spoken of in the Constitution is one of known and settled functions, and in providing that an assessor shall be selected in the manner provided by law for each county it is to be presumed that the framers of that instrument intended to provide for the performance by him, substantially at least, of those duties which had theretofore pertained to his office. *French v. State*, 52 Miss. 760. The court further stated:

"And an assessment can only be made by the officer designated by law to make it. *Welty, Assessments*, § 10. When the Constitution devolves that duty upon a particular person, the Legislature may not substitute another."

The court cites *People v. Kelsey*, 34 Cal. 473; *People v. Hastings*, 29 Cal. 450; *People v. Sargent*, 44 Cal. 434; *Houghton v. Austin*, 47 Cal. 648; *Richmond & D. R. Co. v. Orange County Commissioners*, 74 N. C. 506; *Wilmington & O. & A. R. Co. v. Brunswick Co. Com'rs*, 72 N. C. 10. The court, continuing, said:

"In *Houghton v. Austin*, above cited, the rule that the Legislature could not devolve the duty of assessing property upon any other tribunal or officer than the assessor provided for by the Constitution was carried to the extent of annulling a law creating a state board for equalization of taxation among the several counties of the state."

It was said by this court in the case of *State ex rel. Haskell, Governor, v. Huston et al.*, 21 Okl. 782, 97 Pac. 982, by Mr. Justice Turner, speaking for the court:

"It is a familiar rule of construction, as laid down in the syllabus of *United States v. Weld, McCahon*, 185 (Kan. Dasser's Ed.) 591 [Fed. Cas. No. 16,660], that: 'When one person, or class of persons, is named in a power of attorney, or an act of the lawmaking power, as being authorized to do a certain thing therein named, all other persons are thereby excluded from doing the same thing as effectually as if they were positively forbidden.'"

In the case of *People v. Draper*, 15 N. Y. 2, Chief Justice Denio says:

"A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first title lays down the ancient limitations which have always been considered essential in the constitutional government, whether monarchical or popular; and there are scattered throughout the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions, and the general arrangements of the Constitution, are far more fruitful of restraints upon the Legislature. Every permissive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong though a negative was expressed in each instance." In *re Leasing of St. Lands*, 18 Colo. 8, 32 Pac. 986; *Western Union Tel. Co. v. App*, 186 Fed. 116, 108 C. C. A. 226; *State rel. v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84; *King v. Hunter*, 85 N. C. 603, 6 Am. Rep. 754; *Anderson v. Ritterbusch*, 22 Okl. 761, 98 Pac. 602.

We are also of the opinion that section 49, Rev. Laws 1910, supra, does not confer authority upon the county taxing officers to assess property belonging to a railroad or public service corporation. The language of said section is that:

"The board of county commissioners of any county in the state may contract with any person or persons to assist the proper county officers of the county in the discovery of property to be listed and assessed as required by existing laws," etc.

We hold that this language simply means that such person with whom the county commissioners might contract to assist the property-taxing officers in the county in the discovery and listing for taxation such property as the county authorities were authorized in the first instance to assess for taxation, and that it was not the intention of the Legislature by the provision of the statute supra to include property belonging to a railroad or public service corporation over which the county officers had no jurisdiction to assess for taxation.

From the foregoing we are of the opinion that defendant had no jurisdiction or authority to list for taxation or to extend on the tax rolls the property belonging to plaintiff, and that the writ of prohibition should be granted; and it is so ordered.

KANE, C. J., and TURNER, LOOFBOURNE, and BLEAKMORE, JJ., concur.

RIDDLE, J. (dissenting). I am unable to agree with the conclusion of the majority of the court, expressed in the foregoing opinion. In my judgment, the writ of prohibition should be denied. We are dealing with the

power of the sovereign, and only incidentally with the power and authority exercised by the taxing officials. Speaking of the sovereign power over the subject of taxation, Cooley, in his work on Constitutional Lim. p. 678, states:

"The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. \* \* \* The Legislature of every free state will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not."

Again, the author, on page 679, quoting from Chief Justice Marshall, says:

"The people of a state, therefore, give to their government a right of taxing themselves and their property; and, as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. \* \* \* This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally. \* \* \* It is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power."

It must be remembered that the very term "state" implies that there is somewhere a sovereign power, whose only limit is its will, a power of that transcendent, supreme, illimitable nature, which, in the ascription of it to the English Parliament, is described by the strong word "omnipotence." In the United States this absolute, uncontrollable power resides in the people of each state in the aggregate, as a separate and independent community. As is expressed by Chief Justice Gibson:

"In every American state the people in the aggregate constitute the sovereign, with no limitation of its power, and no trustee of it but its own appointee."

Lord Coke says:

"That the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds."

Blackstone says so long as the English Constitution lasts "we may venture to affirm that the power of Parliament is absolute and without control." It has been well said that the people in the States collectively have all the power which was vested in the English Parliament. The whole, unbounded legislative power of the people is granted to the General Assembly, subject to express exception.

It is clear to my mind that, when the framers of the Constitution vested the power in the state board of equalization of assessing, it was intended that this should relate primarily to the assessment of property in the first instance, and they had no reference to this character of property. The Legislature has plenary power over the subject of tax-

ation, and it was not necessary for any specific grant of power in the Constitution to authorize it to act. As said by Chief Justice Marshall, this is one of the very attributes of sovereignty; thus, unless the power has been expressly taken from the Legislature, it retains it to the fullest extent. The fact that the power has been conferred on the state board in the broad language as is used in the Constitution ordinarily would be construed to be an inhibition by necessary implication. But this is not true as applied to the taxing power. The weight of authority is, in my judgment, that unless the Legislature is, by express terms, prohibited from exercising this power, it retains the same, and may exercise it in any manner it sees proper, and except where it is expressly restrained. Section 36, art. 5, Const., provides:

"The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

We are told that this provision has no application here; that, fairly construed, it means no more than that the Constitution, in granting any specific authority to the Legislature, shall not work a restriction, limitation, or exclusion upon the Legislature from legislating upon such subjects so specifically referred to, or any other subject. While this may be, and no doubt was, the primary intention of the framers of the Constitution in inserting this provision, yet the language is very broad and sweeping, and I am of the opinion that it may fairly be construed to be otherwise applied. In my judgment, the court in two other opinions has given it a broader construction. It was said by Justice Williams, in the case of *State ex rel. v. Hooker*, 22 Okl. 712, 98 Pac. 964:

"A restriction or limitation upon the power of the Legislature, upon any subject of legislation, will not be presumed or implied, unless from the entire instrument it clearly appears that it was so intended."

Justice Kane, in *Anderson v. Ritterbusch*, 22 Okl. 761, 98 Pac. 1002, speaking for the court in discussing the collection of taxes on property omitted from the tax rolls, stated:

"(19) Section 36, art. 5 (Bunn's Ed. § 109), of the Constitution, providing that 'any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever,' was incorporated into the Constitution to exclude the idea of the exclusion of power by implication.

"(20) It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

It is reasonably clear that this language extends the application of this section of the Constitution further than is contended

for in this case. Even without this provision of the Constitution, and discussing the question as though it had not been inserted, I am of the opinion that the Legislature is not limited in the assessment and collection of taxes on omitted property on account of the provision of the Constitution conferring authority upon the state board of equalization. This position is supported by high authority and sustained in principle by the rule announced in *Anderson v. Ritterbusch*, supra.

In the case of *Dorman v. State*, 34 Ala. 216, it is said:

"In the ascertainment of the respective powers of the federal and state governments, this fundamental distinction is to be observed: That whereas, by the federal Constitution the states have delegated to the government thereby organized only specifically enumerated powers, withholding all not named, the state Constitution, on the contrary, contains a grant from the people of all powers not expressly withheld. In the federal Constitution the enumeration of powers is of those delegated; in the state Constitution it is of those reserved. But for the enumeration, the federal government would have no powers; but for the reservations the state government would possess all the powers inherent in the people. Hence it has grown into a maxim of universal acceptance, among both jurists and statesmen, that 'the federal government can do nothing but what is authorized expressly or by clear implication, while that of the state can do whatever is not prohibited.' *Sharpless v. Mayor*, 21 Pa. 147-160 [59 Am. Dec. 759]; *People v. Draper*, 25 Barb. [N. Y.] 359, 360; *Norris v. Clymer*, 2 Barr [3 Pa.] 285; *Calhoun's Works*, vol. 6, p. 224. \* \* \* The whole, unbounded legislative power of the people is granted to the General Assembly, subject only to expressed exceptions. Without these exceptions, the power would be as unlimited as that of the people from whom it is derived; for the express reservation of a particular thing out of a general grant proves that the thing reserved would be within the general grant, had not the reservation been made."

In the case of *Capital City Water Co. v. Board of Revenue of Montgomery County*, 117 Ala. 290, 23 South. 970, the court said:

"It is a well-accepted principle of law that the state Constitutions are not in their nature enabling acts, to which class the Constitution of the United States belongs, but are limitations on legislative power, and that the Legislature may pass any law not in conflict with the state or federal Constitutions; the rule being that 'the federal government can do nothing but what is authorized expressly or by clear implication, while that of the state can do whatever is not prohibited.'"

In 37 Cyc. 727, it is stated:

"The power of taxation being essential to government, and being usually confided in the largest measure to the legislative discretion, constitutional limitations upon its exercise will not be inferred or implied, but must be distinctly and positively expressed. \* \* \* In the absence of constitutional restrictions, the power of the Legislature in regard to taxation is practically absolute and unlimited, so long as it is exercised for public purposes. \* \* \*"

See, also, *Walcott v. People*, 17 Mich. 68; *State ex rel. Ellis et al. v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; *Southern R. Co. v. St. Clair*, 124 Ala. 491, 27 South. 23.

In the case of *Trenton Water Power Co. v. Parker*, 32 N. J. Law, 426, the court said:

"No limitation or restriction upon the exercise of this essential attribute of government will be raised by implication. The intention to limit or abridge must be declared by *positive legislative enactment, expressed in as clear and unambiguous terms as would be required to constitute a total renunciation of the power of taxation.*" (Italics ours.)

This language is in harmony with the language of this court in the case quoted from *supra*, and substantially to the same effect is the case of *State ex rel. Davis & Star Lumber Co. v. Pors*, 107 Wis. 420, 83 N. W. 706, 1 L. R. A. 917, where it was said:

"This legislative purpose is entirely obvious, and should be given complete effect, unless insuperable obstacles prevent. \* \* \* Again, it is urged that, if the property is not in existence, it cannot be within the jurisdiction of the assessors. This contention loses sight of the consideration that the whole subject of taxation is within the control of the Legislature, subject only to the constitutional requirement of uniformity, and that branch of the government can confer jurisdiction to apportion and collect taxes when and where it deems best. *Cross v. Milwaukee*, 19 Wis. 509; *North Carolina R. Co. v. Com'rs of Alamance*, 82 N. C. 259."

In the case of *Davis v. State*, 68 Ala. 58, 4 Am. Rep. 128, it is said:

"In our inquiries into the nature and limits of legislative power, as affecting this subject, we are not disposed to controvert or materially qualify the principle so emphatically enunciated by this court in *Dorman v. State*, 34 Ala. 216, 36, that there are no limits to the legislative power of the state government, save such as are written upon the pages of the state or federal constitution. 'It has never been questioned, so far as I know,' says *Redfield, C. J.*, in *Thorpe v. R. R. Co.*, 27 Vt. 142 [62 Am. Dec. 625], that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think,' he says, 'to be a fundamental principle in the organization of the American states.' *Cooley on Const. Lim.* 3, 89. And this power and jurisdiction of Parliament, as expressed in the familiar language of *Sir Edward Coke*, 'is so transcendent that it cannot be confined, either for causes or persons, within any bounds.' 2 *Coke Inst.* 36."

It was appropriately said by Justice Kane in the case of *Anderson v. Ritterbusch*, *supra*:

"The 'taxing power,' when acting within its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its proportionate share of the public burdens; and, if prevented by any obstacles, it may return again and again until, the way being clear, the tax is collected. In laws for the assessment and collection of taxes due on omitted property, it is uniformity of burden, and not entity of method of enforcement, which is required by constitutional principles."

It may be well to hold that officers exercising authority in assessing and collecting taxes are, by implication, limited, or that persons, when given the right to pursue different remedies may, by implication, be limited; but this rule should not be extended to the state—the sovereign itself. This is the rule, in effect, laid down in 21 *Encyc. of Pl. Fr.* p. 382:

"Another line of decisions establishes the rule that the implied obligation to pay a tax carries with it the remedy by an action against the taxpayer to enforce the payment thereof, and that other remedies provided for the collection of the tax are not exclusive unless they are made so expressly by the statute; and it has been said that the rule as to the exclusiveness of the remedy provided by statute is obligatory upon the tax collector alone, and is not a rule for the conduct of the state or sovereign."

The same rule was announced by the Supreme Court of the United States in the case of *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80. It was said by the Supreme Court of Minnesota, in the case of *Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 41 N. W. 465:

"The grand fallacy in this argument is in assuming that statutes like the one under consideration are acts unauthorized original taxation. The tax was a debt or liability which the land owed in the year which it ought to have been assessed. Such statutes are purely remedial in their nature, and only go to confirm pre-existing rights by adding to the means of enforcing existing obligations. \* \* \* And the owner cannot object to any particular method adopted for that purpose, provided it operates equally and justly."

It is said to hold that the Legislature may confer the power of assessor on other persons than the state board will create confusion and frustrate the taxing system. This argument might, perhaps, appeal to the law-making body; but if the power has not, by express provision, been taken from the Legislature, it should have no weight with the court, and as a further reply to this argument in the language of the Supreme Court of Mississippi in the case of *Adams v. Clarke*, 80 Miss. 134, 31 South. 220:

"We are not concerned with consequences. That is no argument to address to a court, if that be all that there is to be said. We are concerned only to ascertain clearly what the right is, and, having ascertained it, to maintain it inflexibly."

It is suggested that the tax ferrets are sources of annoyance and disturbance, and their powers should not be extended. There is, no doubt, a certain class of citizens who view the tax ferret from the same standpoint that those who honestly list their property for taxation view the tax dodger; but the existence of the latter has created the necessity of the former. About all which is appropriate to say is that, had we never had the tax dodger, we would have had no necessity for the tax ferret. Taxes are a heavy burden, when all the taxable property bears its proper proportion, and the court should, in no way, hinder, cripple, or impede the sovereign in its legitimate and honest effort in executing that most wise and equitable provision of the Constitution—that taxes shall be uniform and all property shall be assessed and taxed at its fair cash value.

We are here dealing with an emergency, which should make an exception to the general rule to which the authorities in the main opinion apply, as was said by the Supreme



Court of Mississippi in *Adams v. Tonella*, supra, and the main authorities in support of the opinion of the majority of the court:

"The provisions of the statute authorizing boards of supervisors to appoint a suitable person to make the assessment when the assessor has failed to discharge his duty, and conferring power on the sheriff to add persons or property to the roll which have been omitted by the assessor, are widely different in their scope, purpose, and effect from the scheme provided by chapter 126 of the Code in relation to the state revenue agent. They are provisions to meet emergencies, and displace as little of the machinery by which a general and uniform plan of assessment is carried on throughout the state as is possible. \* \* \* But chapter 126 of the Code displaces the whole scheme of taxation."

In my judgment, the writ should be denied.

(45 Okl. 349)

**ATCHISON, T. & S. F. RY. CO. v. HUNTER**, County Treasurer, et al.  
(No. 7019.)

(Supreme Court of Oklahoma. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**1. TAXATION (§ 362\*)—ASSESSMENT—DISCOVERY—STATUTE.**

Section 7449, Rev. Laws 1910, does not purport to confer authority upon the county officers, or any one with whom the county commissioners may contract, to assist in the discovery of property not listed and assessed, or to assess property of a railroad or other public service corporation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 601; Dec. Dig. § 362.\*]

**2. TAXATION (§ 317\*)—ASSESSMENT—JURISDICTION—RAILROAD PROPERTY.**

That part of section 21, art. 10, of the Constitution which provides that the state board of equalization shall assess all railroad and public service corporation property confers exclusive jurisdiction on such board; and the Legislature is without power to vest authority in any other person or officer.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 525, 526; Dec. Dig. § 317.\*]

Riddle, J., dissenting.

Original action for writ of prohibition by the Atchison, Topeka & Santa Fé Railway Company, a corporation, against George K. Hunter, as Treasurer of Pottawatomie County, and another. Writ granted.

J. R. Cottingham, Samuel W. Hayes, and Chas. H. Woods, all of Oklahoma City, for plaintiff. S. P. Freeling and J. P. Whittinghill, both of Shawnee, for defendants.

**RIDDLE, J.** This is an original proceeding instituted in this court by the plaintiff against the defendant Hunter, as county treasurer of Pottawatomie county, and R. C. Hurst, tax inquisitor for said county. Substantially, the facts alleged are: That plaintiff is a public service corporation, and at all times alleged was the owner of lines of railway in various counties in this state; that plaintiff, for each of the years, 1909, 1910, 1911, 1912, 1913, and 1914 filed lists

of property as provided by law; that the state board of equalization has for each of said years made assessments of all the property of plaintiff in the manner provided by law and that plaintiff has paid its taxes; that defendants have given notice to this plaintiff that they will proceed to assess certain of its property in said county as omitted property during said years, and will do so, unless restrained.

[1, 2] To plaintiff's petition defendants filed a demurrer. Upon the issues thus made, two questions are presented: (1) Is authority under section 7449, Rev. Laws 1910, conferred upon defendants, as officers of said county, to assess railroads for taxation. (2) If such statute purports to confer such authority, is it void as in conflict with section 21, art. 10, Constitution?

Upon the issues thus made, we are requested to issue a peremptory writ of prohibition. While there are some features of this case dissimilar from the case of *Osage & Oklahoma Co. v. Ret Millard*, County Treasurer of Osage County, et al. (No. 6099) 145 Pac. 797, the same being an original proceeding in this court, wherein a writ of prohibition is sought, and in which, on rehearing, an opinion is this day filed, granting the relief prayed for therein, yet the material facts and the issues raised in both cases are practically the same, and the decision and authorities relied upon in that case will control the decision in this case.

We are therefore of the opinion that, for the reasons stated in said cause No. 6099, supra, the writ of prohibition should be granted; and it is so ordered.

**KANE, C. J., and TURNER, LOOFBOURROW, and BLEAKMORE, JJ., concur.** **RIDDLE, J.,** dissents, for the reasons assigned in dissenting opinion filed in cause No. 6099, supra.

(44 Okl. 592)

**RATCLIFF v. SHARROCK.** (No. 3726.)

(Supreme Court of Oklahoma. Jan. 12, 1915.)

*(Syllabus by the Court.)*

**1. LANDLORD AND TENANT (§ 223\*)—LANDLORD'S ATTACHMENT—COUNTERCLAIM.**

In a landlord's attachment action to recover rent due under a lease contract, the tenant may counterclaim for work and labor performed and money expended in improving and repairing the demised premises, where such work and labor was authorized by the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 885-893; Dec. Dig. § 223.\*]

**2. LANDLORD AND TENANT (§ 223\*)—ATTACHMENT—AMOUNT OF COUNTERCLAIM.**

The amount of the counterclaim is to be determined by the fair and reasonable value of the work and labor authorized and performed, and the money actually expended.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 885-893; Dec. Dig. § 223.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**3. APPEAL AND ERROR (§ 978\*)—NEW TRIAL (§ 159\*) — DISCRETION — MISCONDUCT OF PARTY.**

A motion for a new trial, predicated upon misconduct of the prevailing party, where such motion is supported by the affidavit of a third party, but is controverted by the affidavit of the opposing litigant, is addressed to the sound discretion of the trial court, whose action in denying and overruling the motion can only be reviewed where it is made to appear that the court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978; \* New Trial, Cent. Dig. § 319; Dec. Dig. § 159.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Carter County; M. F. Winfrey, Judge.

Action by Eli R. Ratcliff against C. A. Sharrock. Judgment for defendant, and plaintiff brings error. Affirmed.

Potterf & Walker, of Ardmore, for plaintiff in error. H. H. Brown, of Ardmore, and L. G. Shelton, of Los Angeles, Cal., for defendant in error.

SHARP, C. This is a landlord's attachment action, originally brought in a justice court, and from there appealed to the county court, in which plaintiff sought to recover \$100, rent alleged to be due from defendant under a lease contract. Defendant by his amended answer admitted the lease contract with plaintiff, but denied owing any rent thereunder, by reason of a counterclaim for certain improvements and repairs made on the property, for which plaintiff had agreed to pay, as provided in the contract, but failed to do, and further alleged that there was a balance due defendant on their mutual account of \$57.80. Trial was had and verdict returned in favor of defendant for \$42.81, and from the judgment entered accordingly plaintiff appeals.

[1] The lease contract contains the following provisions:

"Fourth. That during the tenure of this contract the party of the second part shall keep the houses, wells, and fences in repair at his own expense after the same is put in repair."

"Twelfth. It is mutually agreed by the parties to this contract that for all repairing and improvements necessary on said farm the price for doing same shall be agreed upon by the parties to this contract in advance of any work done by the party of the second part."

It is insisted by plaintiff in error that, although plaintiff and defendant may have contracted subsequent to the execution of the lease, for certain improvements and repairs, yet that payment for such improvements and repairs was not a condition precedent to the recovery of rent by plaintiff, but an independent contract for the breach of which defendant should have brought a distinct and separate action; and that defendant should not have been allowed to set off against plaintiff's demand the value of such improvements and repairs. Plaintiff

cites in support of his contention the case of Partridge v. Dykins, 28 Okl. 54, 113 Pac. 928, 34 L. R. A. (N. S.) 984, which holds that a covenant to repair is not a condition precedent, and that the lessor is entitled to recover rent notwithstanding a breach of said covenant; but nowhere does it hold that the defendant lessee may not set up against a claim for rent any counterclaim he may have against plaintiff, arising out of the transaction complained of or connected with the subject of the action. In fact, in that case, defendant was allowed to set up damages caused by plaintiff's failure to repair. In the case in hand the defendant was not by the judgment of the court precluded from recovering rent—the rent due went to partially pay the counterclaim of defendant. There is no room for doubt that under sections 4745 and 4746, Rev. Laws 1910, the defendant by answer may set up a counterclaim for work and labor performed, or money expended, in making necessary repairs on the demised premises, against plaintiff's claim for rent due under the lease. In Myers v. Fear et al., 21 Okl. 498, 96 Pac. 642, 129 Am. St. Rep. 795, a lessee was allowed to set up as a defense damages to the premises leased against the rent for which suit was brought. Other authorities holding that in an action by the landlord to recover rent the tenant may counterclaim for damages sustained by him by reason of the landlord's breach of a covenant to repair, or by reason of an agreement contained in the lease, that the tenant should be remunerated by the landlord for certain work performed during the term, are: Varner v. Rice, 39 Ark. 344; Dougherty v. Taylor, 5 Ga. App. 773, 63 S. E. 928; Hegan Mantel Co. v. Alford (Ky.) 114 S. W. 290; Silberberg v. Trachtenberg, 58 Misc. Rep. 536, 109 N. Y. Supp. 814; Tyson v. Well, 169 Ala. 558, 53 South. 912, Ann. Cas. 1912B, 350; Jones v. Blanks, 178 Ill. App. 196; Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866; Beardsley v. Morrison, 18 Utah, 478, 56 Pac. 303, 72 Am. St. Rep. 795; Cheuvront v. Bee, 44 W. Va. 103, 28 S. E. 751; Taylor's Landlord and Tenant (9th Ed.) § 374; Tiffany, Landlord and Tenant, §§ 182r(2), 296; Underhill on Landlord and Tenant, §§ 355, 515, 525.

[2] The court by its second instruction told the jury that the account as set up and claimed by the defendant was a proper "offset" against the claim of plaintiff, and that if they believed the evidence of defendant they should give said defendant credit for whatever sum of money found to have been expended and costs incurred by him in compliance with an agreement entered into by him with plaintiff. It is contended by plaintiff in error that the court should have instructed the jury that the measure of damages was the difference between the rental

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

value of the premises as they were and what they would have been if repaired as covenanted by the landlord; such an instruction having been approved in *Partridge v. Dykins et al.*, supra. In that case the repairs had not been made or paid for by the tenant at the time of trial, while here the tenant made the repairs and improvements, so that necessarily the rule there announced has no present application. The difference in the rental value of the premises as rented and as occupied would not compensate a tenant for repairs he made or improvements paid for, and which the landlord agreed to pay for. *Hausman v. Mulheran*, supra; *Chevront v. Bee*, supra; *Hegan Mantel Co. v. Alford*, supra; *Varner v. Rice*, supra; *Ladd v. Hawkes*, 41 Or. 247, 68 Pac. 422; *Young v. Berman*, 96 Ark. 78, 131 S. W. 62, 34 L. R. A. (N. S.) 977; *Wood v. Sharpless*, 174 Pa. 588, 34 Atl. 319, 321; *Underhill on Landlord and Tenant*, § 526; *Tiffany, Landlord and Tenant*, § 87.

[3] The next proposition urged is that the court erred in refusing to grant plaintiff's motion for a new trial; there being filed in support of said motion, as one of the grounds therefor, an affidavit of one George Sirmons, to the effect that he was intimidated and threatened by the defendant in such a manner as to cause him to become ill and unable to attend the trial, where he would have been a witness for the defendant, and further setting out the nature of the testimony he would have given. The defendant filed a counter affidavit, denying that he had in any way intimidated Sirmons, so that he was unable to attend the trial as a witness, etc. If the allegations of Sirmons were true, defendant would have been guilty of the misdemeanor of obstructing justice. Section 2258, Rev. Laws 1910; *Bowes v. State*, 8 Okl. Cr. 277, 127 Pac. 883. A new trial may be granted for misconduct of the prevailing party (section 5033, Rev. Laws 1910; *Phares v. Krbut*, 76 Kan. 238, 91 Pac. 52), but we cannot determine from the record that defendant did intentionally intimidate Sirmons or prevent his attendance as a witness at the trial. There is nothing in the record to show that Sirmons was subpoenaed—nothing to show that he would have been a witness, or that defendant threatened him, except his own affidavit, which is flatly contradicted by the affidavit of defendant. In such cases the trial court is vested with a wide discretion in the granting or refusal of motions for new trials, and its action can only be reviewed where it is shown that the court abused its discretion. From the record we are unable to determine the veracity of the affidavit of Sirmons, and cannot say with any certainty that the discretion vested in the court has been abused.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(45 Okl. 447)

STROUD v. ELLIOTT et al. (No. 3682.)  
(Supreme Court of Oklahoma. Sept. 29, 1914.  
Rehearing Denied Jan. 26, 1915.)

(Syllabus by the Court.)

EJECTMENT (§ 109\*)—DIRECTION OF VERDICT—EVIDENCE.

Plaintiff sued defendants for possession of lots 8, 9, 10, 11, and 12 in block 8 of the town of Ralston, in this state. The undisputed testimony shows that said lots are situated in a park reserve and owned by the town, and were not claimed by, or in possession of, defendants. The court directed a verdict for defendants. *Held*, the court did not err, for there was no evidence tending to support plaintiff's alleged cause of action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.\*]

Error from District Court, Pawnee County; L. M. Poe, Judge.

Ejectment by A. W. Stroud against Maria Elliott and another. Judgment for defendants on a directed verdict, and plaintiff brings error. Affirmed.

Biddison & Merritt, of Pawnee, for plaintiff in error. Orton & McNeill, of Pawnee, for defendants in error.

RIDDLE, J. Plaintiff filed suit in ejectment to recover possession of lots 8, 9, 10, 11, and 12, in block 8 in the town of Ralston, in this state, alleging that he was the owner of said lots and that defendants have unlawfully kept him out of possession. Defendants filed their answer, consisting of a general denial. Upon the issue thus made, the cause was tried to a jury. Upon the conclusion of the testimony, the court directed a verdict for defendants, to which action of the court plaintiff excepted and filed his motion for new trial. The motion for new trial was overruled, exceptions allowed, and plaintiff has filed his petition in error in this court, alleging error of the court in directing a verdict, and that the judgment of the court is contrary to law and the evidence. The undisputed evidence shows that plaintiff and defendants claim title to the property involved from a common source, to wit, from one H. E. Thompson; that block 8 is bounded on the north by what is known as Woodland or Oakland avenue, on the south by Egleton creek, on the east by said creek, and on the west by Thompson street; that Thompson owned the block of land, and about the year 1902 had block 8 surveyed and platted into lots, with two tiers of lots, with a street running east and west between the tiers of lots, numbering from 1 to 18, inclusive, north of the street known as Woodland avenue, and numbering from 19 to 37, inclusive, on the south side of said avenue. It appears that plaintiff erected a house and resides on lots 19 and 20, situated south of said Woodland avenue, and on the west side of said block. Defendants claim to own and are in possession of lots 25, 26, 27, 28,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

and 29, also situated south of Woodland avenue and just east of where plaintiff resides. There is reserved a block of land just north of Woodland avenue, designated a park reserve, which extends south to Woodland avenue; the north line of Woodland avenue making the south line of the park reserve, which is owned by the town. Subsequent to the platting of said block and the selling of the lots, the town caused the park reserve to be surveyed and ascertained that all lots north of Woodland avenue, which were supposed to be the north half of block 8, from 1 to 18, inclusive, were situated in the park reserve, and Thompson had no title to same, nor any right to plat and sell same. The uncontroverted evidence shows that lots 8, 9, 10, 11, and 12, sued for by plaintiff, are situated north of Woodland avenue, and within the park reserve, and belong to the town; that defendants are in possession of and claim to own lots 25, 26, 27, 28, and 29, inclusive, situated south of said Woodland avenue and just east of plaintiff's home, and they make no claim to lots 8, 9, 10, 11, and 12.

On the record, the only question for us to determine is: Did the court err in directing a verdict for the defendants? If we can say there was any testimony reasonably tending to support plaintiff's theory and alleged facts, then undoubtedly the court committed error, and the cause should be reversed. While plaintiff testifies he is the owner of and resides on lots 17 and 18 in the northwest corner of block 8, and that he also owns lots 8, 9, 10, 11, and 12, which he says are in possession of defendants, yet the other testimony, which is not denied shows that lots 17, 18, and 8, 9, 10, 11, and 12 are in the park reserve, and that, as a matter of fact plaintiff resides on and owns lots 19 and 20, and that defendants claim and are in possession of lots 25, 26, 27, 28, 29, of block 8, and make no claim whatever to lots 8, 9, 10, 11, and 12. The plat introduced in evidence shows this state of facts. Witnesses testify, and in fact plaintiff also testifies, that people purchased lots north of Woodland avenue and erected houses, which lots are just across the avenue north of plaintiff's and defendants' property, and they were required to move their improvements by the town authorities, on account of same being in the park reserve. It is clear from the plat and all the other testimony in the case that all of the north half of what was supposed to be the north half of block 8, including lots 1 to 18, inclusive, were, as a matter of fact, in the park reserve and defendants do not claim any interest in them. If plaintiff desired to recover the land covered by lots 8, 9, 10, 11, and 12, he should have sued the town, as it is clear from this record that defendants do not claim any interest in the lots described in plaintiff's petition. It would appear that his proper remedy would be a suit

for breach of warranty on his deed of conveyance from Thompson. Defendants received the property they purchased, but it seems that plaintiff did not. Inasmuch as plaintiff failed to show any interest in the property claimed and in possession of defendants, and the property described in his petition appears to be owned by the town, the court did not err in directing a verdict for defendants. Had the court submitted the cause to the jury, and they had returned a verdict for plaintiff, it would have been the duty of the court to have granted a new trial.

The judgment of the trial court is therefore affirmed. All the Justices concur.

(44 Okl. 597)

SOWERS v. WENDEROTT et al. (No. 3873.)  
(Supreme Court of Oklahoma. Jan. 12, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*) — FAILURE TO FILE BRIEF—DISMISSAL.

Where plaintiff in error fails and neglects to file brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Kiowa County; J. W. Mansell, Judge.

Action by John Wenderott against L. C. West and others. Judgment for plaintiff, and defendant J. T. Sowers brings error. Dismissed.

Rummons & Logan, of Hobart, for plaintiff in error. Hays, Carpenter & Hughes and Zink & Cline, all of Hobart, for defendants in error.

SHARP, C. The petition in error and case-made were filed in this court April 24, 1912, and the cause regularly submitted October 13, 1914. The plaintiff in error has failed to file or serve briefs, as required by rule 7 of this court (95 Pac. vi), and the appeal should therefore be dismissed. Douglas v. Clayton Town Site Co., 29 Okl. 9, 115 Pac. 1016; Turner Hdw. Co. v. John Deere Plow Co., 39 Okl. 633, 136 Pac. 417.

PER CURIAM. Adopted in whole.

(45 Okl. 406)

ENID CONSERVATIVE INV. CO. et al. v. PORTER et al. (No. 3409.)

(Supreme Court of Oklahoma. Dec. 22, 1914.  
Rehearing Denied Jan. 26, 1915.)

(Syllabus by the Court.)

1. MORTGAGES (§ 300\*)—TENDER—CONDITIONS —RIGHT TO IMPOSE.

Whilst a tender must not be coupled with any other conditions than those which it is a clear legal duty of the mortgagee to fulfill on receiving payment or satisfaction, the party

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

making a tender may require proof of the authority of an agent to collect the debt, and he may demand the production and surrender of the note and mortgage and a release, cancellation, or entry of satisfaction of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876-888; Dec. Dig. § 300.\*]

## 2. MORTGAGES (§ 300\*)—TENDER—ATTORNEY'S FEES.

Where a tender is made, and kept good, of the full amount due upon a promissory note secured by mortgage after the same has become due and payable, and before suit is commenced on said note and to foreclose said mortgage, it is error to render judgment against the person making said tender for any sum in excess of the principal and interest due on said note on the date of such tender, and to tax against such person an attorney's fee provided for by the terms of said mortgage in case the same was foreclosed by suit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876-888; Dec. Dig. § 300.\*]

Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by C. V. Porter and others against the Enid Conservative Investment Company and others. From the judgment, the defendant named and others bring error. Modified and reversed.

W. J. Otjen, of Enid, for plaintiffs in error. Garber & Kruse, of Enid, for defendant in error Rutland Savings Bank. Zinser & Helsell, of Enid, for defendant in error Huffman. McKeever & Walker, of Enid, for defendant in error Porter.

KANE, C. J. This was a suit upon a promissory note and for foreclosure of a mortgage given to secure the payment thereof, commenced by the defendant in error, C. V. Porter, against the plaintiff in error, Enid Conservative Investment Company, and the defendants in error, the Rutland Savings Bank and B. T. Huffman. Upon issue being joined there was a trial before the court, and a judgment rendered in favor of the Rutland Savings Bank against the Enid Conservative Investment Company upon a certain promissory note, and a decree entered declaring a certain mortgage held by the Rutland Savings Bank to be senior to the mortgage held by the plaintiff Porter, who also obtained judgment against the Enid Conservative Investment Company and a foreclosure of his mortgage subject to the prior lien of the Rutland Savings Bank.

[1] Whilst counsel for plaintiff in error raise some technical objections to the relief granted to the plaintiff Porter, the record does not disclose any substantial grounds for disturbing the judgment and decree in his favor. Therefore we will proceed directly to examine the questions at issue between the Enid Conservative Investment Company and the Rutland Savings Bank. There is no question as to the validity of the promissory note and mortgage of the Rutland Savings Bank, nor that its mortgage constituted a valid lien against the same land covered by the mort-

gage of the plaintiff Porter, or that it is prior and superior to the Porter mortgage. The point made by the Enid Conservative Investment Company is that, by virtue of a certain tender made by it to the Rutland Savings Bank, the latter company was only entitled to a judgment for the amount due on its note and mortgage at the date of the tender, and it was error for the court to enter judgment against it for the full amount of the note, with interest up to the date of trial, and to allow judgment against it for an attorney's fees for the attorneys of the Rutland Savings Bank, which was provided for in its mortgage. We think these contentions ought to be sustained. The undisputed evidence shows that after the execution of the note and mortgage to the Rutland Savings Bank, the Enid Conservative Investment Company became the owner of the mortgaged premises; that subsequent to the commencement of the Porter suit, the Monarch Loan Company of Wichita, Kan., the agent of the Rutland Savings Bank, suggested by letter to the Enid Conservative Investment Company that it take up the loan of the Rutland Savings Bank, which was past due, and save the accumulation of further interest and the payment of a \$200 attorney fee, which was provided for in its mortgage, provided it became necessary to foreclose the same. Subsequent to the receipt of this letter, and in pursuance of the suggestion contained therein, an officer of the Enid Conservative Investment Company held a telephone conversation with the Monarch Loan Company, wherein the Monarch Loan Company told said officer the exact amount due upon the note of the Rutland Savings Bank and agreed to accept a draft for said sum in extinguishment of the note and mortgage of the Rutland Savings Bank and assign the same to a person to be named by the investment company. This conversation was held on the 1st day of February, 1911, and on the 4th day of said month the Enid Conservative Investment Company forwarded its draft in pursuance of the agreement made by telephone. On the 6th of the same month the Monarch Loan Company directed a letter to the Bank of Enid, the bank through which the draft was drawn, wherein it said:

"About 10 days ago we wrote to the parties in interest, suggesting that they take an assignment of this mortgage, and we heard nothing from them until last week, and then by phone. Our understanding from the phone message was that a draft would come up next morning, and now it is Monday morning. In the meantime, according to the plaintiff's petition asking us to come into court and show our interest, we prepared papers, sent them to our attorneys to do so, and the matter is now wholly in their hands, and we cannot take it out.

"In addition, your instruction to the Fourth National Bank was not to turn this draft over to us until we complied with certain conditions. These certain conditions make it necessary for us to confer with the holder of the mortgage in the East, and it would be eight or ten days

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

before we would hear from them, and our client would be losing the interest on their loan while this correspondence was going on, hence if you have any arrangement to make, confer with Garber & Kruse, our attorneys."

The record shows that the answer and cross-petition of the Rutland Savings Bank were filed in the Porter case on the 8th of February, four days after the draft had been forwarded and several days after it had arrived at Wichita. In our judgment, no legal justification appears for the refusal of the Monarch Loan Company to comply with the terms of the agreement it entered into with the officer of the Enid Conservative Investment Company concerning the tender of the amount due it and the assignment of its claim. The reasons assigned for this refusal in its letter are not tenable. They are:

(1) That "our understanding was that a draft would come up next morning and now it is Monday morning"; and (2) "in addition, your instruction to the Fourth National Bank was not to turn this draft over to us until we complied with certain conditions. These certain conditions make it necessary for us to confer with the holder of the mortgage in the East, and it would be eight or ten days before we would hear from them, and our client would be losing the interest on their loan while this correspondence was going on. \* \* \*"

In the first place, the Enid Conservative Investment Company, as a matter of right, was entitled to pay off the mortgage of the Rutland Savings Bank at any time after it became due, without any agreement with it or its agent, and they could not refuse payment upon the grounds stated in the letter. And, if an agreement between the parties was necessary, time was not of the essence of the contract disclosed by the evidence, and the Rutland Savings Bank was not justified in refusing payment on the grounds that the draft arrived a day or two later than it understood it was to be forwarded. Moreover, it does not appear what the conditions were which were coupled with the delivery of the draft in the instructions given to the Fourth National Bank of which complaint is made in the letter referred to above. Whilst it is true that a tender must not be coupled with any other conditions than those which it is clearly the legal duty of the mortgagee to fulfill on receiving payment or satisfaction, the party making a tender may require proof of the authority of an agent to collect the debt, and he may demand the production and surrender of the note and mortgage and a release, cancellation, or entry of satisfaction of the mortgage. 27 Cyc. 1407; *Bailey v. Buchannan County*, 115 N. Y. 297, 22 N. E. 155, 6 L. R. A. 562.

[2] In the absence of a showing as to the nature of the exact conditions coupled with the tender in the instant case, it will be presumed that they were such conditions only as it was the clear legal duty of the mortgagee or its agent to fulfill on receiving payment. In such circumstances it was error to

enter judgment for any amount in excess of the principal and interest up to the date of the tender and to allow the attorney for the Rutland Savings Bank a fee of \$200 and charge it against the Enid Conservative Investment Company. We have no fault to find with the reasonableness of the attorney fee allowed, but are clearly of the opinion that it was assessed against the wrong party. The record discloses that prior to the time it became necessary for the Rutland Savings Bank to take any action in the suit commenced by Porter, negotiations for the assignment of its claim had been closed, and that its answer and cross-petition were not filed in the cause until some three or four days after the tender had been completed.

As the Enid Conservative Investment Company seems to have kept its tender good, the action of the court below should be modified so that the judgment in favor of the Rutland Savings Bank shall be for the amount of the tender without interest from the date thereof, and the judgment for \$200 as an attorney's fees assessed against the Enid Conservative Investment Company shall be reversed. The costs in this court, together with all the costs made by it in the court below, shall be taxed against the Rutland Savings Bank; the balance of the costs shall be taxed against the Enid Conservative Investment Company. All the Justices concur.

(44 Okl. 575)

**BENNETT v. KIOWA COUNTY BANK.**  
(No. 3440.)

(Supreme Court of Oklahoma. Jan. 12, 1915.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 977\*)—DISCRETIONARY RULING—ORDER GRANTING NEW TRIAL.**

This court will not reverse the action of a trial court in granting a new trial, unless it can be seen, beyond all reasonable doubt, that such court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

**2. APPEAL AND ERROR (§ 946\*)—JUDGMENT—PRESUMPTION—DISCRETIONARY RULING.**

The presumption obtains in this court that judgments and orders of trial courts are correct; and where discretion is exercised, except where the abuse thereof is affirmatively shown, the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3812; Dec. Dig. § 946.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action by the Kiowa County Bank against M. V. Bennett and others. Judgment for defendant named, and from an order granting a new trial, defendant brings error. Affirmed.

John T. Hays, of Hobart, for plaintiff in error. Morgan & Deupree, of Oklahoma City, and L. M. Keys, of Hobart, for defendant in error.

**SHARP, C.** This case presents error from the district court of Kiowa county. From an order granting plaintiff a new trial, defendant has brought the case to this court for review. At the close of the trial, the defendant M. V. Bennett moved the court to peremptorily instruct the jury to return a verdict in her favor upon the ground that plaintiff had failed to establish any right to recover therein, charging that both the facts and the pleadings were insufficient to sustain a judgment in behalf of plaintiff and against defendant. The motion was sustained, and, under the court's direction, the jury returned a verdict in favor of said defendant. Thereafter, and within the time allowed by law, the plaintiff filed its motion for a new trial on the following grounds: (1) That the court erred in instructing the jury to return a verdict in favor of defendant; (2) abuse of discretion by the trial court by means of which the plaintiff was prevented from having a fair trial; (3) that the verdict and judgment were not sustained by sufficient evidence and were contrary to law; (4) error occurring at the trial in the exclusion of material and competent evidence offered on behalf of plaintiff; (5) admission over the objection of plaintiff of incompetent, irrelevant, and immaterial evidence offered on behalf of defendant; (6) errors of law occurring at the trial.

[1, 2] The court in the order sustaining the motion for a new trial assigned no reason therefor, and we are not advised of the specific grounds considered by the court as sufficient to justify its action, other than the reasons assigned in the motion for a new trial. It will be noted that the second ground of the motion for a new trial charged that the court abused its discretion during the trial, and that, as a result thereof, plaintiff was prevented from having a fair trial. The presumption accompanying the order granting the new trial in this case is that the court acted correctly. The fact that, in the exercise of its discretion, it delayed the trial of the case in the manner charged did not preclude the court from a reconsideration of the case at the same term. It undoubtedly had the right to review its own action, if in the furtherance of justice it deemed it proper. Such was the holding of this court in *Stapleton et al. v. O'Hara et al.*, 33 Okl. 79, 124 Pac. 55.

The condition upon which this court will reverse an order of a trial court granting a new trial is well settled to be that such order will not be set aside in this court unless it is clear that the trial court has manifestly and materially erred with respect to some pure,

simple, and unmixed question of law, and that, except for such error; the ruling of the trial court would not have been made. *Hogan v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Chapman v. Mason*, 30 Okl. 500, 120 Pac. 250; *Ardmore Lodge No. 9, I. O. O. F., v. Dawson*, 33 Okl. 37, 124 Pac. 66; *Sharp v. Choctaw Railway & Lighting Co.*, 34 Okl. 730, 126 Pac. 1025, and cases cited therein.

There being presented to the court, by the motion for a new trial, and as one of the grounds thereof, a question involving the proper exercise of its discretion during the trial, we cannot say that the court erred with respect to some pure, simple, and unmixed question of law. In *Stapleton et al. v. O'Hara et al.*, supra, action was brought to recover on a foreign judgment. The court denied defendants the right to amend their answer by pleading the statute of limitations, and on trial rendered judgment against them. On reconsidering the case on the hearing of the motion for a new trial, the court granted the same without assigning any reason therefor. It was held that the presumption obtained on appeal that judgments and orders of trial courts were correct; that where discretion is exercised, except where the abuse thereof is affirmatively shown, the action of the court will not be disturbed on appeal. With the rule announced we are satisfied.

The order of the trial court in granting plaintiff below a new trial should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 539)

LEE v. FULSOM. (No. 3702.)

(Supreme Court of Oklahoma. Jan. 12, 1915.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 276\*)—DISSOLVING BOND—EFFECT—GROUND FOR ATTACHMENT—PROOF.

A dissolving bond given and approved as authorized by section 337, Mansf. Dig. of the Laws of Arkansas, in force in the Indian Territory, discharges the attachment and renders proof of the grounds laid in the attachment affidavit unnecessary.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 973-978; Dec. Dig. § 276.\*]

2. APPEAL AND ERROR (§ 1001\*)—LANDLORD AND TENANT (§ 260\*)—LANDLORD'S ATTACHMENT—VERDICT.

While under the laws of Arkansas, in force in the Indian Territory by congressional enactment, a landlord's attachment would not lie against one in possession of real property, unless the relation of landlord and tenant between the parties was shown to exist, yet, where on the trial there is evidence fairly tending to prove such relationship, this court will not disturb a verdict returned in accordance therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001; \* Landlord and Tenant, Cent. Dig. § 1045; Dec. Dig. § 260.\*]

Commissioners' Opinion, Division No. 1.

Error from District Court, Stephens County; F. M. Bailey, Judge.

Action by Oslin Fulsom, by his next friend and guardian, G. W. Scantlin, against S. Lee. Judgment for plaintiff, and defendant brings error. Affirmed.

Cruce, Cruce & Bleakmore, of Ardmore, and Gilbert, Riley & Bond, of Duncan, for plaintiff in error. J. B. Wilkinson, of Duncan, for defendant in error.

SHARP, C. October 14, 1907, Oslin Fulsom, by his next friend and guardian, G. W. Scantlin, began an attachment action against S. Lee, by filing his petition and affidavit for attachment in the United States Commissioner's Court for the Southern District of Indian Territory, at Comanche, in which it was set forth that defendant was indebted to plaintiff for rent, during the year 1907, of plaintiff's farm; that defendant had produced on said farm a crop of corn and cotton, which the plaintiff had a lien on for rent; and that defendant was about to remove said crop from said farm without paying rent—in fact, had already removed a portion thereof from said farm without plaintiff's consent. Sufficient property was attached under the order of attachment issued the same day, but was released and turned back to the defendant upon the giving of a dissolving bond. Upon the incoming of statehood the cause was transferred to the district court of Stephens county, where the defendant filed a general denial March 30, 1909, thereafter. Trial was had November 16, 1911, resulting in a verdict for plaintiff. Judgment having been rendered in accordance with the verdict, and motion for new trial having been overruled, defendant appeals. The land for which rent was sought to be recovered was allotted to plaintiff February 27, 1906.

[2] It is contended for plaintiff in error that there was no evidence introduced at the trial showing the existence of the relation of landlord and tenant between plaintiff and defendant, and therefore that the court should have instructed the jury to return a verdict in behalf of defendant. Section 4453 of Mansfield's Digest of the Laws of Arkansas, at the time in force in the Indian Territory by act of Congress, provided that every landlord should have a lien upon the crop grown upon the demised premises in any year for rent that should accrue for such year, and that such lien should continue for six months from the time the rent became due and payable. Section 4459 of said statutes authorized such landlord to bring suit in a proper court and to have a writ of attachment issue for recovery of rent for the year, whether the rent be due or not, in the following cases: (1) When the tenant was about to remove the crop from the premises without paying the rent; (2) when he had removed it or any portion thereof, without the landlord's consent.

During the year for which the rent was

sought to be recovered, one Brown was contesting the title of plaintiff to the land cultivated by the defendant, and in which contest the plaintiff succeeded. The defendant admitted having agreed to pay the rent to whichever of the parties that succeeded in the contest proceedings. It further appears from the testimony that the defendant procured the plaintiff to make certain improvements on the lands during the term of his occupancy. The foregoing acts, together with the other evidence introduced, while not furnishing strong proof of the relationship, was, we think, sufficient. The jury having, under the instructions of the court, determined the issue in favor of the plaintiff, and there being evidence reasonably tending to support the verdict, it will not be disturbed in this court.

[1] It is further urged that the court did not properly submit to the jury the issue arising out of the attachment affidavit. When the writ of attachment was served, the defendant gave a dissolving bond, as authorized by section 337 of Mansfield's Digest. The effect of this bond was to discharge the attachment without reference to the question of whether the attachment was, in the first instance, rightfully or wrongfully sued out. Upon the giving and approval of such bond, the defendant was concluded from controverting the grounds of attachment. *Ferguson v. Gildewell*, 48 Ark. 195, 2 S. W. 711; *Moffitt v. Garrett*, 23 Okl. 398, 100 Pac. 533, 32 L. R. A. (N. S.) 401, 138 Am. St. Rep. 818. The attachment, therefore, having been discharged, it could not thereafter be made an issue in the subsequent proceedings.

Finding no error in the record of the proceedings, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 598)

HODGES v. ALEXANDER. (No. 3901.)

(Supreme Court of Oklahoma. Jan. 12, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 957\*)—SCOPE OF REVIEW — DISCRETIONARY RULING — REFUSAL TO OPEN DEFAULT JUDGMENT.

Where a trial court has refused to open a judgment by default and permit the defendant to show his defense, this court will inquire as to whether the court has abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

2. JUDGMENT (§ 138\*)—DEFAULT—REFUSAL TO OPEN—DISCRETION.

It is an abuse of discretion for the court to refuse to open a judgment by default where the answer presents a good defense, and the showing made by the defendant is a reasonable excuse for the absence of the defendant and his attorney at the time of trial, with no negligence on his part, and where no substantial prejudice would result from the sustaining of such motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—DENIAL OF NEW TRIAL.**

An assignment of error that the court erred in overruling the motion for a new trial is sufficient to review all the questions raised in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Carter County; M. F. Winfrey, Judge.

Action by M. L. Alexander against M. L. Hodges. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

H. A. Ledbetter, of Ardmore, for plaintiff in error. W. I. Cruce and Thomas Norman, both of Ardmore, for defendant in error.

RITTENHOUSE, C. The assignment of error relied upon in this case is the irregularity of the trial court in the rendition of the judgment which ordinary prudence could not have prevented. Bill of particulars was filed in the justice court, the defendant appeared and filed answer, trial was had and judgment rendered; subsequently the cause was appealed to the county court. R. F. Turner was one of the attorneys for defendant. It appears that his mother, who resided in North Carolina, was very ill, and it became and was necessary for him to leave the state on that account. He therefore arranged with the judge of the county court to have all his cases continued and, relying upon this arrangement, was not present on the day of the trial, when judgment was rendered by default. Immediately upon learning that such a judgment was rendered, and within the time allowed by law, motion for a new trial was filed and evidence offered in support of the defendant's contention. Judge M. F. Winfrey, who was the presiding judge of the county court, stated that:

"Mr. Turner appeared here on Monday and asked me about the case, and I told Mr. Turner that I had continued all his cases up to that date. I supposed he would be here all the time. I knew he had been away. His wife called me up and said Mr. Turner was away on account of his mother's sickness, and I told Mr. Turner that his cases were continued. I did not mean any future cases. He was here, and I supposed that he would be here for the remainder of the term of court."

At the same hearing R. F. Turner testified as follows:

"Q. Did you have any agreement, arrangement, or understanding with the judge of the county court, whereby your cases that you represented either the plaintiff or defendant in were to be passed for the term? A. I will state that the county judge told me, when I went away, that I— I left on an urgent message for North Carolina; I sent word, and also left word with my wife to see Mr. Matthers and Judge Winfrey, and have all the cases that I was attorney in for the term continued. She did so, at least informed me that she did; and when I returned I came to Judge Winfrey's stand in the courtroom, and I asked him what

he did with the cases I was attorney in, and he said that he had continued all my cases. Q. That was after you returned from North Carolina? A. Yes, sir."

The statement of the court and the testimony of the witness Turner all agree that the cases in which Turner was attorney were continued on account of the absence of the witness Turner, who was called to North Carolina on account of the sickness of his mother, and that upon his return he called upon the trial court and was informed that all his cases were continued, and, relying upon that statement, he left for McAlester on the same day, and before his return the judgment by default was rendered in this case.

[1, 2] There was apparently an honest misunderstanding between the court and the attorney as to what cases were continued and over what space of time the continuance was granted. It is stated by Turner that he understood that the continuance was for the term, while the trial judge understood that the continuance was only until such time as Turner might be in North Carolina on account of the sickness of his mother. Under the circumstances of this particular case, the defendant and his attorneys could not be charged with negligence; but, on the contrary, the evidence shows that the attorney exercised reasonable diligence in order to ascertain the status of his cases, and through some misunderstanding allowed judgment by default to be entered against him. Under these facts the cases of *Savage et al. v. Dinkler*, 12 Okl. 463, 72 Pac. 366, and *Linderman v. Nolan*, 16 Okl. 352, 83 Pac. 796, which are relied upon by the defendant in error, are not in point, as in those cases the defendants were guilty of negligence, while in this case the attorney had used diligence in trying to ascertain from the county judge the status of his cases, and was informed that all his cases had been continued, he understanding that the judge meant continued for the term, and, relying upon the statements of the county judge, left for McAlester and was not present when the case was called for trial. Under these circumstances, the court abused its discretion in refusing to set aside the judgment. It is said in *Utah Commercial & Savings Bank v. Trumbo*, 17 Utah, 198, 53 Pac. 1033, that:

"It is true that ordinarily the setting aside of a judgment by default rests within the sound legal discretion of the court, and the appellate court will not interfere; but where, as in this case, it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate court will control such discretion, and set aside the illegal action." *Chicago, Rock Island & P. Ry. Co. v. Eastham*, 26 Okl. 605, 110 Pac. 887, 30 L. R. A. (N. S.) 740; *Chicago, Rock Island & P. Ry. Co. v. Reese*, 26 Okl. 613, 110 Pac. 1071; *Hill v. Crump*, 24 Ind. 291; *Alvord et al. v. Gere*, 10 Ind. 385; *Poff v. Lockridge*, 22 Okl. 462, 98 Pac. 427; *Watson v. San Francisco R. Co.*, 41 Cal. 17; *Craig v. Smith*, 65 Mo.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



536; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 853; 17 Amer. & Enc. of Law, p. 844; 23 Cyc. 933 et seq.; *Nash v. Denton*, 51 Pac. 896.<sup>1</sup>

[3] The motion set forth in detail the grounds for a new trial, showing clearly that the substantial rights of the defendant were materially affected by the irregularity of the court by which the defendant was prevented from having a fair trial on the merits, and by reason of such irregularities the defendant was prevented from having a hearing which ordinary prudence could not have prevented. The error complained of was one occurring at the trial, and the assignment of error that the court erred in overruling the motion for a new trial is sufficient to present the question to this court for review. *De Vitt et al. v. City of El Reno*, 28 Okl. 315, 114 Pac. 253; *Walter A. Wood Mowing & Reaping Co. v. Farnham*, 1 Okl. 375, 33 Pac. 867; *Richardson v. Mackay*, 4 Okl. 328, 46 Pac. 546; *Board of County Com'rs v. Jones*, 4 Okl. 341, 51 Pac. 565; *Boyd v. Bryan*, 11 Okl. 58, 65 Pac. 940; *C. R. I. & P. R. Co. v. Davis*, 26 Okl. 434, 109 Pac. 214; *Id.*, 101 Pac. 1118; *Glaser v. Glaser*, 13 Okl. 889, 74 Pac. 944.

The cause should therefore be reversed and remanded.

PER CURIAM. Adopted in whole.

(11 Okl. Cr. 376)

MONTOUR v. STATE. (No. A-2011.)  
(Criminal Court of Appeals of Oklahoma.  
March 6, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 678\*)—EVIDENCE—OTHER ACTS—ELECTION.

In a prosecution for statutory rape, where evidence is introduced of acts of sexual intercourse between the prosecutrix and the defendant other than the one charged in the information, for the purpose of proving the act charged, it is the duty of the court upon motion of the defendant, made when the state rests its case, to require the state to elect upon which one of the several acts it intends to rely for a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.\*]

Error from Superior Court, Custer County; J. W. Lawter, Judge.

Arthur Montour, convicted of rape in the second degree, brings error. Reversed.

Jas. M. Shackelford, of Clinton, T. B. Norfleet, of Miami, Fla., and Giddings & Giddings, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Arthur Montour, was convicted of statutory

rape, charged to have been committed on or about the 22d day of November, 1912, on Hanna Irlon, a female over the age of 16 years and under the age of 18 years, of previous chaste and virtuous character, and not the wife of the defendant. On the 24th day of March, 1913, the court sentenced the defendant in accordance with the verdict of the jury to be confined in the penitentiary for a term of five years. To reverse the judgment an appeal was taken by filing in this court on June 4, 1913, a petition in error with case-made.

The evidence for the state was substantially as follows: Hanna Irlon, the prosecutrix, testified that she was 16 years of age in August, 1912; that she was the sister-in-law of the defendant; that she was working in a hotel at Weatherford, and the defendant came there presumably to referee a wrestling match; that, under the pretense of taking her out to the wrestling match that night, he took her to a canyon near town, where they stayed for about three hours, and while there the defendant had intercourse with her two or three times; that this was the first time she had ever had intercourse with any one; that it was painful, but did not cause her to bleed; that a few weeks later the defendant came to the hotel and forced her to accompany him to another canyon, and again had intercourse with her two or three times; that this was about November 20th; that the defendant came to the hotel and that evening visited her in the kitchen, staying two or three hours, and there by force accomplished an act of sexual intercourse with her; that this was about November 22d.

T. J. McCoy testified that the prosecutrix worked two or three months at his hotel, and he remembered the defendant having been there two or three times, and one time the defendant went back to the kitchen and visited the prosecutrix; that he remained there until about 10:30 p. m.; that witness went to the kitchen several times while he was there and noticed nothing unusual; that they were laughing and talking, and seemed to be in a good humor.

Mrs. McCoy testified that she remembered the night that the defendant talked to the prosecutrix in the hotel kitchen; that she was in there four or five times during the time the defendant was there; that nothing unusual was apparent; that the light was burning and the shades up and the doors were all open.

F. M. Irlon testified that he was the father of the prosecutrix, and that she was 16 years old in August, 1912; that her conduct had been good so far as he knew.

When the state rested, the defendant moved the court to require the state to elect which one of the three alleged occurrences testified to by the prosecutrix it relies on for

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan. 771.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a conviction. The motion was overruled, and an exception reserved.

In support of the defense that the prosecutrix was not at the time of previous chaste and virtuous character, two physicians were called, who testified that as medical experts they would state that sexual intercourse with a virgin between the age of 16 and 18 years twice within 30 minutes would produce a hemorrhage caused from the rupture of the hymen; that the hemorrhage would likely be so extensive that the under garments would be discolored.

S. A. Townsend testified that in a conversation with the prosecutrix at a dance he made some passes towards her, and she said, "Well, if we were outside you could have what you want;" that he also heard her tell a Mr. Wilson at this same dance to meet her and her sister at a certain place, and that he could have his own way; that on a later occasion he saw Wilson with the prosecutrix and her sister at a dance at Porter's place, and saw them returning the next morning about 8 o'clock.

Gertrude Irion testified that she was a stepsister of the prosecutrix; that on the morning after the wrestling match the prosecutrix told her that she had gone to see some friends the night before; that she later told her that she was out with the defendant that night, but on neither occasion did she mention that the defendant had raped her. The errors assigned and argued are, in substance, that the verdict is contrary to law and to the evidence; that the court erred in its rulings on questions of evidence, and in refusing requested instructions, and in giving instructions excepted to; and that the court erred in refusing to require the state to elect on which one of the three criminal acts sworn to by the prosecutrix the state would rely and against which the defendant would be required to defend.

Of the various errors assigned for a reversal of the judgment, we deem it necessary to consider only the last. It has been held by this court that, in a prosecution for statutory rape, evidence is admissible of sexual acts between the prosecutrix and the defendant prior to and subsequent to the one charged and relied upon for a conviction, to show the relation and familiarity of the parties, and as tending to corroborate the testimony of the prosecutrix as to the particular act relied on for conviction. *Morris v. State*, 9 Okl. Cr. 241, 131 Pac. 731. However, where evidence of acts of intercourse between the prosecutrix and the defendant other than that relied on for a conviction has been admitted, it is the duty of the court upon motion of the defendant to require the state to elect upon which particular act the state will rely for a conviction, and, in the charge of the court, the jury should be restricted

to the consideration of the act the state elects and relies on for a conviction, and the purpose of evidence of acts other than the one relied on should be properly explained therein.

Here the prosecutrix testified to three separate and distinct offenses, either one of which would support the charge in the information, and the defendant could be tried for either, and separately for each of them. Under the ruling of the court refusing to require the state to elect, and under the charge of the court in this case, a verdict of guilty could have been rendered, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these separate offenses. In this class of cases, as well as in any other, the state must rely on a specific offense; and the conviction, if one is had, must depend upon the evidence of that offense alone. Other incidents are important only as tending to prove the one specific offense, for the alleged commission of which the defendant is on trial.

It follows that the trial court committed prejudicial error in overruling the defendant's motion to require the state to elect. The judgment is therefore reversed. The superior court of Custer county having been abolished, the cause is remanded to the district court of said county.

FURMAN and ARMSTRONG, JJ., concur.

(44 Okl. 578)

# UNION ACCIDENT CO. v. WILLIS.

(No. 3558.)

(Supreme Court of Oklahoma. Jan. 12, 1915.)

(Syllabus by the Court.)

## 1. INSURANCE (§ 645\*)—ACCIDENT POLICY—EXCEPTED CAUSE—PLEADING AND PROOF.

Where, in an action on a policy of accident insurance, it is claimed that death was due to one of the causes excepted from the operation of the policy, it is for the insurer to plead and prove such fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.\*]

## 2. INSURANCE (§ 464\*)—ACCIDENT POLICY—INTENTIONAL INJURY.

A policy of insurance, which provides that indemnity shall not be payable for injuries fatal or otherwise, intentionally inflicted upon the insured by himself or some other person, does not exclude a recovery where the insured dies from a fracture of the skull caused by a fall on a hard pavement, the result of a blow in the face struck by the fist of another, where the blow but not the fatal result was intentionally inflicted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1184; Dec. Dig. § 464.\*]

## 3. INSURANCE (§ 464\*)—ACCIDENT INSURANCE—"INTENTIONALLY INFLICTED."

The death of the insured not having been intended by his assailant, and being an unforeseen and unusual result of the blow struck, the insurer is not relieved of liability on account of the fact that the blow itself was intentionally inflicted. The words "intentionally inflicted," as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

used in the policy, should be construed to refer to the fatal injuries resulting from the fall, and not to the blow.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1184; Dec. Dig. § 464.\*]

#### 4. INSURANCE (§ 146\*)—POLICY—CONSTRUCTION.

If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

(Additional Syllabus by Editorial Staff.)

#### 5. INSURANCE (§ 455\*)—CONSTRUCTION OF POLICY—"EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS"—"ACCIDENTAL."

An injury intentionally inflicted by another upon the insured, and without the foreknowledge or connivance of the insured, is an injury inflicted through "external, violent, and accidental means." An injury is "accidental," within the meaning of an insurance policy, although it is inflicted intentionally and maliciously by one not the agent of the insured, if unintentional on the part of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.\*]

For other definitions, see Words and Phrases, First and Second Series, Accident; External, Violent, and Accidental Means.]

Commissioners' Opinion, Division Number

1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Mary Willis, an infant, by her guardian, W. P. Donnell, against the Union Accident Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Baker, Pursel, Gavin & Leith and C. A. Mountjoy, all of Muskogee, for plaintiff in error. Arnote & Rogers, of McAlester, and Charles A. Cook, of Muskogee, for defendant in error.

SHARP, C. Between the hours of 8 and 9 o'clock on the evening of December 10, 1909, the insured, Riley W. Willis, while walking along the street in the city of Ardmore, was knocked down by a blow in the face struck by one Ernest Keys. Striking the pavement, the insured sustained a fracture of the skull, resulting in his death. The action against the defendant is brought by the guardian of the beneficiary, and is to recover on a certain accident policy issued on the life of said Riley W. Willis.

[1] The defense in this court is predicated upon two certain provisions of the policy, which, it is claimed, exempt it from any liability, namely:

(1) "In the event that the insured, while this policy is in force, shall sustain personal bodily injury, which is effected directly and independently from all other causes through external, violent and purely accidental means, and which injury causes, at once (within 24 hours). \* \* \* For loss of life four hundred dollars (the principal sum of this policy)."

(2) "Indemnity shall not be payable for injuries fatal or otherwise intentionally inflicted upon the insured by himself or some other person."

We fail to find, however, that the former provision of the policy was availed of by the insurer as a defense in the trial court. It is a rule well supported by authority, and based upon sound principle, that, where death or injury has resulted from one of the excepted causes enumerated in the policy, the onus both of averment and proof in such regard rests upon the insurer. *Vernon v. Iowa State Traveling Men's Ass'n*, 158 Iowa, 597, 138 N. W. 696; *Anthony v. Mercantile Mutual Acc. Ass'n*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367; *Railway Officials' & Employes' Acc. Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Stevens v. Cont. Casualty Co.*, 12 N. D. 463, 97 N. W. 862; *Standard Life & Acc. Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; *Accident & Employer's Liability Insurance*, Fuller, pp. 100-102. Further consideration need not therefore be given this defense.

[2, 3, 5] In the absence of any provision to the contrary, a policy insuring against death effected through "external, violent and accidental means," an injury inflicted intentionally by another upon the insured, but without the foreknowledge or connivance of the insured, is within the terms of the policy rendering the company liable. If the injury is not brought about by the agency of the insured, and if it is not anticipated by him, it is none the less accidental as far as he is concerned, although it may be inflicted with malice and premeditation by the other party; the great weight of authority being that an injury intentionally inflicted upon the insured by another is accidental, if it is unintentional on the part of the insured. As a protection against this class of liability, a clause is frequently inserted in policies of accident insurance, specifying that the policy shall not cover injuries, fatal or otherwise, intentionally inflicted upon the insured by himself or some other person. Ordinarily, where a policy expressly so provides, it is not necessary that the insured should take part in the intent of such third person, in order to make the exception operative, and relieve the company from its liability. The policy, in such cases, becomes one of limited indemnity as contradistinguished from that of general indemnity. It is shown that the blow sustained by the insured was intentionally inflicted. The testimony as to the origin of the trouble between Keys and the insured is conflicting. That of plaintiff tends to show that the insured was sober and was not the aggressor in the difficulty; while the defendant's testimony tends to establish that the insured was drunk at the time, ran into Keys, and first struck him. There is nothing in the testimony that tends to distinguish the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

difficulty from an ordinary fist fight where but two or three blows were passed, except in the fatal consequences that attended it. Keys and two companions met Willis and another Indian on Caddo street near one of the main business corners of the city. The former did not know Willis at the time, and, whatever may have provoked the difficulty, there is no room for belief that the injuries sustained by Willis were intended by Keys. At the time Keys, who was a young man, weighing but 133 pounds, though right handed, was unable to use his right hand on account of a broken bone, and struck the insured, who was a heavier man, with his left fist. The blow knocked the insured backward on the slanting pavement, with the result that his head struck the pavement, fracturing his skull and causing death. Keys did not know until the morning following that Willis had died as a result of the fall. It is not even claimed that Keys intended the result that followed, but it is insisted that, having struck Willis intentionally, a recovery cannot be had on account of the last-mentioned provision of the policy. We do not think so. As we have seen, the insured's death was accidental. The injury which resulted fatally was not intentionally inflicted by Keys. The case differs materially from the great majority of the reported cases. Had Keys had in his hand a deadly weapon, the use of which was reasonably calculated to produce death, and in fact did so, a different question would be presented. No motive for killing the latter is shown to have existed, and the means used indicates only an intention to strike the insured. The result was unforeseen and unusual, and not such as would ordinarily follow a blow with the fist. It was not the logical result of a deliberate act, and could not reasonably have been anticipated by Keys, and he cannot be charged with a design of producing it. It was the result of fortuitous circumstances.

In *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 28 Pac. 762, 23 Am. St. Rep. 455, the policy exempted against liability where death was the result of design on the part of the insured or any other person. The court instructed the jury that:

"If the death of Phillip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that, when Dassonville or some other person inflicted such blow, he did not mean to kill said Phillip Richards."

The giving of the instruction was sustained. It was said by the court that there were circumstances in evidence tending to show that, if Dassonville did give the blow which resulted afterwards in the death of the deceased (by a fall from an elevated sidewalk), he did not intend such result, and it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow, not intended

to kill, unfortunately and undesignedly produces death.

In *Travelers' Protective Ass'n v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 886, the action was to recover for the loss of an eye. It was complained by the appellant that the trial court erred in charging, in effect, that, if the assailant did not intend the particular injury, plaintiff was entitled to recover, and it was insisted that a verdict should have been directed for the defendant. Sustaining the contention, it was said by the court:

"We do not undertake to say that consequences might not follow such a blow, of a character so unusual and so apparently unrelated to the act, as to exclude the idea that they were included within the general intention to inflict injury."

The court then proceeds to distinguish between the facts there presented and those in *Richards v. Travelers' Ins. Co.*, supra, and further says:

"But under the facts of this case we are of opinion there is no room for controversy. We have a blow of the fist, struck by an adult man actuated by the anger and passion naturally resulting from his supposed provocation; a blow struck in the eye, according to plaintiff's own statement. The force was sufficient to knock him down, and the injury to the eye was due to the blow and not to the fall. We think the injury to the eye falls clearly within the general purpose to injure, and that it did not devolve on the defendant to show that Innes had a specific intention to inflict the particular character of injury which might flow from the assault."

In *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, a provision of the policy excepted from recovery for death or personal injury, the result of design, either on the part of the insured or any other person. The insured was shot by an officer; but there was some evidence tending to show that the officer did not know it was the insured at whom he shot, and that he did not intend to kill the insured. It is said in the opinion:

"It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry."

In *Orr v. Travelers' Ins. Co.*, 120 Ala. 647, 24 South. 997, after quoting from the opinion in *Utter v. Travelers' Ins. Co.*, the court announced the principle stated to be correct. In *Travelers' Protective Ass'n v. Fawcett* (Ind. App.) 104 N. E. 991, the insurer defended under a paragraph in the policy denying a recovery where the insured came to his death as the result of an injury intentionally inflicted by another. In that case the uncontroverted evidence showed that the assailant, a bank robber, discharged several shots from revolvers into a group of four men huddled together in front of a vault in the bank. The company relied upon the presumption that a person intends the usual and

ordinary consequences of his act; that, relying upon this presumption, the usual and ordinary consequences of such an act would be to kill or injure some one or more of them; and that, as there was no evidence tending to overcome the presumption, it must prevail and be sufficient to establish the fact that the robber intentionally killed the insured. The judgment, however, of the trial court was affirmed, and in the course of the opinion the following language was used:

"The question arises under a contract by which it was stipulated that the association should not be liable on account of injuries intentionally inflicted on the assured by any other person. 'Intentional injuries' inflicted on the assured by some other person, within the meaning of this contract, refers to injuries which the other person actually directed against the insured and intended to inflict upon him. The parties contracted with reference to the actual intention of the person inflicting the injury, rather than such an intention as the law presumes as against a wrongdoer. \* \* \* In such a case, if an act is shown which would naturally and reasonably result in injury to some one of several persons, it may be presumed that the author of the act intended to injure some one; but it cannot be presumed, as against any one except the author of the act, that he intended the injury for the particular person who received it."

The court then cites *Utter v. Travelers' Ins. Co.*, and approves the principle announced therein, though expressing a doubt as to the application to the state of facts shown to exist in the *Utter Case*.

Discussing the question of accidents and risks excepted in accident insurance, it is said in 1 Cyc. 257, that intentional injuries inflicted on the person of insured are usually considered "accidental," and as coming within the proviso that the insurance shall extend to injuries sustained through "external, violent and accidental means," but that, where the policy provides that it shall not extend to injuries or death resulting from "intentional injuries inflicted by the insured or any other person," such provision is valid and binding, and no recovery can be had for injuries or death so inflicted. It is further said, in discussing the question of intent, that the existence of an intent on the part of the person inflicting the injury is necessary, and this intent must be to inflict the injury actually inflicted. See, also, *Corpus Juris*, vol. 1, p. 442; *Railway Officials' & Employees' Acc. Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072.

The death of the insured not having been intended by Keys, and being an unforeseen and unusual result of the blow struck, the insurer is not relieved of liability on account of the fact that the blow itself was intentionally inflicted. The words "intentionally inflicted" in this case should be construed to refer to the fatal injuries resulting from the fall, and not to the blow.

[4] Where the meaning of a policy of insurance is ambiguous, or so drawn as to be

fairly susceptible of different constructions, it will be construed strictly against the insurer, and that construction adopted which is most favorable to the insured. *Taylor v. Ins. Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; *Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & Simpson*, 30 Okl. 116, 120 Pac. 936; *Standard Accident Ins. Co. v. Hite, Adm'r*, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986. Also, when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured. *May on Insurance*, §§ 174, 175; *Janneck v. Metropolitan Life Ins. Co.*, 162 N. Y. 574, 57 N. E. 182; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Allen v. Ins. Co.*, 85 N. Y. 473; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(45 Okl. 411)

VICK v. VICK. (No. 3827.)

(Supreme Court of Oklahoma. Dec. 22, 1914.  
Rehearing Denied Jan. 26, 1915.)

(Syllabus by the Court.)

DIVORCE (§ 240\*)—ALIMONY—AMOUNT.

Evidence examined, and held, that the alimony awarded by the court is not shown to be excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.\*]

Error from District Court, Muskogee County; R. C. Allen, Judge.

Action by P. M. Vick against Annie Vick. Judgment for defendant, and plaintiff brings error. Affirmed.

Edward Curd, Jr., of Muskogee, for plaintiff in error. G. W. P. Brown and R. Emmett Stewart, both of Muskogee, for defendant in error.

PER CURIAM. On March 3, 1911, P. M. Vick, plaintiff in error, sued Annie M. Vick, defendant in error, in the district court of Muskogee county, for divorce. On December 13, 1911, she appeared and filed her amended answer and cross-petition, alleging cruel and inhuman treatment and adultery on the part of plaintiff, and praying for divorce and permanent alimony, for the custody of the three minor children, and for attorney's fees. After reply, in effect a general denial of the allegations set forth in the cross-petition, there was trial to the court and judgment for defendant decreeing her a divorce pursuant to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the prayer of her cross-petition and awarding her the care and custody of the children. As permanent alimony she was decreed lot 14 of block 8 of the city of Muskogee, together with the improvements thereon; also the household and kitchen furniture therein and \$100 per month. The decree fixed a specific lien on all property of plaintiff, both real and personal, for the payment of the alimony. After motion for a new trial filed and overruled, plaintiff brings the case here, and assigns that the court erred in that part of the decree fixing alimony, because, he says, the same is unreasonable and excessive. The evidence discloses that both parties are negroes. They were married in Mississippi in 1884, and 15 children were born of the marriage of whom 3 are minors. Plaintiff is a "bootlegger," and lives in Muskogee with his mistress. There he bought lot 14 in block 8, and built a brick house thereon, furnished it well, and therein supports her in comparative ease in open and notorious adultery, and, until otherwise decreed, he there also maintained the 3 minor children. His income from illegal traffic in whisky is considerable. His daughter testified that it was some \$100 or \$200 per day, which is not denied. His wife is 45 years old, and was told by him that she was unfit for further service. She takes in washing for a living. The evidence discloses that he has accumulated considerable property, which in his brief he admits to be worth some \$8,000. He owes about \$800. The statute provides (Rev. Laws 1910, § 4969) that alimony " \* \* \* may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable."

As the adequacy or excessiveness of an allowance of permanent alimony depends largely upon the circumstances of each particular case, we cannot say that this allowance, which decrees from out the estate of plaintiff alimony in a lot of unascertained value, with a brick house thereon worth \$1,100, together with the household and kitchen furniture, is excessive. Nor can we say that the further allowance of \$100 is excessive, in view of plaintiff's income.

Affirmed. All the Justices concur, except KANE, C. J., absent and not participating.

(93 Kan. 753)

MILBOURNE v. KELLEY. (No. 19123.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 107\*) — VESTED RIGHTS—LIMITATION OF ACTIONS.

It is within the power of the Legislature to amend a statute of limitation by shortening the time in which an existing cause of action may be barred, provided a reasonable time is given for

the commencement of an action before the bar takes effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 246-251; Dec. Dig. § 107.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 225\*)—PRESENTATION OF CLAIM—LIMITATION PERIOD—STATUTES.

In an action to establish a claim against the estate of a deceased person it was shown that the letters of administration issued on December 10, 1910. At that time the statute (section 3516, Gen. Stat. 1909), allowed three years for the presentation of claims. An act which took effect on the 22d day of May, 1911 (chapter 188, Laws 1911), reduced the time to two years, with a provision that all demands not exhibited within two years shall be forever barred. Although the plaintiff had 18 months after the act took effect in which he might have commenced his action, his claim was not exhibited until more than two years thereafter. *Held*, that he was allowed a reasonable time to pursue his remedy, and that the action is barred by the new statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. § 225.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 225\*)—PRESENTATION OF CLAIM—LIMITATIONS—SUSPENSION.

The fact that the claim was filed in the probate court, and that the administrator had knowledge of it and had made efforts to adjust and settle it, will not suspend the statute nor estop the administrator from relying upon the bar of the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. § 225.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 225\*)—PRESENTATION OF CLAIM—LIMITATIONS—REASONABLE TIME.

Nor will the plaintiff be heard to say that by reason of such acts and conduct of the administrator the period of 18 months was not in this case a reasonable time.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. § 225.\*]

5. EXECUTORS AND ADMINISTRATORS (§ 216\*)—ACTION AGAINST ADMINISTRATOR—RIGHT—SERVICES.

No cause of action against an administrator in his official capacity can be based upon services rendered him in the administration of the estate. *Brown v. Quinton*, 80 Kan. 47, 102 Pac. 242, 25 L. R. A. (N. S.) 71, 18 Ann. Cas. 290.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 757; Dec. Dig. § 216.\*]

Appeal from District Court, Marion County.

Action by F. D. Milbourne against G. W. Kelley, administrator. From judgment for defendant, plaintiff appeals. Affirmed.

W. H. Carpenter, of Marion, and Branine & Hart, of Newton, for appellant. C. M. Clark, of Peabody, and Wm. El. Byers, of Kansas City, Mo., for appellee.

PORTER, J. The action was commenced in the probate court to establish a claim against the estate of Thomas Kelley, deceased. From an order disallowing the claim an appeal was taken to the district court, where pleadings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were filed. The district court held that the action was barred by the statute of limitation and sustained a demurrer to the petition. From this ruling the plaintiff appeals.

[1, 2, 4] The letters of administration issued on December 10, 1910. At that time the statute allowed three years for the presentation of claims. By an act which took effect on the 22d day of May, 1911 (chapter 188, Laws 1911) the time was reduced to two years. Section 4 of the new act provides that all demands not exhibited within two years shall be forever barred. Section 11 amends section 3541, Gen. Stat. 1909, and provides that:

"No executor or administrator, after having given notice of his appointment as provided in this act, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within two years from the time of his giving bond."

The act expressly repeals the old law allowing three years in which to present claims. The plaintiff's claim was presented and notice served upon the administrator December 12, 1912, more than two years after the issuance of letters and the giving of the administrator's bond. The only question is whether the two-year statute controls in this action.

The plaintiff's main contention is based upon section 9037, Gen. Stat. 1909, which fixes the rules for the interpretation of statutes, and which provides that the repeal of a statute shall not "affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed." The contention, in other words, is that the administration of the estate was a "proceeding commenced," and the demand of the plaintiff was a "right accrued," under the statute repealed by the act of 1911. Whether or not the administration of an estate may be regarded as a "proceeding commenced" it is unnecessary to decide; the only proceeding involved in this action is plaintiff's claim against the estate, and it was commenced by the service of the notice upon the administrator under the provisions of section 91 of the executor's and administrator's act and section 92 as amended by the act of 1911. *Hanson v. Towle*, Adm'r, 19 Kan. 273, 279; *Clifton v. Meuser*, 79 Kan. 655, 100 Pac. 645. From the time notice was served upon the administrator the proceeding has been an action to recover upon a claim against the estate. Manifestly, when the appeal was taken to the district court from the order disallowing the claim, the whole matter of the estate was not brought to the district court; nothing was appealed except this proceeding against the estate, and since it was not a "proceeding commenced" under the repealed statute, but was commenced under the new statute, the latter controls. The Legislature has full control over the remedy and as the new statute affects the remedy only, the Legislature could, without violating any rights

of the plaintiff or of other parties similarly situated, reduce the period in which claims may be filed against the estates of decedents and substitute another statute of limitation. In *Keith v. Keith*, 26 Kan. 26, it was held that the two-year statute of limitations in force at the time of a tax sale could be extended to five years by the Legislature without being open to the objection that it impairs the obligation of contracts in violation of the Constitution of the United States. In the opinion it was said:

"The rights of parties in respect to contracts are liable to be affected in many ways by changes in the laws, but where such changes belong merely to the remedy, or to matters of evidence, such changes are not held by the decisions of the courts to impair the obligation of the contract. It is a general rule that the state has complete control over the remedies which it offers to suitors in its courts, and therefore we think the Legislature, without the violation of any constitutional right, might repeal the statute of limitation of two years, and substitute a new one of five years." 26 Kan. 40.

The statute providing rules for the construction of statutes contains no provision for the saving of a remedy or former procedure. In the recent case of *Bowen v. Wilson*, 93 Kan. 351, 144 Pac. 251, it was held that there is no vested right to an appeal, and that the Legislature may take away from a defeated party the privilege before the appeal has been taken. To the same effect see *Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114; *Kansas City v. Dore*, 75 Kan. 23, 88 Pac. 539. The plaintiff cites and relies largely upon the case of *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737, where a Kansas statute of limitations was construed so that the limitation was held to commence when the cause of action is first subjected to the operation of the statute, unless the Legislature has otherwise provided. The opinion, however, distinctly recognizes three different modes adopted by the courts for construing such statutes in order to avoid giving to the literal language an effect which would absolutely bar the cause of action as soon as the statute went into effect. In the opinion it was said:

"A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the Legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this con-

struction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires—which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others." 17 Wall. 599, 21 L. Ed. 737.

The second of these three recognized rules or methods of construction had already received the approval of the same court in *Ross and King v. Duval et al.*, 13 Pet. 45, 10 L. Ed. 51. It has been the rule followed in this state from the earliest decisions. In *Morton v. Sharkey, McCahon*, 113 (Dass. Ed.) 1 Kan. 535, it was said, "the Legislature must give a reasonable time to bring suits on causes of action which are not barred by the existing law when the new one is enacted" (syl. 4), and it was held that where the act fails so to provide, suit may be brought within a reasonable time after the passage of the new act. The case was cited with approval in *Shepard v. Gibson*, 88 Kan. 305, 306, 128 Pac. 371, where it was said in the opinion:

"It is competent, however, for the Legislature to enact a statute shortening the period within which an action for the enforcement of a contract must be brought, if a reasonable time is allowed after the passage of the act in which to bring an action."

It is settled by the great weight of authority, and is no longer disputed, that it is within the power of the Legislature to amend a statute of limitations either by shortening or extending the time in which an existing cause of action may be barred, provided a reasonable time is given for the commencement of an action before the bar takes effect. In *Terry v. Anderson*, 95 U. S. 628, page 633, 24 L. Ed. 365, Chief Justice Waite used this language:

"The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and, as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain."

To the same effect see *Sansberry v. Hughes*, 174 Ind. 638, 92 N. E. 783; *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294, 61 Am. St. Rep. 661; *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521; 19 A. & E. Encyc. of L. 169.

[3] Certain facts are alleged in the petition which it is contended estop the administrator from setting up the bar of the statute. It is stated that plaintiff's claim was filed in the probate court in January, 1911, and that the administrator had knowledge of the claim, and, moreover, that the parties had made some efforts to settle it. It has been held, however, that no action of the administrator can suspend the statute, nor will any promise or acknowledgment of a claim by him have that effect. *Collamore v. Wilder*, 19 Kan. 67; *Hanson v. Towle, Adm'r*, 19 Kan. 273; *Clawson v. McCune's Adm'r*, 20 Kan. 337; *Ætna Life Ins. Co. v. Swayze, Adm'r*, 30 Kan. 118, 1 Pac. 36.

[6] Two causes of action are set out in the petition. The second is for services rendered the defendant in the administration of the estate, and it is urged that this claim was not barred by any statute. Debts and obligations, however, which were not contracted by the decedent, cannot be made the basis for a claim against the estate. In a quite similar case (*Brown v. Quinton*, 80 Kan. 47, 102 Pac. 242, 25 L. R. A. [N. S.] 71, 18 Ann. Cas. 290), the action was to recover for the services of attorneys employed by an administratrix in proceedings in behalf of the estate. It was held that the defendant was liable personally, but not in her official character, and that no cause of action was stated against her as administratrix or against the estate. Manifestly, the same principle applies here.

It follows that the demurrer to the petition was rightly sustained, and the judgment is affirmed. All the Justices concurring.

(93 Kan. 791)

**NORMAN v. RULLMAN et al.** (No. 19163.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**1. BILLS AND NOTES (§ 443\*)—ACTIONS—EVIDENCE.**

In making a loan of money, a promissory note was taken, payable to the order of the lender at a certain date, if living, or, in case of his death, to his wife. The lender having died before the note was paid, the administrator of his estate sued the maker and joined the widow as a defendant, who answered, claiming the amount due upon the note. In the issue joined between the administrator and the widow, it is held that the widow should recover.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.\*]

**2. BILLS AND NOTES (§ 443\*) — ACTION — RIGHTS OF PARTY.**

The circumstance that the deceased left insufficient personal property to pay all his debts is immaterial to the issue tried.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.\*]

Appeal from District Court, Doniphan County.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by Charles V. Norman, administrator of the estate of French J. Mallows, against Nellie Rullman and Margaret E. Mallows. Judgment for plaintiff, and defendant Margaret E. Mallows appeals. Reversed.

Perry A. Brubaker and Christian Dubach, both of St. Joseph, Mo., for appellant. J. J. Baker, of Troy, and Owen & Paschal, for appellee.

BENSON, J. This action was brought by the administrator against the defendants, Nellie Rullman and Margaret E. Mallows, upon a promissory note as follows:

"\$300.00. Troy, July 15, 1912.

"One year after date I promise to pay to the order of French J. Mallows, or in case of his death to his wife, Margaret Mallows, three hundred no/100 dollars, for value received, payable, without defalcation or discount, with interest from date at the rate of 8 per cent. per annum until due, and 10 per cent. after due until paid. The drawers hereof and the indorsers hereon severally waive notice, protest, and appraisal.

"Payable at the First National Bank of Troy, Troy, Kansas. Due July 15, 1913.

"[Signed] Nellie Rullman."

Mrs. Rullman answered, admitting the execution of the note and her liability thereon, alleging that the proceeds were claimed by the estate of French J. Mallows, and also by Margaret Mallows, and offering to confess judgment in favor of the person entitled to receive the amount.

The defendant Margaret Mallows alleged that the note was due to her, and that she furnished the consideration. In a reply it was alleged that the note was never delivered to Margaret Mallows, and that the estate of French J. Mallows is indebted to numerous parties and is insolvent. Mr. Mallows died a little over a month after the note was given. It still remained in the bank.

The testimony of Mrs. Rullman, in substance, was that just before the date of the note she asked Mr. Mallows, who was then ill, for a loan. He referred to certificates of deposit in the First National Bank of Troy which drew only 3 per cent., and said that he might as well make 5 per cent. as the bank; that he had given the certificates as a wedding present to his wife, but had reserved a lifetime interest. He prepared a note, which Mrs. Rullman signed, payable to French J. Mallows, or, in case of his death, to Margaret E. Mallows. He gave her a check for the amount, which, however, the bank declined to pay, because he had no money on general deposit, only the certificates. In a short time Mrs. Rullman returned to the bank accompanied by Mrs. Mallows, who then had the two certificates of deposit for \$150 each, payable to the order of French J. Mallows, which then bore his indorsement. The president of the bank objected to the note that Mr. Mallows had prepared because of

indefiniteness in time of payment, and wrote out the note now sued upon, following the form of the first note as to payees. Mrs. Mallows surrendered the certificates, and the money was paid over to Mrs. Rullman upon her signing the note, which was left at the bank, as Mr. Mallows had requested.

The testimony of the banker relating to the transactions at the bank does not materially differ from that of Mrs. Rullman, only his recollection was that both ladies came the first time, instead of Mrs. Rullman alone. Mrs. Mallows then produced the certificates, but they did not then bear Mr. Mallows' indorsement. The note was then written by him, made payable the way in which it now appears, at the direction of Mrs. Mallows, who said her husband requested it to be so drawn. The note was then signed and left at the bank. In a short time both women returned; Mrs. Mallows having the certificates indorsed by Mr. Mallows, which the bank cashed, paying the money to Mrs. Rullman.

There was some other evidence tending to prove that at or before his wedding Mr. Mallows said he would give the certificates to his wife, and handed them to her. Over the objection of Mrs. Mallows, evidence was admitted tending to prove that the personal property left by Mr. Mallows had been exhausted, and that a claim of about \$50 for funeral expenses remained unpaid.

The court instructed the jury that the burden was upon the defendant Mrs. Mallows to prove that she was the owner of the note in question, and that she furnished the money for which it was given. An instruction was also given to the effect that, if Mr. Mallows gave the certificates to his wife, but reserved an interest or a life estate in them, then there was no valid gift, and she could not recover. Other instructions were given, but the foregoing sufficiently show the theory adopted by the court.

[1] In our view of the case, it is not material whether there had been a valid gift of the certificates or not. Mr. Mallows had an undoubted right to appropriate them to the loan in the way the undisputed evidence shows was done. He could take a note for the proceeds, payable absolutely to his wife, or to her in case she outlived him, and the transaction cannot be lawfully challenged by the administrator. Prima facie the note is payable to the party named in it just as written; that is, to Mrs. Mallows, Mr. Mallows having died. Nothing is found in the evidence to overthrow this prima facie effect of the instrument, and the burden to do so was upon the administrator. The contract evidenced by the note was made with Rullman for the benefit of his wife upon conditions that it remained unpaid at his death. Even if not privy to the consideration, Mrs. Mallows could enforce it, as it was made for her benefit. *Anthony v. Herman*, 14 Kan. 495; *Life Assurance Society v.*

Welch, as Supt., etc., 26 Kan. 632, 641. If the certificates were not hers already, he applied them for her benefit to the extent stipulated in the note when he indorsed them and diverted them to the loan, payable as he directed it should be. The deposit of the note in the bank where it was payable was as effectual a delivery for one payee as the other, both having an interest in it, and both consenting to the deposit. Indeed, it has been held that it is not necessary that a contract made for the benefit of another shall be delivered to the beneficiary if delivered to the one who made the contract. 9 Cyc. 302.

This subject is discussed at length in *Copeland, Executor, et al. v. Summers et al.*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971. A father conveyed land to a son upon a contract that the son should pay a sum annually to the father during his life, and afterwards make certain payments to persons named. The contract was never delivered to the persons who were to receive these payments, but was retained by the father. The executor was impleaded, and an issue was framed and tried to determine whether the payments the son had agreed to make should be paid to the persons named in the contract, or to the executor; it being conceded by the son that he owed the amount. Referring to the rule that one for whose benefit a promise has been made to a third party may maintain an action upon it, as too familiar to require the citation of authorities, it was held that the beneficiaries named in the contract were entitled to the payments as against the executor. Concerning the contention of the executor that the transaction was a testamentary disposition, and that the title and control had not passed from the father during his life, and therefore the payments due belonged to his estate, the court said:

"By the conveyance to Milton L. Copeland, Jr., and taking back from him an obligation to pay the appellees the sums therein named, he made him a trustee for the appellees. In contemplation of law, he left in the hands of Milton L. Copeland, Jr., the amount of money to be paid to them, and thereafter he held such funds as their trustee, to be paid according to the terms of the contract."

So here Mr. Mallows, by paying over the money to Mrs. Rullman upon her promise to pay it over to his wife after his death, appropriated it to that use.

In *Prindle v. Caruthers*, 15 N. Y. 425, the action was upon an instrument in the following form:

"For value received, I promise to pay to Henry Caruthers, or his wife, Elizabeth, annually, on the 1st day of April, during the life of the longest liver of them, the sum of two hundred dollars, if called for or needed."

The suit was by an assignee of the wife; the husband having died. In opinions obscured somewhat by discussions of pleadings not pertinent here, it seems to have been held that upon the death of the husband the

right of action survived to the wife, assignable by her after the death of her husband. It appears by a footnote that upon a second action to recover an installment upon the interest the plaintiff obtained a verdict and judgment, and upon a review by the Court of Appeals the same right of the wife was sustained, and the judgment was affirmed.

Another instructive case is that of *Blanchard v. Sheldon*, 43 Vt. 512. There the contract was to pay to Aurilla Ballou, if called for before her decease; if not, to Daniel Blanchard. Mrs. Ballou retained the instrument until her death. The executor, with knowledge of the facts, kept the possession of the paper from Blanchard and collected the amount. In an action against the executor for conversion, he was held liable. The court places the right of recovery upon the doctrine of a gift *inter vivos* by the delivery of the money to Sheldon, one of the obligors upon the paper, for Blanchard.

Whether the transaction here should be called a gift *inter vivos* conceding that the fund loaned belonged to Mr. Mallows, he could dispose of it by making the note payable to himself or to his wife, or to a stranger, had he desired, and in either case it would have been no concern to an administrator of his estate. *Crawford's Adm'r v. Lehr*, 20 Kan. 509; *Robinson's Executors v. Blood's Heirs*, 64 Kan. 290, 294, 67 Pac. 842. In any event the note sued upon appeared upon its face to belong to Mrs. Mallows, her husband being dead, and, in the absence of evidence to the contrary, she was entitled to recover. The instruction to so find, which she requested, should have been given.

As there was no conflict in the evidence, and no good reason appears for another trial, the judgment is reversed, with directions to render judgment for Mrs. Mallows for the recovery of the money due upon the instrument. All the Justices concurring.

(83 Kan. 733)

KNICKERBOCKER et al. v. BANGS et al.  
(No. 19105.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

LIFE ESTATES (§ 8\*)—ADVERSE POSSESSION—RIGHTS OF REMAINDERMEN.

Certain devisees held the life estate in a tract of land which was ordered sold for the payment of debts. One of the life tenants at the time the sale was ordered and notice thereof served had living an infant son a few months old, on whom no service was made, and later certain other children were born who, with the son already referred to, became remaindermen. The deed, as well as the order of sale, purported to cover the entire title to the land. The grantees of the purchaser remained in actual, visible, open, and adverse possession, claiming title as against the world until all the minors had become of age, and until more than two years thereafter in case of the youngest, and had made lasting and valuable improvements, no proceeding having been begun to set aside the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

administrators' deed or to assert title to the land. *Held*, that such grantees are entitled to have their title quieted as against the remaindermen; the defense of the latter being barred by the statute of limitation.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 24-28; Dec. Dig. § 8.\*]

Appeal from District Court, Cowley County.

Action by Hattie Knickerbocker and others against A. C. Bangs and others. From judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions to enter judgment.

O. A. Keach, of Wichita, for appellants. Hackney & Lafferty, of Winfield, for appellees.

WEST, J. The plaintiffs sued to quiet title to a 10-acre tract of land. From an adverse judgment they appeal, and the questions involved concern the effect of an administrator's sale and the matter of adverse possession. The trial court made findings of fact which appear to be satisfactory to both parties, the controversy being over the conclusions of law. From these findings it appears that the land was embraced in a larger body which passed by the will of Soranus L. Brettum in 1881. That under this will the widow, Margaret, took a life estate. Charles L. Black, a grandson, took one-third in fee, and two other grandchildren, Caroline Louise Crapster, now Bangs, and Brettum Crapster, each took a life estate in one-third and after the death of Caroline Louise her children were to have her one-third in fee. Caroline Louise married the defendant A. C. Bangs, and Brettum C. died before this action was begun, leaving a widow, Jennie G. Crapster, and two children, Brett A. and Caroline L. In October, 1883, the executors of the will secured an order to sell the real estate now in controversy for the payment of debts of the testator, and it was ordered that notice be given to Caroline L. and Brettum, who were designated as the sole heirs at law of Soranus L. Brettum. Margaret Brettum and Charles C. Black were the executors, and of course had notice of their own proceeding. Notice was served as directed, and an order was made directing a sale of the real estate, including that now in controversy, and a deed was ordered executed and recorded. When notice was served, however, Caroline L. Bangs had an infant son, Milton A. Bangs, then between two and three months old, on whom no service was made. Afterwards, in certain other litigation, all the interest of Charles C. Black was extinguished. In August, 1886, a sister of Milton A. Bangs, Margaret E., was born. In November, 1890, Ruth T. was born, and in February, 1892, Phyllis G. Bangs was born. Milton A. Bangs' majority was reached in 1904, and those of his three sisters, respectively, in 1904, 1908, and 1910. Certain other defendants filed disclaimers, and need not be further men-

tioned. In June, 1885, the grantee of the administrators executed a warranty deed to George E. Knickerbocker purporting to convey a full and complete title to the north five acres of the tract in question, and in June, 1887, he executed a warranty deed to the same grantee, purporting to convey a complete title to the south five acres. Immediately after the purchase of these tracts George E. Knickerbocker fenced the land, planted an orchard, and put on improvements costing about \$500, which was the purchase price of the land, and until his death held open, notorious, and exclusive possession, claiming to own the tract as against the defendants and the world. He was absent from Kansas from April 1, 1889, until his death March 25, 1891. In April, 1891, the plaintiffs, being the widow and daughters of George E. Knickerbocker, returned to Kansas, and in a year or two buildings and improvements were placed upon the land to the value of \$800, the plaintiffs occupying the tract as the homestead from 1892 or 1893, and from their return in April, 1891, up to the commencement of this action August 7, 1912, they held open, notorious, tangible, exclusive, and adverse possession as against the world.

It is claimed by the plaintiffs that as no proceeding was begun within five years to attack the administrators' deed, and none of any kind by either of the heirs within two years after reaching majority, they are barred from any defense to this action, the defendants contending that the deed was void, and that the title still remains in the heirs of Caroline Louise Bangs.

The deed as to Milton A. Bangs was void for want of notice to him, and the form of the order of sale and also of the deed by which each purported to cover the entire title to the land could have no effect to divest such estate therein as belonged to a minor on whom service was omitted, but the court found that for much more than 15 years beyond the two years succeeding the majority of each of the heirs the appellants were in open, notorious, exclusive, and adverse possession as against the world. Whatever rights each of these minors had when coming of age to set aside the administrators' deed or to have his interest in the land adjudicated, the statute made it imperative that such rights should be asserted within the time fixed, in order to prevent the ripening of full and complete title by adverse possession. It is only necessary to decide, as we must and do decide, that the defendants have slept upon their rights and their defense is barred. *Young v. Walker*, 26 Kan. 242, 248-251; *Thompson v. Burge*, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867; *Crapster v. Taylor*, 74 Kan. 771, 87 Pac. 1139; *James v. Logan*, 82 Kan.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

285, 290, 291, 108 Pac. 81, 136 Am. St. Rep. 105; *Freeman v. Funk*, 85 Kan. 473, 117 Pac. 1024, 46 L. R. A. (N. S.) 487.

It is suggested that the plaintiffs hold under the life tenants, and cannot be heard to question the validity of the administrators' sale, and that a life tenant cannot quiet title as against a remainderman. Probably the adverse possession found by the court would be fully sufficient for the purposes of the plaintiffs, regardless of the administrators' proceedings or deed, and certainly there is nothing in the findings to indicate in the slightest degree that the plaintiffs have ever held in subreversion to the interest of the remainderman. See *Nelson v. Oberg*, 88 Kan. 14, 127 Pac. 767.

It follows, therefore, that the judgment must be reversed and the case is remanded, with directions to enter judgment in accordance herewith. All the Justices concurring.

(94 Kan. 18)

MARNEY v. JOSEPH. (No. 19167.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. PLEADING (§ 217\*)—DEMURRER TO ANSWER—EFFECT.

A demurrer to an answer may be carried back to a petition and the sufficiency of the petition tested upon that challenge, although a previous demurrer to the petition had been considered and overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 537, 540-548; Dec. Dig. § 217.\*]

2. PLEADING (§ 214\*)—DEMURRER TO ANSWER—CONSTRUCTION—PETITION.

Upon a demurrer to an answer which is carried back to a petition, the plaintiff will not be deemed to have admitted allegations in the answer which are inconsistent with and contradictory of those included in his petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

3. LIBEL AND SLANDER (§ 38\*)—ABSOLUTE PRIVILEGE—FALSE STATEMENTS BY GUARDIAN.

False statements made by a guardian of an insane ward to relatives of his ward, imputing dishonesty and crime to another who is making a claim against the ward and his estate, are not within the rule of absolute privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 114, 115; Dec. Dig. § 38.\*]

4. LIBEL AND SLANDER (§ 51\*)—CONDITIONAL PRIVILEGE—WHAT CONSTITUTES.

Neither will the false statements above referred to be conditionally privileged if they were not spoken in good faith in the performance of the guardian's duty and without a malicious purpose, nor if the statements include libelous matter not pertinent to the subject within the privilege of the guardian to write and publish.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.\*]

Appeal from District Court, Butler County. Action by Mattie Marney against J. D. Joseph. From judgment for defendant, plaintiff appeals. Reversed and remanded.

C. L. Aikman, of Eldorado, for appellant. Von der Heiden & Morgan, of Newton, and T. A. Kramer, of Eldorado, for appellee.

JOHNSTON, C. J. Mattie Marney brought this action against J. D. Joseph to recover damages resulting from an alleged libel. In her petition she set forth a number of written statements made and published by the defendant imputing misconduct, fraud, and crime to her. A demurrer to the petition was overruled, and the defendant then answered admitting the writing and publication of the alleged libels and averring that his statements were true. He also alleged that the statements were written in good faith and were such as are privileged under the law. Plaintiff demurred to the answer, claiming that it failed to state a defense, and upon this demurrer the court determined that it should be carried back to the petition, and upon a reconsideration of the averments of the petition decided that a cause of action against the defendant was not alleged, and accordingly gave judgment for defendant.

[1, 2] The fact that the court had previously overruled the demurrer to plaintiff's petition did not preclude a re-examination of its averments upon the demurrer to defendant's answer. It was competent for the court to carry the demurrer back to the petition, thus searching the entire record, and to decide whether or not the averments of the petition, supplemented as they may have been by admissions recited in the answer, stated a cause of action. There is a contention that plaintiff by her demurrer to the answer admitted the averments contained in it to be true, and that these admissions should be held to qualify the averments of the petition, and that, so regarded, the petition failed to state a cause of action. Ordinarily a demurrer admits the facts stated in the pleading to which it is addressed, and while it is true that the sufficiency of the petition may be tested on a demurrer to an answer, and that in testing it any defects in the petition may be regarded as cured by admissions made in the answer (*Sill v. Sill*, 31 Kan. 248, 1 Pac. 556), yet on such consideration the averments of the petition cannot be regarded to be overturned and destroyed by inconsistent and contradictory averments in the answer. The demurrer does not admit allegations of the answer which are contradictory to the averments in the petition. 6 Standard Proc. 952. In passing upon the sufficiency of the petition, the court could not regard the averments in the answer which were wholly antagonistic to those of the petition to the effect that the charges of misconduct and crime made against plaintiff were true, nor that any other of the averments in the answer which were inconsistent with or contra-

dictory to the allegations of the petition were admitted.

[3] We still have the question whether a cause of action is stated in the petition. The contention of the defendant is that the defamatory communications, about the writing and publication of which there is no dispute, are privileged. As the statements imputed to the plaintiff were those which rendered her liable to punishment and were calculated to make her odious and infamous, they were deemed to be actionable and malicious unless they come within the exception of privileged communications. This exception includes what are termed absolute and qualified privileges. It is first contended that the defamatory statements in question belong in the class called absolute privilege. This privilege is founded on public policy and provides immunity for those engaged in the public service and in the enactment and administration of law. It is not intended so much for the protection of those engaged in that service, as it is for the promotion of the public welfare; the purpose being that members of the Legislature, judges of courts, jurors, lawyers, and witnesses may speak their minds freely and exercise their respective functions without incurring the risk of a criminal prosecution or an action for recovery of damages. The statements in question, as we have seen, were not made in any judicial proceeding, nor did the occasion bring them within the rule of absolute privilege. *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316; *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; note, 5 L. R. A. (N. S.) 163. True, the defendant was a guardian of the insane man, and his duty required him to protect the estate of his ward; but it did not require him to write and publish charges of misconduct, immorality, and crime against those who claimed an interest in the estate of his ward, nor those who contemplated the presentation of a claim against it. His statements, as will be observed, were not made to the probate or any other court in any judicial proceeding, but were voluntarily written to relatives of his ward, and some of the statements could not have had any relevancy to any duty owed to the ward. Even if the defamatory statements had been made in a pleading or proceeding in court, they must have been pertinent to the subject of inquiry in order to come within the rule of absolute privilege. *Townshend on Slander and Libel* (4th Ed.) § 222; *Newell on Slander and Libel* (3d Ed.) §§ 518, 519.

[4] It is next contended that the communications come within the class of qualified or conditional privilege. Where a confidential relationship exists between parties so as to put upon one making the communication the duty of protecting the interests

of others, and a statement containing no impertinent or unnecessary libelous matter is made in good faith and in the belief that it comes within the discharge of his duty, it may be within the rule of qualified or conditional privilege. In such a case the protection of privilege is not extended to defamatory statements made with bad intent. A confidential relation cannot be used by a party to give expression to his personal spite or ill will, nor can he use the occasion as a cloak to indulge in a malicious publication of an unfounded charge of dishonesty and crime. If he publishes the statement, not in the bona fide performance of a duty, but in furtherance of a malignant design, the conditional privilege is destroyed. *Kirkpatrick v. Eagle Lodge*, supra; *Redgate v. Roush*, supra; *Coleman v. MacLennan*, supra; *Richardson v. Gunby*, 88 Kan. 47, 127 Pac. 533, 42 L. R. A. (N. S.) 520; *Newell on Slander and Libel* (3d Ed.) § 568 et seq. In the plaintiff's petition it is expressly alleged that the defamatory statements were not written or published in good faith, but that in writing and publishing them the defendant was actuated by a malicious purpose; and hence it must be held that the petition did state a good cause of action against the defendant. While it will devolve upon the plaintiff to prove the malice alleged in order to overcome the privilege claimed, still the questions of the good faith of defendant in an effort to perform a duty owed by him to the family of his ward, his belief in the truth of the defamatory statements, and whether they were made with actual malice, are all for the determination of a jury upon the proof that may be produced. *Richardson v. Gunby*, supra.

The ruling of the court in sustaining the demurrer to plaintiff's petition cannot be upheld, and hence its judgment will be reversed and the cause remanded for further proceedings. All the Justices concurring.

(93 Kan. 654)

DELGARNO et ux. v. MIDDLE WEST  
PORTLAND CEMENT CO. et al.  
(No. 18749.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. ACTION (§ 45\*)—VENDOR AND PURCHASER (§ 314\*)—ACTION FOR PRICE—PETITION—SUFFICIENCY—CORPORATIONS.

The petition examined, and held not to be demurrable for misjoinder or for the failure to state a cause of action.

[Ed. Note.—For other cases, see *Action, Cent. Dig.* §§ 378-383, 385-448; *Dec. Dig.* § 45; *Vendor and Purchaser, Cent. Dig.* §§ 920-927; *Dec. Dig.* § 314.\*]

2. TRIAL (234\*)—INSTRUCTIONS—EVIDENCE.

In an action for a money judgment, equitable relief was also sought. Both features of the case were heard together, and the jury were instructed that a part of the evidence was ad-

\*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*

mitted because of its effect upon matters to be decided by the court, but that they might consider any of it that threw light upon the matters submitted to them. *Held*, that under all the circumstances of the case it does not appear that material prejudice resulted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.\*]

**3. CORPORATIONS (§ 521\*)—PROMOTER'S CONTRACT—LIABILITY OF CORPORATION—INSTRUCTIONS.**

Other rulings examined, and *held* not to constitute error.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. § 521.\*]

Appeal from District Court, Allen County.

Action by George C. Delgarno and wife against the Middle West Portland Cement Company and others. From judgment for plaintiffs, the defendant named appeals. Affirmed.

Ewing, Gard & Gard, of Iola, for appellant. Apt & Apt, of Iola, for appellees.

MASON, J. George C. Delgarno and his wife obtained a judgment for \$9,000 and interest against the Middle West Portland Cement Company, and it appeals.

[1] Complaint is made of orders overruling a motion to require the several causes of action stated in the petition to be separately stated, and a demurrer on account of their misjoinder. The more important allegations of the petition may be thus summarized: The Delgarnos were the owners of a 240-acre tract of land in Allen county. Acting in behalf of a corporation about to be organized for the manufacture of cement, and of themselves and other individuals interested in such organization, E. C. Gatlin and R. C. Patterson contracted on September 14, 1906, for the purchase of the land for \$18,000. One-half the price was paid, and a deed was made (running to Gatlin, but taken by him for the benefit of the corporation and its organizers) and placed in a bank to be delivered upon the payment of the balance. (The plaintiff's evidence was that a contract in writing was executed, by which a cement plant was to be built within three years, the company to have the option to pay in cash or in stock after the plant was built.) On the 27th of the same month the deed was delivered, with the consent of Delgarno, without this payment, upon an oral agreement (the previous written contract being destroyed) that \$9,000 of the capital stock of the corporation should be put up to secure it, and that unless a cement plant should be built and in operation within three years the plaintiffs should be unconditionally paid in cash, with interest. To induce Delgarno to enter into this arrangement, false statements were made to him as to matters affecting the value of the stock. The corporation was organized, its name being the Union Portland Cement Company. The title to the land was transferred to it. Stock was issued in the name of the plaintiffs and

deposited with a trust company, the plaintiffs knowing nothing of the transaction, excepting that they were told that stock had been deposited to secure the payment of the amount owing to them. A new corporation was created called the Middle West Portland Cement Company, which is a reorganization of that first named, and is liable for its obligations. Bonds of the new corporation, secured by mortgage on its property, were issued to the individual defendants without consideration. This corporation in July, 1909, gave its note to Delgarno for the interest on the deferred payment. The three years have expired and the plant has not been built or begun. The new corporation has failed to comply with the statute in several respects. The plaintiffs asked judgment against all of the defendants for the amount of the unpaid purchase price, with interest, and that the judgment be declared a first lien on the land. They also asked for the appointment of a receiver to take charge of the property and records of the company and preserve them, subject to the orders of the court. Judgment was rendered against the Middle West Company for the amount claimed. The case was dismissed as to one of the individual defendants and continued as to the others. The cause was reserved for further action regarding the equitable relief sought, and the receivership applied for.

The appellant contends that several causes of action were stated, not all of which were capable of joinder in the same petition. These different causes of action are said to be: (1) For the setting aside of certain deeds on the ground of fraud; (2) on a contract for the purchase of the land, a lien being asked for the unpaid purchase price; (3) for the winding up of the corporation by means of a receivership, because of its failure to comply with the law; and (4) against the individual defendants as promoters of the corporation. We regard the petition as declaring upon a promise to pay the balance of the purchase price of the land in cash in three years, if within that time a cement plant had not been established. Various allegations of bad faith are made, but their purpose seems to be to form a basis for holding the individual defendants, as well as the corporation, liable upon the promise, and for asserting a lien against the land. The allegations of a failure to observe the law regarding corporations, and the application for a receivership, may be considered as incidental to the main purpose of the action, looking to the enforcement of such money judgment as might be rendered. Some of the language used may tend to suggest other theories, and some of it may be surplusage; but we cannot believe that the defendant was materially prejudiced by the rulings referred to.

The contention is also made that the peti-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion did not state a cause of action against the appellant, because it was not a party to the purchase of the land and there are no sufficient averments of its assumption of liability for the purchase price. There were direct statements that the contract was made in its behalf, and the title taken for its benefit; and its ratification and adoption of the transaction is fairly inferable from the other allegations already referred to.

The action was brought in October, 1911. The appellant maintains that it is barred by the two-year statute of limitations applicable where relief on the ground of fraud is sought, or at any rate by the five-year statute. The action is one on the contract to pay in three years unless the plant should be built, and therefore did not accrue until September, 1909. The statute of frauds is invoked, on the theory that the plaintiffs rely on an oral promise to pay the debt of another, and on an oral agreement not to be performed within a year. The alleged obligation of the corporation is direct and not collateral, and the statute of frauds cannot be used to defeat the payment of the purchase price of land to which a deed has been made and accepted. 20 Cyc. 231; A., T. & S. F. R. Co. v. English, 38 Kan. 110, 16 Pac. 82.

A demurrer to the evidence on the part of the appellant was overruled, and complaint is made of that ruling. We think there was evidence to sustain the substantial allegations of the petition, although there was some variance in detail. The deed was made by the Delgarnos to Gatlin, September 14, 1906. On the 18th of the same month the Union Company was organized, and a meeting of the directors was held at which Patterson (who was one of them, and was also chosen general manager) made a written offer as trustee to convey to the company certain land (including the Delgarno tract) for stock. The proposal was accepted. On September 27th, Gatlin deeded the same land to Patterson, who was described as "trustee for Union Portland Cement Company, a corporation." This was the same day that the deed from the Delgarnos to Gatlin was delivered, and that the conversation took place which the plaintiffs assert resulted in the oral contract sued on. Stock was issued to Gatlin to the amount specified in his offer, and he assigned \$9,000 of it to Delgarno. When the Middle West Company was organized, the stock was exchanged for bonds of that company. Delgarno testified that he held the stock and bonds only as security. There is difficulty in reconciling some parts of his testimony with others, and with the documentary evidence. In letters complaining of the delay in establishing the cement plant he referred to himself as a stockholder in the company. He sent a letter to the Union Company purporting to inclose his stock in that company, to be transferred to bonds and stock of the Middle

West company, and asking for a note for the "interest on the stock." The note he received from the new company bore a memorandum describing it as a dividend on Union Company stock. He signed a receipt for it under that description. Apparently, however, he was not sufficiently familiar with the kind of transactions in which he became involved to understand their legal effect, or to express himself with clearness or accuracy. The appellant insists that the evidence conclusively shows that Gatlin, and not the corporation, bought the land, and that Delgarno accepted stock in payment of the balance of the price. The effect of any seeming contradictions was for the jury. We think there was evidence to support the findings implied by the verdict that the land was purchased in behalf of the corporation, that it adopted the bargain, and that the agreement called for a payment in cash unless the cement plant should be constructed within the time mentioned, and these were the vital matters in controversy.

[2] Objection is made to the admission of a large amount of evidence, principally minutes of meetings of the stockholders and directors of the corporations. Some of it had a bearing upon the connection of the company with the original transaction. A part of it was admitted on the theory that it was pertinent to the equitable matters presented for the consideration of the court, the statement being made that the instructions would limit the effect of this class of testimony. An instruction was given on the subject in these words:

"You are instructed that, inasmuch as the petition of the plaintiffs invokes equitable aid from the court, the evidence has been permitted to take a wide range touching the organization and business operations of the corporations defendant named in the petition, much of which relates especially to such equitable questions as are involved and for the consideration of the court upon such propositions and which issues are reserved to the court, yet all such evidence is competent and for your consideration in so far as it may throw any light upon the propositions that will hereinafter in these instructions be submitted to you for your determination."

The appellant insists that as the result of these proceedings the jury were allowed to consider a mass of irrelevant evidence, greatly to its prejudice. By the instruction quoted they were told that they might consider all the evidence, so far as it threw any light on the questions submitted for their decision, and they were left to determine for themselves what part of it was of that character. Such an arrangement might in some situations be obviously prejudicial. But here the evidence which was irrelevant to the issues submitted to the jury does not seem to be of a character likely to affect their judgment, and they were admonished that it did not have any necessary bearing upon the case so far as they were concerned. We do not think such presumption of prejudice arises as to require a reversal.

[3] An instruction is objected to on the ground that it amounts to a statement that the mere acceptance and retention of benefits of a promoter's contract makes the corporation liable. We cannot regard it as open to this construction. It consists essentially of the syllabus in *Tryber v. Creamery Co.*, 67 Kan. 489, 493, 73 Pac. 83, coupled with a text that is quoted with approval in the opinion. Another instruction is criticized as omitting a full statement of the matters necessary to make the corporation liable on a contract made by the promoters, while undertaking to enumerate the elements necessary to sustain the plaintiffs' case. The rule having been once stated in full, we do not think prejudice can have resulted from its subsequent abridgment.

The judgment is affirmed. All the Justices concurring.

(94 Kan. 52)

**FRY v. KILBORN.** (No. 19190).†  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**LANDLORD AND TENANT (§ 104\*)—ASSIGNMENT OF LEASE—VALIDITY—RIGHTS OF LANDLORD.**

The defendant owned a farm and made a contract of sale to McKee with a provision for forfeiture without notice if McKee failed to make the payments in accordance with the contract. McKee took possession and farmed the place for one year, and then made a lease to Britton for one year beginning March 1, 1913, and Britton sowed a crop of wheat in the fall of 1912. The written lease contained a provision that Britton should not sublease the land without the written consent of the landlord. In February, 1913, without the consent of the landlord, he sold the growing crop of wheat to the plaintiff and assigned to the latter his interest in the lease and abandoned the premises. McKee being in default in payment of principal and interest, the defendant took possession and appropriated the proceeds of the crop. The plaintiff sued to recover the tenant's share of the wheat. *Held*, that by the provisions of section 4700, Gen. St. 1909, as well as by the terms of the lease under which the plaintiff claims, he could acquire no interest by the transfer without the written consent of the landlord, and that the defendant had the right, under his contract, to take possession of the premises and declare a forfeiture for the nonpayment of the principal and interest.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 328; Dec. Dig. § 104.\*]

Appeal from District Court, Reno County. Action by S. O. Fry against H. B. Kilborn. From judgment for defendant, plaintiff appeals. Affirmed.

C. M. Williams, of Hutchinson, for appellant. F. L. Martin and Van M. Martin, both of Hutchinson, for appellee.

PORTER, J. Plaintiff brought this action to recover the value of a three-fifths interest in 95 acres of wheat, claiming that he had purchased from the tenant his interest

therein by a bill of sale. The defendant recovered judgment for costs, and the plaintiff appeals.

In February, 1912, the defendant, H. B. Kilborn, entered into a contract with D. W. McKee, by which he agreed to sell to McKee a half section of land in Reno County for \$20,000. The first cash payment of \$500 was due January 1, 1913, and McKee was to pay 6½ per cent. interest on the 15th day of February, annually. He was given possession of the land and had all the crops and income from the land for the year 1912, although the contract gave Kilborn a lien on one-half of all crops for the payment of interest. There was a provision for a forfeiture without any declaration, or act, or notice, on the part of Kilborn if McKee failed to make the payments in accordance with the contract. McKee defaulted in the payment of the principal due on the 1st of January, 1913, and also failed to pay the interest amounting to \$1,300, due February 15, 1913. The plaintiff Fry claims under a lease executed September 2, 1912, by which McKee leased to Wade Britton the land for one year beginning March 1, 1913, and McKee permitted Britton to sow 95 acres of wheat in the fall of 1912. Britton was to pay McKee two-fifths of the crop delivered in Sterling. On March 14, 1913, McKee paid \$620.50 to Kilborn to be applied on the interest, saying he expected to pay the balance soon. Shortly thereafter he sent word to Kilborn that he would be unable to raise the balance and for Kilborn to go ahead and run things there. He had moved away from the farm and was then living in Hutchinson. On the 25th day of February, 1913, Wade Britton, the tenant of McKee, sold to Fry, the plaintiff, his interest in the 95 acres of wheat for \$237.50, and gave to Fry a bill of sale for the same. Britton moved away from the farm and turned the written lease over to Fry. Fry testified that it was his intention to take up the lease, and that he was going to farm the land in spring crops; that his agreement with Britton was that when Britton moved off the place, he would move on, and would harvest the wheat and deliver the landlord's two-fifths of the crop, according to the terms of the written lease. The plaintiff and the defendant had conversations, one on May 1st, another on June 1st, and another June 24th, in which Kilborn told Fry not to harvest the wheat; that he was going to cut it himself. He afterwards harvested and appropriated all of the wheat. The plaintiff thereupon brought this action to recover the value of his three-fifths interest in the crop, and in his petition set out copies of the lease from McKee to Britton, and of the bill of sale to himself. The defendant answered, pleading his contract with McKee, the latter's failure to comply with the contract, and alleging that he had taken pos-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 12, 1915.



session of the premises upon forfeiture of McKee's rights under the contract of sale. He further alleged that he had taken possession of the premises prior to March 1, 1913, when the lease to Britton was to commence.

The appellant contends that while time is made the essence of the contract between Kilborn and McKee for the sale of the land, the provisions of forfeiture were for the benefit of the seller and may always be waived; and it is insisted that the fact that Kilborn accepted a payment from McKee as late as March 14, 1913, and allowed him further time on the balance due, must be held as a waiver of the forfeiture. While the evidence would indicate very strongly that Kilborn did not elect to forfeit the contract as early as stated in his answer, March 1, 1913, nevertheless by the terms of his contract he had the right to forfeit it at any time without notice upon failure of McKee to make the payments. We do not think it can be held that his standing by and seeing Britton put out a crop in the fall of 1912 would estop him from claiming a forfeiture for failure to pay the principal and interest at any time thereafter. The defendant relies mainly upon two points: First, A provision in the written lease between McKee and Britton by which Britton expressly agreed that he would not sublease, release, or assign the premises without the written consent of McKee. There is no showing that McKee consented to the bill of sale from Britton to Fry; and there is evidence tending to show that very shortly after he had made the payment to apply on interest, he notified Kilborn that he would not be able to comply with his contract, and that Kilborn might take possession of the land. The second point upon which the defendant relies is section 4700, Gen. Stat. 1909, which provides:

"No tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest or any part thereof to another without the written consent of the landlord or person holding under him."

This section has been construed to make such an assignment voidable only (*Mabry v. Harp*, 53 Kan. 398, 36 Pac. 743), but it is not claimed that any subsequent assent of McKee had been obtained so as to render the transaction valid.

There is a further claim by the defendant that the contract of sale between himself and McKee prohibited by its own terms an assignment or leasing of the premises, unless the same was indorsed upon the contract. The particular language of the contract of sale upon which this contention is based reads as follows:

"And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon."

It is, to say the least, doubtful whether this provision can be construed to prohibit the purchaser of the land from exercising

the rights of an owner and of leasing the premises without the consent of the seller. If, for instance, McKee had complied for a number of years with his part of the contract, and had made the annual payments of principal and interest, it would seem that he would have the same right that any other purchaser of land would have to lease it to another, subject, of course, to the provisions of the contract by which Kilborn was to have a lien on one-half of the crop for the payment of the interest. Without deciding this question, however, we think the plaintiff cannot recover for two reasons: First, under his contract with McKee, the defendant had the right at any time to take possession of the premises and declare a forfeiture for the nonpayment of principal or interest; second, by the terms of Britton's lease under which the plaintiff claims, as well as by the terms of the statute, the assignment was at least voidable.

For the reasons stated, the judgment must be affirmed. All the Justices concurring.

(93 Kan. 824)

WATTS v. MYERS et al. (No. 19153.)†

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. WITNESSES (§ 159)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

On the trial of an action by a widow to recover possession of land which she had been induced to convey by the fraud and duress of her former husband, she was asked whether or not she had heard that her husband had made threats in case she did not sign the deed, and answered in the affirmative. She was also permitted to testify, in answer to a question why she feared there would be more trouble, "Well, I had it from the surrounding circumstances, what had happened." *Held*, that such testimony was not incompetent by reason of section 320, Code Civ. Proc. (Gen. St. 1909, § 5914), as amended by chapter 229, Laws 1911, concerning transactions or communications had with deceased persons.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.\*]

2. EVIDENCE (§ 230\*)—DECLARATIONS—STATEMENTS BY DECEASED HUSBAND.

The testimony showed and the court found that the former husband, in conspiracy with his brother, had by fraud and duress procured from the wife a deed conveying the land to the brother, but that the husband continued to be the real owner of the land up to the time of his death, and that the defendants were voluntary grantees without consideration; the deed to them being made for the purpose of defrauding the plaintiff. *Held*, that it was proper to receive in evidence proof of statements made by the deceased husband, after the execution of the deed by the wife, that he still owned the land and had deeded it to his brother to defraud his wife.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 835-851; Dec. Dig. § 230;\* *Fraudulent Conveyances*, Cent. Dig. § 828.]

3. EQUITY (§ 72\*)—LACHES—EFFECT.

Mere delay in bringing a suit does not estop the plaintiff from its maintenance, when

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 12, 1915.

the property has remained substantially the same, and the rights of no innocent third party have intervened.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210–220, 225, 226; Dec. Dig. § 72.\*]

**4. ADVERSE POSSESSION (§ 14\*)—ACQUISITION OF TITLE—NONRESIDENTS.**

The defendants, never having been within the state of Kansas, could not avail themselves of the 15-year statute of limitation as a basis for claiming adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77–81; Dec. Dig. § 14.\*]

Appeal from District Court, Kingman County.

Ejectment by E. C. Watts against Emma Myers and another. From judgment for plaintiff, defendants appeal. Affirmed.

S. W. Mills, of Kirksville, Mo., and Chas. C. Calkin, of Kingman, for appellants. C. M. Williams, of Hutchinson, for appellee.

WEST, J. This is an action in ejectment, involving the title to a quarter section of land in Kingman county. The court made findings of fact and conclusions of law, resulting in a judgment for the plaintiff, from which the defendants appeal, and complain of certain rulings touching the introduction of evidence and certain findings made by the court, and its refusal to make others requested by the defendants, and of the general result of the trial.

From the findings it appears that in 1884 the plaintiff, then a widow having several children by a former marriage, was married to Lafayette Watts, and the following year with him took up her residence upon the land in question. Two of the plaintiff's sons and a daughter lived with their mother and stepfather as members of the family, and for a time the relations appear to have been pleasant. After the husband's return from the funeral of his mother he suggested a conveyance of the land to his brother, Oliver Watts, who lived in Missouri, and upon the plaintiff's objection he became sullen, and brutally assaulted one of her boys without apparent provocation, saying that if she would sign the deed to his brother they would get along all right. Shortly after this another attack, still more brutal and cowardly, was made on the same boy, followed by a repetition of the same suggestion to his mother concerning a deed. This was followed by threats of death to the boy, and by the peculiar handling of a large pruning knife, and at another time an ax, all of which resulted in the plaintiff's joining in the requested deed, being moved thereunto by fear of further violence to her boy and bodily harm to her other children; the deed not being made, however, until the plaintiff had suffered a serious nervous collapse, followed by 10 days' sickness. The land was the homestead of the plaintiff and Lafayette Watts, and the court found that the latter, with his brother Oliver, fraudulently conspired to defraud the

plaintiff out of her interest, and to get the title in the name of the brother, and that the conduct referred to was in furtherance of this conspiracy; that shortly after the marriage the plaintiff furnished her husband \$400 in money with which to build a house upon the land and to make other improvements, being money inherited from her father's estate; that when the deed was made (1886) the land was worth \$2,400, and at the time of the trial, June 26, 1913, \$7,500; that although she lived within a distance of from 20 to 70 miles of this land the plaintiff did not, until the bringing of this suit, August 12, 1912, take any steps to set aside the deed. In the spring of 1887 Lafayette Watts left the plaintiff, taking some of the household goods, and never returned to live with her, merely visiting her two or three times.

Various other findings were made that need not be discussed. It was, however, expressly found that the deed passed only the naked legal title, and that the land continued to be the property of Lafayette Watts until the time of his death, April 23, 1910; that Oliver Watts was appointed administrator, and did not make the slightest exertion to find the plaintiff's address or whereabouts, and procured final settlement, which was set aside on her motion, without recognizing her as one of the heirs, and without giving her any notice of his appointment, which the court found was fraudulent misconduct on his part amounting to a continuance and carrying out of the original conspiracy, and that the deed by Oliver Watts to the defendants was voluntary and without consideration, and made for the purpose of defrauding the plaintiff; also that the plaintiff first learned of Lafayette Watts' death in July, 1912, and there was no unreasonable delay on her part in bringing this suit; that Lafayette Watts left no bodily heirs, but left the plaintiff as his widow.

As a conclusion of law the court found that the execution of the deed was procured by fraud, coercion, and duress, and did not carry with it the joint consent of the husband and wife, and that the plaintiff as the sole heir of Lafayette Watts, and hence sole fee owner of the land, was entitled to have her title quieted and to recover for rents and profits.

[1] Much complaint is made because the plaintiff was permitted to answer whether or not she had heard that her husband made threats in case she did not sign the deed, and that she "had it from the surrounding circumstances, what happened," and it is asserted that this violated the statutory bar against testimony concerning transactions or communications had with deceased persons. But the fact that she had heard that he had made threats would imply that she had heard it from others, rather than from him, and as to what had happened she was not permitted to state; hence the testimony was properly

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

admitted. *Murphy v. Hindman*, 58 Kan. 184, 48 Pac. 850; *Bryan v. Palmer*, 83 Kan. 298, 111 Pac. 443, 21 Ann. Cas. 1214; *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777; *Fish v. Poorman*, 85 Kan. 237 (syl. 7), 243, 116 Pac. 898; *Coblentz v. Putifer*, 87 Kan. 719 (syl. 2), 725, 125 Pac. 30, 42 L. R. A. (N. S.) 298; *Dennis v. Perkins*, 88 Kan. 428, 436, 129 Pac. 165, 43 L. R. A. (N. S.) 1219.

[2] It is urged that it was highly improper to receive testimony of statements made by Lafayette Watts, after the deed was made, to the effect that he still owned the land, which he had deeded to his brother to defraud his wife. No reason is apparent, however, why one who has carried out such a conspiracy should not, as against the person defrauded, be bound by his subsequent acknowledgment thereof. It is not a case of a grantor destroying the effect of a deed as between himself and his grantee, and especially in view of the fact that he treated this land as his own, and received rent for it, and exercised dominion over it, it was proper for his widow and heir to show his statements and declarations touching his relation to the land. *Martin v. Shumway*, 89 Kan. 892, 132 Pac. 993.

The defendants also urge that the findings of fact should have been for them, and not for the plaintiff, which evidently means that in their opinion the fraud and duress were not sufficiently proved; but it is impossible to read the evidence without finding ample support for the charge of duress of a peculiarly cruel and effective kind.

Complaint is made that the court did not at the defendants' request vacate the 36 findings of fact made, and return 56 others submitted by them; but such examination as is consistent with the brevity of human life has resulted in finding no error in this respect.

[3] It is urged that because the plaintiff did not move to set aside the deed, or take any other steps to protect her rights, all the many years which elapsed between its execution and the death of her husband, she must be held to have jointly consented, and to have estopped herself by her laches. The trial court found, however, that the land remained as it was, except slight improvements; that the rights of no innocent third party had intervened; that in accordance with the repeated statements made by the deceased himself he continued to be the owner of the land, which as a matter of course the sole heir would inherit upon his death. *Clark v. Coolridge*, 8 Kan. 189; *Golden v. Claudel*, 85 Kan. 465, 471, 118 Pac. 77; *Rambo v. Bank*, 88 Kan. 257, 128 Pac. 182; *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262; *City of Hutchinson v. Hutchinson*, 92 Kan. 518, 141 Pac. 589; 36 Cyc. 730.

[4] As to adverse possession, neither Oliver Watts nor either of the defendants had ever

been in Kansas prior to the trial; hence the statute of limitation does not avail. Civ. Code, § 20; Gen. St. 1909, § 5613; *Ard v. Wilson*, 8 Kan. App. 471, 54 Pac. 511; *C. & N. Ry. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988; *Ard v. Wilson*, 60 Kan. 857, 56 Pac. 801.

Finding no material error, the judgment is affirmed. All the Justices concurring.

(94 Kan. 61)

# BARKER v. MISSOURI PAC. RY. CO.

(No. 19194.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

## 1. DAMAGES (§ 217\*)—DESTRUCTION OF FRUIT TREES—MEASURE OF DAMAGES—INSTRUCTIONS.

Where fruit trees, which have a distinct value as a part of the land, are injured and destroyed by fire through the negligence of another, and their value and the damages sustained can be definitely measured by showing the value of the trees before and after the fire, and this measure is applied by the court, there is no material error in the failure of the court to direct the application of the rule that the measure of damages is the difference in the value of the land before and after the burning of the trees.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. § 217.\*]

## 2. DAMAGES (§ 60\*)—DESTRUCTION OF FRUIT TREES—BENEFIT.

The owner is entitled to plant an orchard on his land whether or not it is the most profitable use to which it can be applied; and, if the fruit trees are destroyed, he is entitled to claim damages from the wrongdoer for being deprived of such use and of the value of the trees.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 115, 116; Dec. Dig. § 60.\*]

## 3. DAMAGES (§ 188\*)—EXCESSIVE RECOVERY—DESTRUCTION OF PROPERTY—EVIDENCE.

Under the evidence herein, it cannot be held that the damages awarded are excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 511; Dec. Dig. § 188.\*]

Appeal from District Court, Wyandotte County.

Action by Sarah F. Barker against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

B. P. Waggener and W. P. Waggener, both of Atchison, and J. N. Baird, of Kansas City, for appellant. Emerson & Smith, of Kansas City, for appellee.

JOHNSTON, C. J. Sarah F. Barker, the appellee, recovered a judgment against the Missouri Pacific Railway Company, the appellant, for damages for the destruction of a part of an orchard and some meadow by fire alleged to have been caused by the negligent operation of one of appellant's locomotives. In her petition she alleged, substantially, that on August 2, 1911, a freight train of appellant passed through her farm,

\* Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in the Kansas Reports.

and the locomotive threw out fire which ignited dry vegetation and other combustible material on the north side of appellant's railway track; that the fire thus started spread to and burned across the meadow and orchard on her farm, causing a loss of \$4,000; and she alleged, further, that the fire was caused by the negligent operation of appellant's railway. She also asked for \$500 as an attorney's fee. The appellant answered by general denial and allegations that its locomotive was properly equipped with modern fire-arresting appliances; that it was handled by competent and careful employes; and that the fire was not the result of any negligence on its part. On the trial appellee offered evidence tending to show that the locomotive in question was puffing and working hard when it passed through her farm; that shortly after its passage fire was discovered north and near the track; that the fire spread over her meadow, destroying it, and then entered into the orchard, where it destroyed a considerable portion of it. She also offered evidence tending to show that about 92 apple trees were destroyed and about 65 badly damaged, and that these were of the value of from \$10 to \$12 each; that 65 peach trees were destroyed, which were of the value of about \$3 each; and that the orchard was in good condition and productive before the fire, but was practically destroyed by the fire. Evidence was also given by appellee that a reasonable attorney's fee for prosecuting the action would be between \$200 and \$400. The appellant, on the other hand, offered evidence tending to prove that the engine in question was in good condition; that it was not negligently operated; and that it was equipped with modern fire-arresting appliances. The appellant also offered much evidence tending to support its contention that the orchard was not in good condition, but, on the contrary, that it had not been cared for in a proper manner, and that many of the trees had been rendered valueless by various insect pests. The verdict of the jury was in favor of appellee allowing her \$1,060.50 as damages for the destruction of the orchard and meadow and \$250 as attorney's fees. Special findings were returned to the effect that the fire was caused by the negligence of the appellant; that appellant's locomotive was not equipped with modern fire-arresting appliances that were in good repair; that the appellant had not exercised reasonable care in selecting the appliances and in keeping them in good order, but also found that the fire was not caused by the negligence of the engineer or fireman nor because of the quality of the coal used.

[3] On this appeal it is contended, first, that there should be a reversal because the damages awarded are excessive. If the court were to look no farther than the evidence of the appellant, it might conclude that

the orchard was not in good condition and was not of much value. There is other testimony in the case, however, and to which the jury no doubt gave credit, which tends to show that the trees constituted what is called a commercial orchard in good condition, and that the loss resulting from the fire was as much or more than the amount awarded by the jury. A number of appellee's witnesses, who had orchard experience, and were acquainted with the value of trees in that vicinity, and knew the condition of the trees prior to the fire, stated that the trees were in a reasonably healthy condition and constituted a fairly good commercial orchard. The condition of the trees, the value of those injured and destroyed, and the amount of the loss sustained by reason of the fire were interesting and debatable questions until they were determined by the jury upon what appears to be competent and sufficient testimony. It is said that the values fixed by the witnesses of appellee were based on the value of trees that were in a healthy condition, and that proper consideration was not given to the fact that the trees of appellee had been injured by insects and by lack of pruning. It appears that the witnesses for the most part fixed the value of the trees as they found them prior to their destruction by the fire and of trees such as those in question were shown to be. There is complaint that witnesses were allowed to testify what trees would produce or be worth in the future rather than what they were worth just before the fire. While some of them referred to crops usually borne by trees of that character, it appears that they did not base their opinions on the value of the future crops, but rather on the character of the trees and the condition of the orchard as it existed before it was burned. The court specifically instructed the jury that in fixing the damages sustained they "should not indulge in any speculation as to the extent or value of the fruit crop which said trees might have produced in the future." Objections are made to the instructions, but they furnish no ground for setting aside the verdict and judgment.

[1,2] One objection is that the court did not permit the jury to measure the damages of appellee by finding the difference in value of the entire farm before and after the fire. The court instructed the jury that, if they found for the appellee, the measure of her damages would be—

"the reasonable value of the fruit trees destroyed, as a part of the land of the plaintiff, and the hay destroyed, and the amount of loss suffered by the plaintiff by the depreciation of the value of the orchard which was injured by said fire. \* \* \*

In another instruction the jury were advised that:

"Only such damages as were proximately caused by the fire in question can be allowed, taking into consideration the value of said fruit trees

immediately after the fire in question and immediately before said fire, also taking into consideration the character of said trees, and all circumstances proven by the evidence which tend to show the actual loss by said fire to the plaintiff."

The jury were told that, in measuring the damages of the plaintiff, the trees were to be regarded as a part of the land, and that they might consider any and all evidence proven which tended to show the actual loss. The testimony showed the number and character of the trees destroyed and injured, and, although they constituted a part of the land, they had a distinct value as an appurtenance of the land, and the loss sustained could be definitely measured by the evidence of the number and character of the trees destroyed and injured. In *Railway Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526, it was held that when trees were destroyed by fire, as in this case, and they had a distinct value which under the evidence was susceptible of definite measurement, the value of the trees or things destroyed is the best measure and the most satisfactory method of determining the extent of the loss. It was also said that it was only where damages to one part of the land affects other parts and were incapable of more direct proof that it is necessary to resort to the rule of finding the difference in the value of the land before and after the injury. Other cases of like import are *Railway Co. v. Arthurs*, 63 Kan. 404, 65 Pac. 651; *Railroad Co. v. Perry*, 65 Kan. 792, 70 Pac. 876; *Railway Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68.

Witnesses of the appellant testified that the farm of appellee was as valuable without as with the orchard on it. Some might prefer to have the land clear of trees and regard the naked land to be of more value than if it were planted with fruit trees. The owner, however, is entitled to use his land for an orchard and to compensation in case it is wrongfully destroyed. Appellee had a right to claim damages for being deprived of its use as an orchard or in fact of any use to which it is adapted and which is most advantageous to her. *Cohen v. St. L., Ft. S. & W. Rld. Co.*, 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; *Com'rs of Smith County v. Labore*, 37 Kan. 480, 15 Pac. 577; *C. K. & W. Rld. Co. v. Willits*, 45 Kan. 110, 25 Pac. 576; *Irrigation Co. v. McLain*, 69 Kan. 334, 76 Pac. 853; *Railway Co. v. Weidenmann*, 77 Kan. 300, 94 Pac. 146.

It is not for the wrongdoer, who causes an injury, to decide whether an owner should have used his land for a particular purpose nor the use to which it can most profitably be employed. He is liable to pay for the loss of the property appurtenant to real estate, which is actually destroyed, and which has a value independent of the land, such as buildings or trees, and the evidence indicates that there was no difficulty in determining

the value of the trees destroyed and the extent of the loss sustained. In fact, both parties offered evidence as to the value of the trees which had been destroyed and injured, and the appellant seems to have adopted and approved this rule of measuring the damages by asking that the jury make a special finding as to the number and value of the different kinds of fruit trees that were injured and destroyed. In view of the evidence in the case and the course of the trial, we think the appellant has no reason to complain of the rule applied by the district court as to the measure of damages.

There was no occasion to inquire as to the effect of the fire upon the land of appellee on the south side of the railroad. She had not alleged nor claimed that that part of the farm had been injured, but limited her claim for damages to the orchard tract on the north side; and hence the court properly instructed the jury to confine the allowance of damages to the injury to the orchard and meadow lying north of the track, and which arose from the negligent operation of the railroad by appellant.

We find nothing in the special findings inconsistent with the general verdict nor any material error in the proceedings which requires a reversal.

The judgment will therefore be affirmed. All the Justices concur.

(94 Kan. 96)

STATE ex rel. DAWSON, Atty. Gen., v. KANSAS CITY STOCKYARDS CO. OF MISSOURI. (No. 19419.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. CARRIERS (§ 4\*)—STOCKYARDS COMPANY—ENGAGED IN BUSINESS AS A "COMMON CARRIER."

A corporation engaged in operating stockyards, owning a track between such yards and the railroads over which stock is transported thereto, and making a charge to the railroad companies for each car moved over such track, in accordance with a tariff which it has filed with the Interstate Commerce Commission, is to be regarded as engaging in business as a common carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Common Carrier*.]

2. CORPORATIONS (§ 654\*)—FOREIGN CORPORATIONS—POWERS—BUSINESS OF COMMON CARRIER.

The grant to a foreign corporation of the right to operate a stockyards does not carry with it the privilege of engaging in business as a common carrier in the manner stated.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2551, 2556; Dec. Dig. § 654.\*]

3. CORPORATIONS (§ 651\*)—FOREIGN CORPORATIONS—OUSTED—ENGAGING IN UNAUTHORIZED BUSINESS.

To the extent of any intrastate business done in that manner such a corporation exercises a function which is unauthorized, and from which it will be ousted by the courts upon appli-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cation of the proper executive officer of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2574, 2575; Dec. Dig. § 651.\*]

4. COMMERCE (§ 38\*)—STOCKYARDS—FOREIGN CORPORATIONS—CONTROL BY STATE.

The fact that most of the business done in such manner is interstate, and that intrastate business is done only in virtue of the presence of a few cars of that character in an entire train, which is handled together, does not effect such a merger of the two classes of business as to place it all beyond the control of the state.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 38.\*]

West, J., dissenting.

Original proceeding in quo warranto by the State, on the relation of John S. Dawson, as Attorney General, against the Kansas City Stockyards Company of Missouri. Judgment for plaintiff.

J. S. Dawson, Atty. Gen., and H. O. Caster, of Oberlin, for plaintiff. Keplinger & Trickett, of Kansas City, and Wm. R. Smith, of Topeka, for defendant.

MASON, J. The Kansas City Stockyards Company, a corporation organized under the laws of Missouri, operates stockyards situated in part in Kansas, having been authorized to do so by the charter board of this state. The company owns, or controls as lessee, tracks leading to the stockyards, which are used by various railroads in delivering live stock thereto. For the use of these tracks the stockyards company exacts a charge which it requires the railroad companies to pay. The state contends that, in virtue of these transactions, the stockyards company is engaging in the business of transportation as a common carrier, without having the legal right to do so, and this action is brought on the relation of the Attorney General to oust the company from the exercise of that function. The plaintiff asks for judgment upon the pleadings, and, in case that is not granted, for an order restraining the acts complained of during the pendency of the action.

[1] For many years the switching tracks were owned by the stockyards company, and were operated substantially as at present, without a charge being made to the railroad companies for their use. In May, 1913, persons interested in the stockyards company procured a charter for a Kansas corporation under the name of the Kansas City Connecting Railway Company, to which the title to the tracks in question was transferred, but the state utilities commission denied its application for authority to commence business. The tracks were then leased to the stockyards company, which filed a tariff with the Interstate Commerce Commission, providing a charge of 75 cents per car for their use.

The stockyards company seems clearly to be engaged in the business of transportation,

so far as to make it subject to regulations applicable to common carriers. United States v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; Tap Line Cases, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185. In the cases cited some effect was given to the circumstance that the corporations in question had been granted specific authority to operate as common carriers, but that was not the controlling consideration. Here the filing of the tariff with the Interstate Commerce Commission goes far to characterize the business undertaken. If a right to do business as a carrier resulted by implication from the express grant of authority to engage in another business to which it was incidental, doubtless such implied right would have to be exercised in conformity to traffic regulations the same as though it were specifically mentioned in the charter. Here, however, we think the powers incidental to those expressly granted to the defendant company did not include the character of business now under consideration. In its Missouri charter its purposes are thus described:

"The purchase, construction, maintenance, and operation of a general union stockyards, with the necessary inclosures, buildings, hotels, exchanges, structures, railroad tracks, switches, bridges, and viaducts for the reception, inspection, safe-keeping, feeding, watering, weighing, delivering, transferring, and caring for live stock."

[2] In the application of the company for leave to operate in Kansas, which was granted by the charter board of this state, the business in which it proposed to engage was described as "the maintenance and operation of stockyards." The authority thus granted would doubtless include the right to use railroad tracks and terminal facilities as an incident to the receiving and handling of live stock, but we cannot regard it as authorizing the exaction of a charge for the use of its track in transporting cattle from the railroads to the stockyards, that being distinctly the function of a carrier.

The defendant maintains that, if it actually is engaged in a business which is beyond its corporate power, the court, having a discretion in the matter, ought not to interfere, because to do so would be inequitable, and would result in grave inconvenience and loss to the public, while no injury results to the state from the exaction of the charges referred to. It argues that no one but the railroad companies is affected by the charges, and that, as they employ the defendant's track in making delivery of stock to the yards, they ought in fairness and justice to pay for the privilege; that the defendant cannot be required to allow the use of the track without compensation, and, if its use is denied, live stock destined for the yards will have to be driven on foot to reach them, entailing great loss upon shippers. We believe, however, that where a corporation is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

engaged in a business not authorized by the law, and the state by the proper executive officer makes objection, the court has no alternative, but must decree its discontinuance. To invoke such relief the state need not show any particular detriment to the public. "It has an interest in seeing that the will of the Legislature is not disregarded, and need not, as an individual plaintiff must, show grounds of fearing more specific injury." *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839.

[3, 4] The defendant pleads that all business done over the tracks referred to is interstate commerce, but this broad averment is limited by these specific statements:

"That a train of live stock arriving at the terminal facilities of this defendant will be composed of, say 40 cars of live stock that is interstate, and mingled therewith there may be 4 or 5 cars that are intrastate; that this defendant will have no knowledge of the origin of said cars until they are pulled up to the unloading dock, in, over and upon the terminal facilities of the defendant herein."

The contention is made that this results in such a mingling of the two classes of shipments that the intrastate must be regarded as incidental to, and merged in, the interstate. The state, of course, cannot interfere with the interstate business done by the defendant, but we do not think the allegations quoted exhibit such a confusion of interstate and intrastate shipments as to cause the latter to lose their identity as such or to exempt them from state control. *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

The defendant further maintains that the state cannot, or at least should not, forbid the collection of a charge for the use of its tracks in connection with intrastate business, because, if the company furnishes for local shipments, without compensation, the same facilities for which payment is exacted if the commerce is interstate, the result is an unlawful discrimination—a violation of the federal statute which forbids a carrier to give undue or unreasonable advantage to any particular description of traffic. Act Feb. 4, 1887, c. 104, 24 U. S. Stat. at Large, 380 (U. S. Comp. St. 1913, § 8565); *Houston & Texas Ry. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341. And the defendant represents that on this account, if an order is made preventing the making of a charge to local shippers, it will be compelled to deny to them the use of its facilities, thereby necessitating the driving of live stock from the railroads to the stockyards. The fact, however, that a corporation is engaged in interstate commerce cannot authorize it to exercise the functions of a common carrier in purely local business without the permission of the state. The courts cannot grant that permission, and, until it is granted by the proper authority, they must upon due application forbid the doing of acts which without it are illegal.

We conclude that upon the pleadings the plaintiff is entitled to a decree ousting the defendant from the exercise of the function of engaging in intrastate business as a common carrier.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, and BENSON, JJ., concurring.

WEST, J. (dissenting). If a stockyard company owns a piece of railroad track, it does not become a common carrier by permitting a railroad company to use such track. Should it sell or lease a piece of land for depot purposes, it would not thereby become a common carrier. For this and other reasons which cannot now be stated for lack of time, I dissent.

(46 Utah, 19)

STATE v. MacMILLAN. (No. 2637.)

(Supreme Court of Utah. Jan. 27, 1915.)

1. INDICTMENT AND INFORMATION (§ 110\*) — STATUTORY OFFENSES—INDICTMENT IN LANGUAGE OF STATUTE—"INDECENT ASSAULT"—"INDECENT LIBERTIES."

An indictment in the language of Laws 1909, c. 26, declaring that every person who shall assault a child under the age of 14 years, and shall take indecent liberties with or on the person of such child, without committing, intending, or attempting to commit the crime of rape or assault with intent to rape, shall be guilty of an indecent assault, is sufficient without alleging in what manner and under what circumstances accused took indecent liberties with the person of prosecutrix, for the crime is in its legal import an indecent assault, and the terms "indecent assault" and "indecent liberties" are convertible, and the term "indecent liberties" is self-defining, and the term "indecent assault" is but the statutory definition epitomized. (citing Words and Phrases, Indecent Liberties).

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

2. CRIMINAL LAW (§ 1153\*)—WITNESSES (§ 79\*)—COMPETENCY OF CHILD.

The competency of a child to testify is within discretion of the trial court, and its decision will not be disturbed, unless clearly abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153; \* Witnesses, Cent. Dig. §§ 201-204, 216; Dec. Dig. § 79.\*]

3. WITNESSES (§ 79\*) — COMPETENCY — DISCRETION OF COURT.

On a trial for taking indecent liberties with a child between seven and eight years old, the court may, in its discretion, permit the child, who was a "bright" girl, to testify.<sup>2</sup>

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204, 216; Dec. Dig. § 79.\*]

4. CRIMINAL LAW (§ 824\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Failure of the court to charge on the subject of good character of accused, proved by undis-

<sup>1</sup> *State v. Topham*, 41 Utah, 39, 123 Pac. 888.

<sup>2</sup> *State v. Blythe*, 20 Utah, 379, 53 Pac. 1108; *State v. Morasco*, 42 Utah, 5, 123 Pac. 671.

puted testimony, is not error, in the absence of a request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

D. MacMillan was convicted of crime, and he appeals. Affirmed.

Jos. W. Rozzelle and Willard Hanson, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. Iverson, Asst. Attys. Gen., for the State.

FRICK, J. The defendant was convicted of the crime of having committed an "indecent assault" upon the person of a female child of the age of eight years, was sentenced to a term of imprisonment in the state prison, and appeals.

He was charged in the information as follows:

"That the said D. MacMillan, at the county of Salt Lake, in the state of Utah, on the 29th day of March, A. D. 1913, did willfully and feloniously make an assault upon —, a female child under the age of 14 years, to wit, of the age of 8 years, and did then and there willfully, unlawfully, and feloniously take indecent liberties with the person of the said — without committing, or intending or attempting to commit, the crime of rape on the said —, contrary," etc.

The information was based upon chapter 26, Laws Utah 1909, which reads as follows:

"Every person, who shall assault a child, whether male or female, under the age of fourteen years, and shall take indecent liberties with or on the person of such child, without committing, intending or attempting to commit the crime of rape, or the crime of assault with intent to commit rape, upon such child, with or without the child's consent, shall be deemed guilty of an indecent assault, and on conviction thereof shall be guilty of a felony."

It will be observed that the charge in the information is in the language of the statute.

The defendant, before pleading to the merits, interposed a demurrer to the information upon the grounds: (1) That the facts stated therein do not constitute a public offense; and (2) that the acts constituting the offense are not set forth in ordinary and concise language, and in such manner as to enable a person of ordinary understanding to know what is intended in this: That said information fails to state in what manner or under what circumstances the said defendant made the assault upon the said — (child), and fails to state in what manner or under what circumstances the said defendant took indecent liberties with the person of said — (child). The court overruled the demurrer, and the ruling is assigned as error.

[1] It is insisted that to charge that the defendant did unlawfully, etc., "take inde-

cent liberties with the person of said" child is a mere general statement and is insufficient to apprise the defendant of the particular acts with which he is charged. It is contended that the case of *State v. Topham*, 41 Utah, 39, 123 Pac. 888, is decisive of the question in favor of the defendant's contention. We need not go into details to show why the principles of pleading which controlled that case have no application here. We think a mere cursory reading of the opinion in that case clearly demonstrates that the reasons why we held the information insufficient in that case also show why the information is sufficient in this case. It has been held that, under a statute like ours, an "indecent assault" and "indecent liberties" are convertible terms. In that connection the court said:

"The crime as defined by the statute is, in its legal tenor and import, an 'indecent assault.' \* \* \* The term 'indecent assault' is but the statutory definition of the crime epitomized." 4 Words and Phrases, 3537; *State v. West*, 39 Minn. 321, 40 N. W. 249.

The question raised by counsel in this case was presented to and passed on by the Supreme Court of Minnesota in *State v. Kunz*, 90 Minn. 526, 97 N. W. 131. That court, after setting forth the statute, which, in legal effect is like chapter 26, supra, disposes of the contention as follows:

"He further urges that the indictment is defective because it does not state the particular acts which constitute the alleged indecent liberties. The claim is without merit, for the term 'indecent liberties,' when used with reference to a woman, old or young, is self-defining; and it would be as unnecessary and as indecent to allege the defendant's particular acts as it would be, if he were charged with rape or carnally knowing or abusing a female child under the age of consent, to set forth the evidence in the indictment."

We thoroughly agree with the Supreme Court of Minnesota that the term "indecent liberties," as used in the statute, is clearly self-defining. What more could be said, except to state the evidence which proves or establishes the offense? We think that every person of the most ordinary intelligence and understanding, who is familiar with merely the rudiments of the English language, understands what is meant when he, or any one else, is charged with having taken indecent liberties with the person of a child. To say more is merely to explain what was done, which, like in a charge of carnal knowledge, or of assault with intent to have carnal knowledge, is not necessary. We think the information was sufficient.

[2, 3] It is next contended that the district court erred in receiving the testimony of the little girl, with whose person the indecent liberties were taken, and who testified in behalf of the state, upon the ground that she by reason of her youth and want of comprehension of the solemnity of an oath,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was incompetent to testify. The question of the competency of a child who is called as a witness, in the very nature of things, must, to a large extent at least, be left to the sound discretion of the trial court. When that court has passed upon the question either way, we cannot interfere, unless it is clearly made to appear that the court abused the discretion vested in it. Nothing is shown here in that regard, and the record of the child's testimony discloses nothing upon which we could intelligently act. The little girl in question, at the time of the alleged assault, was between seven and eight years of age, and, at the time she testified, was past eight years of age. The defendant in his testimony himself testified that she was a "bright girl." In the recent case of *State v. Morasco*, 42 Utah, 5, 128 Pac. 571, the witness, a little boy, was considerably younger, to wit, between five and six years of age, and we nevertheless refused to hold that he was incompetent as matter of law or that the court had abused its discretion in permitting him to testify for the state. That case was similar in character to this only the indecent assault was made upon a little boy, and he, like the little girl here, was the only eyewitness. See, also, *State v. Blythe*, 20 Utah, 379, 58 Pac. 1108, where the question is discussed. The district court committed no error in receiving the testimony of the little girl, nor in refusing to strike it from the record upon defendant's motion.

It is next urged that the time that the alleged offense was committed was not proven. We think otherwise. It is true the little girl could not give the date, nor the month, nor the year; but the time was sufficiently proved by other facts and circumstances.

[4] It is next urged that the court erred in failing to charge the jury upon the question of defendant's good character. The defendant produced witnesses who testified to his good character. The state in no way opposed or contradicted his evidence relating to that subject. The defendant offered no requests to charge, nor did he ask the court to instruct the jury in its own language upon that subject. In view of that we cannot see how we can say the court erred respecting the matter. It certainly cannot be assumed that simply because the defendant strengthened the legal presumption of good character by direct evidence, which the state did not dispute, he was prejudiced as matter of law, because the court failed to tell the jury what effect they were authorized to give the evidence of good character. Had the defendant requested a proper instruction upon that subject, and the court had refused it, the question might be different. The mere fact, however, that the court failed to instruct upon its own motion on the subject does not constitute error. As was said by the Supreme

Court of Nebraska in *Sweet v. State*, 75 Neb. 270, 106 N. W. 33:

"While the giving of an instruction respecting evidence of good character may have been proper, noninstruction alone on that point, in the absence of a proffered instruction correctly stating the law, is not prejudicial error."

This disposes of all the assignments that are argued in counsel's brief.

The judgment is affirmed.

STRAUP, C. J., and McCARTY, J., concur.

(93 Kan. 719)

BORTON v. MANGUS. (No. 19089.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

HIGHWAYS (§ 155\*)—OBSTRUCTION—RELIEF BY INJUNCTION.

One who has occasion to pass over a highway more frequently than others does not sustain special damage peculiar to himself beyond that of the general public which would entitle him to relief by injunction.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 432-436; Dec. Dig. § 155.\*]

Appeal from District Court, Sherman County.

Action by J. C. Borton against George Mangus. Judgment for defendant, and plaintiff appeals. Affirmed.

John Hartzler, of Goodland, for appellant. E. F. Murphy and G. L. Calvert, both of Goodland, for appellee.

PORTER, J. Plaintiff brought suit to enjoin the obstruction of a public highway and appeals from a judgment sustaining a demurrer to his petition.

The plaintiff is a stockgrower and farmer and owns and resides on a farm located in the state of Colorado adjoining the line between that state and Kansas. The defendant is the owner of land lying in Kansas immediately east of the lands of the plaintiff. It appears from the petition that there is a north and south road in Colorado adjoining plaintiff's land on the east, which road lies wholly within the state of Colorado, and that there is also a road in Colorado running east and west through the lands of the plaintiff and which is 200 yards south of his residence, and that this east and west road intersects the north and south road and connects with a road in Kansas which the plaintiff claims the defendant has obstructed.

The plaintiff alleges that the obstructed road became a highway by special act of the Legislature of Kansas (chapter 215, Laws of 1887) declaring all section lines in Sherman and certain other counties in Kansas to be public highways, and to be of the width of 60 feet. The section line between sections 19 and 30 in Sherman county runs through the tract of land owned by the defendant, and the plaintiff alleges that by virtue of this

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

act of the Legislature and the use by the public for a number of years it became a public highway. The town of Kanorado is in Kansas and is the post office and market town of the plaintiff. When the road in question was opened and used by the public, the plaintiff could travel from his farm in Colorado to the town of Kanorado, and it furnished the nearest highway to the town from his land and residence. He alleges that the defendant has erected and maintains buildings and fences thereon, and that the obstruction compels him in order to reach the town of Kanorado to drive about one-half mile south on the north and south road in Colorado, then by an angling road northeast to town; and that on every trip he makes to the town either for business or pleasure he must travel about two miles more by reason of such obstruction.

It will be observed that there is no allegation in the petition that the plaintiff is denied ingress to or egress from his farm by reason of the obstruction, and, indeed, the facts show that his lands do not abut upon the road which defendant has obstructed. The obstructed road lies wholly within the state of Kansas; his farm lies in Colorado. The allegation is that the obstructed road intersects the north and south highway along the state line and is a continuation of an east and west road which runs 200 yards south of plaintiff's residence. It therefore affirmatively appears that he has ample means to get to and from his farm by the highways in Colorado.

The rule is firmly established in this state and is of general application everywhere that, to entitle a private individual to invoke the interposition of a court of equity to restrain a public nuisance arising from an obstruction of a public highway, he must show special damages apprehended or sustained peculiar to himself and different in character from those suffered by the public at large. *Venard v. Cross*, 8 Kan. 248; *Trosper v. Com'rs of Saline Co.*, 27 Kan. 391; *Ruthstrom v. Peterson*, 72 Kan. 679, 83 Pac. 825. In the latter case the court interpreted the petition to mean that a public road 40 feet wide was established on the west side of a tract of land and along the east side of the land belonging to the plaintiff. The obstruction interfered with the east 20 feet of the road, but left a strip 20 feet wide on the west side of the road adjoining the land belonging to the plaintiff, and, because the court could not judicially declare that a 20-foot strip of land was too narrow for plaintiff's use as a road to and along side of his land, it was held that he failed to show special damages different in character from that sustained by the public at large. In the opinion it was said:

"The only special right which an abutting owner has in the public highway is that of access to his premises. When he has passed from his land into the road, his right to travel there

is not different from the right enjoyed by other members of the community." Page 680 of 72 Kan., 83 Pac. 825.

In *Sargent v. George*, 56 Vt. 627, the court refused relief by injunction where the damage complained of was the obstruction of a passageway leading from a house to the street for the reason that but a few rods distant there existed another way equally available and in daily use. One who has occasion to pass over a highway more frequently than others does not sustain special damage peculiar to himself beyond that of the general public which would entitle him to relief by injunction. In *Wellborn v. Davies*, 40 Ark. 83, it was held that the inconvenience resulting to a physician in visiting his patients caused by the obstruction of a public road by fences is not a special injury different from that which every citizen suffers whose business or pleasure may cause him to travel the road. It is of the same character, only perhaps different in degree, from that which others suffer who have other business and live far away.

In *Crook v. Pitcher*, 61 Md. 510, it was held that the fact that one who had very frequent occasion to use a highway is obliged to travel a longer road because of an obstruction does not show a special damage different from that which the public sustains. To the same effect is *Jacksonville, T. & K. W. R. Co. v. Thompson*, 34 Fla. 346, 16 South. 282, 26 L. R. A. 410; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813. There is some conflict of authority upon this question in the different states. See note 7 L. R. A. (N. S.) 73; note 28 L. R. A. (N. S.) 1053.

The allegations in the petition are to the effect that the plaintiff can and does go from his land to a public road and reaches the market town in Kansas by traveling one-half mile south, and then by a road northeast to Kanorado. As said in *Ruthstrom v. Peterson*, supra:

"When he has passed from his land into the road his right to travel there is not different from the right enjoyed by other members of the community."

The same principle would seem to apply here. There is a road which reaches his land and by which he can pass to and from town. The inconvenience resulting to him from the obstruction of the road is of the same character that every citizen suffers who from business or pleasure has occasion to travel the road. It may differ in degree, but not in kind, from that which others suffer who have occasion to use the road. He is not denied access to his land by the alleged obstruction, but is merely required, like others, to travel a longer distance between his land and the town.

If the state line between Kansas and Colorado were located a mile farther west than it is, and the plaintiff's land lay in this state, and the road when open, as the plaintiff contends it should be, extended from the town

to the road running north and south along the plaintiff's land, he could not enjoin the obstruction complained of because he would still have free access to his land and would be unable to show that he sustained a damage different in kind and character from that suffered by the public at large. It will therefore be unnecessary to discuss the interesting question whether the action is transitory or local, or whether the courts of this state would entertain jurisdiction in a suit by a nonresident to enjoin the obstruction of a highway in Kansas upon the theory that the obstruction closed a road and resulted in denying him access to or egress from lands in Colorado.

It is said in the abstract that the court sustained the demurrer on the ground that the plaintiff lacked legal capacity to sue, which was one of the grounds of the demurrer, as was also the ground that the petition failed to state a cause of action. The plaintiff has legal capacity to sue, but, being in court, is unable to state facts which constitute a cause of action entitling him to relief.

The judgment therefore will be affirmed. All the Justices concurring.

(94 Kan. 1)

**HEMBROW v. WINSOR et al.** (No. 19162.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**VENUE (§ 22\*)—RESIDENT AND NONRESIDENT DEFENDANTS — RESIDENT OF ANOTHER COUNTY.**

An action was brought in one county against certain nonresidents of the state, and jurisdiction over their property obtained by attachment. A resident of another county was joined as a defendant, and he was served by summons issued to the sheriff of the county where he resided. He answered challenging the jurisdiction of the court and alleging that the pretended cause of action against the nonresident defendants was not brought in good faith, but for the purpose of obtaining jurisdiction over him. On the trial a demurrer was sustained on the part of the nonresident defendants. *Held*, that as there was no evidence to sustain a cause of action against the nonresident defendants, and the action having failed as to them, the court had no jurisdiction over the defendant who resided in the other county, and that a motion to dismiss the action as to him was rightly sustained.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.\*]

Appeal from District Court, Sumner County.

Action by William Hembrow against W. M. Winsor and others. From judgment for defendants, plaintiff appeals. Affirmed.

F. A. Dinsmoor, of Victorville, Cal., and W. T. McBride, of Wellington, for appellant. Harold W. Herrick, of Wellington, and C. M. Clark, of Peabody, for appellees.

PORTER, J. The appellant brought this action in the district court of Sumner county

against certain nonresidents of the state, and joined as defendant W. M. Winsor, the appellee, who is a resident of Marion county. Jurisdiction over the property in Sumner county belonging to the nonresident defendants was obtained by attachment, and they afterwards entered their appearance in the action. The appellee was served by a summons issued to the sheriff of Marion county. The action was to recover a commission for procuring a purchaser of real estate pursuant to a written agreement executed by Winsor, the appellee. As against the Illinois defendants, the petition alleged that, in making the contract for the sale of the real estate and in the employment of the appellant to procure a purchaser, Winsor acted for himself, and also as agent and representative of the other defendants, and that they were jointly liable with him for the commission which the appellant claimed he had earned in procuring a purchaser. The nonresidents answered by a verified denial of the agency of W. M. Winsor, or his authority to act for them. Winsor challenged the jurisdiction of the court by motion to quash the summons. The challenge was sustained, and on appeal the judgment was reversed and the cause remanded for further proceedings. *Hembrow v. Winsor*, 87 Kan. 714, 125 Pac. 22. It was there held that on the face of the pleadings W. M. Winsor was rightfully joined as a defendant. Winsor filed another answer challenging the jurisdiction of the court and alleging that the pretended cause of action against the nonresident defendants was not brought in good faith, but for the purpose of obtaining jurisdiction over him in Sumner county. He admitted the execution of the contract as his personal obligation and denied all other allegations of the petition. The relief asked for was that the act be dismissed as to him for want of jurisdiction. On the trial at the close of plaintiff's evidence a demurrer was sustained on the part of the nonresident defendants, and the action was left pending solely against Winsor, a resident of Marion county. He thereupon filed a motion to have the cause dismissed for the reason that, the action having failed as to the nonresident defendants, the court had no jurisdiction over him. The court sustained the motion and rendered judgment against the appellant for costs.

It is clear that the ruling of the court dismissing as to the appellee must be sustained. The appellant cites and relies upon the case of *Edwards v. Gildemeister*, 61 Kan. 141, 59 Pac. 259, where it was held that:

"A contract executed by an authorized agent in his own name, but in fact in behalf of his principal, is the contract of the principal, and suit may be brought against him to enforce its provisions." Syl. 2.

The doctrine of that case has no application here because the appellant failed to pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

duce any evidence showing that the contract sued upon was in fact made in behalf of the Illinois defendants as principals. No evidence was offered which tended to show that Winsor was authorized by the nonresident defendants to employ any real estate agent to assist him in procuring a purchaser for the land, or that they were to become liable for the payment of a commission to any person. The land is situated in Sumner county. It belonged to Winsor and the Illinois defendants as cotenants. They entered into an agreement with Winsor that he might sell the land at a net price of \$12,000, and that they would convey their interest to him so that he could convey title to the purchaser. He employed the appellant by the written contract sued upon to assist him in a sale of the land. The appellant claimed that he procured a purchaser able and willing to take the land at the price agreed upon in the contract between himself and Winsor, but that Winsor refused to complete the sale. Many of the authorities which appellant relies upon are cases in which a contract was entered into by the agent of an undisclosed principal. The appellant claimed that Winsor in making the contract acted for himself personally, and as agent and representative of the other defendants, and that at the time the contract was entered into he exhibited to the appellant certain letters written by the other defendants authorizing him to sell or have the land sold upon certain terms. It thus appears that if there was an agency it was not undisclosed, but that plaintiff accepted the written agreement of the agent knowing that he represented the other defendants. The contract sued upon does not pretend to bind any one except Winsor, and, if it were conceded that appellant's proof sustained his claim, it falls within the rule that one who takes an agent's obligation for work performed, with knowledge of the principal's liability therefor, must look to the agent alone. *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Merrell v. Witherby*, 120 Ala. 418, 28 South. 974, 74 Am. St. Rep. 39. See, also, 31 Cyc. 1570, and cases cited.

The case of *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367, is not in point. It was there held that an agent having authority to sell land, exercising his discretion as to price, he may employ a real estate agent to find a purchaser and a sale by him will be enforced. It was not an action to recover for the commission paid to the subagent, but was an action for specific performance of the contract of sale made through the subagent. The court does not hold that the agent may bind his principal for compensation of a subagent.

It is true there was evidence that one or more of the nonresident defendants had written Winsor to sell, and the evidence tended to show that the other Illinois defendants

consented to his selling the land; but there was no evidence that any of them authorized him to employ a subagent. The fact that they conveyed their interests to him in order that he might convey the title to a purchaser cannot be held as a ratification of his employment of a subagent so as to bind them to pay the compensation of the subagent.

In the former decision (*Hembrow v. Winsor*, 87 Kan. 714, 125 Pac. 22), nothing was decided further than that the acceptance of service by the nonresident defendants made the case rightly brought in Sumner county so far as appeared from the pleadings. On the trial it was disclosed that the action was not rightly brought in Sumner county, because of the failure of the evidence to sustain a cause of action against the nonresident defendants, and it left a case standing alone against the appellee, who is a resident of Marion county. It follows that the court in Sumner county had no jurisdiction over his person, and the motion to dismiss was rightly sustained. *Brenner v. Egly*, 23 Kan. 123; *Linney v. Thompson*, 44 Kan. 765, 25 Pac. 208; *Rullman v. Hulse*, 32 Kan. 598, 5 Pac. 176, and *Id.*, 33 Kan. 670, 7 Pac. 210; *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 628)

STATE v. REASER. (No. 18407.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 12\*)—MINING EMPLOYEES—STATUTORY REGULATION—POLICE POWER.

Chapter 222, Laws of Kansas of 1911, was enacted in the exercise of the police power of the state to promote the health of employes in coal mines and is within the legislative power of the state.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 12.\*]

2. CONSTITUTIONAL LAW (§ 275\*)—MASTER AND SERVANT (§ 12\*)—STATUTES (§ 76\*)—DUE PROCESS—GENERAL AND SPECIAL LAWS.

The law applies to all mines of a designated class, and is not violative of the Bill of Rights or Constitution of Kansas nor of the fourteenth amendment of the Constitution of the United States because not applicable to other classes or kinds of mines.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 830, 835, 839, 843-846; Dec. Dig. § 275;\* *Master and Servant*, Dec. Dig. § 12;\* *Statutes*, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.\*]

Appeal from District Court, Crawford County.

Phil Reaser was convicted of a misdemeanor, and appeals. Affirmed.

W. P. Dillard, of Ft. Scott, and C. E. Benton, of Los Angeles, Cal., for appellant. J. S. Dawson, Atty. Gen., and T. J. Karr, of Girard, for the State.

SMITH, J. [1, 2] The appellant, Phil Reaser, was charged with a misdemeanor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for failing to comply, as superintendent and agent of the Western Coal & Mining Company, with the provisions of chapter 222 of the Laws of 1911. Trial was had before a justice of the peace of the county, and the defendant was found guilty and fined. An appeal was duly taken to the district court of Crawford county, and, upon the case being called for trial therein, the defendant filed his motion to quash the complaint upon the grounds, substantially, that chapter 222 of the Laws of 1911, under which the complaint was made, is in violation of sections 1 and 2 of the Bill of Rights, and section 17 of article 2 of the Constitution of Kansas, and of section 1 of the fourteenth amendment to the Constitution of the United States. On the hearing, the motion to quash was overruled, and this constitutes the most important question in the case.

The questions involved are very analogous to those involved in the case of *In re Williams*, 79 Kan. 212, 98 Pac. 777, and 222 U. S. 415, 32 Sup. Ct. 137, 56 L. Ed. 253, known as the Black Powder Case. The act involved in that case (chapter 250 of the Laws of 1907) imposed upon the operators of coal mines certain regulations involving greater expense in the operation of coal mines, the object of which was to guard the employes from the accidental explosion of the powder used in such mining and to guard such employes from the consequences thereof. Identically the same objections were made to that act as are made to the act involved in this case, above recited.

It is probably true that the requirements of the act in question involve a greater expense to the mining companies than did the provisions of the Black Powder Act, but there is no showing that such requirements are confiscatory or unreasonable in consideration of the object to be attained.

It is contended in this case that the act is discriminatory, in that it places burdens upon coal mine operators, while the operators of lead, zinc, gypsum, and salt mines are free from such burdens; and it is contended that the occupation of working in such other mines is equally hazardous and dangerous to the health, of the employes as is the work in coal mines, that a general law could have been made applicable to all such employments, and therefore the special law is in violation of section 17, art. 2, of the Constitution of Kansas. It cannot be said as a matter of law that the contention is correct.

On the other hand, it is contended that the act in question was passed in the exercise of the police power of the state, and that the Legislature had a right to select as a class persons engaged in the mining of coal and to make a law specially applicable to that class. It is practically conceded that the enactment of the law was in the exercise of the police power, and only as such can it be sustained.

The determination of the necessity and wisdom of a police regulation rests, in the first instance upon the Legislature, and, if there be reasonable grounds for exercising such power, the court should not interfere, although its judgment might not fully concur with that of the Legislature. In *McLean v. State of Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. (U. S.) 315, it is said:

"The Legislature, being familiar with local conditions, is, primarily, the judge of \* \* \* such enactments. The mere fact that a court may differ with a Legislature in its views \* \* \* inconsistent of the propriety of the legislation in question affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

In *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed., 872, it is said:

"The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health, and comfort, are so obviously within the police power of the several states that no citation of authority is necessary to vindicate the general principle."

See, also, *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915; *Health Dep't v. Rector*, etc., 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

In *Booth v. State*, 179 Ind. 405, 100 N. E. 563, sustaining the validity of a similar statute requiring bathhouses at coal mines, it is said:

"The act of March 8, 1907, \* \* \* requiring the owners or operators of coal mines to erect and maintain washhouses, being a proper exercise of the police power, is not open to the objection that it contravenes the fourteenth amendment to the Constitution of the United States in that it deprives the owner or operator of property without compensation. (Syl. 8.)

"The Legislature alone may determine, inside the limits fixed by the Constitution, when public safety or welfare requires the exercise of the police power, and the courts can only interfere when a statute conflicts with the Constitution, and have nothing to do with the wisdom, policy, or necessity of the enactment." (Syl. 9.)

It is a matter of common knowledge in Kansas that many of the coal mines therein are worked at considerable depths, and that the temperature in such mines is considerably higher than at the surface; that the atmosphere therein is damp, and that the laborers therein perspire freely; and that on coming to the surface it is a great protection to their health and well-being that a washhouse should be located as required by the act in question, in order that their bodies may be cleansed and dry clothing substituted for their laboring clothes before walking any considerable distance from the mine, especially in cool or cold weather. The health of the employe is a matter of concern not only to himself but to the employer and the public as well. The framers of the law will be presumed to have been possessed of such general knowledge and to have made such special investigations of the conditions

at coal mines as to them was deemed necessary.

A jury was impaneled to try the case, and it is claimed that the court erred in overruling the challenge of the defendant to the qualifications and competency of one Banhart to serve as a juror. The particular grounds for challenging this juror were that he testified that he was a member of the United Mine Workers of America; that as a member of that organization he paid weekly or monthly dues; that he did not know whether such dues went to employ counsel for the state in this prosecution; that he did not know whether certain attorneys prosecuting the case were employed by the United Mine Workers of America; that he did not know whether such attorneys were employed by Leon Besson, head of the society of mines and miners, or not; that he did not know whether the organization to which he belonged was interested in the enforcement of the law; that as an individual member of that organization he was interested in the enforcement of the law; that he did not expect any money from the conviction of the defendant; that as a miner he was interested in the law, thought it was a good law, and as a citizen thought, as long as it was the law, it should be enforced; that, notwithstanding he was a miner, a member of the organization, and interested in seeing the law enforced, he would give the defendant a fair trial. The challenge was overruled.

Jurors Doblebower and Fisher were also challenged and examined and made answers to questions substantially the same as had Banhart. A talesman named Bollocco was called and examined and testified substantially as the others had, except that he was an ex-member and not a present member of the United Mine Workers of America; that he had been employed by the Western Coal & Mining Company, but was at the time of his examination engaged in other business. All these challenges were overruled. Defendant then peremptorily challenged Banhart, Fisher, and Bush, when, his right to challenge being exhausted, he was forced to go to trial with Doblebower as a member of the jury.

Every good citizen ought to be in favor of the enforcement of the laws of the state, and the fact that the law is designed to protect a special class of business or property, generally, does not disqualify a juror who has had some general interest in the class of business but has no personal interest in the result of the action. Neither does the fact that a juror has some time employed an attorney in another matter, which attorney is engaged in the trial of the present case, of itself disqualify such juror.

Upon the production of the first witness, the defendant objected to the introduction of any testimony on the ground that the complaint did not charge the defendant with an

offense under any valid law of the state. The objection was properly overruled and the case proceeded.

The state introduced as a witness Leon Besson, who testified that he was secretary of the state association of miners and, as such, was state mine inspector; that he was acquainted with shaft No. 15 of the Western Coal & Mining Company, knew defendant, superintendent of that mine, had been to the mine and examined the bathhouse there, and had taken measurements of the wash room and dressing room; he said there were 60 lockers and one shower and proceeded to detail the arrangements of the rooms, the supply of water, and how it was operated, etc. He testified, in substance, that he examined the building with reference to heat and the water and steam pipes, and describes generally the conditions therein as he saw them. On cross-examination, he was asked many questions as to the size, arrangement, etc., of a washhouse such as he considered sufficient at that mine. It was claimed by the state that these questions were propounded to him as an expert designer or builder and the objections thereto were sustained. There was no material error in excluding answers to such questions as were held improper. The testimony in chief did not entitle the defendant to cross-examine the witness as an architect or designer of a washhouse.

William Kiehl also testified as a witness for the state and gave a description much as had the former witness of the building and its condition from what he had seen, and as to the manner in which it was kept. Over the objection of the defendant, he was allowed to say that he stopped bathing there because it became so filthy that he did not think it decent to bathe there; that he did not think it healthy. The objection is urged that the court erred in allowing him to testify that he had quit bathing there while he continued to work at the mine. This seems to have been only incidental to his testimony as to the condition of the bathhouse, and, while his not continuing to bathe at the bathhouse was itself immaterial, we cannot see that it was prejudicial.

We find no substantial error on the trial, and the judgment is affirmed. All the Justices concurring.

(94 Kan. 86)

**BROOKS v. KANSAS CHEMICAL MFG. CO.**  
(No. 19213.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

In an action by an employé against his employer for damages resulting from the loss of an eye which was struck and penetrated by a sliver of steel, the jury found specially that the proximate cause of the injury was a defective tool furnished the employé for use in his work.

The defendant suggested several other causes. All of them were fairly eliminated either by the proof or for lack of proof. Under the proof the cause assigned by the jury was natural, reasonable, and adequate. *Held*, the inference was legitimate, and not the product of speculation or conjecture.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

## 2. MASTER AND SERVANT (§ 205\*)—DEFECTIVE TOOLS—CONTRIBUTORY NEGLIGENCE.

The decision in the case of *Steele v. Railway Co.*, 87 Kan. 431, 124 Pac. 169, relating to the right of an unskilled employé to accept a simple, mechanical tool like a cold chisel or cold hammer furnished him by an employer as reasonably safe for use, unless defects were so patent they must have been observed and appreciated, or unless defects were actually brought to the employé's cognizance, followed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

## 3. INSTRUCTIONS—ASSIGNMENTS OF ERROR.

Various errors assigned considered, and *held* to be without substance and without prejudice.

Appeal from District Court, Reno County.

Action by Will Brooks against the Kansas Chemical Manufacturing Company. From judgment for plaintiff, defendant appeals. Affirmed.

O. C. Mossman, of Kansas City, Mo., and G. M. Williams, of Hutchinson, for appellant. F. L. Martin and Van M. Martin, both of Hutchinson, for appellee.

**BURCH, J.** The plaintiff sued the defendant for damages resulting from personal injuries suffered on account of the negligence of the defendant. The plaintiff recovered, and the defendant appeals.

The plaintiff was a helper in the defendant's manufacturing establishment. He was directed to assist in shortening a sheet-metal hood or covering for a conveyer. To do this it was necessary to cut some rivets. The hood lay on a wooden platform constructed of light material which did not afford room to do the work, which gave the plaintiff insufficient opportunity to protect himself from the hazards of the work, and which did not furnish a sufficiently solid foundation upon which to rest the hood while the rivets were being cut. It was suggested to the defendant's foreman that the hood be taken to the shop where the work could have been done according to proper methods, but the foreman said, "they were covered up in the shop," and that the work should be done on the platform. By direction of the foreman the plaintiff applied to the person in charge of the defendant's storeroom for a sledge and a cold hammer, received them, repaired to the platform, and together with an associate undertook to perform the service required. He had no experience in doing work of that kind. For a time the plaintiff's associate held the cold hammer while the plaintiff struck it with the sledge. They then changed tools,

and the plaintiff held the cold hammer. While so engaged, upon a stroke of the sledge a sliver of steel penetrated the plaintiff's eye. The plaintiff's associate immediately examined the cold hammer and the sledge. The sledge was in fairly good condition, but the head of the cold hammer was battered and scaled and had "little edges over the edge of the head." Some time after the injury the sliver was extracted from the plaintiff's eye by the use of a magnet, and it was produced at the trial. Cold hammers are made of tempered steel, and there was evidence that the sliver taken from the plaintiff's eye was a fragment of tempered steel.

The court submitted to the jury charges of negligence respecting the safety of the place where the plaintiff was required to work, the safety of the tools given him, and the safety of the methods by which the plaintiff was directed to do the work. With the general verdict the jury returned the following special findings of fact:

"Q. No. 1. If you find the defendant was negligent, then in what respect was it negligent? A. No. 1. They were negligent in not furnishing proper instruments to inexperienced workmen.

"Q. No. 2. Was the platform on which plaintiff was working the cause of the injury to plaintiff? A. No. 2. Indirectly by not being the proper place to do this kind of work.

"Q. No. 3. Was the use of the cold cut hammer and the sledge hammer the cause of the injury to plaintiff? A. No. 3. Yes; by the cold cut not being in proper condition.

"Q. No. 4. Was the use of the cold cut hammer and the sledge hammer proper tools to use in the work being done by the plaintiff? A. No. 4. Yes."

[1] The defendant argues that the verdict was based on conjecture because the injury might have been produced by a glancing blow of the sledge which might scale a good cold hammer or sledge, the sliver which penetrated the plaintiff's eye might have come from the sledge or from the cutting edge of the cold hammer, and the sliver might have come from the material which the plaintiff was cutting. The argument rests upon conjecture, not the verdict. There was no evidence that the blow which occasioned the injury was a glancing blow. The head of the sledge was in fairly good condition, but the head of the cold hammer was in the very condition which would likely cause fragments of steel to fly when struck by the sledge. The cold hammer was examined at once by a person looking for the cause of the plaintiff's injury, and nothing about the cutting edge of it attracted his attention sufficiently to cause him to speak of it. There was no evidence on which to rest an inference that a chip or sliver of metal came from a rivet or from the hood. The testimony was that, if the cold hammer bounded out of the gash made in a rivet by strokes of the sledge, the plaintiff always tried to put the hammer back in the same gash. If this were not done and the hammer were set in a new place, it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was supposable that a piece of metal might be chipped off, but there was no testimony that these were conditions of the blow which caused the injury. The result is that all causes of the injury except the one assigned in the findings of fact are eliminated either by the proof or for lack of proof, while under the proof the cause assigned in the findings is natural, reasonable, and adequate. Consequently it may legitimately be inferred that the cause assigned for the injury was the true one. Indeed the inference accords so fully with the laws of logic, the methods of scientific inquiry, and the ordinary operations of the rational faculty that it is quite irresistible. *Railroad Co. v. Perry*, 65 Kan. 792, 794, 70 Pac. 876.

[2] It is said that the tool was a simple, common tool which the defendant was not bound to inspect, that the plaintiff must have been as fully aware of its condition as the defendant, and that he was bound to know that particles of steel are likely to fly when a tempered tool like the cold hammer is struck with great force by a heavy sledge. The court has had before it several cases of this general character, and the present one is governed by the decisions in the case of *Steele v. Railway Co.*, 87 Kan. 431, 124 Pac. 169, and *Railway Co. v. Quinlan*, 77 Kan. 126, 93 Pac. 632. The opinion in the *Steele* Case distinguishes the cases of *Railway Co. v. Welkal*, 73 Kan. 763, 84 Pac. 720, and *Gillaspie v. Ironworks Co.*, 76 Kan. 70, 90 Pac. 760, relied on by the defendant, and that function need not be performed again.

[3] The subjects of the safety of the place where the plaintiff was obliged to work, the method which he was required to pursue in doing the work, and some others are given much attention in the defendant's brief. They are no longer of consequence because the verdict rests on the defective condition of the cold hammer. True the jury in answer to special question No. 4 stated that the platform indirectly contributed to the plaintiff's injury. The finding responded to evidence tending to show that the place was not a proper one in which to do the work, that if the work had been done in a proper place the danger from chipped pieces of metal would have been minimized, and that the plaintiff might have been able to take a position which would have protected him from pieces of metal flying from any source. The jury, however, following closely the instruction relating to proximate cause, classi-

fied the place where the work was done with the indirect antecedents of the injury, and stated the proximate cause in findings No. 1 and No. 3. This discrimination on the part of the jury was distinctly favorable to the defendant.

It is suggested, but not argued, that the court did not instruct the jury on the subjects of contributory negligence and assumption of risk. No instructions on those subjects were requested, and the absence of such instruction was not included among the grounds of the motion for a new trial. Therefore it will be assumed that the defendant rested upon its defense of unavoidable accident.

It is pointed out that in one place in the instructions the court said it would be the duty of the master to know whether or not the place was reasonably safe before ordering his servant to work there, and it is said an absolute duty was thus imposed upon the defendant, instead of the qualified duty which the law contemplates. But the court immediately proceeded to say that the defendant was not an insurer, and was only bound to exercise reasonable and ordinary care to furnish the plaintiff a reasonably safe place in which to work.

There are other space-filling criticisms of the instructions which will not be noticed here.

The plaintiff was injured on October 29, 1912, and at that time was earning \$1.76 a day. At the time of the trial, which occurred a year later, he was 23 years old. The piece of steel penetrated his left eye. The tissues healed over the foreign body, and it was necessary to cut them in order to extract it. Afterwards the eye itself was removed. During this time the plaintiff's right eye was sympathetically inflamed and the injured eye was removed in order to save it. The plaintiff testified that the sight of the right eye was not as good as it formerly was. While this evidence was somewhat meager, it was sufficient to authorize the court to submit to the jury the plaintiff's claim for damages for permanent injury to the right eye. What, if anything, the jury allowed for this item of damages cannot be known; but inasmuch as the total recovery did not exceed what might have been allowed for loss of time, for expenses, for pain, and for loss of the injured eye, the defendant has no reason to complain.

The judgment of the district court is affirmed. All the Justices concurring.



(16 Ariz. 366)

**STEINFELD v. BOLEN. (No. 1396.)**

(Supreme Court of Arizona. Feb. 13, 1915.)

**1. MORTGAGES (§ 489\*)—FORECLOSURE BY ACTION—PLEADINGS—SUFFICIENCY.**

In a suit to foreclose a mortgage for \$1,500, judgment for the plaintiff for the full amount and interest, and foreclosing the mortgage lien upon the property, was improper, when the complaint merely alleged that there was due and unpaid "about \$1,500 and interest," a plea so indefinite that no judgment by default could have been entered, under Civ. Code 1913, par. 563, providing for the entry of default judgments in actions of contract, the complaint not being aided by the answer, as to the amount due, that denied \$1,500 was owing, alleged that \$1,050 had been paid on the principal, and admitted a balance of \$576.83.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1425-1430, 1470; Dec. Dig. § 489.\*]

**2. MORTGAGES (§ 460\*)—PAYMENT—PRESUMPTION AND BURDEN OF PROOF.**

In an action to foreclose a past-due mortgage, in which plaintiff alleged that there was due "about \$1,500 and interest thereon," and defendant denied that "\$1,500 is now due to plaintiff," and alleged that \$1,050 had been paid, and that interest was paid to a date stated, and in which the note and mortgage were not produced at the trial nor their nonproduction accounted for, the presumption was that the debt was paid, and the burden was on the plaintiff to show nonpayment, though payment is ordinarily an affirmative defense to be pleaded and proved by the party asserting it.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1348-1352; Dec. Dig. § 460.\*]

Appeal from Superior Court, Pima County; W. F. Cooper, Judge.

Action by Frederick C. Bolen against Harold Steinfeld. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Charles Blenman, of Tucson, for appellant. E. S. Curtis, of Phoenix, for appellee.

ROSS, C. J. The plaintiff appellee, as the assignee and legal owner and holder of a real estate mortgage, brought this action to foreclose on the mortgaged property which had, by mesne conveyance from the mortgagor, come into the ownership and possession of defendant appellant. The mortgage was given on January 31, 1907, to secure a note of same date for \$1,500, payable on or before five years after date, bearing 9 per cent. interest, but the note provided it should be payable in monthly installments of \$25 per month, plus interest for such month on the entire debt. The payee of the note and mortgage died in November, 1910. In January, 1912, appellee became the owner by assignment of "the mortgage, \* \* \* together with the debt thereby secured." Suit to foreclose was begun December 10, 1913. As to the amount due on the mortgage, the allegation of the complaint was as follows:

"That there is due upon the same [promissory note], as the plaintiff is informed and believes, and upon such information and belief alleges it to be a fact, the sum of *about* \$1,500 and interest thereon."

Defendant in his answer admitted the execution of the note and mortgage as alleged in the complaint, denies on information that appellee is the legal holder and owner of note and mortgage, and "also denies that the sum of \$1,500 is now due to plaintiff under said note and mortgage," and alleges on information that \$1,050 had been paid on note and mortgage to the payee in his lifetime, together with interest thereon up to October 13, 1910, admitted a balance due of \$576.83, and paid the same into court.

It is stipulated by the parties that at the trial the only evidence introduced by appellee was a certified copy of the mortgage and the assignments of note and mortgage to him. The original mortgage and note were not produced, and their nonproduction was not accounted for. No evidence at all was produced or offered respecting said note or mortgage (except the certified copy of mortgage) or of the amount due thereunder. Upon this showing, no evidence being introduced by appellant, the court entered judgment in favor of appellee for \$1,500 and interest from date of note amounting to \$933.75, and foreclosed the mortgage lien upon appellant's property for that sum. From this judgment this appeal is prosecuted by appellant. Under the facts as they appear, and under the stipulation of the parties, the only question for us to pass upon is: Did the court err in rendering judgment for appellee, he not having produced the original note and mortgage nor accounted for their nonproduction and not having made proof of the amount due thereon?

At the date of the institution of suit, December 10, 1913, the note and mortgage were long past due. In fact, the note itself provided for partial payments of \$25 per month and interest monthly from its date. The payee thereof held it for nearly four years before he died. The plaintiff evidently did not know the amount due thereon, for in his complaint he alleges, on information and belief, that there was due and unpaid "*about* \$1,500 and interest thereon," and prayed "that an account may be taken \* \* \* of the amount now due upon said promissory note and upon said mortgage."

[1] Had no answer been filed by appellant, under the prayer of the complaint, no judgment could have been entered without proof of the amount due on note and mortgage, as in case the defendant defaults, the statute (paragraph 563, Civil Code) provides that "judgment in the amount sued for in the complaint, including the costs," where the action arises out of contract for the recovery of money or damages only, may be entered. The amount sued for was not definitely stated. It was "*about* \$1,500 and interest thereon." This allegation is indefinite and uncertain in the amount sued for as principal, and still more indefinite and uncertain as to amount claimed as interest, as no date is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

given from which the interest could be computed, and, to emphasize the uncertainty of amount claimed as due, the prayer of the complaint asks for an accounting.

[2] Nor do we think the complaint was aided by the answer filed, in respect of the amount claimed as due. The answer denies that \$1,500 is due, and affirmatively alleges that \$1,050 had been paid on the principal, and that the interest had been paid up to October 13, 1910, and admits a balance due of only \$576.83 principal and interest. The certified copy of the mortgage introduced by the appellee was proof of nothing that had not been admitted in the answer. The answer admitted the execution of the note and mortgage as alleged. The only controverted question was as to the amount still unpaid. The note and mortgage were not produced, and their nonproduction was not accounted for. They were long past due. In the absence of proof to the contrary, the presumption of law is that past-due paper has been paid. *Ward v. Munson*, 105 Mich. 647, 651, 63 N. W. 498, 499, was a case wherein the bond secured by a mortgage was not produced nor sufficiently accounted for, and upon these facts the court said:

"The defendant was asserting the mortgage as a valid lien upon the premises. The law would not raise a presumption of nonpayment, but of payment when due, unless the contrary was shown by the production of the bond, or other evidence repelling the presumption of law when the bond could not be produced. *Bailey v. Gould*, Walk. Ch. [Mich.] 478. In *Bassett v. Hathaway*, 9 Mich. 28, the bill was filed to restrain the foreclosure of a mortgage. The notes were not produced, and it was said: 'It was held in *Bailey v. Gould*, Walk. Ch. [Mich.] 478, that, unless the note accompanying a mortgage is produced or accounted for, it must be presumed paid as against the party setting up the mortgage. This is in accordance with well-settled principles. In the case now before us, the notes are not produced, and we are entirely without evidence either of their existence or ownership at the present time.' In *George v. Ludlow*, 66 Mich. 176, 33 N. W. 169, the cases of *Bailey v. Gould* and *Bassett v. Hathaway* were referred to and approved. It was further said: 'For aught that appears in this case, Mr. Pearl might have receipted payment of the notes and mortgage before he died, and, if they were produced, might be found to furnish the evidence establishing the fact. \* \* \* A decree will not be made on the foreclosure of a mortgage without producing the securities, unless their absence is accounted for by clear and conclusive proof.' In *Bergen v. Orbach*, 83 N. Y. 49, the action was to foreclose a mortgage. Upon the hearing the plaintiff did not produce the bond nor account for its nonproduction. It was said: 'The case is subject to the rule which makes the nonproduction of the bond referred to in the mortgage evidence of the nonexistence or discharge of the mortgage debt, and, when unexplained, is conclusive against the plaintiff's right to recover.' *Buckmaster v. Kelley*, 15 Fla. 180, *Butler v. Washington*, 28 S. C. 607, 5 S. E. 801, and *Field v. Anderson*, 55 Ark. 546, 18 S. W. 1038, where the same doctrine is laid down."

To the same effect is *George v. Ludlow*, 66 Mich. 176, 33 N. W. 169, 171.

The appellee was entitled, under the admissions contained in the answer, to a judgment

for \$576.83, but we think the presumption of payment should be indulged as to the amount alleged to have been paid and denied as due and owing, until overcome by competent evidence. The plea of payment may be an affirmative defense that places the onus of proof upon him who pleads it; but under the general issue, the appellee failing to produce the note sued on, and it being past due, the burden was on him to overcome the presumption of payment by showing that the note has not, in fact, been paid.

Judgment is reversed, and case remanded, with directions that a new trial be granted.

CUNNINGHAM and FRANKLIN, JJ., concur.

(32 Kan. 810)

GARDNER v. INTER-OCEAN LIFE & CASUALTY CO. OF SPRINGFIELD, ILL. (No. 19191.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

INSURANCE (§§ 371, 384\*)—RECEIPT CONTAINING MISTAKEN RECITAL—PAYMENT OF PREMIUM—ESTOPPEL.

The annual premium on an accident policy was paid to the local treasurer of the company authorized to collect and give receipts for premiums, who gave the insured a receipt for the amount, reciting that it was the premium for the month ending August 30, 1911. The payment, in fact, was for the year ending July 30, 1911, a mistake being made in writing "August," instead of "July." The accidental death of the insured occurred on August 16, 1911, within the time covered by the language of the receipt, but beyond the time for which the payment had been made, and the insured was in fact, in default at the date of his death, for which default the policy by its terms had lapsed. It is held that the delivery of the receipt containing the mistaken recital, without evidence that the insured was in any manner misled, does not estop the insurer from asserting the forfeiture provided for in the policy, and should not be construed as a waiver, new agreement, or extension of time of payment.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 943-946, 1019; Dec. Dig. §§ 371, 384.\*]

Appeal from District Court, Clay County.

Action by Emma G. Gardner against the Inter-Ocean Life & Casualty Company of Springfield, Illinois. From judgment for plaintiff, defendant appeals. Affirmed.

James V. Humphrey, of Junction City, for appellant. O. Vincent Jones, of Clay Center, for appellee.

BENSON, J. The plaintiff appeals from a judgment denying a recovery sought by her as beneficiary in an accident policy issued to Ira S. Gardner, her son, by a casualty company, whose liabilities had been assumed by the defendant.

The only question for decision is whether the policy had lapsed before Gardner's death for failure to pay a premium as provided in the policy, and is presented here upon the conclusions of fact and law of the district court. No transcript of the evidence was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made. The policy provided for the payment of an annual premium of \$12 and for a lapse on failure to pay a premium when due. The payment of a premium of \$12, the amount which the policy provided should be paid annually, was due on August 1, 1910. On August 8th the insured paid that amount to a local agent authorized to collect premiums and issue receipts therefor, and took a receipt signed by the agent in the following form:

"By an Authorized Collector.

"Woodmen's Casualty Company.

"Springfield, Illinois, 7-30-1910.

"Received of Ira S. Gardner \$12.00, premium for the \_\_\_\_\_ month ending Aug. 30, 1911.

"Policy No. \_\_\_\_\_ W. D. Starling, Treas.

"This receipt shall not be construed as a reinstatement of the insured until a health certificate has been furnished and approved by the secretary."

In issuing the receipt a mistake was made in writing the word "August," instead of "July." In the following spring Mr. Gardner delivered the policy to his mother, and went to Colorado, taking the receipt with him. He was killed on August 16, 1911, by an accident covered by the terms of the policy. The premium due for the year commencing August 1, 1911, was not paid.

The plaintiff concedes that the policy had lapsed, unless, because of waiver or estoppel, the payment of the 1911 premium should be considered as extending the time to August 30th of that year, as recited in the receipt. This narrows the inquiry to the effect of that instrument. It will be observed that there is no question of custom in receiving overdue payments such as was considered in *Life Ins. Co. v. Twining*, 19 Kan. 349, *Benefit Association v. Wood*, 78 Kan. 812, 98 Pac. 219, and other decisions of this court. Neither is the effect of receiving and retaining a payment after default involved in this inquiry. Conceding that the local treasurer was authorized to receive the payment for the year ending July 30th, at the time it was paid, did his mistake in reciting in the receipt that it was for the year ending August 30th operate as a waiver of the time of payment specified in the contract, or as an estoppel against an assertion of a forfeiture? The plaintiff quotes upon the question of waiver as follows:

"The reason of the rule is that the prompt payment of the money may be waived by the creditor, and if he, by his words or conduct, has led the debtor to believe that prompt payment is not required, he cannot be allowed to insist on a forfeiture of the policy for a default in payment which he himself induced the debtor to make. \* \* \*"  
*Continental Insurance Co. of N. Y. v. Browning*, 114 Ky. 183, 185, 70 S. W. 660.

In connection with the same proposition a quotation is also made from the opinion in *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, in which the following language appears:

"That courts are always prompt to seize hold of any circumstances that indicate an election

to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

The facts of this case do not warrant the application of the foregoing principles. It does not appear by the findings or just inference from them that the defendant by the mistake of its agent or otherwise induced the insured to believe that the policy would not lapse at the stipulated time. In *Surety Co. v. Bragg*, 63 Kan. 291, 65 Pac. 272, cited by the defendant, it was held, upon facts not necessary to state here, that:

"The insurance company cannot be heard to assert a forfeiture after a liability has arisen on a policy, \* \* \* when, by its course of dealing, it has induced the insured to believe that the premium was paid."

Following the rule above quoted, the plaintiff's case falls short, because there was no custom, course of dealing, or other conduct of the company or its officers by which the insured could have been warranted in believing that his premium had been paid beyond the time plainly specified in the policy, which was a constant notice of the date and time covered by the payment. In order to bring the plaintiff's case within the principle of estoppel as decided in the cases mainly relied on, it would be necessary to presume that the insured was misled by the mistake, and honestly relied upon the date so written in the receipt. The district court did not so presume, and neither should this court from the facts found. It is true that, upon the principle of waiver, it is not always necessary that the insured should be misled in order to avoid the forfeiture. Thus, where the insurer receives and retains a premium with knowledge of the default for which a lapse might be claimed, a waiver may be found, as decided in *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, 12 Ann. Cas. 636, and *United Workmen v. Smith*, 76 Kan. 509, 92 Pac. 710. In such a situation the result does not depend so much on what the insured does or omits to do as upon what was done or omitted by the insurer. *Equitable Life Assurance Society of U. S. v. Ellis*, 105 Tex. 526, 147 S. W. 1152, 152 S. W. 625.

It cannot be held that the delivery of the receipt operated as a relinquishment of the proportional part of the premium for one month nor as an extension of the time, or to fix another time for payment. If it should be conceded that the local treasurer could bind the company by such an agreement, none was made, the receipt was neither given or accepted for that purpose, or with that intention or understanding. It was simply a mistake which, in the absence of any other

evidence, should not be construed as modifying the contract or making a new one.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 814)

INGALLS v. SMITH. (No. 19205.)†  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 854\*)—NEW TRIAL (§ 72\*)—ORDER GRANTING—GROUNDS.

The principles applicable to the review of an order granting a new trial where the particular ground of the order does not appear in the record, as declared in *Ireton v. Ireton*, 62 Kan. 358, 63 Pac. 429 (Syl. pp. 1 and 2), followed in numerous other decisions, are followed in this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854; \* New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

2. BROKERS (§ 52\*)—COMMISSION—PROCUREMENT OF PURCHASER — ENFORCEABLE CONTRACT.

The rule stating the right of a real estate broker to commissions where an enforceable contract has been entered into between his principal and a purchaser produced by the broker, as declared in *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681, is followed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.\*]

3. BROKERS (§ 88\*)—COMMISSION—WAIVER OF RIGHT—QUESTION FOR JURY.

The court cannot declare as a matter of law that a broker is entitled to a commission when he has produced a purchaser with whom his principal has entered into an enforceable contract, if afterwards, pending a dispute between the parties over the details, the broker by his language or conduct gives his principal good reason to believe that he intends to relinquish his claim, and the principal relying upon such belief foregoes his right to enforce the contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

Appeal from District Court, Cowley County.

Action by R. R. Ingalls against J. W. Smith. Verdict for defendant, new trial ordered, and both parties appeal. Affirmed.

S. A. Smith and Hackney & Lafferty, all of Winfield, for appellant. Ed. J. Fleming, of Arkansas City, for appellee.

BENSON, J. This is another of the frequently recurring actions to recover commissions upon a real estate deal. A verdict was returned for the defendant which was set aside. A new trial was ordered, and both parties appeal.

[1] The ground upon which the verdict was set aside is not stated.

It was said in *K. C. W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 12, 30 Pac. 108, 109:

"It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause could, within the rules prescribed, approve the same."

The rules in such cases were stated in *Ireton v. Ireton*, 62 Kan. 358, 63 Pac. 429, syl. pars. 1 and 2:

"Upon an application for a new trial because the evidence does not sustain the verdict, it is the duty of the trial court, though not of an appellate court, to weigh the evidence, although conflicting, and, if the verdict is clearly against the weight of the evidence and does not meet the approval of the court, it should be set aside.

"Where a new trial is granted upon a motion alleging several grounds, and the trial court does not state upon what particular ground the motion was sustained, the Supreme Court will sustain the order, if it can be sustained upon any one or more of the grounds assigned in the motion."

Among the more recent cases where these principles are stated are *Rowell v. Gas Co.*, 81 Kan. 392, 105 Pac. 691; *Thompson v. Seek*, 84 Kan. 674, 115 Pac. 397; and *White v. Railway Co.*, 91 Kan. 526, 138 Pac. 589.

[2] A written agreement was entered into between the defendant, the owner of the land, and W. E. Lambert as purchaser, for the exchange of the land for notes, and mortgages securing them, upon Oklahoma land, and the purchaser's note for the balance. After an abstract had been submitted and some objections to it had been made, among others that it showed a mortgage besides the one referred to in the agreement, the parties to the contract disagreed over the details of performance and the exchange was not made. The purchaser declared that the owner was trying to pass a crooked title upon him, and to compel him to become personally obligated upon the Oklahoma mortgages, and to obtain his wife's signature upon a note for the balance, which he had not agreed to do. On the other hand, the owner charged the purchaser with a purpose to repudiate the trade.

It was admitted that the agency agreement was to find a person ready, able, and willing to purchase the land for a commission of \$500. The agent contended that he had found such a purchaser with whom an enforceable contract had been made and that the failure of the deal was caused through the defendant's own breach of the contract, while the defendant contended that the purchaser was not ready and willing to comply with the contract of purchase. This was the issue submitted to the jury upon conflicting evidence.

The cross-appeal is based upon the refusal of an instruction to find for the plaintiff for the amount of commissions agreed upon.

It was held in *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681, that:

"Ordinarily a real estate broker has earned his commission when he has produced a customer with whom his principal enters into an enforceable contract for the sale of the land, although the title does not actually pass. After the principal has entered into such a contract, not being induced thereto by any deceit on the part of the broker, he cannot avoid liability for a commission by showing the inability of the buyer to carry out his agreement."

That decision was followed in *Avery v. Howell*, 91 Kan. 297, 137 Pac. 785.

If the contract in this case was enforceable, and within the principle so decided, the question whether it was abandoned because

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied March 13, 1915.

of the default of the vendor or of the vendee is of no practical consequence in this action for commissions. The defendant argues that the rule just stated has no application to an option contract and that the contract here was an optional one. The material provisions of the contract were that Smith should deed to Lambert a farm of 480 acres as described for a consideration of \$13,200, to be paid by assuming one-half of a mortgage of \$11,000; the balance of \$7,700 to be paid as follows:

"One note \$2,640, secured by mortgage on (describing land in Oklahoma), party of the first part is to have the option of taking one mortgage of \$3,500 on (describing land in Oklahoma), this being a second mortgage, or a mortgage note of \$4,500 being a first mortgage on (describing land in Oklahoma) if party of the first part takes the \$4,500 note, the remaining \$560 to be paid in cash not later than Oct. 1st, if party of the first part takes the \$3,500 note then party of the second part is to pay \$560.00 Oct. 1st, and give a note to party of the first part a note due in one year for \$1,000 and to draw 7 per cent. interest from date of same, party of the second part is to pay his part of the interest of the \$11,000 from day he receives deed. Party of the first part is to have good and sufficient time to make examination of mortgages that being offered as in payment on the above land if party of the first part excepts (accepts?) mortgages as above described then he is to make party of the second part a warrantee deed and to give full possession not later than Nov. 14, 1911."

It will be noticed that there are two options referred to in the contract, an option or right of selection of securities, and an option to take such securities after a reasonable time to examine them; but both are options given to the vendor. The engagement of the vendee became absolute when the vendor exercised his options. The evidence shows that the defendant selected the \$3,500 Oklahoma mortgage under the contract, and that he made and tendered a deed of conveyance in execution of the contract, so the options had been exercised and were out of the case before this suit was commenced. It is difficult to see how he can successfully claim that the contract was not enforceable. When he indicated his acceptance of the Oklahoma mortgages and made his selection from them, the contract was as binding upon him as though the writing had provided absolutely that he should take them.

[3] If the only question on this branch of the case had been whether the commissions were earned when the contract was made and the option was exercised by the defendants, an affirmative answer would be required, and in that event the plaintiff would have been entitled to the requested instruction. On examining the evidence, however, it appears that while the defendant and Mr. Lambert, the purchaser, were engaged in a controversy over the details of the contract, the defendant appealed to his agent the plaintiff, who thereupon had a talk with Lambert, and then reported to the defendant: "I can't do

anything with (using a reproachful term); we will have to let him go." The defendant testified that this was the last he heard from his agent until this suit was brought. If the agent intended by this statement to relinquish his claim for commission, or if he gave the defendant good reason to believe that he intended to do so, and the defendant relied upon that belief in foregoing his rights under the contract, it should be held that the plaintiff had waived his claims for commission. The proper inference to be drawn from his conduct and language was for the jury and not the court.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 829)

BOARD OF COM'RS OF TREGO COUNTY  
v. HAYS et al. (No. 19159.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 65\*)—  
COUNTY HIGH SCHOOL—SITE—TITLE.

Trustees of a county high school were appointed under a statute providing that they should select the best site obtainable without expense, the title to which should vest in the county. They selected a site which was paid for by a popular subscription. The owner made a deed running to the trustees. An action was brought in behalf of the county, asking that it be decreed to have the full title. A decree was rendered declaring the county to be the equitable owner, but suffering the legal title to remain in the trustees. *Held*, that such decree should be affirmed.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. § 65; \* Deeds, Cent. Dig. §§ 276, 277.]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 65\*)—  
LANDS—TITLE—COUNTY HIGH SCHOOL SITE.

The deed above referred to recited a part of the consideration to be "that the said county erect a building and maintain a county high school therein, or revert to the original owner." A building was erected, at a cost of \$28,000, in which a high school has been maintained for several years. *Held*, that the grantors have no longer any interest in the property conveyed.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. § 65; \* Deeds, Cent. Dig. §§ 276, 277.]

Appeal from District Court, Trego County.

Suit by the Board of County Commissioners of Trego County against T. B. Hays and another. From the decree, both parties appeal. Affirmed.

S. M. Hutzell, of Wakeeney, for plaintiff.  
Monroe, Roark, McClure & Monroe, of Topeka, for defendants.

MASON, J. In 1904 a high school was established in Trego county under a special act (Laws 1903, ch. 473) making applicable thereto the provisions of the general law relating to counties having 6,000 inhabitants. Gen. Stat. 1909, §§ 7765-7783. A board of trustees was chosen. T. B. Hays offered them a tract suitable for a site for the school for \$1,000. The board voted to accept it if it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could be had without cost to the county. For the purpose of paying for the site a number of individuals contributed to a fund which, including cash, promissory notes, and oral promises to pay, amounted to \$1,600, equal to the full value of the property; Hays contributing \$200 of it. Hays and his wife accepted the results of this subscription and executed a deed to the trustees, which was in the usual form, excepting that the portion reciting the consideration was made to read as follows:

"In consideration of the sum of one dollar and the further consideration that the said county erect a building and maintain a county high school therein or revert to the owner . . . . . and 00 /100 dollars."

A building worth \$28,000 was erected, in which the school has ever since been maintained. The present action was brought in behalf of the county, asking that the deed be canceled and that Hays and his wife be required to execute a new conveyance to the county, and that they and the trustees be barred from all interest in the land. The trial court entered a decree excluding Hays and his wife from any interest in the property, and declaring the county to be the equitable owner, but leaving the legal title in the trustees. Appeals are taken both by the county and by Hays and his wife.

[1] The statute (Gen. Stat. 1909, § 7773) provides that the board of trustees shall select "the best site that can be obtained without expense to the county, and the title thereof shall be vested in the said county." The county maintains that in view of this provision the full title should be vested in it. We regard the judgment rendered as a complete protection to the county. It is declared to be the equitable or beneficial owner of the property, and no substantial injury or inconvenience can result from the fact that the trustees are suffered to retain the naked legal title. The public is the actual owner, and it is not very material in what officers the formal title rests.

[2] Hays and his wife contend that they should not have been decreed to have no interest in the property, because, if a high school should cease to be maintained upon it, it would revert to them, or their successors, by virtue of the provisions of the deed. The soundness of their contention turns upon whether the phrase "erect and maintain a county high school therein" should be interpreted as though it read "erect and forever maintain," giving the clause in which it occurs the effect of a provision that the title should revert to the grantor if the maintenance of a high school upon the property should cease. They place some reliance upon the case of *Randall v. Wentworth*, 100 Me. 177, 60 Atl. 871. There a deed to a Trotting Park Association contained this provision:

"The above-named association \* \* \* to erect and maintain a fence around the remain-

der of the lot, of which the above-mentioned ten acres is a part, and lying between said association track and the county road; said association or their successors failing to erect and maintain a suitable fence, this instrument becomes null and void."

The association built a fence, but after a period of some 10 years ceased to maintain it, and this condition continued for 5 years. The title was held to have reverted to the grantor. In the circumstances stated a purpose to require the permanent maintenance of the fence, under the penalty of a forfeiture of the property by its discontinuance, is reasonably clear. But in the present case the language chosen, in view of the entire situation, seems rather to impose the condition that a school shall be established upon the tract, and to vest a complete title in the public upon the fulfillment of that condition. The building has been erected and the school is established and maintained, not colorably merely, but in obvious good faith as a permanent institution. A note on the general subject includes cases holding that a condition for the "permanent" location of a school is complied with by its maintenance for a reasonable period. Note, 44 L. R. A. (N. S.) 1220, 1221, 1225. As suggested in the note referred to, language providing for a forfeiture of title is construed strictly against the grantor. In a case which illustrates the general rule of interpretation, and in which the facts are somewhat analogous to those here presented, a deed contained this provision:

"The above ground is deeded to the state of Indiana expressly for the use and purpose of depot grounds for the Madison and Indianapolis railroad. Now, therefore, be it known that, in case the state of Indiana shall fail to erect buildings and occupy said ground for the use and purpose above mentioned, then and in that case the above-specified ground shall revert back to the donors." *Jeffersonville, Madison & Indianapolis R. R. Co. et al. v. Barbour et al.*, 89 Ind. 375, 376.

A depot was maintained on the tract conveyed for about 30 years, and then removed. In an action to declare the title forfeited the court said:

"In determining whether a condition subsequent in a deed has been broken or not, construction is required in nearly every case. But little assistance can be had from examining other cases, except to ascertain rules for interpretation. Each case differs so widely from all others that even rules of construction cannot be wholly depended upon. The application of good sense and sound equity are as much to be relied upon as subtle and artificial rules of construction. The point, of course, to be arrived at in every case, is to ascertain the intention of the parties. And we may suppose in this case, from the language of the deed and the surrounding circumstances of the transaction, \* \* \* that the grantors' object in the conveyance was satisfied in the occupancy of the premises by the railroad, for depot purposes, for a period of time nearly equal in duration to the average of human life." *Jeffersonville, Madison & Indianapolis R. R. Co. et al. v. Barbour et al.*, supra.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 491)

MARTIN v. ATCHISON, T. & S. F. RY. CO.†  
(No. 18998.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

## 1. MASTER AND SERVANT (§§ 148, 180, 280, 281\*)—NEW TRIAL (§ 60\*)—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT.

In an action under the act of Congress known as the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), brought against a railway company by a brakeman of a freight train to recover for injuries, it was shown that the conductor directed the plaintiff to go forward and act as fireman while he himself took charge of the locomotive for the purpose of allowing the regular engineer and fireman to go to the caboose and eat their dinner. It was shown that while obeying the order of the conductor the plaintiff received injuries, resulting in consequence of the conductor's negligence in managing the locomotive. *Held:*

(a) In the absence of any rule of the company prohibiting the conductor from giving or a brakeman from obeying such an order, the conductor had authority to order the plaintiff to act as fireman, and in obeying such order the plaintiff was acting within the scope of his employment.

(b) Under the federal Employers' Liability Act the railway company is liable for the negligence of the conductor in the management of the engine.

(c) The evidence is sufficient to sustain a finding that the plaintiff had not assumed the risk, and that he was not guilty of contributory negligence in obeying the conductor's orders.

(d) Certain special findings, when considered in the light of the evidence, the contentions of the parties, and all the facts and circumstances of the case, are held not to be so inconsistent with each other or with the general verdict as to authorize the granting of a new trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 290, 359-361, 363-368, 981-996; Dec. Dig. §§ 148, 180, 280, 281.\* New Trial, Cent. Dig. § 126; Dec. Dig. § 60.\*]

## 2. MASTER AND SERVANT (§ 125\*)—INJURY TO SERVANT—LIABILITY OF MASTER—NOTICE.

The petition alleged that the injuries of the plaintiff were caused by a defect in the tire of one of the drivewheels of the locomotive; that it was loose, and had been in that condition for a sufficient length of time to charge the company with notice thereof. The jury found that it became defective by the improper use of the brakes by the conductor while acting as engineer, and that this occurred but a few moments before the injury to the plaintiff. *Held*, that since the special findings and the evidence show that plaintiff's injuries were caused by the negligence of the conductor, the company is liable irrespective of any notice it may have had of the condition of the tire.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

Appeal from District Court, Sedgwick County.

Action by H. A. Martin against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith and A. A. Scott, both of Topeka, and Houston & Brooks, of Wichita,

for appellant. Dale, Amidon & Madalene, of Wichita, for appellee.

PORTER, J. In this action the plaintiff recovered damages for personal injuries, and the defendant appeals from the judgment.

[1] The plaintiff was the rear brakeman of a freight train running from Dodge City to Newton, and at the time he was injured the train upon which he was at work was engaged in hauling interstate shipments. The crew consisted of the conductor, engineer, fireman, and a head and rear brakeman. The train was made up of 62 freight cars. Just before the train left Larned, which is 22 miles west of Great Bend, the conductor directed the plaintiff to go forward and act as fireman of the engine while he himself took charge of the engine and acted as engineer from that point to Great Bend, for the purpose of allowing the regular engineer and fireman and the head brakeman to go to the caboose and eat their dinner. It required 45 minutes to run from Larned to Great Bend. The plaintiff testified that when he and the conductor finished eating their dinner the conductor said:

"You can go to the head end; you and I will take charge of the engine and let the engine crew come back and eat."

"I obeyed instructions. . . . When we got to the head end he told me to get up and finish taking water for the fireman; then he told me to fire the engine from there to Great Bend. . . . It must have been about 2:30 when I got on the engine at Larned. . . . As we turned the curve going into Great Bend, the conductor said he heard a noise and asked me to look and see if I could see anything dragging. I looked and told him I couldn't see anything. He says, 'Get down on the step and look.' I told him as soon as he shut off for town I would. As he shut off for town I turned on the blower and got down on the step, and I was looking. As we hit the passing track the tire came off and hit the blow-off cock and the blow-off cock hit my leg and knocked me off the step."

He also testified:

"Neither the engineer nor the fireman nor the brakeman objected to the conductor and me relieving the engineer and fireman and letting them go back and eat. I didn't object; I didn't dare to. We had done that frequently before."

With reference to the brakes the plaintiff testified that the conductor looked at them just before going into Pawnee Rock, and it showed that the brake was set a little, about four or five pounds, and he released it, and said, "Look how much faster it is picking up the train—how much faster it is going." The other brakeman testified that the exchange of positions on the train was made in order that the rest of the crew might eat their dinners, and that it was done for the interest of the company in order to get over the road; that they had been accustomed to do this under the same conductor; that they had been doing it most of the time that he was on that run, for about a year.

The jury found for the plaintiff in the sum of \$3,000, and returned special findings of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—54

† Rehearing denied February 12, 1915.



fact, including the following, which defendant claims are inconsistent:

"Q. 6. If you find for plaintiff, state the exact negligence of which defendant was guilty upon which you base your verdict. A. 6. Defective tire on right rear driver.

"Q. 7. State the exact defect (if any) in the engine tire and wheel which caused the tire in question to come off. A. 7. Improper use of brake, causing expansion of tire.

"Q. 8. How long had the defect in the engine tire or wheel in question existed (if at all) prior to the time of the accident? A. 8. Between Pawnee Rock and Great Bend."

Manifestly the sixth and seventh findings cannot, technically speaking, be correct. The improper use of the brake did not constitute a defect in the tire, though there was evidence to sustain a finding that the tire became defective by reason of such improper use. Nor was the defective condition of the tire an act of negligence, but it may have been, and the evidence seems to indicate that it was, caused by a negligent act in improperly using the brakes. It seems more than probable that the answers to questions 6 and 7 became in some manner transposed. We think the three findings, considered together in the light of the evidence, the contention of the parties, the general verdict, and all the circumstances of the case, should be construed to mean that the improper use of the brakes, causing an expansion of the tire, is the negligence of which the jury intended to find the defendant guilty; that the defect in the tire consisted of an undue expansion, caused by such negligent use of the brake; that this defective condition of the tire arose between Pawnee Rock and Great Bend, and that there was nothing wrong with the tire previous to that time. The findings were not attacked by a motion on the part of the defendant, nor a request to have the answers made more specific or definite, nor was judgment asked upon the findings. It does not seem possible that the defendant was prejudiced by the manner in which these answers were returned, nor do we find anything to indicate that the jury were attempting to evade the questions. In view of what we have said, we cannot regard the findings as so inconsistent with each other or with the general verdict as to justify the granting of a new trial.

It is insisted that the finding that improper use of the brake caused an expansion of the tire was wholly speculative, and without any basis in the evidence to support it. The evidence of the plaintiff, in substance, to the effect that for five or six miles after leaving Larned the conductor ran the engine with the brakes partially set; evidence of the defendant that the tire had been inspected the day before, and was not loose when the engine left Dodge City; the evidence of an ex-engineer, who testified that a tire can be made to work loose by using the brakes too much or too severely and sliding the wheels, and all the circumstances in evidence showing the manner in which the accident occurred—furnish a sufficient basis for the finding. While,

as suggested, there was nothing to show any sliding of the wheels, there was sufficient evidence to support a finding that the tire became loose as a result of improper use of the brakes.

We discover no fatal variance between the statements of plaintiff's petition and the proof. The allegation that plaintiff was acting in the line of his duty as a brakeman when he stood on the step of the engine is in accordance with the theory upon which the petition was obviously drawn, which is that it was his duty as a brakeman, acting under the control of the conductor, to obey orders, even if that required him to perform temporarily the duties of a fireman. The jury find that the tire became loose between Pawnee Rock and Great Bend. The petition alleged that the tire had been loose two days prior to the accident, and that defendant knew, or had opportunity to know, of such defect. Conceding a variance here between the allegations and the proof with respect to notice, it cannot be regarded as prejudicial if, as we shall attempt further on to show, the plaintiff's right to recover in no manner depends upon whether or not the defendant knew, or had opportunity to know, of any defect in the tire. There is a variance in the averments of the petition and the proof which arises from the fact that for some reason the plaintiff saw fit to allege that the name of the unauthorized person who was operating the engine was unknown to him, and that, although the engineer and fireman were wrongfully absent from the engine, plaintiff did not know upon what part of the train they were at the time of the accident. Of course, he did know who was running the engine and knew where the engineer and fireman were; but it does not appear that defendant has been prejudiced by the misstatements of fact in the petition.

The defendant insists that plaintiff was performing work outside the regular scope of his employment without direct authority from the company. It is, of course, true that at the time of his injuries he was not performing the usual duties of a brakeman; he was acting, for the time being, as a fireman; but it by no means necessarily follows that in so doing he was acting outside the scope of his employment.

Did the conductor have authority to order the plaintiff to perform temporarily the duties of a fireman? The plaintiff offered in evidence certain rules of the company, and others were offered by the defendant. One rule requires that freight brakemen must be on top of their trains when approaching and passing stations. Another declares that the post of the rear brakeman is on the last car in the train, which he must not leave while the train is in motion, except to apply the brakes, without instructions from the conductor. Rule 452 provides that engineers will not permit persons to ride on engines other



than designated employes in the discharge of their duties, without a written order from the proper authority. Another rule places the engineer under the direction of the conductor in the management of trains, but provides that engineers will not obey instructions that will endanger the safety of the train or require a violation of rules. One rule holds the enginemen responsible with the conductor for the safety of the train; another holds conductors responsible for the safe management of their trains, and for the strict performance of duty of all persons employed thereon; another provides that conductors must instruct their brakemen in all their duties.

From an examination of these rules we fail to find any express provision prohibiting a brakeman from performing the duties of a fireman upon the orders of the conductor, nor do we find any rule which seems to limit the control of the conductor over the acts and conduct of the brakeman within the scope of the latter's employment while the train is in the conductor's charge. If the railway company desired to make a rule that under no circumstances should a brakeman act as fireman without orders from some officer superior to the conductor, it would seem a very easy matter to have so provided.

The conductor is given control of the train and of the train crew, and must instruct the brakemen in all their duties; he is given authority to order the rear brakeman to leave his post on the last car in the train. In view of the absence of any specific rule on the subject, we do not think it can be said that there is anything in the nature of the business or the manner in which it is usually carried on that would make it seem unreasonable that a brakeman might, on occasion, be called upon by a necessity or emergency to perform the duties of a fireman, and certainly it would not seem unreasonable in this instance. According to the plaintiff's testimony he had been a fireman on engines for five years on other railroads. So far as appears from the evidence, he may have been as well as qualified to perform the duties as the regular fireman. In our opinion, therefore, the conductor must be held to have had authority to order the plaintiff to act as fireman. His act in this respect, as well as that of the brakeman in obeying the order, seems to us as the necessary, natural, and proper result of the thing they were employed to do. Whether an emergency existed requiring the exchange of the positions we think was for the conductor to determine, and the plaintiff, who was under his control, was not required to call for the papers or rules showing the conductor's authority.

The case of Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205, page 213, is in point. There the railway company was held liable for the negligence of the conductor of a work train in ordering a laborer to do work outside

the scope of his contract. In the opinion in that case it was said:

"It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. *But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority.* The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority, the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction. In this case Smith had charge of the train and of the men employed with it. In what he did, he was not purposely committing any wrong outside the employment, but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose not to injure Williams but to advance the interests of the railway company." (Italics ours.)

Was the plaintiff acting within the scope of his employment at the time he was injured? As we have said, the mere fact that he was employed as a brakeman and was injured while temporarily performing the duties of a fireman does not settle that question. He was employed as a brakeman, but if the duties of a brakeman required him to obey the orders of the conductor even to the extent of acting as fireman when in the opinion of the conductor there was an emergency or a necessity that he should perform such duties, then it would seem to follow necessarily that in obeying the orders of the conductor he was not acting beyond the scope of his employment. Whether a certain act is outside the scope of the servant's employment frequently depends upon the other question whether the superior officer has authority to require him to perform the service. This is the view taken by Judge Cooley in *Rodman v. Mich. Central R. R. Co.*, 55 Mich. 57, 20 N. W. 788, 54 Am. Rep. 348. The question there was whether a brakeman can recover against the railway company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence. The Michigan court was equally divided, and therefore the judgment of the lower court denying such liability was affirmed. Judge Cooley wrote the opinion for those members of the court who held there was no liability, and in the opinion used this language:

"And the only question there can be in this case is whether the plaintiff was ordered to do something which, under the circumstances, was outside of his employment, so that, had he been inclined to do so, he might rightfully have refused obedience to the order. And this, as it seems to us, must depend upon whether, when the contingency appears to the conductor to render it necessary, that official may, for the occasion, take charge of the engine and at the same time require the brakeman to continue to per-

form his service. That contingencies may and do arise in which the conductor should take charge of the engine for the time is undoubted. The necessity may sometimes be as urgent as it is plain, and lives may depend upon it. This might happen from injury to the engineer, or sudden illness, and when to leave the train where the disability of the engineer occurs would endanger some other train. But there might be other reasons for the engineer leaving his post, for which the company would not be in fault, and the conductor, with the train in his charge and under obligation to avoid other trains, must act in the emergency as the necessities of the case shall require. *His highest and plainest duty in some circumstances will be to take possession of the engine and operate it.*" 55 Mich. 58, 20 N. W. 788, 54 Am. Rep. 348. (Italics ours.)

It was held that the conductor was acting rightfully in taking charge of the engine, but that the plaintiff's suit failed because he had assumed the risk of the injury. The other members of the court held that the services were not contemplated by the plaintiff's contract, but the conductor in the exercise of his authority having ordered him to perform services of increased peril, the case was—

"no different from what it would have been had the defendant been a natural person, and without possessing the requisite skill and experience and being wholly unfit and incompetent, had himself undertaken to run and manage the engine, and had at the same time ordered the plaintiff to couple the cars, and the injury had resulted in consequence of the want of fitness, competency, skill, and experience of defendant." 55 Mich. 63, 20 N. W. 791, 54 Am. Rep. 348.

This division of the court held that the case was ruled by the decision in *Chicago & N. W. Ry. Co. v. Bayfield*, supra.

In *Barry v. Hannibal, etc., Ry. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610, it was held that where a servant steps outside his usual duty and the departure is such as the necessity of the case fairly and reasonably calls for, keeping in view the character of the work the servant is contracting to perform, then such departure will not of itself defeat a recovery of damages in case he is injured. In that case an engineer was killed by being run over by a hand car. He had left his engine, although the rules required him to remain there.

The following Kansas cases cited by defendant, *Hudson v. M., K. & T. Ry. Co.*, 16 Kan. 470, *Crelly v. Telephone Co.*, 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, and *Kemp v. Railway Co.*, 91 Kan. 477, 138 Pac. 621, were all cases where the plaintiff sought to hold the master liable for an assault committed by the servant. In each case it was held that the tortious act of the servant was outside the scope of his employment, and that, for the time being, the relation of master and servant was suspended. In the *Kemp* case, a brakeman shot and killed one who had been stealing a ride on a freight train after the trespasser had left the train at the brakeman's command. It was said in the opinion:

"It is difficult to state with precision the exact meaning of the phrase 'scope of the employment,' but from the foregoing expressions in decisions and text-books it may be said generally that, to fix liability upon the master or employer, the act must not only be done in the time, but in pursuance of the objects, of the employment, in furtherance of duty. If done solely to accomplish the employé's own purpose or device, although in an interval of his regular service, the employer is not liable." 91 Kan. 481, 138 Pac. 623.

In the *Orelly* case, supra, the duty of the servant was to have the plaintiff sign a voucher for compensation due her at the time she was quitting the service. Because she refused to sign the voucher he violently assaulted and beat her. It was held that the use of force for such a purpose was not within the scope of his employment. In the opinion it was said that "to assault or beat a telephone operator is not a recognized or usual way of procuring her signature to a voucher on which to draw the wages due to her." 84 Kan. 24, 113 Pac. 388, 33 L. R. A. (N. S.) 328.

While we do not wish to be understood as intimating that it would have made any difference if there had been proof in that case showing that for some time that had been the usual and customary way for the telephone company to procure signatures to vouchers, nevertheless in determining the scope of plaintiff's employment in the present case some consideration must be given to the fact that it appears from the testimony that it had been the usual custom for more than a year for this particular train crew to exchange positions and for the conductor and a brakeman to operate the engine while the enginemen went to the caboose to eat their dinner.

It is manifest that little aid can be had from a consideration of those cases where a corporation is sought to be held liable for the wrongful or malicious act of an agent or servant where the doing of the act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant. As a general rule, it is true that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all, the master cannot be held responsible for what he does, nor is it sufficient that the servant did the act with the intent to benefit or serve the master. The act must be done in attempting to do what the servant has been employed to do.

In the case of *Gavigan v. Lake Shore, etc., R. Co.*, 110 Mich. 71, 67 N. W. 1097, cited by defendant, a section hand was a member of a gang engaged in relaying a track, and it became necessary, in order to distribute the rails, to move two freight cars. The plaintiff was injured in obeying the order of the section boss to climb upon one of the flat cars for the purpose of moving it so that the

rails might be distributed, and it was held that he was acting outside the scope of his employment. It was therefore held that he had assumed the risk, and, further, that the negligence of the section boss was that of a fellow servant. We decline to follow that case as an authority on the question of the scope of the servant's employment. It seems to us that it would be far more reasonable to hold that the act of the plaintiff in that case was a necessary, natural, and proper result of what he was employed to do, rather than to hold that in such a situation the work of laying the rails must stop while a train crew was sent for to move the freight cars.

Another case cited by defendant is *Richmond & D. R. Co. v. Finley*, 63 Fed. 228, 12 C. C. A. 595, holding that:

"An engineer in temporary charge of a train, in the absence of any conductor, cannot waive a rule, well known to a brakeman, absolutely prohibiting brakemen from coupling and uncoupling cars except with a stick, by ordering such brakeman to go between cars and place in position, by hand, a bent coupling link, which cannot be controlled with coupling sticks." Syl. 1.

This, and the case of *Indiana, etc., Gas Co. v. Marshall*, 22 Ind. App. 121, 52 N. E. 232, proceed upon the principle that it would establish an unsafe rule to hold that a superior officer could, without direct authority from the company, change safe and proper rules adopted by the master for the performance of the work, and direct workmen to prosecute their labors in dangerous places, and that if the danger or peril which the workman is directed to do by his superior officer is plain and obvious so that he understands its dangerous character, it is his duty to decline the employment. These cases can hardly be said to be in point in view of the fact that the defendant has failed to call our attention to any absolute rule or a rule of any kind prohibiting a brakeman from acting as a fireman under the orders of the conductor.

In *Brown v. Jarvis Engineering Co.*, 166 Mass. 75, 43 N. E. 1118, 32 L. R. A. 605, 55 Am. St. Rep. 382, it was held that the foreman of a gang of men employed in constructing a foundation for a printing press has no authority, while such work is suspended because of the presence of a van containing rolls of paper which must be unloaded and rolled into the basement of the building, to direct the men constituting a part of his gang to assist with such unloading, though their so doing may expedite the work for which they were employed. It was said in the opinion:

"In the construction of a building it frequently happens that one set of workmen has to wait until another set of workmen gets through, but it never has been supposed that this would authorize a foreman of a gang of painters to direct his men to assist carpenters or plasterers, or to attempt to do their work, although the doing of it might, in a sense, be said to facilitate the car-

rying forward of the work of painting. Men are employed because they are supposed to be skillful in their particular trades, and, when they are set to do a work within their trade, they carry no implied authority from their master to engage in any other trade." 166 Mass. 77, 78, 43 N. E. 1119, 32 L. R. A. 605.

It was further said in the opinion:

"The act of the defendant's servants was not a necessary, or natural, or proper result of anything that the servants were employed to do."

In the present case everything that was done by the conductor and the plaintiff in operating the engine was done in furtherance of the defendant's business, undoubtedly for the purpose of avoiding delay in the operation of the train while the engineer and fireman were taking their dinner. How can it be said that the conductor and fireman had temporarily laid aside the master's business while engaged in running the train from Larned to Great Bend?

It is true that, according to the statements of the petition, the plaintiff knew that the conductor was not an experienced engineer, and knew that it was no part of the conductor's duty to operate the engine, and that no emergency existed requiring him to do so, and also knew that the conductor was acting in direct violation of the rules of the company. It is self-evident, as the defendant contends, that plaintiff would not have been injured if he had remained at the rear of the train; but if the conductor had authority to require plaintiff to perform duties upon the engine, the plaintiff may recover, notwithstanding his knowledge that the conductor was violating the rules of the company. *A., T. & S. F. R. Co. v. Randall*, 40 Kan. 421, 19 Pac. 783; *Chicago & N. W. Ry. Co. v. Bayfield*, supra. The jury by their verdict have found that an ordinarily prudent person in his situation would not have refused to obey the orders.

In our view, to hold that the conductor had authority to order the brakeman to perform the duties of fireman practically determines the case. The action was brought under the act of Congress known as the "Employers' Liability Law." The court instructed that if the jury found that the conductor ordered the plaintiff to go with him to the engine and act as fireman while he acted as engineer, and, after discovering that something was wrong with the engine, directed the plaintiff to get down on the step to ascertain what was the matter, the plaintiff was justified in obeying the instructions and orders of the conductor notwithstanding a rule to the effect that the post of duty of the plaintiff as rear brakeman was on the last car, unless the danger in complying with the orders of the conductor was so obvious and imminent that an ordinarily prudent person acting as brakeman would refuse to obey it, and that on the other hand, if they found that plaintiff did not use that degree of care for his own safety which an ordinarily pru-

dent person under like circumstances would have exercised, either in getting upon the engine and acting as fireman, in compliance of such order, or in attempting to make the examination, he could not recover.

The court also charged in substance, that if the conductor carelessly and negligently applied the brakes to the wheel and caused the tire to expand and become loose, and the plaintiff was directly injured by reason thereof, then the defendant was guilty of negligence and would be liable to the plaintiff for injuries sustained, provided the plaintiff did not assume the risk incident to the examination of the tire, as otherwise indicated in the instructions, and, further, if they found he was guilty of contributory negligence, they were directed to apportion the damages as provided in the federal Employers' Liability Act. We think the instructions correctly stated the law, and that there was evidence to sustain the verdict and findings.

[2] In view of all the evidence, including the showing that the plaintiff had years of experience as a fireman on an engine, we think the jury was justified in finding that an ordinarily prudent person with his experience and in his situation would not have refused to act as fireman, nor to attempt to make the examination to ascertain what was the matter with the engine when the conductor ordered him so to do. In this view of the case the variance between the averments of the petition and the proof respecting the defendant's knowledge or notice of the defective condition of the tire, as well as the finding that the defect itself occurred only a few moments before the accident, and the instructions of the court on that issue, are of no importance. We rest our decision on the proposition that the conductor of the train had authority to direct the brakeman to perform the duties of a fireman on the engine whenever it appeared to the conductor necessary that an exchange of that kind should be made; and, even though the conductor was violating a rule of the company in acting as engineer, that would not defeat the plaintiff's right to recover. If the conductor's negligence in assuming to act as engineer without experience, and in improperly using the brakes caused the accident which resulted in the plaintiff's injury, under the limitations mentioned in the instructions, the plaintiff is entitled to recover for injuries occasioned by the negligence of the servant of the defendant. The question of notice goes out of the case. For instance, if the negligence of the conductor while operating the engine had instantly injured the plaintiff so that the company could not be said to have had any notice at all of any defect caused by the negligent act in time to have remedied it, still the company would be liable for his negligence.

It follows that the judgment must be affirmed. All the Justices concurring.

(34 Kan. 78)

DIEBALL et ux. v. WILHITE. (No. 19204.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. PLEADING (§ 376\*)—VERIFIED GENERAL DENIAL—ISSUES—EXECUTION OF WRITTEN INSTRUMENT.

While a verified general denial standing alone will raise the issue of the execution of a written instrument, it cannot be given that construction, where in the same answer there is an admission of the execution coupled with the denial that it was in existence at the date it purports to be executed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.\*]

2. ALTERATION OF INSTRUMENTS (§ 22\*)—EFFECT ON RIGHTS—FORECLOSURE—DEFENSE.

As between the maker and the payee, the terms of a note and mortgage given to secure it may be altered by erasures and interlineations in material matters; and, where the real estate has been sold subject to the mortgage, the purchaser may not defeat foreclosure on the ground that material alterations were made in the written instruments, unless he has suffered prejudice thereby.

[Ed. Note.—For other cases, see Alteration of Instruments, Dec. Dig. § 22.\*]

3. MORTGAGES (§ 460\*)—FORECLOSURE—BURDEN OF PROOF.

In the situation presented by the facts recited in the opinion, the burden of proof, in an action upon a note and mortgage, was upon the plaintiff, and it was error to place the burden upon the defendants.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1348-1352; Dec. Dig. § 460.\*]

Appeal from District Court, Pawnee County.

Action by John Wilhite against William Dieball and wife. From a judgment for plaintiff, defendants appeal. Reversed.

G. P. Cline and Nellie Cline, both of Larned, and E. E. Glasscock, for appellants. F. J. Oyler, of Iola, for appellee.

PORTER, J. This is an action to foreclose a mortgage. The plaintiff formerly owned the property, which consists of a hotel at Garfield, and he traded it to a man by the name of Mason for a farm in Missouri. Mason and wife gave him a mortgage on the hotel property to secure a note for \$1,000, and on the same day that the mortgage was executed they conveyed the property to the defendant William Dieball, the deed reciting that the conveyance was subject to a "first mortgage for \$1,000 dated to-day and due in two years from date, in favor of John Wilhite, drawing 6 per cent. and payable semiannually." There was a provision in the mortgage that if any interest on the note was not paid when due, "and if the taxes and assessments" were not paid when due, then the whole principal and interest thereon should become due. The petition alleged that the interest due on March 9, 1913, had not been paid, and also that the taxes were in default, and asked for the foreclosure of the mortgage and for a sale of the property to satisfy the lien.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[1-3] Dieball filed a verified answer, consisting of a general denial and an admission that he was the owner in possession of the property, and further alleged that neither the note nor the mortgage sued on was in existence at the time of the delivery of his deed, but were executed long after he had received the conveyance from Mason and wife. The case was tried to the court, and over the defendants' objections the court ruled that the burden of proof was upon the defendants, and this presents practically the only question involved in the appeal. After this ruling as to the burden of proof, the defendants introduced some testimony which, however, the court gave defendants leave to withdraw from the record; and the case was submitted upon the pleadings and the ruling as to the burden of proof. The court found the issues for the plaintiff and rendered a decree foreclosing the mortgage.

Attached to the petition and made a part thereof is Exhibit A, purporting to be a copy of the note sued upon. It reads as follows: "\$1,000.00. Sept. 9th, 1912.

"June 1st, 1914, after date we promise to pay to the order of John Wilhite, one thousand (\$1,000) dollars. For value received negotiable and payable without defalcation or discount and with interest from date at the rate of 6 per cent. per annum, and if the interest be not paid semiannually to become as principal and bear the same rate of interest.

"[Signed]

John M. Mason.  
"Angenette Mason."

A copy of the mortgage was likewise made a part of the petition, and it purports to set out a copy of the note which the mortgage was given to secure, and which reads as follows:

"\$1,000. Columbus, Ka. Sept. 9th, 1912.

"June 1st, 1914, we promise to pay John Wilhite one thousand dollars with interest at the rate of six per cent. from date, payable semiannually.

"[Signed]

John M. Mason.  
"Angenette Mason."

The original note and the original mortgage which were filed for cancellation at the time judgment was rendered are before us, and the copy of the note in the mortgage shows an erasure and alteration. The words, "June 1st, 1914," are written over an erasure and by a different typewriter and different ribbon from the other portions of the note. The original note also shows an erasure, the body of the note having been written with pen and ink, and the time when the note was due has been erased and the words "June 1st, 1914," written therein with an indelible pencil.

In *Threshing Machine Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470, it was held that in a suit upon a promissory note, a copy of which was set out in the petition showing a specified rate of interest, an answer consisting of a verified general denial casts the burden of proof upon the plaintiff, and further that under a verified general denial it is proper

to introduce proof to show an alteration of the note.

The answer in the present case consists of a general denial, and language which must be construed as an admission of the execution of the note and mortgage, but denying that they were in existence at the time the defendants purchased the property.

But whether or not the answer should be technically construed as a general denial of the execution of the particular note and mortgage, we think the burden of proof upon the pleadings rested upon the plaintiff. When the case was called for trial, the plaintiff was hardly in a situation to stand upon any technical rule as to the burden of proof. His petition asked for the foreclosure of a mortgage given to secure a certain note, a copy of which was made a part of the petition. Also, as part of the petition there was attached a copy of the mortgage which recites an entirely different note. There is no similarity in the two instruments except as to amount and dates. One is a negotiable promissory note; the other is nonnegotiable. Besides, plaintiff in his petition further alleged that the defendants had accepted a conveyance of the property subject to this mortgage. The answer set up a copy of the deed conveying the property to the defendants, which recited that the conveyance was subject to a note differing in terms from either of the notes referred to in the petition.

Without asking the court to reform the instruments, or attempting to offer some explanation of the inconsistent recitals of the petition, the plaintiff saw fit to stand upon his pleading and to insist that the defendants had the burden of proof upon the question whether the note sued on was the same one mentioned in the deed of conveyance. He offered no proof; but the original note and mortgage which were filed for cancellation show on their face erasures and alterations. Under what circumstances and by what authority these were made was not shown.

The court had overruled a motion to make the petition more definite and certain by requiring the plaintiff to state whether he was seeking to hold the defendants on a mortgage given to secure the indebtedness referred to in Exhibit A or that referred to in Exhibit B. In this situation of the pleadings, the plaintiff should have been willing to have assumed the burden; and we think it was error to cast it upon the defendants.

In *Stewart v. Balderston*, 10 Kan. 131, referring to a case where proper motions had been made to require a defective pleading to be made definite and certain, it was said in the opinion:

"And where the adverse party then refuses to amend his defective pleading, resists the motions to have it amended, and has the motions overruled by the court, the most rigid rule of the common law should prevail. No statement of fact in the pleading, which the motions reached, should then be taken as true unless well

pleaded; and, if any such statement would bear different constructions, the party demurring should be allowed to adopt any one of such constructions which he should choose. \* \* \* After a party has received full notice that his pleading is defective in some particular, and has been asked to correct it, it is his fault if it still remains defective in such particular, and he is the one who should suffer on account of such defective pleading, and not the other party." Page 149 of 10 Kan.

On the other hand, it is quite clear that, as between themselves, the maker and payee could alter the terms of the note and mortgage to suit their pleasure; and, as against the defendant who purchased the real estate subject to the mortgage, they could likewise alter the terms and conditions of the note and mortgage, provided such alterations did not prejudice the rights of the defendant. Upon his own theory he purchased subject to a mortgage given to secure a note for \$1,000, due two years from date, but with a provision in the mortgage for the acceleration of the maturity of the debt if the interest and taxes were not paid when they became due, and, if there was no default in payment of the interest and taxes, the plaintiff could not maintain an action to foreclose as to him, until two years from the date the note was executed. However, it is our opinion that in the state of the pleadings the plaintiff was required to offer proof, and that it was error to place the burden of proof on the defendant.

The judgment will be reversed, and the cause remanded for further proceedings. All the Justices concurring.

(94 Kan. 71)

**WILLIAMS v. WESSELS et al.** (No. 19203.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**1. VENDOR AND PURCHASER (§ 244\*)—OUTSTANDING RIGHTS—NOTICE—SUFFICIENCY OF EVIDENCE—SPECIFIC PERFORMANCE.**

In an action for the specific performance of a contract to sell real estate, the evidence is examined and held sufficient to support a finding that a subsequent purchaser was chargeable with notice of the plaintiff's rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. § 244.\*]

**2. DESCENT AND DISTRIBUTION (§ 6\*)—OPERATION OF STATUTE—REAL ESTATE—RESIDENCE.**

The provisions of the act regarding descents and distributions relate to lands in Kansas owned by any intestate at the time of his death, irrespective of his residence.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28-32; Dec. Dig. § 6.\*]

**3. HUSBAND AND WIFE (§ 15\*)—CONVEYANCE BY HUSBAND—EFFECT—SUBSEQUENT PURCHASER—NOTICE.**

Where the owner of land in Kansas executes a valid contract for its sale, in which his wife, who was at one time a resident of the state, does not join, a later deed executed by the husband and wife transfers her interest in the land free of any claim of the original purchaser,

notwithstanding the grantee has notice of the prior contract.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13, 16, 37, 84, 90-99, 283; Dec. Dig. § 15.\*]

**4. SPECIFIC PERFORMANCE (§ 10\*)—SALE CONTRACT—RIGHT—ABATEMENT OF PRICE—HUSBAND AND WIFE.**

Where the owner of land in Kansas, whose wife has at one time been a resident of the state, contracts for its sale, agreeing to convey a full title, and his wife refuses to join in the deed, the purchaser may enforce specific performance against the husband, or any one who claims under him with notice of the contract, so far as that is possible, receiving an abatement in the agreed purchase price to the extent to which the value of the title he obtains is diminished by the outstanding interest of the wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.\*]

Appeal from District Court, Butler County.

Action by Camel Williams against Herman Wessels and others. From the judgment, plaintiff and defendant O. P. Shearer appeal. Modified and affirmed.

Chas. B. Hudson and Clyde M. Hudson, both of Wichita, for appellants. Kramer & Benson, of El Dorado, for appellees.

MASON, J. Herman Wessels, a married man residing in Idaho, owned a tract of land in this state. On November 3, 1911, he entered into a written contract for its sale to Camel Williams for \$5,500. On November 7th, he undertook to sell it for \$6,650 to O. P. Shearer, to whom he and his wife executed a deed, dated November 3d, but acknowledged November 10th and 17th, and recorded on the last-named date. Williams brought an action against Wessels for the specific performance of his contract, making Wessels' wife and Shearer parties, and alleging among other things that Shearer had taken the deed with notice of Williams' rights. A decree was rendered granting specific performance, but requiring the plaintiff to take the title subject to the interest originally held in the land by Mrs. Wessels, in virtue of her being the wife of the owner, and having at one time been a resident of Kansas, which interest she had transferred to Shearer. Shearer appeals and asks a reversal on the ground that he bought the land without notice of the plaintiff's claim, and that the decree rendered is inequitable. Williams also appeals and asks that the decree be modified so as to award him a full title, or, if that be not done, that he be allowed an abatement of the purchase price proportioned to the diminished value of his title due to the unextinguished interest of Mrs. Wessels.

[1] Shearer maintains that the contract is too indefinite to be enforced, on the ground that it did not mention a mortgage on the land which Wessels orally agreed to pay off, and that it did not specify where the purchase money was to be paid and the deed de-

livered. It was not necessary that the written contract should mention the mortgage. Wessels contracted to give a good title, and this required him to take care of any lien not otherwise provided for. The contract was left at a bank. It contained a provision that Williams was to deposit \$1,000 with it, to be paid to Wessels when the deal was closed, and that \$2,000 more (substantially the balance over a mortgage that was to be assumed) was to be paid at the same time. The fair inference is that the money was to be paid and the deed delivered at the bank. Shearer also contends that the petition was defective in not asking specific performance against him. A point is made also that the evidence did not correspond with the allegations of the petition. It is apparent that when the pleading was framed the plaintiff was not fully advised of the facts. We think it sufficiently apprised the defendants of the nature of the plaintiff's claim.

Shearer contends that he bought the land without notice of Williams' claim, and that there is no evidence to the contrary. The evidence on the subject is not very explicit, but we think it sufficient to justify the inference that he had such information as put him on inquiry, and would, if followed up with due diligence, have brought to him knowledge of the actual situation. A witness gave substantially this testimony: I. J. Hysom, a real estate agent, asked him to buy the land, but he refused, stating that he did so for two reasons, first because Williams was a friend of his, and second because he did not believe he could get a good title, knowing that the land had been sold on a contract; on the 4th or 5th of November, or a few days later, Shearer came to the office of this witness and told him he thought he was mistaken in what he had said to Hysom, that he would not get a good title knowing the land had been sold under contract; the witness persisted in his opinion, saying that he would buy the land if he were not afraid to, that he would not buy knowing of the previous sale; Shearer contended that if he (Shearer) got the deed he would get the title. Shearer gave a somewhat different version of this conversation, and insisted that it took place after he had secured his deed. The deed which Shearer received showed that the name of Williams had been written as grantee, and then erased. There was other evidence bearing on the matter, but this sufficed to impute to him knowledge that prior negotiations for a sale had progressed so far that a binding contract was believed to have resulted, and that a deed had been prepared, bearing the date November 3d, naming Williams as grantee. It was sufficient, in view of all the circumstances, to warrant a finding that he was chargeable with notice of the claim of Williams. *Faris v. Finupp*, 84 Kan. 122, 113 Pac. 407. Complaint is made of the introduction of certain evidence, but any of it that

was incompetent must be presumed to have been disregarded. *McCready v. Crane*, 74 Kan. 710, 88 Pac. 748. A question is raised as to the sufficiency of the plaintiff's tender of performance, but in view of the defenses made this is hypercritical. In behalf of Shearer it is argued that the decree of specific performance against him is harsh and unjust. If he bought with notice of the Williams contract, as the court found, he voluntarily took the risk and suffers no legal or equitable wrong from the enforcement of a valid contract.

[2] In behalf of Williams the contention is made that he should have been given a complete title to the land. A first reason assigned is that Mrs. Wessels has no interest in it because her husband is not a resident of Kansas, and it is necessary that he should die while a resident of this state in order for her to invoke the statute allowing to a widow one-half of the lands in this state at any time owned by her husband, to which she has made no conveyance. Gen. Stat. 1909, § 2942. The section relied on to support this view reads:

"After allowing to the widow and children of any deceased intestate of *this state* the homestead provided in the next section of this act, and the personal property and other allowances provided by law respecting executors and administrators and the settlement of the estates of deceased persons, the remainder of the real estate and personal effects of the *intestate*, not necessary for the payment of debts, shall be distributed as hereinafter provided." Gen. Stat. 1909, § 2985.

The argument is that the italicized words "the intestate" refer to the intestate already described, that is to "any deceased intestate of this state," so that all the subsequent provisions regarding the distribution of the property of intestates refer only to those who die while residents of Kansas. The words "of this state" are employed with obvious reference to the homestead provision, and, while as a mere matter of grammatical construction they might be regarded as qualifying the term "the intestate" in the latter part of the section, we cannot believe that to have been the intention of the Legislature.

[3, 4] Williams maintains that he should have been given an absolute title to the property, on the ground that Mrs. Wessels, being a party, asserted no claim to it, and her interest cannot be regarded as having passed to Shearer, because the transaction was tainted with fraud. Taking the facts to be as found by the court, "fraudulent" may be too strong a term to apply to the conduct of the defendants. After Wessels had executed the Williams contract, his deed to any one else, who had notice of it, could not affect the rights of Williams to have it enforced, irrespective of the motives of the parties. But Wessels, the only person with whom Williams had a contract, could not convey his wife's interest. Since he had promised to give Williams a clear title, good

faith and fair dealing would seem to require that he should try to induce her to join in carrying out the agreement. But even if her refusal to sign the deed was at his instigation, it was a lawful act on her part, since she had an absolute right to refuse for any reason she thought sufficient, or for no reason at all other than her own pleasure. Williams had a right to compel a deed from Wessels, but not from Wessels' wife—the law gave him a remedy by which he could acquire all the interest held by Wessels, but that of Mrs. Wessels was beyond his reach. In this situation Shearer received a deed from Wessels and his wife. Because of the knowledge he had of the prior contract, he took the interest of Wessels charged with Williams' equitable right to it; but he took the interest of Mrs. Wessels, as she held it, free from any such claim, unless he was incapacitated from doing so by the unconscionable character of the transaction. The extent of his offending was this: He undertook to buy the land knowing it had been contracted to Williams, professing ignorance of the prior contract in order to make his purchase effective. This ought not to disable him from retaining any benefits of his bargain to which Williams had no legal or equitable claim. We therefore think the trial court rightly decided that Williams could not require the conveyance of the interest in the property held originally by Mrs. Wessels, and by her transferred to Shearer.

But while we decide that Williams could not exact more from Shearer than he could have required from Wessels, his remedy should be as effective against one as against the other. And Wessels was personally liable upon his contract, notwithstanding his inability to perform it in full. *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640. The question remains whether, having received a less title than he had bargained for, Williams should not have a corresponding abatement in the purchase price. On this matter there is some conflict, but the weight of authority, and as we think the better reason, supports the view that there should be an abatement in the price, or that the purchaser should be indemnified against loss, which amounts to practically the same thing. The purchaser does not receive what he bargained for, and by the usual rule in such cases should not be required to pay the full amount agreed upon. There is some practical difficulty in measuring the value of the interest in the land which he does not acquire, but not more than in many other instances where damages are assessed which are not capable of exact computation. The right of a wife with respect to land owned by her husband in this state is regarded as an existing interest, capable of conveyance (*Munger v. Baldrige*, 41 Kan. 236, 243, 21 Pac. 159, 13 Am. St. Rep. 273), and, so far as affects the matter now under consideration,

is not substantially different from the common-law dower, the law concerning which in this connection is thus stated:

"The usual rule as to specific performance with abatement from the price is applied, in many of the states, to the case of a purchase from a married man, whose estate is subject to his wife's inchoate dower right. The purchaser may have specific performance, with a deduction from the price of such sum as represents the present value of the wife's contingent interest, estimated by the usual rules and tables. By the practice in a number of states, instead of making an abatement of a lump sum from the purchase price, estimated as the present value of the wife's inchoate dower interest, the court gives an indemnity to the vendee against such interest. \* \* \* By the rule in New Jersey the vendee will be indemnified against the wife's contingent dower if the wife's refusal to join was by collusion with, or the fraudulent procurement of, the husband; otherwise the vendor is not entitled either to an indemnity or compensation during the lifetime of the husband." 36 Cyc. 744.

See, also, note 24 L. R. A. 764; note Ann. Cas. 1914A, 207; 26 A. & E. Encycl. of L. 83; and these cases, cited in 13 Mich. Law Rev. 346-347; *Hirschman v. Forehand* (Ark.) 170 S. W. 98; *Long v. Chandler* (Del.) 92 Atl. 256.

The judgment is affirmed, with this modification: Unless Shearer shall elect to transfer the full title in consideration of the full purchase price named in the contract, the proportion by which the value of the land is diminished by reason of the outstanding interest shall be ascertained and deducted from the amount upon payment of which the plaintiff is to receive the title subject to this interest. All the Justices concurring.

(33 Kan. 743)

#### STATE v. CURTIS. (No. 19118.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

#### 1. HOMICIDE (§ 308\*)—INSTRUCTIONS—EVIDENCE.

In a trial for murder, aside from proof of a few collateral circumstances, the evidence consisted of testimony of a previous confession of the defendant and the testimony of the sole eyewitness of the shooting. The information in one count charged murder in the first degree perpetrated in an attempt to rob, and also murder in the first degree independent of an attempt to rob. Aside from the confession, the evidence was insufficient to sustain the charge of murder in an attempt to rob. The defendant testified at the trial that the confession was untrue, and gave testimony that he had nothing to do with the crime and knew nothing about it, and gave testimony tending to prove that the confession had not been freely or voluntarily made and the prosecution offered testimony tending to show that it had been so made. This conflict in evidence was submitted to the jury with instructions not challenged here and the alleged confession was read in evidence. The jury were instructed "that under the evidence and the information in this case \* \* \* the defendant is either guilty of murder in the first degree or he is not guilty." It is held:

Upon the charge of murder in the first degree, apart from the allegation of an attempt to rob, the jury should have been instructed upon the lesser degrees if there was any evidence although

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



slight, tending to show any lesser offense included in the principal charge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.\*]

2. HOMICIDE (§ 308\*)—INSTRUCTIONS—EVIDENCE.

The evidence, apart from the confession, was sufficient to require instructions upon the lesser degrees.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.\*]

3. HOMICIDE (§ 308\*)—INSTRUCTIONS—CONFESSION.

Upon the confession alone considered as an entirety, and entirely true, instructions upon the lesser degrees were unnecessary.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-647; Dec. Dig. § 308.\*]

4. CRIMINAL LAW (§ 538\*)—EVIDENCE—CONFESSION—PROBATIVE EFFECT.

It was the province of the jury to believe or disbelieve all or any part of the evidence of the confession, and to accept as proof of guilt, or to reject, the confession or any part of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1227-1229; Dec. Dig. § 538.\*]

5. HOMICIDE (§ 340\*)—INSTRUCTION—GROUND FOR REVERSAL.

The instruction complained of was erroneous, and upon all the testimony the error appears to have been prejudicial to the substantial rights of the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

6. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—WAIVER OF ERROR.

Upon the circumstances stated in the opinion, the defendant did not waive the error by failing to ask for further instructions; the attention of the court having been directed to the matter which such requests would have called attention to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

Appeal from District Court, Sedgwick County.

Guy Curtis was convicted of murder in the first degree, and appeals. Reversed, with directions to grant new trial.

Dale, Amidon & Madalene and Brubacher & Conly, all of Wichita, for appellant. J. S. Dawson, Atty. Gen., and George McGill, of Wichita, for the State.

BENSON, J. [1,2] The defendant appeals from a conviction of murder in the first degree. The principal error alleged is in an instruction to the jury that the verdict must be for murder in the first degree or not guilty.

The information in one count charges murder in the first degree by willful, deliberate, and premeditated shooting, and murder committed in an attempt to rob, which is murder in the first degree whether deliberate and premeditated or not. The statute is:

"Every murder which shall be committed by means of poison or by lying in wait, or by any kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of an attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree." Gen. Stat. 1909, § 2494.

It will be seen that murder is in the first degree when committed: (a) By poison; (b) by lying in wait; (c) by any kind of willful, deliberate, and premeditated killing; or (d) in the "perpetration of an attempt to perpetrate any robbery \* \* \* or other felony." The construction of the phrase in quotation marks suggests a possible change in revision or compilation. In the corresponding section in the Compiled Laws of 1862, the word "or" appears in place of "of," as printed in the General Statutes of 1868 and of 1909, but the latter omits the word "other" between "any" and "kind," found in the General Statutes of 1868. These matters, however, are unimportant, at least in the present inquiry.

Counsel for the state say in their brief that the Legislature "has seen fit to make a legal presumption \* \* \* that a homicide committed, perhaps unintentionally, or accidentally, or unwittingly, in the perpetration of an attempt to perpetrate a robbery, shall be deemed, that is shall be considered or regarded as, murder in the first degree." The conclusion thus stated is not justified. The statute reads "every murder," not "every homicide," and malice aforethought is essential to murder in either degree. *Craft v. State of Kansas*, 3 Kan. 450, 482; *State v. Ireland*, 72 Kan. 265, 83 Pac. 1036. While murder committed in an attempt to rob is deemed murder in the first degree, the general charge of murder in the first degree not alleging an attempt to rob includes murder in the second degree and manslaughter. In a case where the general charge is made, the court is required to instruct the jury concerning every lesser degree to which the evidence applies, and evidence includes all reasonable inferences from direct testimony. *Brown, Adm'r, v. A., T. & S. F. R. Co.*, 31 Kan. 1, 1 Pac. 605; *State v. Demming*, 79 Kan. 526, 100 Pac. 285. But where the evidence shows beyond question that a defendant is either guilty of murder in the first degree or innocent, it is unnecessary upon the general charge of murder in the first degree to instruct the jury upon any other degree. It follows that the sufficiency of the instruction complained of must be determined by the evidence. If, however, there is even slight evidence tending to prove a lesser degree, an instruction is erroneous which restricts the jury from finding a verdict accordingly. *State v. Patterson*, 52 Kan. 335, 34 Pac. 784; *State v. Buffington*, 66 Kan. 706, 72 Pac. 213; *State v. Moore*, 67 Kan. 620, 73 Pac. 905; *State v. Clark*, 69 Kan. 576, 77 Pac. 287; *State v. McAnarney*, 70 Kan. 679, 685, 79 Pac. 137; *State v. Newton*, 74 Kan. 561, 87 Pac. 757.

The principal evidence of the prosecution consisted of a previous confession of the defendant, which he repudiated at the trial, and the testimony of an eyewitness.

The defendant has been a resident of Wich-

ita since 1910. On the 25th day of February, 1911, he was living there with his father. He was then 18 years of age. Burton M. Reed was killed on the evening of that day while walking with his little daughter on a street in Wichita. On October 20th of that year the defendant returned from Oklahoma, where he had worked as a farm hand since the preceding August. Soon after his return he was suspected of having some complicity in killing Reed, and, being so accused, he stated that Benton Houston had killed him; that he heard the shot and saw Houston running away with a smoking gun in his hand. The testimony of the defendant given on the trial in this case tended to show that these statements were not voluntary and free, but were made through fear and to avoid arrest. On the other hand, the testimony of the state tended to prove that his declarations were voluntary and not made under restraint, compulsion, or fear. The defendant was discharged without trial. Houston was also arrested for the crime but discharged at the preliminary examination, when the defendant was immediately rearrested and placed in jail. While there, in the presence of the chief of police, the county attorney, a stenographer, and one, perhaps two, other persons, a confession was made, taken down in shorthand, and transcribed as follows:

"Houston came up to my room, on Saturday some time, I think it was, and wanted to go out and get some money some way, and I asked him how he wanted to get it, and he said he wanted to stick somebody up and wanted to know if I would go with him, and I asked him when, and he said we had better go right now. He came to my house some time that evening, and we went up to Schnoor's Cigar Store, and played a game or two of pool there. From there we went up North Topeka eight or ten blocks, and didn't see any one, and we came back down Main street to the Phister Pool Hall. We stayed in there until about 11 o'clock, somewhere near there, and we went up to Topeka avenue and went south to the second block on the south corner, and he looked and seen this couple across the street, and wanted to know if we could get them, and I told him it didn't make any difference to me, and they were on the east side of the street, and we were on the west, and we got ahead of them and came across the street where that building was going up, and we got in behind that toolhouse, and he handed me his gun and wanted me to hold the gun while he got the money. I told him that I wouldn't do it, and I gave his gun back to him, and he said he would, and I started around the toolhouse and got possibly nearly around it, and I heard this shot fired, and he came around the toolhouse and went up the street. When I seen him run, I ran too. I went to the next corner north, and he turned and got on the sidewalk, and I went up the street and caught up with him in the next block on Emporia avenue, and we walked on up to my room at 331 South Emporia. We stayed in there and talked about 10 or 15 minutes, and he wanted to leave his gun there with me that night, and I took his gun and put it away, and he went on home to the Hamilton Hotel. He came up to 331 South Emporia the next morning and wanted to borrow \$5 on his gun and watch, and I said, 'All right,' and he said he would have the money in about a week. The next Thursday I went to the Hamilton Ho-

tel and asked for him, and they said he had left town. That's about all there is to it."

Answering questions of the county attorney, the defendant said that the statements he had given previous to the first arrest were untrue. He made some other answers in harmony with and perhaps emphasizing the confession above recited, but these answers are not deemed material to the present inquiry.

The daughter of the victim, a girl ten years old when the shooting occurred, who was with her father at the time, testified:

"We started to walk home after 10 o'clock on South Topeka street, and got to about the tenth block, near Gilbert street. No one was with my father but myself. We walked on the east side of the street and passed no one going down Topeka avenue to Gilbert street, and no one passed us. Going north Gilbert street runs across Topeka avenue east and west. The Grace M. B. Church and the toolhouse were on the corner of Topeka and Gilbert streets on the side that we were walking. The church was being constructed, and the building in which they keep their tools is just a little toolhouse. They were on the north side of Gilbert street and east of Topeka avenue. A sidewalk runs between the church building and the toolhouse. The toolhouse stood on the parking between the street and the sidewalk. My father was walking on the inside, next to the church, and I was walking on the outside. If any one had turned around us next to the street as we walked in that block I would have noticed them. We did not meet any one. As we arrived near the corner of Topeka and Gilbert streets, where the toolhouse was, a man stepped out from the south end of the toolhouse, said a few words, and shot. I don't know what he said. We were almost to the south end of the toolhouse at the time the man stepped out. I noticed the gun that he had. It looked to me like a new one—shiny. It was a short pistol. I didn't notice how he held it. The first I noticed it was when it was fired and it was pointed at my Papa. Papa was north a little bit of the man who fired the shot, and I was still standing on the west side of Papa when the shot was fired. After the shot was fired, Papa moaned and fell over onto his face. The man who fired the shot ran around the south end and on the west side of the toolhouse and north on Topeka avenue just as far as I could see him. I couldn't tell whether or not he came back from the street to the sidewalk, but could hear him running just a few steps. He turned and ran just as soon as he fired the shot. \* \* \*

At the trial the defendant testified that his confession was untrue, that he knew nothing of the shooting of Reed and had nothing to do with it. Without giving the language or details, it is sufficient for the present purpose to say that he also gave testimony tending to prove that the confession was obtained by unfair means, while the evidence offered by the state tended to prove that it was made freely and voluntarily. Upon this conflicting evidence which we need not discuss, the confession was admitted in evidence and submitted to the jury upon instructions which will be referred to again. Their sufficiency, however, is not challenged in the argument.

It will be noticed that in the testimony of the only person who witnessed the tragedy there is nothing tending to prove a robbery or

attempt to rob, but only the fact that the fatal shot was fired immediately following a few words which were not understood by the witness. If this were the only evidence offered in support of the charge of murder in an attempt to rob, that particular charge could not be sustained; it must therefore stand or fall upon the evidence of the confession. On the charge of murder in the first degree, independent of any attempt to rob, the degree of crime could not be determined by the court, but should be left to the jury, under the statute and all the decisions of this court upon the subject. The only theory upon which the instruction that the defendant must be convicted of murder in the first degree, or acquitted, could be based, is that the crime was committed in an attempt to rob, the proof of which rests entirely upon the evidence of a confession. This confession, it must be remembered, was not made to the court or jury, but was related by witnesses as statements they had heard him make.

[3-5] If the jury were bound to believe the evidence of the confession in its entirety, or reject it altogether, the instruction would be easily sustained; but they were not. It is elementary that jurors are exclusive judges of facts whether established by evidence of a confession or otherwise. It might be said that there is no good reason for accepting a part of the confession as true and rejecting another part, but that was for the jury to determine. It frequently happens that the statement of a witness, although relating only to a single matter, is believed in part and disbelieved in part for reasons inherent in the narration or appearing in collateral circumstances; some of the testimony being given ready credence, and some as readily rejected. It is the right of the jury to believe or disbelieve a witness in whole or in part. Not only is the weight of the testimony of any witness for the jury, as they are usually told in the instructions, but the weight of every part is equally for their determination. It seems unnecessary to cite authorities on this proposition, but they are close at hand. In *State v. Kittle*, 70 Kan. 241, 78 Pac. 407, after referring to the duty to instruct on inferior degrees, it was said:

"In behalf of the state it is argued that the defendant's own version of the affair was either true or false; that if it was true he was innocent of all offense and should have been acquitted, while if it was false he was guilty to the full extent of the accusation against him. The fallacy of this argument lies in the assumption that the defendant's narrative must be accepted as either wholly false or wholly true; whereas, in fact, it may have been a combination of truth and falsehood."

The same principle was applied in *State v. Jackett*, 81 Kan. 168, 171, 105 Pac. 689, 19 Ann. Cas. 118, where it was stated that the jury were not bound to treat the defendant's testimony as wholly false or wholly true, for it in fact might be partly false and partly true. This is equally true of a confession.

There is another aspect of the case which should be considered. The jury were warranted upon the instruction of the court in rejecting the confession altogether. They were told:

"It is for you to determine for yourselves whether the alleged confession of the defendant was made freely and voluntarily, without any influence of hope or fear. If so, you may consider it. If not, it is no evidence. Any menace or threat, or any hope engendered or encouraged that the prisoner's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession, thereby superinduced, from your consideration."

The jury may have so excluded the confession, and based their verdict on the testimony of the eyewitness and the talk of the defendant which led to his first arrest given in evidence on this trial in which no reference was made to any robbery or contemplated robbery. To meet such possible finding of the jury, instructions might have been given to the effect that a murder committed in an attempt to rob was murder in the first degree; but, in the absence of such an attempt, the jury should determine the degree, appropriate instructions being also given defining such degree. This phase of the case, possible under the evidence, was excluded from the consideration of the jury by the instruction complained of.

[6] It is suggested in behalf of the state that the failure of the defendant to request instructions upon the inferior degrees waived any error in the instruction objected to. In deciding this question of waiver the language of the instruction should be considered. It was:

"That under the evidence and the information in this case \* \* \* the defendant is either guilty of murder in the first degree or he is not guilty, and you should return the verdict either that he is guilty of murder in the first degree as charged and set forth in the information or that he is not guilty; but whether he is guilty or not is for you to determine from the evidence and the instructions given you in this case."

It will be seen that this was not merely an instruction upon the constituent elements of murder in the first degree, omitting mention of other degrees. If that had been the case, the contention that a request should have been made for instructions upon other degrees would have more weight. The jury were told that the defendant was guilty in that degree or not guilty at all. Thus the attention of the court was already directed to the very matter, which requests for instructions upon other degrees would have called attention to. The discussion of this matter with a review of previous decisions in *State v. Winters*, 81 Kan. 414, 105 Pac. 518, sufficiently shows the views of the court upon the question of waiver. It was there said:

"From all the decisions noted it may be concluded that the statute means what it says and should be followed, but that a duty rests on counsel for the defendant to aid and not to ambush the court, and consequently instructions should be requested covering all lesser degrees or lesser crimes involved in the main charge

which the defendant desires to be considered. A request sufficient to direct the mind of the court to the subject is enough. Good instructions need not be offered, or a good theory for them formulated; and the evidence itself may point so plainly to the necessity for such instructions that no request is necessary."

A request for instructions upon the lesser degrees, which the court by this instruction held not applicable, would only direct attention again to a matter considered and acted upon. There was no ambush.

It is concluded that the district court erred in giving the instruction complained of, and that the error was prejudicial to the substantial rights of the defendant. Having so concluded, it is not necessary to consider other assignments of error which involve matters not likely to arise upon another trial.

The judgment is reversed, with directions to grant a new trial. All the Justices concurring.

(84 Kan. 22)

**SAPPENFIELD v. NATIONAL ZINC CO.**  
(No. 19171.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**1. NEGLIGENCE (§ 119\*)—PERSONAL INJURIES—PLEADING AND PROOF.**

In a personal injury action it is not error to allow the plaintiff to introduce evidence that he was injured by reason of the defendant's want of care specifically set out in the petition, concurring with a condition not there referred to, where he does not rely on such condition as constituting negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

**2. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—EVIDENCE.**

Error in the admission of evidence in support of a particular allegation of negligence is ordinarily cured by the withdrawal of such allegation.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**3. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—SAFETY DEVICE—EVIDENCE.**

Whether or not it would otherwise have been competent to show that the safety device, the want of which was relied on as constituting negligence, was used in another part of the defendant's plant, evidence to that effect was rendered admissible by testimony that upon complaint having been made by the plaintiff a promise had been given to him that the same device in use elsewhere should be provided at the place where he was afterwards hurt.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**4. MASTER AND SERVANT (§ 221\*)—INJURY TO SERVANT—SAFE PLACE TO WORK—PROMISE TO REPAIR.**

Where an employé complains of a condition affecting the safety of his place of work, and is promised a change in that regard, such complaint and promise have the same effect upon the employer's liability for a subsequent injury, whether the condition complained of resulted from an appliance being out of order, or from its want of fitness to meet the needs of the situation; the important consideration being wheth-

er the condition was such that its continuance was inconsistent with the exercise of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.\*]

*(Additional Syllabus by Editorial Staff.)*

**5. MASTER AND SERVANT (§ 221\*) — ASSUMPTION OF RISK—PROMISE TO REPAIR—"DEFECT."**

The word "defect," as applied to a master's liability for injuries to a servant resulting from failure to remedy a defect on complaint by the servant, means any condition inconsistent with ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Defect*.]

Appeal from District Court, Wyandotte County.

Action by Daniel G. Sappenfield against the National Zinc Company. From judgment for plaintiff, defendant appeals. Affirmed.

Sherman & Landon, of Kansas City, Mo., for appellant. Bird & Pope, of Kansas City, Mo., and Angevine, Cubblison & Holt, of Kansas City, Kan., for appellee.

MASON, J. Daniel G. Sappenfield recovered a judgment against the National Zinc Company for injuries received while in its employ, and it appeals. It was a part of the plaintiff's duty to attend to a furnace 12 feet long, 7 feet wide and 12 to 15 feet high, in the top of which were several openings, a foot and a half square, ordinarily closed with iron covers, but opened for the purpose of feeding coal and slack. As the coal burned, a crust would form, and before fresh fuel was introduced it was necessary to break this up by prodding it with an iron bar 10 or 12 feet long, introduced through one of the holes referred to. The plaintiff was injured while poking the fire in this manner. He had just started to poke it when a flame burst out through the opening to the height of 10 or 15 feet, burning him severely. The conduct of the defendant which is relied upon as constituting negligence was the omission to provide small holes, little larger in diameter than the iron bar referred to, through which it might be inserted, thus preventing the escape of flames while the fire was being poked, a device employed upon another of the defendant's furnaces.

[1] Witnesses for the plaintiff were permitted to testify that both furnaces were equipped with "safeties," that is with valves at the bottom that were supposed to open as the coal fell, and so relieve the pressure; that at the time of the injury these valves on the furnace where the plaintiff was hurt were in poor condition and were not working; and that if they had been in proper condition the flame would have gone out at the

bottom instead of at the top. The defendant complains of the admission of this evidence on the ground that it amounted to charging it with a form of negligence that was not alleged in the petition. We do not regard the complaint as well founded. It was competent for the plaintiff to try to show just how the injury was occasioned. It may have been due to the concurrence of two causes, only one of which was the result of the defendant's want of care; this being a sufficient basis for liability. 29 Cyc. 496. If it was due to two concurring causes, the stopping of the valves and the want of small poke holes, no prejudice results to the defendant from the plaintiff electing to exculpate it from all blame for the former, and to rest his case upon the claim that the latter was culpable. Counsel for the plaintiff distinctly stated that the condition of the valves was not relied on as a ground of negligence. For the same reasons the trial court was justified in refusing an instruction that the jury should disregard all the evidence concerning the "safeties." If the request had been to instruct them that no recovery could be based on the condition of the valves as a ground of negligence, it would doubtless have been given.

[2] The petition as originally drawn alleged that the defendant was negligent in not providing a larger platform for the plaintiff to stand on while poking the fire. One of the plaintiff's witnesses was asked whether the platform was large enough to give a man room to get out of the way of the heat. The defendant objected to the question as calling for a conclusion. The objection was overruled and a negative answer was returned. The ruling is now complained of, on the ground that the width of the platform had nothing to do with the accident. At the conclusion of the evidence the allegations of negligence with respect to the size of the platform were stricken out on motion of the plaintiff. This was a withdrawal of the claim of negligence in that regard, and rendered the ruling non-prejudicial.

[3] Objection is also made to the evidence that the other furnace referred to was equipped with small poke holes. It has been said that:

"Evidence that some other kind of instrumentality would have been safer and better than that which caused the injury should be excluded." 3 Labatt's Master & Servant (2d Ed.) § 931, p. 2506.

But there seems to be a conflict of authority on this point. 8 Encycl. of Evidence, 938. The fact that an appliance by which an employé is injured is not so safe as one used elsewhere does not constitute negligence, but it does not follow that it is not in some circumstances a fair matter to be taken into consideration in determining the existence of negligence. It does not establish, and may not tend to establish, any standard to which the employer is bound to conform; but it

may sometimes throw light on the feasibility of providing a higher degree of protection. Here, however, the evidence was rendered competent upon another ground. Evidence was introduced tending to show that the plaintiff had complained of the want of proper poke holes, and had been promised that they should be provided. The testimony of one witness is thus stated in the abstract:

"He heard Sappenfield make complaint to Moore [the foreman] about the same time that he made a complaint, which was four or five days before Sappenfield was burned. The remarks made to Mr. Moore were that he would like to have the poke holes in the top of No. 2 [the furnace where the injury occurred] like they were on No. 1 [the other furnace]; didn't see why they didn't have them that way, and heard Moore say he thought so himself, and would try and have them put there, and heard him say that to Sappenfield."

In view of this evidence, which had a manifest bearing on the question of assumption of risk, it was competent to show the character of the poke holes on the other furnace, in order that what had been said concerning them might be fully understood.

[4, 5] The defendant maintains that there was no evidence of negligence on its part. Whether ordinary care required small poke holes to be provided was a fair question for the jury. The defense of assumption of risk was relied on, but is met by the evidence of a complaint of the existing condition and a promise to remedy it. The defendant asserts that the complaint-and-promise principle applies only where an old appliance is out of repair and requires restoration, not where a new kind of appliance is demanded. Such is not the rule. It has been said that unless the condition complained of (whether due to an appliance being out of order, or to its not being adapted to meet the needs of the situation) is such as to sustain a charge of negligence, the failure of the employer to keep a promise to improve it will not render him liable for an injury which would have been prevented by such improvement; in other words, that the condition complained of, in order that the promise may affect the employer's liability, must amount to a "defect," but that word in this connection applies to any condition which is inconsistent with the exercise of ordinary care. The contention is also made that the conversation narrated by the plaintiff's witnesses did not show a promise to remedy the defect complained of. Whether what was said was fairly to be interpreted as a promise made under such circumstances as to relieve the plaintiff from carrying his own risk was a question for the jury. *Anders v. Railway Co.*, 91 Kan. 378, 137 Pac. 966. The defense of contributory negligence is relied on, but this also presents an issue of fact, which is concluded by the verdict and judgment.

An instruction concerning contributory negligence, going somewhat into detail, was refused; but its substance was sufficiently cov-

ered in the general charge. The language of the instructions given on the subject is criticized, but we think when read as a whole they sufficiently advised the jury as to the law of the case.

Complaint is made that the amount of the verdict—\$1,500—is excessive. There was evidence of pain and permanent injury, and we cannot say that the verdict is without support.

The judgment is affirmed. All the Justices concurring.

(91 Kan. 57)

**FRERE v. MISSOURI, K. & T. RY. CO.**†  
(No. 19193.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 193\*)—OBJECTION BELOW—NECESSITY—PLEADING.**

An action which should have been brought under the workmen's compensation act (chapter 218, Laws of 1911, as amended by chapter 216, Laws of 1913) was brought and tried as one arising under the act relating to mines (Gen. Stat. 1909, § 4992). No suggestion was made by the defendant that either party had filed its nonacceptance of the provisions of the compensation act, and the pleadings and instructions were in accordance with an act brought under the mining statute; no request being made for different instructions. *Held*, that the defendant cannot be heard to complain for the first time in this court on appeal that the petition contained no allegation that either party had elected not to accept under the terms of the compensation act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.\*]

**2. APPEAL AND ERROR (§ 1005\*)—DAMAGES (§ 163\*)—RECOVERY FOR PERMANENT INJURY—PROOF.**

Permanent injury is to be proved like any other issuable matter; and when there is competent testimony showing, or fairly tending to show, its existence, and the jury have found that the plaintiff was permanently injured, and the verdict has been approved by the trial court, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005; \* Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.\*]

Appeal from District Court, Cherokee County.

Action by Jules Frere against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Brown and James W. Reid, both of Parsons, and Al. F. Williams, of Columbus, for appellant. McNeill, Stephens & McNeill, of Columbus, for appellee.

WEST, J. June 26, 1913, plaintiff filed his petition charging that on April 19, 1913, he was burned while working in a coal shaft in one of defendant's mines by an explosion of gas. It was charged that the defendant knew or should have known that gas was generating in the mine, and that explosions

were liable to occur; that the defendant unlawfully and negligently failed to have the working places therein examined or properly inspected. The answer consisted of a general denial and an allegation that whatever injury occurred was due solely to the plaintiff's carelessness and failure to comply with the orders and instructions of the mine foreman; further that he knew the exact condition; that he assumed the hazards; and that the coal produced by the mine was used in interstate commerce. The jury returned a verdict in favor of the plaintiff for \$1,000, \$410 of which were for permanent injuries, as shown by the special findings. The instructions were strictly in line with an action under the statute for failure to comply with the provisions governing the operation of mines; the jury being expressly told that the laws of this state require the operator of a coal mine to appoint a competent fire boss, whose duty it is to carefully examine and inspect every working place and opening in such mines and to notify the employees of the existence of fire damp or gas, and that a willful failure to comply with these provisions or any violation of them, which was the approximate cause of the injury, would make the defendant liable. The defendant appeals and insists that the petition contained no allegation that either party had elected not to accept under the terms of the compensation act, and that there was no evidence to sustain a recovery for permanent injuries.

[1] Under section 7, c. 216, Laws of 1913, all employers entitled to come within the provisions of the act shall be presumed to have done so, unless they file with the secretary of state a written statement that they do not so elect, and under section 8 a similar rule is laid down touching employees. It is argued that, in the absence of an allegation of nonacceptance, it must be presumed that the parties were acting under the compensation act. The plaintiff replies that, under the circumstances of the case, he should be permitted to amend his petition and prove what he suggests is a fact not shown by the record that the defendant had filed a statement which has been a matter of record since April 19, 1913; that, unless thus permitted, the remand, if ordered, should be for the sole purpose of trying this question.

When the parties are actually within the purview of the compensation act, no other remedy than the one therein provided remains. *Shade v. Cement Co.*, 92 Kan. 146, 139 Pac. 1193; *McRoberts v. National Zinc Co.*, 144 Pac. 247. The statutory presumption that all employers affected by the act are within this provision remains until the contrary appears, and the matter of election to stand outside of the provision is an affirmative defense. *Gorrell v. Battelle*, 144 Pac. 244. Presumptions of law need not be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 12, 1915.

pleaded. Code Civ. Proc. § 131 (Gen. St. 1909, § 5724). As the pleadings, proceedings, and instructions were all in line with a statutory action for damages under section 4992, and as the affirmative defense of nonelection was not presented, it is difficult to see how the defendant can complain.

[2] As to the other question presented, while it is true that it was testified by physicians that the burns were first degree burns, and that a gas explosion to affect the hearing would have to be strong enough to burst the eardrum, still the testimony showed that the burns covered the face, ears, back of the neck, both hands, and a portion of the forearm; that the plaintiff was confined to his home about two weeks; that at the time of the trial, which was seven months after the injury, the plaintiff's right ear was at times swollen and blistered on the inside and caused an eruption, so that the plaintiff could not hear, and that he could hardly read at nights on account of the injury to his right eye; that he never had anything wrong with him before the injury; that whenever his ears were swelled he could not sleep on account of a sensation like that of a hammer pounding. One of the physicians testifying on behalf of the plaintiff was asked if, from the character of the injury he saw, after the burns had passed away they would leave no permanent injury, and his answer was: "I could not say that."

Numerous authorities from other states are cited to the effect that, before recovery can be had for permanent injury, reasonable certainty of such injury, and not merely possibility thereof, must be shown. This is also the rule in this state. In *C., R. I. & P. Co. v. Kennedy*, 2 Kan. App. 693, 702, 43 Pac. 802, 805, it was said:

"Before such damages can be given, the evidence must show that the permanency of the injury is reasonably certain; there must be more than a mere possibility that such will be the result."

It was further said that the jury should have been instructed as to the degree of proof required, but that the failure so to instruct would probably not be reversible error, as no further instruction was requested on that subject. There is no essential difference between proof of permanent injury and proof of any other matter. If competent evidence showing, or fairly tending to show, its existence be submitted, the weight and effect thereof are for the jury, and, from the evidence already referred to, it would seem fairly deducible that the plaintiff will never be free from the results of the burning and concussion.

Finally, no objection was made to proceeding as if the action were one for damages under the act relating to mines (General Statutes 1909, § 4992). No instruction was offered touching the compensation act, but

both parties tried the issues as framed by the pleadings, and on that basis no error is apparent. It is too late now to invoke the provisions of the compensation act for the first time.

The judgment is affirmed. All the Justices concur.

(94 Kan. 83)

GLENN v. ST. LOUIS & S. F. R. CO. et al.  
(No. 19209.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR (§ 1002\*)—SCOPE OF REVIEW—CONFLICTING EVIDENCE—WEIGHT.

The rule that the Supreme Court cannot weigh conflicting evidence or go farther in its examination than to see that there is substantial testimony to support the finding or verdict of the trier of the facts is herein applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

2. RAILROADS (§ 350\*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

The rule that an employé of a railroad company, whose duties require his presence upon the track and preclude the strictest watch for the approach of trains, is not necessarily guilty of contributory negligence, as a matter of law, if he omits to look and listen for the approach of a train which strikes and injures him, but that he is required to exercise such reasonable care as the circumstances surrounding him would suggest to a man of ordinary prudence, is herein applied.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

3. RAILROADS (§ 348\*)—ACCIDENT AT CROSSING—SUFFICIENCY OF EVIDENCE.

On a challenge of the sufficiency of the evidence, it is found to be sufficient to sustain the verdict of the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

Appeal from District Court, Wyandotte County.

Action by Caroline Glenn against the St. Louis & San Francisco Railroad Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John H. Lucas, of Kansas City, Mo., and A. L. Berger, of Kansas City, Kan., for appellants. T. A. Pollock and E. C. Little, both of Kansas City, Kan., for appellee.

JOHNSTON, C. J. Caroline Glenn brought this action against the St. Louis & San Francisco Railroad Company, the Kansas City, Clinton & Springfield Railway Company, and Henry Hopkins, to recover damages for the death of her husband, John Glenn, which she alleged was caused by their negligence. They answered, denying generally the allegations in plaintiff's petition, and charging that the deceased was guilty of contributory negligence. It appears that the St. Louis & San Francisco Railroad Company, spoken of here as the Frisco, is the owner of the railroad tracks; that Hopkins, who was charged with

negligence in the killing of Glenn, was a watchman in the employ of that company, and that the Kansas City, Clinton & Springfield Railway Company runs trains over the Frisco tracks and the agent of the Frisco acts for both companies. A general verdict was returned in favor of the plaintiff and against all of the defendants in which the damages were fixed at \$1,500.

[1, 3] On this appeal it is contended that the evidence did not warrant the verdict rendered, and that the court erred in refusing to sustain defendants' demurrer to plaintiff's evidence and in failing to direct a verdict in favor of the defendants. There appears to be evidence which supports the verdict. John Glenn was an employé of a street railway company, and on the day of the accident was engaged in repairing tracks at the Frisco crossing. The evidence of the plaintiff tended to show that on that day the train of the Kansas City, Clinton & Springfield Railway Company approached the crossing at an excessive rate of speed; that no warning of the approach was given by whistle or bell; and that the Frisco watchman, Hopkins, negligently failed to warn Glenn, who was absorbed in his work, of the approach of the train, and that Glenn did not observe that the train was coming until his attention was called to it by a fellow workman a moment before he was struck, and it was then too late to get out of the way of the train which struck and killed him. The testimony of the defendants was contradictory to that offered in behalf of the plaintiff, and was to the effect that the whistle was sounded as the train came towards the crossing; that Hopkins, the watchman, responded to the whistle by giving a signal to the engineer to proceed with the train; that warning was actually given to Glenn by Hopkins, but that he disregarded it; that he was walking on the outside of the track, and, just as the train came upon him, he turned in upon the track and was struck by the pilot beam of the engine. If the evidence offered by plaintiff is believed, it is sufficient to support the finding of the jury, while, if that of the defendants is accepted as true, the defendants were not negligent, and Glenn was killed through his own want of care. The credibility of the witnesses has been determined and the conflict in the evidence settled by the jury. This court cannot weigh the evidence or go farther in its examination than to see that there is evidence to sustain the verdict.

[2] There is a claim that Glenn was guilty of contributory negligence, but that issue, like the one that defendants were negligent, depends upon conflicting testimony. It is said that he knew or should have known of the approach of the train and could, by the exercise of ordinary care, have saved himself. Of course he could have seen the oncoming train if he had been on the lookout

for its approach, but naturally he would expect to receive warning from the watchman, who was there to watch and warn. Besides, a different rule applies to one like Glenn, whose duties required his presence on the track, than is applied to a traveler upon a highway who is about to cross. Negligence cannot be imputed to him, as a matter of law, for failure to continually look and listen while he is on the track; but as said in *Westine v. Railway Co.*, 84 Kan. 213, 220, 114 Pac. 219, 222:

"The failure to look and listen in such a case may or may not constitute negligence, according to the circumstances. The employé must exercise such care as the danger of his surroundings would suggest to a man of ordinary prudence and caution."

See, also, *Comstock v. U. P. Ry. Co.*, 56 Kan. 228, 42 Pac. 724; *Railway Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150; *Ray v. Railway Co.*, 82 Kan. 704, 109 Pac. 172.

There are some objections to the rulings made in instructing the jury, but the only objection upon which there is argument is that the instructions given were confusing, and that there was no evidence upon which to base some of them. The issues appear to have been fairly presented to the jury, and there was evidence sufficient to warrant the instructions given. We find nothing substantial in the objections to the rulings on the admission of testimony.

The judgment is affirmed. All the Justices concur.

(84 Kan. 92)

#### STATE v. BRIGGS. (No. 19354.)†

(Supreme Court of Kansas. Jan. 9, 1915.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1202\*)—SUCCESSIVE OFFENSES—"PERSISTENT VIOLATOR."

Under chapter 165, Laws of 1911, a sale of liquor or the maintenance of a nuisance in violation of the prohibitory law by one who is shown to have previously violated such law is deemed to constitute such person a persistent violator.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3260-3265; Dec. Dig. § 1202.\*]

#### 2. CRIMINAL LAW (§ 1211\*)—SUBSEQUENT OFFENSES—PUNISHMENT.

Whether such repeated violations be few or many, as shown by the evidence on the trial of a charge consisting of one or many counts, they constitute not many offenses but one, the penalty for which is imprisonment in the penitentiary at hard labor for not more than one year.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3302; Dec. Dig. § 1211.\*]

#### 3. INDICTMENT AND INFORMATION (§ 114\*)—PREVIOUS OFFENSES—"PERSISTENT VIOLATOR."

Each count of an information should be complete in itself, and in this class of cases should not merely charge that the defendant made a sale or maintained a nuisance and is a persistent violator, but should set forth the facts of the prior conviction and the subsequent violation in such manner as to show that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 12, 1915.



defendant, if the charge be true, has become a persistent violator.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 301-307; Dec. Dig. § 114.\*]

**4. CRIMINAL LAW (§ 1171\*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.**

Language used by the county attorney in addressing a jury, though somewhat improper, will not be deemed materially prejudicial unless such as fairly to lead to the conclusion that the jury were thereby swerved from the performance of their duty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8126, 8127; Dec. Dig. § 1171.\*]

**5. CRIMINAL LAW (§ 1201\*)—SUCCESSIVE OFFENSES—CONSTITUTIONALITY OF STATUTE.**

The rule already announced in other decisions, that the statute in question is constitutional, followed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3254; Dec. Dig. § 1201.\*]

Appeal from District Court, Shawnee County,

Will Briggs was convicted of violating the prohibitory law, and appeals. Affirmed except as to one count and remanded, with directions to set aside the sentence thereunder.

Janison & Jamison and H. G. Larimer, all of Topeka, for appellant. J. S. Dawson, Atty. Gen., and W. E. Atchison, of Topeka, for the State.

WEST, J. The defendant was charged in one count with having on the — day of October, 1913, unlawfully and feloniously sold one-half pint of whisky in violation of law and with having on the 3d day of the previous June voluntarily pleaded guilty to keeping and maintaining a common nuisance in violation of the prohibitory law, thereby becoming violator thereof. In the second count he was charged with having unlawfully and feloniously maintained a nuisance in violation of the prohibitory liquor law. A motion to quash the information was overruled. The jury were instructed that if they believed beyond a reasonable doubt that the defendant was on June 3, 1913, duly convicted upon his voluntary plea of guilty of maintaining a nuisance and was guilty of making the alleged sale as charged in the information, it would be their duty to return a verdict of guilty; that, under the second count, if they believed beyond a reasonable doubt that the defendant had maintained a nuisance as therein charged and had on the 3d day of June, 1913, been convicted upon his plea of guilty of keeping and maintaining a common nuisance, he would be guilty of a felony under the second count, and their verdict should be accordingly. The defendant was sentenced to the penitentiary for one year on each count in the information. Complaint is made that the former conviction was not pleaded in the second count, and that, even if it had

been so pleaded, it would not have charged any additional offense for which sentence could be pronounced.

[1, 2] The statute in question provides that any one having once been duly convicted "of the violations of the provision of the prohibitory law and who shall thereafter directly or indirectly violate the provisions of the prohibitory liquor law shall be deemed a persistent violator of the prohibitory liquor law and shall be deemed guilty of a felony," and upon conviction shall be imprisoned in the penitentiary at hard labor for not more than one year. Laws 1911, c. 165, § 1. As quite plainly indicated by the language of the section, when one is found guilty of a violation of the prohibitory law and at the same time is found to have been previously convicted of a violation thereof, the effect is to place the defendant in the status of a persistent violator, or, in other words, to classify him as one who has been judicially determined to possess a disposition to violate the prohibitory law persistently for which persistent violation he is to be punished. The legislators evidently intended to make good the saying that "The law is a terror to evil doers." The principle under consideration was decided in *State v. Shiffler*, 144 Pac. 845. It follows therefore that repeated violations shown by the evidence under one or many counts, when all added to the previous conviction, do not constitute separate felonies, but one; and hence, if the penalty imposed under the second count was additional to that imposed under the first count, such penalty would be erroneous. If, however, it simply runs concurrently with the other, the punishment provided by statute would not thereby be exceeded. In *re Welsman*, 93 Kan. 161, 143 Pac. 487. The transcript discloses that the penalties imposed were cumulative and not concurrent, and hence the one based upon the second count is void.

[3] While it is often sufficient to charge an offense in the words of the statute, still such words must be descriptive of such offense, and it is always the rule that the facts constituting the offense must be pleaded. *State v. Foster*, 30 Kan. 365, 2 Pac. 628; *State v. Bellamy*, 63 Kan. 144, 65 Pac. 274; *State v. Seely*, 65 Kan. 185, 69 Pac. 163; *State v. Buis*, 83 Kan. 273, 111 Pac. 189. Except for the use of the word "feloniously" in the second count, no fact is stated indicating persistency, and hence not even the language of the statute, nor that portion thereof that one doing certain things shall be considered a persistent violator was followed. Each count of an information requires the same completeness as an information containing but one count (*State v. Fields*, 70 Kan. 391, 78 Pac. 833), and in this class of cases should set forth the facts of the prior conviction and the subsequent violation in such manner as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices

to show that the defendant, if the charge be true, has become a persistent violator.

[4, 5] Earnest complaint is made of certain language used by the county attorney in addressing the jury, and it is argued that prejudice resulted therefrom to the defendant. We have carefully examined the statements indulged in, and, while some of them would have been better left unuttered, we find nothing which would fairly lead to the conclusion that the jury were by reason of such statements swayed from the performance of their duty. The ingenuity of counsel has suggested divers objections to various rulings upon the trial; but, no prejudicial error appearing therefrom, they need not be discussed. The validity of the statute is also assailed, but prior decisions set that matter at rest. *State v. Adams*, 89 Kan. 674, 132 Pac. 171; *State v. Schmidt*, 92 Kan. 457, 140 Pac. 843; *State v. King*, 92 Kan. 669, 141 Pac. 247; *State v. Watson*, 142 Pac. 956.

The judgment is affirmed, except as to the second count, and the cause is remanded, with directions to set aside the sentence thereunder. All the Justices concurring.

(94 Kan. 30)

**LINSCOTT STATE BANK v. FIDELITY & DEPOSIT CO. OF MARYLAND.**  
(No. 19182.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**PAYMENT (§ 47\*) — APPLICATION — RECOVERY BY WRONGDOER.**

An officer of a grand lodge died a defaulter, and his administratrix paid a 25 per cent. dividend on the amount of the defalcation. A bank was found to have knowingly permitted such officer to pay to it his individual debt with grand lodge funds, and was thereby held jointly liable with the estate for the amount of such payment, and paid a judgment recovered therefor by the creditor; such judgment being paid after the dividend had been paid. Thereafter the bank sued the creditor to recover 25 per cent. of such judgment on the theory that, the estate having paid such per cent. thereof, the creditor could be compelled to account therefor to the bank. *Held*, that the creditor had a right to look to the bank for the amount of the judgment and to the estate for the remainder of the defalcation, and that the bank cannot require the dividend to be applied to its portion of the joint liability.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 127, 129; Dec. Dig. § 47.\*]

Appeal from District Court, Jackson County.

Action by the Linscott State Bank against the Fidelity & Deposit Company of Maryland. From judgment for defendant, plaintiff appeals. Affirmed.

Wm. B. Sutton, of Kansas City, for appellant. Garver & Garver, of Topeka, for appellee.

WEST, J. The plaintiff in its petition alleged that about June 30, 1911, the administrative council of the Grand Lodge of Masons

of the state of Kansas recovered a judgment against the plaintiff for \$6,760 and costs; that prior to such recovery the defendant company had succeeded to the rights of the plaintiff in the action just mentioned; that the judgment was collected in full and was for a certain sum composed of two items, \$4,465.76 and \$934.09, making \$5,399.85, and interest, being moneys belonging to the grand lodge which the grand treasurer had paid to the plaintiff bank on account of his individual indebtedness to it, and which sums were a part of the grand lodge funds which the defaulting grand treasurer should have in his hands at the time of his death; that the grand treasurer's administratrix had been presented with a claim by the grand lodge for the total amount of the defalcation, which claim was allowed by the probate court and assigned to the fifth class; that afterwards the estate paid to the defendant a dividend of 25 per cent. of the total claim of the grand lodge; that the estate was primarily liable for the whole of the shortage, which was \$16,359.99, and the interest thereon, which included the two items making up the principal for which judgment had been recovered against this plaintiff; that the 25 per cent. dividend included \$1,339.18 of such principal and accrued interest amounting to \$1,455.88, and judgment was asked for this amount with interest. A demurrer to the petition was sustained, and the plaintiff appeals and contends that the petition shows on its face that the shortage was composed of separate and distinct items standing on their own bases; that the liability of the plaintiff was secondary and not primary and simply that of surety on the debt of the former grand treasurer to the extent only that the plaintiff had profited by the payment of his individual debts with grand lodge funds. That it was under obligation to make good only the amount so received if the grand treasurer or his estate did not, but that whenever the estate made good a portion thereof the plaintiff could be held liable for the balance only. The defendant denies that the grand lodge claim against the estate was made up of separate items, and asserts: That it simply represents a total of the grand treasurer's misappropriations and constitutes one legal claim against the estate which could be satisfied only by full payment. That "to the extent of the judgment obtained against it, the appellant was a party to this misappropriation and was liable for that amount. Both Sarbach and the bank were joint wrongdoers and each liable to the grand lodge for the full amount of the misappropriation which resulted from their joint acts." That the grand lodge or its assigns could rightfully pursue the remedies which were adopted until the entire amount of the defalcation had been paid. That whether or not the plaintiff could, after the payment of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied March 13, 1915.

the judgment against it, recover from the estate 25 per cent. thereof, it could not diminish the rights of the grand lodge or of the defendant its assignee.

Thus we have presented a most interesting law question and one so novel that it may have to be decided more upon principle than upon precedent.

It is apparent, and indeed it is conceded, that the bank could be held liable for only such portion of the entire shortage as it was instrumental in causing, which was \$5,399.85. Had this sum with interest been made good before the grand lodge's claim was filed with the administrator, such claim, instead of being for \$16,359.99, would have been the difference, and the grand lodge or its assignee could look no further to the plaintiff bank. It is equally clear that the entire defalcation constituted one claim for which the estate was primarily liable whether made up of one or many items, and that to the extent of \$5,399.85 and interest the plaintiff was equally liable regardless of whether such sum represented one or more items. In other words, in so far as both were jointly liable, such liability was not affected by the question as to what separate transactions and sums went to produce it. Had the bank and the former grand treasurer jointly caused the entire loss so that the bank and the estate would be jointly and severally liable for the whole shortage, then clearly both could be pursued until one or both paid in full, and a partial satisfaction by one would be no defense to the other against liability for the entire unsatisfied balance. That is, if each were liable for all, then a 25 per cent. payment by one would leave both responsible for the remaining 75 per cent. The peculiarity of the present situation is that, while the estate was liable for all, the bank was liable for only \$5,399.85 and interest, and had the estate paid 75 per cent. the bank could be looked to for the remaining 25 per cent. only, for the creditor can have but one satisfaction though many judgments. Here the creditor in effect had a judgment against the estate for \$16,359.99 and against the estate and the bank jointly for \$6,760, the amount due when the judgment was rendered. It may proceed against both only until the latter sum is realized, and then against the estate for the remainder. Indeed, the bank was never a judgment debtor for any sum beyond \$6,760 and interest. Now it so happens that when the bank satisfied this judgment in full, leaving the estate liable for the remaining loss, the latter had paid a 25 per cent. dividend, or one-fourth of the entire shortage, which left several thousand dollars still due the creditor. As between the bank and the creditor, the former has only done its duty, and the latter is not liable for any money had and received from the estate, because such money belongs to the creditor and the creditor is still the loser by some

thousands of dollars on account of the defalcation. If the estate in paying the creditor the 25 per cent. dividend used any of the bank's money, then possibly the bank may look to the estate therefor. *Ft. Scott v. Railroad Co.*, 66 Kan. 610, 72 Pac. 238. But that problem need not be solved until it directly arises.

It is argued that when the estate paid the dividend it thereby paid 25 per cent. of the bank's liability, which had already been paid in full, making 125 per cent. received by the defendant, the dividend covering the entire shortage and of necessity every constituent element thereof, and being a payment by compulsion and not by choice must be applied pro rata in liquidation of all the constituent items. In *Washbon v. Bank*, 86 Kan. 468, 121 Pac. 515, it was sought to prevent the grand master from asserting against the bank a claim included in the one allowed by the probate court, and it was urged that by presenting the entire claim and having it allowed against the estate the grand master was estopped to pursue a remedy inconsistent with such proceeding; that, having elected to treat the claim as a debt against the estate as for a conversion, he could not at the same time pursue the bank upon the theory of still owning the proceeds of the check there in controversy. It was held, however, that both remedies could be consistently pursued until there was one satisfaction. In *Sarbach v. Deposit Co.*, 87 Kan. 774, 125 Pac. 63, it was shown that the administratrix had collected about \$32,799 with which to meet debts of over \$76,000 and had asked an order of distribution among the undisputed claims and had been directed to pay 25 per cent. of all which had been allowed, except that of the grand lodge, which had been ordered to be held in abeyance until it could be determined how much could be recovered by the lodge in its suits against various banks and individuals. The district court on appeal directed the administratrix to pay without regard to the pendency of the cases referred to, and that order was affirmed by this court. It was there contended that the company should not be allowed to collect 25 per cent. of its claims against the estate until it should appear whether it could collect more than 75 per cent. from other parties sued, and that the other suits were for portions of the identical money which should have been in the hands of the defaulting grand treasurer. But it was said:

"We think the appellee has the same right to the 25 per cent. dividend as other creditors of the same class, and if, in any of the pending proceedings, any overplus should be recovered, the creditor must account to the estate therefor; but until such contingency happens neither of the debtors who have participated in the wrongful diversion of the fund in question can require the claimant to stay proceedings until it is seen how much some other debtor may be compelled to pay." Page 777 of 87 Kan., page 64 of 125 Pac.

The present proceeding is one step still further in advance, but we think it is governed by the same rule. In paying the judgment against it the plaintiff only performed its duty towards the defendant and only paid what it then owed the defendant. Upon such payment the account between the two parties was square. Their controversy was ended. The incident was closed. True when this payment was made the estate had paid the defendants towards its liability a sum amounting to one-fourth its total, but this still left three-fourths of such total due, save as diminished by the portion paid by the bank, and, should the defendant now be compelled to return one-fourth of the amount formerly paid to it by the bank, such one-fourth would be a complete loss to the defendant and a like gain to the bank.

The plaintiff cites authorities holding that the term "dividend" means a pro rata application to every item of a claim, but the situations presented by these cases are generally those of secured and unsecured claims, and plaintiff contends that the bank is in the position of a guarantor or surety for the defalcation and that the rule announced in these decisions applies. We think the difficulty with this proposition is that, while the bank was in a sense in the position of guarantor or surety, it came into that position by virtue of a tort committed jointly by itself and the former grand treasurer and is held for the shortage, not on account of a suretyship or a guaranty voluntarily entered into, but as a matter of law on account of its own wrong for which the injured party has a right to call upon the bank to respond in full regardless of what other wrongs the estate may answer for. Sureties are favorites of the law, and guarantors may at least stand upon their contract rights; but joint wrongdoers are in another class and not entitled to the same consideration. But counsel say this very defendant, in *Washbon v. Bank*, 87 Kan. 698, 125 Pac. 17, took the position of having waived the tort and cannot now be heard to invoke the doctrine of joint wrongdoing. It was there held that the action was not one for relief on the ground of fraud, but one on an implied contract to repay money fraudulently received. In the opinion it was said:

"The bank must have known that Sarbach had no authority to loan the funds and that it participated in the fraudulent use of the moneys for its own profit, \* \* \* and the bank also knew that the purpose of the loan was to enable Sarbach to perpetrate a fraud up-

on the grand lodge." Page 710 of 87 Kan., page 22 of 125 Pac.

Counsel say that the effect of the bank's knowledge of the source of the money taken was to raise a promise by implication where it had failed to make such promise (to repay) expressly, and that "with that the tort spent its force." We are unable to agree with this contention, but are impelled to conclude that the bank is not in a situation to force a return by the defendant of anything received from the estate.

It is urged that, in case of an involuntary payment like that of the dividend here involved, the option of the creditor to apply it to the unsecured portion of the debt does not exist, but that a pro rata application to all the debts must be made. The rule, however, is said to be that usually the application by the court will in cases of voluntary payment be pro rata, "but in some jurisdictions involuntary payments insufficient to pay all claims are applied by the court so as to pay the unsecured rather than the secured claims." 30 Cyc. 1228. Again:

"At common law, however, and in most of the states of this country, while there are cases laying down the rule that the creditor should be preferred, yet the general rule is that the court will make the application in such a manner, in view of all the circumstances of the case, as is most in accord with justice and equity and will best protect and maintain the rights of both debtor and creditor. \* \* \* It is generally held that the court will apply a payment \* \* \* to an unsecured debt in preference to one for which the creditor is secured, to a debt for which the security is most precarious where the creditor holds more than one security." 30 Cyc. 1240-1242.

Without deciding the exact rule of the application of payments which should govern in this case, it is sufficient to say that the plaintiff cannot rightfully complain of the application actually made. See *Medical Co. v. Hamm*, 89 Kan. 138, 130 Pac. 650.

No question is made by the defendant touching the right to recover an involuntary payment were such recovery otherwise proper; hence the correctness of plaintiff's position in this respect appears to be conceded.

The allegations of the petition that the judgment was made up of separate items which formed a part of the defalcation have not been overlooked, but they are not deemed sufficient, if true, to require the application of the dividend contended for by the plaintiff.

Having carefully considered each point raised, we find no error in the record, and the judgment is therefore affirmed. All the Justices concurring.

(94 Kan. 115)

In re TURNER. (No. 19858.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

## 1. HABEAS CORPUS (§ 30\*)—GROUNDS—JUVENILE DELINQUENTS — UNVERIFIED COMPLAINT.

A girl 15 years old found by the probate judge, sitting as the juvenile court, to be delinquent and incorrigible, to associate knowingly with immoral persons, to be growing up in idleness and crime, and violating the city ordinances by remaining out until late hours at night, was ordered committed to the Industrial School for Girls at Beloit. Her parents appeared without service of process on them, but the child was taken into custody by the probation officer upon a warrant based upon a complaint verified on information and belief. A hearing followed, and the testimony abundantly supported the findings of the court. Held, that such child is not entitled to a writ of habeas corpus because of failure to verify the complaint positively.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

## 2. INFANTS (§ 16\*)—JUVENILE COURT ACT—OBJECT.

The juvenile court act (Gen. St. 1909, §§ 5099-5113) has for its object, not the punishment of juvenile offenders for misconduct, criminal or otherwise, but their removal from the path of temptation and their direction into the paths of rectitude by preventive and corrective means.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

## 3. INFANTS (§ 16\*)—JUVENILE COURT ACT—OPERATION.

The act is an assertion of the state's power as parens patrie and its right to exercise proper parental control over those of its minor citizens who are disposed to go wrong.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

## 4. INFANTS (§ 12\*)—JUVENILE COURT ACT—PROCEEDINGS—CONSTITUTIONAL RIGHTS.

In the charge, apprehension, investigation, and order involved herein, the child was not denied any of her constitutional rights.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 13; Dec. Dig. § 12.\*]

## 5. INFANTS (§ 16\*)—JUVENILE COURT ACT—OBJECT.

By express declaration of the statute in question, and by the settled decisions applicable to similar enactments, all such proceedings, orders, and judgments are deemed to have been taken and done in the exercise of the state's parental power, and neither the stigma nor the penalty for crime can be held to accompany such proceedings or order.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

*(Additional Syllabus by Editorial Staff.)*

## 6. WORDS AND PHRASES—"PARENS PATRIÆ."

The words "parens patriæ," meaning "father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability.

Original habeas corpus by Mary Turner. Writ denied.

Ferry, Doran & Dean and Ed. D. McKeever, all of Topeka, for petitioner. W. E. Atchison, of Topeka, for respondent.

WEST, J. Mary Turner, a girl 15 years of age, by her father and next friend, alleges that she is restrained of her liberty by certain officers of Shawnee county, acting under color of authority from the probate court, who are unlawfully holding and imprisoning her "solely under and by virtue of an insufficient complaint and void warrant, and under a void order and commitment committing said Mary Turner to the Industrial School for Girls at Beloit"; that she was arrested upon a warrant issued upon a complaint which charged no crime warranting her arrest, and was not positively verified; that no summons was issued to her or either of her parents, neither of whom voluntarily appeared; that the evidence taken upon the hearing was insufficient to show probable cause of the commission of any crime to warrant her commitment to the school named. The exhibits attached to the petition, together with the return of the matron of the county jail, show that a probation officer filed a complaint verified on information and belief that Mary Turner did, on or about the \_\_\_\_\_ day of the \_\_\_\_\_ month of 1914, violate the laws of the state and the ordinances of the city of Topeka, and did then and there unlawfully remain out late at night; that she is incorrigible, and knowingly associates with thieves and vicious and immoral persons, and is growing up in idleness and crime. Upon this complaint a warrant was issued by the judge of the juvenile court commanding the matron to arrest Mary Turner and bring her before the judge at his office, then and there to abide the order of the court in the premises. After the hearing a final order was made setting forth that it was found by the court "that the above-named child was a delinquent child and is incorrigible; that said child knowingly associates with immoral persons, and is growing up in idleness and crime; that said child violated the ordinances of the city of Topeka by carrying what is commonly known as 'knucks'; also "that said child knowingly and willfully violated the ordinances of the city of Topeka by remaining out until late hours of the night"—and it was ordered that she be committed and delivered to the superintendent of the Industrial School for Girls at Beloit, there to be safely kept under the direction and control of the authorities having charge of such institution until discharged according to law. In the paper called "Commitment to Industrial Schools" it is recited that, the petition and complaint coming on to be heard, Mary Turner and her parents and the probation officer were present in court, and it was found that due and legal notice had been given to the probation officer; "Mr. and Mrs. Pete Turner having appeared voluntarily upon service of the warrant on said child."

The transcript of the evidence shows abun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dant ground for the finding already mentioned touching the delinquency and conduct of the child. The probation officer testified that he informed the judge "that she would not be here for trial if we did not take her into custody." The copy of the warrant attached to the petition accords with the allegation of the latter that the girl was imprisoned and deprived of her liberty solely upon the warrant based upon a complaint.

[1] It must be taken as true therefore that, while the parents appeared without service of process upon them, the daughter was taken into custody by the probation officer on the strength of the warrant based upon the complaint both of which have already been described. It must also be taken as true that the intention of the officers is to place the child in the industrial school as indicated.

Section 8680 of the General Statutes of 1909, enacted in 1889, provides that probate courts shall have power to commit to the school in question:

"Third, any girl under sixteen years of age who is incorrigible and habitually disregards the commands of her father, mother or guardian, and who leads a vagrant life, or resorts to immoral places or practices, and neglects or refuses to perform labor suitable to her years and condition, and to attend school."

The only other grounds applicable are liability to punishment by imprisonment under any existing law of the state. Section 2782 makes it a misdemeanor punishable by fine or imprisonment or both to carry on one's person knucks in a concealed manner. But there is no evidence whatever that Mary Turner made any attempt at concealment of the knucks carried by her; hence the only ground of the section in question which applies is the third already quoted. This section further provides that before such girl shall be committed the probate court shall cause a complaint to be filed setting forth the charges complained of in writing, and before he shall investigate such charges shall give at least five days' notice to all persons interested in the filing of such complaint.

Section 1 of the juvenile court act passed in 1905 (Gen. Stat. 1909, §§ 5099-5113) provides that the probate judge shall be in charge of the juvenile court, which shall have authority, among other things, to issue all process necessary in any case "the same as justices of the peace are authorized to do in misdemeanors." All writs and process are to be served by the probation officer. Section 2 defines a "delinquent child" as one who, among other things, is incorrigible, or knowingly associates with thieves, vicious or immoral persons, or is growing up in idleness or crime. Section 3 provides that any probation officer may without warrant or other process at any time until the final disposition of the case of any child over whom the court shall have jurisdiction take the child placed in his care by the court and bring the child before the court, "or the

court may issue a warrant for the arrest of any such child; and the court may thereupon proceed to sentence or make any such disposition of the case as it may deem just." Section 4 authorizes a petition in writing when filed to be verified upon information and belief. Section 5 requires that, unless the parties voluntarily appear in court, it shall issue summons requiring the child and the persons having custody thereof to appear. If the person so summoned fails without reasonable cause to appear and abide the order of the court or to bring the child, he may be proceeded against for contempt or a warrant be issued against such person "or against the child itself." Section 12 provides for an appeal from the order of commitment upon the demand of the child's parent, guardian, custodian, or any relation within the third degree of kinship. Section 14 places all punishments and penalties imposed by law upon persons for the commission of offenses against the laws of the state or ordinances of a city by delinquent children under 18 within the discretion of the juvenile court. Section 15 expressly provides:

"And in no case shall any proceedings, order or judgment of the juvenile court, in cases coming within the purview of this act, be deemed or held to import a criminal act on the part of any child; but all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state."

[2, 3, 5] At first blush, the claim of the petitioner that his daughter is unlawfully restrained and was unlawfully arrested appeals strongly to one's sense of liberty, but a close examination into the matter discloses that the juvenile court, while a modern institution, is provided for in numerous acts which have been before the court for interpretation. In a general way, it may be said that these statutes, instead of attempting to punish juvenile offenders for misconduct, criminal or otherwise, try to remove them from the path of temptation, and by preventive and corrective means seek to direct them in the paths of rectitude. It is an assertion upon the part of the state of its right to exercise its power as *parens patriæ* for the welfare of such of its minor citizens as are deprived of proper parental control and oversight and are disposed to go wrong.

[6] These words, meaning "father of his country," were applied originally to the king, and are used to designate the state, referring to its sovereign power of guardianship over persons under disability. When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states.

"The sovereign will is made known to us by legislative enactment. The state, as a sovereign, is the *parens patriæ*. \* \* \* The court of the United States cannot exercise any equity powers, except those conferred by acts of Congress, and those judicial powers which the

High Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States." *Fontain v. Ravenel*, 17 How. 369, 384, 393, 15 L. Ed. 80.

In the case cited Mr. Justice Taney in a concurring opinion said:

"And the chancery jurisdiction of the courts of the United States, as granted by the Constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercised over infants, lunatics, or idiots, or charities, has not been conferred. These prerogative powers, which belong to the sovereign as *parens patriæ*, remain with the state."

While the old Spartan theory that the child and the citizen are for the state has been reversed by our civilization, which regards the state as an institution for the good of the child and the citizen, still the state, as *parens patriæ*, may exercise over the child parental care and authority in order that he may receive the highest good from the state and achieve the best results for himself thus guarded and directed in youth. As said in *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 665, 79 N. W. 422, 427:

"Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered."

[4] The authorities are nearly all to the effect that statutes of this kind are parental, rather than criminal, so that a jury may not be demanded as a matter of constitutional right. This, together with the express declaration of the closing section that all proceedings, orders, and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state, makes it clear that neither the stigma nor the penalty of crime should be held to accompany the proceeding and order in this case.

The following are among the numerous authorities touching the interpretation and effect of similar statutes: *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 79 N. W. 422; *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 96, and note; *Wharton, Crim. Law* (11th Ed.) vol. 1, §§ 368-375; *Ex parte Januszewski* (C. C.) 196 Fed. 123; *In re Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886, note; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222, and note; *Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 105 N. W. 531, 3 L. R. A.

(N. S.) 564, 7 Ann. Cas. 821, note, 831; *Pugh v. Bowden*, 54 Fla. 302, 45 South. 499, 14 Ann. Cas. 816, note, 819.

The state had the same right to bring Mary Turner before the juvenile court that her parents had, and, when once there by proper compulsion of either sort of parental authority, the court had jurisdiction to proceed as it did.

Finding in the record no infringement upon her legal and constitutional rights, the petition for her discharge is denied. All the Justices concurring.

(94 Kan. 67)

HOWE v. HOWE et al. (No. 19199.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. DEEDS (§ 93\*)—CONSTRUCTION—INTENTION OF GRANTOR.

In the premises of a deed the grantor was described as "of the first part." Five persons, who were his children, were named as "of the second part." The granting clause granted the land to "the parties of the second part, their blood heirs and assigns." The habendum was "forever." The covenant of seisin was with "said parties of the second part." The warranty was to "said parties of the second part, their heirs and assigns." A life estate was reserved to the grantor by a separate clause. *Held*, the intention of the grantor is to be gathered from the four corners of the instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

2. DEEDS (§§ 124, 143\*)—CONSTRUCTION—INTEREST CONVEYED.

The grantor intended to make a present grant of the land to the five persons named as parties of the second part, reserving to himself a life estate. The grantees were to have power to convey, but if no conveyance were made the land was to descend to their blood heirs only.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452-455, 465-468; Dec. Dig. §§ 124, 143.\*]

3. DEEDS (§§ 123, 124\*) — CONSTRUCTION — "BLOOD HEIRS"—LIMITATION—VALIDITY.

The words "blood heirs" were words of limitation and not words of purchase. The limitation was void and the grantees took estates in fee simple and not estates for life.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-374, 413-435, 439, 452; Dec. Dig. §§ 123, 124.\*]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"BLOOD"—"OF THE BLOOD."

The word "blood" has a broad signification, being defined as kindred; consanguinity; family relationship; relationship by descent from a common ancestor. One person is "of the blood" of another when they are related by lineal descent or collateral kinship.

[Ed. Note.—For other definitions, see Words and Phrases, Blood.]

Appeal from District Court, Sumner County.

Action by Mary Olive Howe against Henry H. Howe and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

F. L. Martin and Van M. Martin, both of Hutchinson, for appellant. J. S. Dey, of Wellington, for appellees.

**BURCH, J.** The action in the district court was one to quiet title. The facts were that Fanny K. Howe, owner of the land in controversy, died intestate leaving as her heirs at law her husband, Henry H. Howe, and five children, one of whom was Ira E. Howe. To effect partition the children deeded to Henry H. Howe, who then executed and delivered to the children a deed containing the following provisions:

"This indenture, made this 19th day of October, A. D. 1900, between Henry H. Howe a single man of Sumner county, in the state of Kansas, of the first part, and Eva C. Regan, Emma A. Allen, Eugene E. Howe, Ira E. Howe, and J. Earl Howe, in the state of Kansas and territory of Oklahoma, of the second part:

"Witnesseth, that said party of the first part, in consideration of the sum of one thousand dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey, unto said parties of the second part, their blood heirs and assigns, all the following described real estate: \* \* \* The grantor herein expressly reserves to himself a life estate to the rents, use and occupancy of said real estate.

"To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining forever.

"And said grantor \* \* \* does hereby covenant, \* \* \* to and with said parties of the second part, that at the delivery of these presents, he is lawfully seized in his own right, of an absolute and inalienable estate of inheritance, in fee simple. \* \* \* And that he will warrant and forever defend the same unto said parties of the second part, their heirs and assigns."

Ira E. Howe died leaving a will in which he devised the land to his wife, Mary Olive Howe. The blood heirs of Ira E. Howe asserted title to the land, and Mary Olive Howe brought the action to free her estate from their claims and to remove the cloud cast upon her title by the word "blood" prefixed to the word "heirs" in the granting clause of the Henry H. Howe deed. The court held that Ira E. Howe took a life estate only under the deed and rendered judgment for the defendants. The plaintiff appeals.

The statute reads as follows:

"The term 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant." Gen. Stat. 1909, § 1651.

[1-3] The intention of the grantor in the deed in question is to be gathered from the four corners of the instrument. So considered, the deed makes it clear that the grantor intended to make a present grant of the land to the five persons named as parties of the second part, reserving to himself a life estate. The grantees were to have power to

convey, but if no conveyance were made the land was to descend to their blood heirs only.

An estate tail was not created because words of procreation were not inserted in the deed. 2 Blackstone's Commentaries, p. 114.

[4] The word "blood" has a broad significance:

"Blood. Kindred; consanguinity; family relationship; relation by descent from a common ancestor. One person is 'of the blood' of another when they are related by lineal descent or collateral kinship." Black's Law Dictionary, title, blood.

The very indefiniteness and generality of the term is such that the grantor could not have intended it to designate and describe certain persons who were to take as present purchasers under the deed. It merely designated a class of heirs who were to take by inheritance from the named grantees, and consequently was a word of limitation only. Ira E. Howe bore within himself during his lifetime all his heirs, of every class. When he became seised, the inheritance limited to his blood heirs vested in him and he took a fee simple and not a life estate. While the grantor could create estates in the land, he could not abrogate the statute of descents and distributions.

"In creating an estate of inheritance, other than an estate tail, the inheritance cannot be restricted to a particular class of heirs. Thus an estate to one and his 'heirs male,' or 'heirs female,' would be regarded as a fee simple; the limitation to the particular class of heirs being regarded as surplusage." 1 Washburn on Real Property (6th Ed.) § 163.

William G. Hammond, dean of the St. Louis law school and lecturer on the history of the law at several American universities, appended to his edition of Blackstone the following illuminating note bearing upon this subject.

"Although the owner in fee simple has an absolute power of controlling his property, and can do what he pleases with it, generally speaking, there is one very important limitation upon this power.

"He cannot change the state's law of descent, e. g., he cannot make it descend to sons only. All he can do is to give it, or rather to give particular estates in it, to specified individuals during a limited period. He can give it to whom he pleases for life, or for years, with a remainder over to the grantee's oldest son, or to any other individual, whether existing or not, if properly specified and limited.

"In this case, of course, no person can change the disposition made of it, until the last remainderman entitled to take comes into being and into possession of the estate.

"Formerly many attempts were made by ingenious limitations to keep the property in this condition for many generations. \* \* \* It is evident that this would change the law of the state so far as this particular property was concerned, by substituting for a fee simple an endless succession of life estates." 2 Hammond's Blackstone's Commentaries, p. 203.

The judgment of the district court is reversed, and the cause is remanded, with direction to quiet the plaintiff's title. All the Justices concurring.



(94 Kan. 48)

KIRBY v. BROADDUS. (No. 19189.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

## 1. DEEDS (§ 128\*)—INTEREST CONVEYED—RULE IN SHELLEY'S CASE—APPLICATION.

The rule in Shelley's Case, except as applied to wills, is a part of the common law of this state, and therefore a deed to a named grantee for life, with a provision that at his death the title shall vest in his heirs, enables him to make an effective conveyance of the fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

*(Additional Syllabus by Editorial Staff.)*

## 2. DEEDS (§ 128\*)—CONSTRUCTION—ESTATE CREATED—"RULE IN SHELLEY'S CASE."

The "rule in Shelley's Case" is that, where a conveyance is made to one for his life with a provision that at his death the title shall pass to his heirs, the grantor is conclusively presumed to intend that upon the death of the grantee named the title shall pass, not only in accordance with, but by virtue of, the law of descent; and, having chosen to vest an inheritable estate in the grantee, the grantor cannot, by describing it as one for life only, effectively forbid the grantee's alienation of the fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. § 128.\*]

For other definitions, see Words and Phrases, First and Second Series, Rule in Shelley's Case.]

Appeal from District Court, Leavenworth County.

Action by Mary Broaddus Kirby against Anne Lee Broaddus. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter E. Brown, of Atchison, for appellant. Waggener & Challiss, of Atchison, for appellee.

MASON, J. Mrs. Mary A. Broaddus executed to her sons J. Norris Broaddus and John W. Broaddus a warranty deed which was in the usual form, excepting that after the description of the property it contained these provisions:

"This conveyance is made upon the following conditions: First, said grantor reserves a life estate in said premises to herself. Second, said grantor hereby conveys and intends to convey to said J. Norris Broaddus and John W. Broaddus a life estate only in said premises after the expiration of the life estate of the grantor in said premises, and upon the death of said J. Norris Broaddus and John W. Broaddus the fee to the premises herein shall vest absolutely in the heirs of said J. Norris Broaddus and John W. Broaddus."

Thereafter J. Norris Broaddus (his wife joining) and John W. Broaddus (unmarried) reconveyed the property to their mother (now Mrs. Kirby), who brought an action to quiet her title against Anne Lee Broaddus, the minor daughter of J. Norris Broaddus. An answer was filed in behalf of the defendant asserting that, by reason of the facts already stated, she had a vested interest as remainderman; her father having taken only a life estate under the deed from his mother. A

demurrer to the answer was sustained, and an appeal is taken from that ruling.

[1, 2] The question presented is whether the conveyance from Mary A. Broaddus vested in J. Norris Broaddus and John W. Broaddus a title in fee or merely a life estate with a remainder to their heirs, and this depends upon whether the rule in Shelley's Case is in force in this state as applied to deeds. The argument is made for the appellant that the rule in the Shelley Case is no part of the common law of Kansas, not being adapted to the conditions and wants of our people; the reasons for it having no place under our system. The rule is sometimes said to have been founded solely upon principles of feudal law that have no application in this country, but more substantial grounds for it have also been stated. While it has been denounced by some authorities as arbitrary and unreasonable, it has been commended by others as well founded, and as accomplishing good results. The rule in substance is this: Where a conveyance is made to one for his life with a provision that at his death the title shall pass to his "heirs," the grantor is conclusively presumed to intend that upon the death of the grantee named the title shall pass not only in accordance with, but by virtue of, the law of descent; and, having chosen to vest an inheritable estate in such grantee, the grantor cannot, by describing it as one for life only, effectively forbid the grantee's alienation of the fee. There is a reasonable basis for saying that the real intention of the grantor in such case is that upon the death of the grantee the new owners shall derive their title by inheritance. He obviously has in mind no particular beneficiaries of his own grant. He is content that the law, as it shall exist when the grantee dies, whatever it may be, and however it may have been changed since the execution of the deed, shall determine the disposition of the title. His essential purpose is, as the rule interprets it, to vest the fee in the grantee, but to disable him from alienating it. This he cannot do, and the attempted restriction is ineffective. 13 Cyc. 687; note, 3 L. R. A. (N. S.) 668. See, also, Durand v. Higgins, 67 Kan. 110, 72 Pac. 567; Brady v. Fuller, 78 Kan. 448, 96 Pac. 854; Howe v. Howe, 93 Kan. —, 145 Pac. 873, decided at this session.

"Upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or to curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either of these cases, would clearly be inoperative and void, because the act or thing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the state by mere private contract. This cannot be done." *Steib v. Whitehead*, 111 Ill. 247, 251.

Since at this time one cannot convey a fee simple in land and at the same time forbid its alienation by the grantee, there is nothing archaic in holding that he cannot (without legislative authority) accomplish exactly the same result by merely calling the title he bestows a life interest.

The wisdom of the rule need not be discussed. Its history and operation are elaborately considered in a series of cases, with an accompanying note, in 29 L. R. A. (N. S.) 935, 963. It is a well-recognized part of the common law which has been adopted in this state. Gen. Stat. 1909, § 9850. In *Peck v. Ayres*, 79 Kan. 457, 100 Pac. 283, it was said that the rule has been abrogated here, but there the title created by a will was under consideration. In *Bunting v. Speck*, 41 Kan. 424, 435, 437, 21 Pac. 288, 292 (3 L. R. A. 690), it was said:

"The rule in *Shelley's Case*, which was a part of the common law, has been repealed or altered by all the states except in Maryland, Georgia, Texas, Indiana, and Pennsylvania. In this state, however, it [the repeal] affects wills only. \* \* \* When this devise took effect, the rule in *Shelley's Case* was in force in this state; but by revision of 1868 (chapter 117, § 52) it was abrogated so far as wills are concerned."

The partial repeal of the rule in *Shelley's Case* (Gen. Stat. 1909, § 9829) was effected by a section of a new chapter on wills, adopted at the time of the general revision of the statutes in 1868. At the same session of the Legislature, and as a part of the same general plan, the entire law of conveyances was revised. If it had been the purpose to do away with the rule entirely, it seems clear that a provision on the subject would have been inserted in the chapter relating to deeds. The abrogation of the rule so far as wills were concerned was a recognition of its existence, and proves that the matter engaged the attention of the lawmaking body. That no change was made in this respect in the statute regarding conveyances seems to demonstrate that the Legislature at that time was satisfied with the operation of the rule so far as it affected deeds.

The judgment is affirmed. All the Justices concurring.

(93 Kan. 634)

**HUNDLEY DRY GOODS CO. v. LINVILLE.**  
(No. 18618.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**BILLS AND NOTES (§ 537\*)—FRAUD—ISSUES—SUFFICIENCY OF EVIDENCE.**

There was no sufficient evidence of fraud in the procuring of the promissory note sued on to justify the submission to the jury of the ques-

tion of fraud as determinative of the validity of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.\*]

Burch, J., dissenting.

Appeal from District Court, Mitchell County.

Action by the Hundley Dry Goods Company, a corporation, against W. H. Linville. From judgment for defendant, plaintiff appeals. Reversed.

Kagey & Anderson, of Beloit, for appellant. Charles W. Clarke and Edgar Bennett, both of Washington, Kan., for appellee.

**SMITH, J.** The appellant, the Hundley Dry Goods Company, sold a bill of goods to the Linville Dry Goods Company, amounting to over \$800. Before any payments were made on the bill the Linville Dry Goods Company sold its entire stock of dry goods to one J. H. Huyck, who assumed and agreed to pay the wholesale bills outstanding, including the bill of appellant. Huyck paid nothing thereon, but sold the stock of goods to one C. W. Jolley, who in turn assumed and agreed to pay all the wholesale bills, including the bill of appellant, but neither did Jolley pay anything thereon. Some time thereafter Mr. Babb, a representative of the Hundley Dry Goods Company, came to W. H. Linville, who had been president of the Linville Dry Goods Company, when, as appears by the testimony of Linville in the transcript, the following colloquy occurred between Linville and Babb:

"A. He (Babb) said his people sent him out to straighten up the accounts of the Linville Dry Goods Company. He wished to get that in some kind of shape different from what it was, and I told him that Mr. Jolley was assuming that portion, and he said Jolley was not able to assume that, and he didn't want to settle that matter without my signature or guaranty. Q. What did Babb want to do? A. He wanted me to sign a note. Q. What did he say? A. He said if I would sign it Mr. Jolley would then sign; that it would be returned to me and never be turned into the company. Q. What did he say would be done with the note if Mr. Jolley would sign it? A. I don't know, I cannot repeat the words he used right along, but, however, if Mr. Jolley signed the note, he had money enough at the Farmers' State Bank of Washington to cover this and hold the note in the bank, to be turned over to the bank and not be applied on the accounts. Q. After these remarks by Mr. Babb, what did you do? A. I finally signed the note. Q. For how much? A. Whatever the note called for, eight hundred and some dollars. Q. What was done with this note after you signed it? A. About the next thing I heard \* \* \* Q. (Interrupting) Did you deliver this note to Mr. Babb? A. Yes, sir. Q. After signing and delivering this note to Mr. Babb, did you have any further conversation with him that day? A. Yes, sir. Q. What was that? A. Well, before I left town, Mr. Babb came to me—I was at the depot—and he said Mr. Jolley had refused to sign the note, and then we went back uptown. Q. Babb told you that Jolley had refused to sign the note? A. Yes, sir. Q. What was then done? A. We came down to Mr. Bennett's of-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fice in Washington, and Mr. Jolley finally signed another note for the same amount. Q. Payable to the Hundley Dry Goods Company? A. Yes, sir. Q. What was done with that note? A. Mr. Babb put it in his pocket. Q. Was this note signed by you returned to you? A. No, sir. Q. It was to have been? A. Yes, sir; according to our former agreement. Q. But was it afterwards returned? A. No; never was. Q. This man Babb, who was he? A. He was attorney or agent for the Hundley Dry Goods Company. Q. Where was this note drawn and signed by you? A. In Mr. Bennett's office at Washington, Kan. Q. Any one present beside you and Mr. Babb? A. Mr. Bennett. Q. Was that all? A. That was all."

The court instructed the jury, in substance, that Linville was not personally responsible for the entire indebtedness of the Linville Dry Goods Company until he signed the note in question; that he was not responsible on the note if the same was procured by false representations made by the plaintiff's agent with the intent to cheat and defraud the defendant in the giving of the note, and plaintiff's agent knew them to be false when made, and the defendant believed them to be true, and relied thereon and was induced thereby to execute and deliver the note sued on when otherwise he would not have done so.

The note sued on was an unconditional promise to pay the amount specified therein at a certain time, and we cannot agree that there was any sufficient evidence that Linville's signature was procured through fraud. Mr. Linville testified, as above set forth:

"That Jolley was not able to assume that [the debt of the Linville Dry Goods Company], and he [the solicitor] did not want to settle the matter without my signature or guaranty. \* \* \* He said if I would sign it, Mr. Jolley would then sign; that it would be returned to me and not turned in to the company. \* \* \* If Mr. Jolley signed the note, he had money enough at the Farmers' State Bank at Washington to cover this, and hold the note at the bank, to be turned over to the bank and not applied on the accounts."

It further appears that Jolley, the second purchaser of the stock of goods, did sign a note for about the same amount, but it does not appear that Linville demanded the return of his note, which he says was a part of the agreement upon which he signed it. He says he was present when Jolley signed the note, and it appears that he allowed the solicitor to go away with both notes without objection. In fact, he was in about the same condition that he would have been had he and Jolley signed the same note and the solicitor had, in substance, informed him that he would not accept Jolley's note alone.

We conclude that the evidence does not support the verdict of the jury which under the instructions must be based upon a finding of fraud in the procuring of the note. It cannot be said that the note was given without any consideration, although the consideration did not pass to Linville personally, but to the corporation of which he was president and a stockholder. In effect, the

note was given by him as a surety for his corporation.

The motion for a new trial should have been sustained. The judgment is reversed, and the case is remanded for a new trial.

JOHNSTON, C. J., and MASON, PORTER, BENSON, and WEST, JJ., concurring.

BURCH, J. I dissent. The evidence was sufficient to show that the delivery was for a special purpose. Negotiable Instruments Act, § 23, Gen. Stat. 1909, § 5269, and cases cited in *Storey v. Storey*, 214 Fed. 973, 131 C. C. A. 269. The use of paper delivered for a special purpose only, and not for the creation of a debt, for other purposes constitutes fraud.

SMITH, J., joins in the dissent of Mr. Justice BURCH.

(93 Kan. 661)

LEAVENS v. HOOVER. (No. 18870.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1048\*)—WITNESSES (§ 330\*)—HARMLESS ERROR—CROSS-EXAMINATION—RESTRICTION.

In an action upon a promissory note, one of the principal issues being whether the plaintiff was a holder in due course, it is held that no prejudicial error was committed in restricting his cross-examination concerning the circumstances under which he acquired it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048; \*Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.\*]

2. BILLS AND NOTES (§ 538\*)—TRIAL (§§ 260, 296\*)—INSTRUCTIONS—REPETITION—FRAUD.

Various trial rulings examined, and held not to require a reversal.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1898, 1900-1910; Dec. Dig. § 538; \*Trial, Cent. Dig. §§ 651-659, 705-713, 715, 716, 718; Dec. Dig. §§ 260, 296.\*]

Appeal from District Court, Osborne County.

Action by K. G. Leavens against John J. Hoover. From a judgment for plaintiff, defendant appeals. Affirmed.

Hawkes & Else, of Osborne, for appellant. Bowersock & Hall, of Kansas City, Mo., and J. K. Mitchell, of Osborne, for appellee.

MASON, J. K. G. Leavens obtained a judgment upon a promissory note against John J. Hoover, who appeals. The note was executed to W. E. Raiguel by Hoover, who defended on the ground that it was procured by fraud, in that false representations were made to him with respect to the value of shares of stock in a corporation, for the purchase of which it was given. Leavens claimed as an innocent purchaser. No special findings were made, and it is not certain whether the jury found that the allegations of fraud were not sustained, or that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this defense was not available against the plaintiff.

The petition alleged a commercial indorsement by Raiguel, which was denied under oath. Raiguel's name was attached to an indorsement on the note, but the defendant maintains that there was no evidence whatever of the genuineness of the signature, and that therefore this issue should not have been submitted to the jury. There was circumstantial evidence which probably warranted the inference that Raiguel made or authorized the indorsement, but this need not be determined, as there was direct evidence on the subject. The defendant testified that he had had some correspondence with Raiguel. He was then asked if he was sufficiently familiar with his handwriting to identify it positively. The record shows this answer:

"I would think I could positively, I never had sufficient knowledge of his signature to the affidavit."

He was then asked if the signature so far as he knew was genuine, and answered:

"So far as I know it is his signature. I am not sufficiently acquainted with his handwriting to be positive."

It is suggested that the context shows that the word "not" must have been omitted from the record of the first answer quoted. This may be granted; but the fair interpretation of the answers is that, having some familiarity with Raiguel's handwriting, the defendant believed the signature to be genuine. There being nothing elsewhere in the record to suggest a doubt on the subject, this evidence was sufficient to support a finding of its genuineness.

The plaintiff contends that it is really immaterial whether or not he was an innocent purchaser of the note, because the defendant's own evidence showed that no actionable misrepresentations were made to him, and that his subsequent conduct prevented his relying on that defense. The defendant asserts that misrepresentations were made to him regarding the value of the corporate stock for which the note was given. The plaintiff argues that, in view of the defendant's opportunity for investigation, the case is within the rule that false statements regarding values, being matters of opinion rather than of fact, do not in legal contemplation constitute fraud. *Else v. Freeman*, 72 Kan. 666, 83 Pac. 409; 20 Cyc. 49. The defendant, however, among other matters, some of which were of a similar character, alleged that false statements were made to him concerning the kind of water rights appurtenant to lands owned by the corporation. These were representations of fact upon which the defendant might have a right to rely. The plaintiff also insists that, because the defendant retained the stock after becoming fully advised of the situation, he is precluded from asking a rescission of the contract. The defendant relied upon the

damages he suffered, as an offset to the note, and for that purpose no return of the stock was necessary.

[1] The note was dated July 13, 1908, and was due in two years from that time. The plaintiff testified that he purchased it in the early part of 1909. On his cross-examination this colloquy took place:

"What was the consideration for this note you paid? I paid for that note and some others for my services to Van Asmus. What were those services? Introducing to people? Yes, and assisting him."

A little later he was asked, "When did you introduce Mr. Van Asmus to these gentlemen in Kansas City?" An objection to the question as incompetent, irrelevant, and immaterial was sustained, and of this ruling complaint is made. In reply to this the plaintiff says in his brief:

"There was no intimation whatever that a contract existed between plaintiff and Van Asmus under which the former received the note 18 months before he paid for it, and such was not the case. The transaction was executed on both sides early in 1909. As plaintiff testified, he purchased the note at that time, and the lower court did not abuse its discretion in refusing to allow defendant to cover this matter again."

This is not a sufficient answer to the objection. The defendant was entitled to cross-examine the witness in detail for the very purpose of determining the accuracy of his general statement, which was of the nature of a conclusion. The matter might possibly have become important, for one who pays for a note after having notice of an infirmity is not a holder in due course (Gen. Stat. 1909, § 5307), although it is said that where a note is transferred as payment for personal property a delivery of all the property before notice is not indispensable (7 Cyc. 943). However, the inquiry was not pressed further. The question objected to was not asked in direct connection with the testimony as to the time and manner of the plaintiff's acquiring the note. No statement of its purpose is shown, and there is no affirmative showing that the attention of the trial court was directed to the phase of the matter that is now presented. In the course of his rebuttal evidence, the plaintiff testified as follows:

"State the circumstances under which you came into the possession of this note. For services rendered Van Asmus. And you paid for this a valuable consideration? State whether or not you paid for this a valuable consideration. \* \* \* Go ahead and state the circumstances under which you became the owner of this note. In payment of my services."

The trial judge then asked these questions, among others, receiving the answers indicated:

"When did you first see this note—the \$3,000 note? The first part of 1909. How did you get possession of the note? Van Asmus had this note and some others, and he wanted me to assist in floating his proposition in Kansas City, and he told me if I would do so he would turn these notes over to me."

On cross-examination he was asked when he had his first talk with Van Asmus about the notes, and replied that he could not exactly remember; that he received the notes shortly afterwards. The question as to when he had introduced Van Asmus was not renewed, nor was any further question asked bearing upon the time when the plaintiff's services in payment of the note were performed. In this situation, it cannot be said that in sustaining the objection to the single question the court committed reversible error. It was not shown that at any time before the action was brought the plaintiff was advised of the claim of fraud.

The plaintiff also testified on his original examination that before he purchased the note Van Asmus told him what it was given for, but the court sustained an objection to a further question as to what it was. This was perhaps too close a restriction upon the cross-examination. But it is not made to appear that the ruling was prejudicial. The inquiry was not extended or renewed, and there was at no time any controversy as to what the note was given for. The statute (Civ. Code, § 307 [Gen. St. 1909, § 5901]) does not require a litigant to show what answers would have been returned to the excluded questions, in order to urge a new trial on the ground of the denial of a right to cross-examine the adverse party. *McIntosh v. Oil Co.*, 89 Kan. 289, 131 Pac. 151, 47 L. R. A. (N. S.) 730. But it does forbid the granting of a new trial without an affirmative showing that the ground relied on affected the result. We do not think the record can be said to show a probability that any prejudice resulted from the rulings complained of. It is suggested that, "if Van Asmus told plaintiff what the note was given for, then plaintiff could not be an innocent purchaser of the note." That does not follow, for a statement in a note of the transaction which gave rise to it does not affect its negotiability. Gen. Stat. 1909, § 5256; *Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59.

[2] An instruction was asked, which the court refused, that in determining the question of the plaintiff's right to be deemed an innocent purchaser the jury might take into consideration all the evidence of the circumstances under which he acquired the note, including his business relations with the person from whom he received it. It might well have been given; but its omission was not error, especially in view of the fact that the jury were told that in determining the existence or nonexistence of any fact they could take into consideration all the evidence tending to prove or disprove it, including the surrounding circumstances.

Complaint is made of an instruction that evidence of fraud in the procuring of the note was not to be considered in deciding whether the plaintiff was an innocent purchaser. No misapprehension can have resulted from this, for the jury were elsewhere told that, if such fraud were shown, the burden of proving want of notice was on the plaintiff.

An instruction was given to the effect that, although fraud may have been practiced upon the defendant in the procuring of the note, no sum in the way of damages therefor could be allowed to the defendant, if the plaintiff knew nothing of the fraud and was not a party to it. This is complained of by the defendant as ignoring the requirement that the plaintiff, to have the benefit of his ignorance of the fraud, must have been a purchaser for value, in due course of business, and before maturity. The plaintiff seeks to justify the instruction on the ground that there was no conflict in the evidence as to these matters, and contends that in any event no prejudice resulted, inasmuch as they were fully covered in other parts of the charge. We are inclined to believe that this instruction referred only to the possibility of damages being found in excess of the amount of the note, and becoming the basis of a money judgment against the plaintiff, in which case it was unobjectionable.

The last instruction objected to reads:

"If the plaintiff purchased the note before due, and for a valuable consideration, then before he would be chargeable with notice of any infirmity in the instrument he must have actual knowledge of the defect or defects as claimed by the defendant, or knowledge of such facts that his action in taking the instrument amounted to bad faith upon his part."

The defendant criticizes this on the ground that:

"It leaves out of consideration the element of good faith, want of notice, and in the usual course of business, which must exist in order to protect a purchaser of a negotiable instrument."

The statute uses the term "holder in due course" to describe one who holds a note free from defenses available to prior parties among themselves. Gen. Stat. 1909, § 5310. It specifies what is necessary to constitute such a holder (Gen. Stat. 1909, § 5305), and his obtaining the paper "in the usual course of business" is not named as one of them; that ground being covered by the phrase "that he took it in good faith and for value." The instruction embodied the requirement of good faith by making bad faith equivalent to notice. Its purpose was to define the term "notice," which it did substantially in the words of the statute. Gen. Stat. 1909, § 5309.

The judgment is affirmed. All the Justices concurring.

(94 Kan. 6)

NEW et al. v. SMITH. (No. 19166.)†  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**1. WITNESSES (§ 159\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.**

In an action to recover possession of certain real estate on the ground that a deed therefor had been procured by fraud and that the defendant took his title with notice of such fraud, the plaintiff testified to transactions and communications had personally by her with one of the defendant's grantors who was charged with the fraud; such grantor being present as an attorney in the case. At a subsequent trial, such grantor having died, the plaintiff was on the defendant's objection precluded from testifying to the matters covered by such former testimony, and thereupon offered in evidence the stenographer's transcript thereof. *Held*, that an objection thereto, on the grounds of incompetency and because it concerned transactions and communication had personally with a deceased grantor from whom the defendant claimed title, was properly overruled.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.\*]

**2. EVIDENCE (§ 582\*) — STENOGRAPHER'S TRANSCRIPT—DEPOSITIONS.**

The statute permitting the use of the stenographer's transcript of testimony (Gen. Stat. 1909, § 2407) does not restrict such use to the limitations which attach to a deposition under sections 5931 and 5953 (Code Civ. Proc. §§ 337, 358).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2419-2423; Dec. Dig. § 582.\*]

**3. PLEADING (§§ 93, 369\*)—INCONSISTENT DEFENSES—ELECTION.**

The defendant claimed title by virtue of his purchase, and also claimed the right to possession by reason of having paid off certain incumbrances which had been placed thereon by the plaintiff. Upon motion of the plaintiff, the defendant, over his protest, was required to elect between these defenses and elected to stand upon his claim of title. At a subsequent trial he was held bound by such previous election. *Held*, that the two defenses are not inconsistent, and the election was improperly required, and for that reason, as well as because it was compulsory, the defendant should not have been held bound thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190, 1199-1209; Dec. Dig. §§ 93, 369.\*]

**4. SUBROGATION (§ 23\*)—PAYMENT OF INCUMBRANCES—EFFECT—MERGER.**

Such payment did not as a matter of law work a merger of the interests of the mortgagees and the owner-merger, under the circumstances being optional with the owner.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. § 23.\*]

**5. EJECTMENT (§ 26\*)—EQUITABLE DEFENSE.**

Although it was determined that the defendant took his title with notice of facts sufficient to put him upon inquiry leading to knowledge of the fraud of one of his grantors, so that he must yield up possession and lose what he paid for the land, still, having paid off certain mortgages placed thereon by the plaintiff, the latter cannot oust him from possession until she has accounted to him for the amount thus paid; his right of subrogation being similar to that of a mortgagee in pos-

session and based upon the same principles of equity and fair dealing.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 107-113; Dec. Dig. § 26.\*]

(Additional Syllabus by Editorial Staff.)

**6. ELECTION OF REMEDIES—"ELECTION"—"HOBSON'S CHOICE."**

The very word "election" signifies a free choice, and an election by compulsion is an anomaly. An election which involves no freedom of choice is known as "Hobson's choice," which is defined as a choice without an alternative (citing Words and Phrases, Election).

Appeal from District Court, Greenwood County.

Action by Emelia New and another, as trustee of Emelia New, a convict, against J. A. Smith. From judgment for plaintiffs, defendant appeals. Remanded, with directions to modify.

See, also, 86 Kan. 1, 119 Pac. 390.

T. A. Kramer, of Eldorado, for appellant. John Stowell, of Seneca, Clogston & Clogston, of Eureka, and Crane & Woodburn Bros., of Holton, for appellees.

WEST, J. This is in form an action in ejectment to recover title and possession of a 240-acre tract of land in Greenwood county. The defendant in his answer denies the allegations of the petition and admits his possession of the real estate. Beneath the surface of these pleadings, the real issue is the validity of a conveyance from the plaintiff, Emelia New, to E. C. Schultz, the wife of James Schultz, formerly an attorney at Eureka, and a conveyance by E. C. Schultz and husband to the defendant, J. A. Smith; the claim of the plaintiff being that her deed was procured by the fraud of James Schultz, and that J. A. Smith took with knowledge or with notice of sufficient facts to have put him upon inquiry leading to knowledge of such fraudulent transaction. When the case was reached for trial, the defendant's counsel in his statement to the jury said, among other things, that his client Smith took his deed in good faith, having paid good money for it, and went into possession and afterwards made improvements and paid the taxes; that he paid off the three mortgages upon the land out of his own funds; whereupon the plaintiff moved that the defendant be required to elect whether he would rely upon his claim of title or upon his claim of being a mortgagee in possession, and, being required so to do, the defendant under protest elected to stand upon the former. At a subsequent trial the court ruled that he was bound by his previous election. The jury returned a verdict in favor of the plaintiff, and from the judgment thereon the defendant appeals and assigns many alleged errors touching rulings upon the admission of evidence, in giving and refusing instructions, in requiring the defendant to elect, and in refusing to consider his rights as a mortgagee in possession. Upon the last

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied February 12, 1915.

trial, the plaintiff was called as a witness, and asked if, after she was brought to Eureka under arrest for the murder of her former husband, she saw James Schultz, and upon objection was forbidden to state what conversation she had with him. One of the plaintiff's counsel testified that before the former trial Mrs. New's testimony was taken, and that on that trial Mr. Schultz was present in the courtroom and appeared as one of the attorneys in the case; that Mr. Smith, the defendant, was also present at that time; that Mr. Schultz was not sworn and did not testify on that trial. Then the counsel offered a transcript of this testimony in which the witness stated: That she saw Mr. Schultz the day she was brought to Eureka under arrest. That he came to visit her and said a few words. That, after she was taken to the jail at Wichita, Mr. Schultz visited her there about three times, during one of which visits she signed a paper which he said was to protect her property, but she did not know at the time what the paper was. That he called Mary Williams in the hall to come in and sign the paper. There was a tall slender man there. Mr. Schultz then said, "You signed this paper, Mrs. New?" to which she answered, "Yes." That she at no time made an agreement with him that he was to have her farm if he would defend her in the criminal case or had any agreement as to what she was to pay him for his services. When this transcript was offered in evidence, Mr. Schultz was no longer alive, and the defendant contends that it was error to admit this testimony, and that, under the statute which provides that the transcript of the stenographer's notes may be introduced in evidence under like circumstances and with like effect as the deposition of the witness, Mrs. New, being present in court, could not have testified by deposition, and that it was not competent because in respect to a transaction had personally with a deceased person prohibited by section 320 of the Code (Gen. St. 1909, § 5914) as amended by chapter 229, Laws of 1911.

The defendant offered in evidence the record of all mortgages that were on the real estate when deeded to Mrs. Schultz and to the defendant. Also assignments, releases, and foreclosure proceedings concerning them, and offered to show that such mortgages were paid by the defendant. These were excluded from consideration on the theory that he was bound by his former election to stand on his claim of title.

It is earnestly contended by the defendant that he not only had a right to have this evidence received and considered, but that his payment of the mortgages with his own money gave him the right to be subrogated to that extent and to be treated as a mortgagee in possession. To this the plaintiff replies that having procured the land by fraud, or rather that, having taken it with notice of

the fraud by which Schultz procured it to be conveyed to his wife, the defendant is barred from consideration as a mortgagee in possession.

[3, 6] The matter of "election" must be determined by the rightfulness of the order requiring it in the first place, for it was then made under compulsion and protest, and hence the defendant could not be held bound by it on a subsequent trial on the mere ground that, having once elected, he must stand by such election. The very word signifies a free choice, and an election by compulsion is an anomaly. 3 Words and Phrases, p. 2336. An election which involves no freedom of choice is known as "Hobson's choice," which is defined as "a choice without an alternative." Webster's New International Dictionary (1911 Ed.). It must follow therefore that an involuntary election in obedience to the order of the court was not such a choice as would bind the party on a subsequent trial unless for the sole reason that it was rightfully ordered at the first trial. But when one defends an action for the recovery of land on the grounds that he has a paper title which he desires held good, and is also in possession of mortgages on such land which he has paid, we can see nothing necessarily irreconcilable about the two defenses. It is proper in an action for specific performance to plead in the alternative and ask for damages for non-performance (*Henry v. McKittrick*, 42 Kan. 485, 22 Pac. 576; *Naugle v. Naugle*, 89 Kan. 622, 132 Pac. 164), and it is quite possible for one to purchase incumbered land the title to which may be uncertain and by purchasing the incumbrance hold both as owner and mortgagee; the matter of merger usually being one of choice and not one of compulsion (*Loan Association v. Insurance Co.*, 74 Kan. 272, 86 Pac. 142; *Carson v. Fulbright*, 80 Kan. 624, 103 Pac. 139; *Williams v. Bricker*, 83 Kan. 53, pp. 58-59, 109 Pac. 998, 30 L. R. A. [N. S.] 343; *Zuege v. Mortgage Co.*, 92 Kan. 272, 140 Pac. 855).

[1, 2] As to the admissibility of the transcript of the evidence, aside from the competency of the witness, it should be observed that, when this testimony was originally offered, Mr. Schultz was present as one of the attorneys in the case, although he did not testify. Mrs. New had then testified about her interviews with Mr. Schultz at one of which she had signed and acknowledged a paper which turned out to be a deed, and about other transactions with him when he acted as her attorney. This was followed by a cross-examination by her counsel covering in detail her dealings with Mr. Schultz after his motion that her examination in chief be stricken out was overruled. It is contended that the only basis for admitting this transcript is the statute providing that a transcript of the court stenographer's notes of one's testimony properly verified and certified may be introduced under like circumstances

and with like effect as the deposition of such witness. Gen. Stat. 1909, § 2407 (Laws of 1905, c. 494) § 1. The circumstances under which depositions may be used are set forth in sections 5931 and 5953 (Code Civ. Proc. §§ 337, 358), an essential one being that the witness is not and cannot be in attendance. The witness was present and placed on the stand, but an objection to testimony by her was sustained, and plaintiff's counsel argue that, having been deprived of her evidence by this objection, it was proper to introduce the transcript of her former testimony. The objection was on the ground of the incompetency of the evidence and also the incompetency of the witness to testify concerning a transaction with a deceased person, and it does not appear on which ground it was sustained. The fact that the transcript was received indicates, however, that it was on the ground of the present incompetency of the witness. Of course, aside from this the transcript was properly received like evidence of any other statement made by the plaintiff in the presence and hearing of Mr. Schultz and undenied by him. *Fullenwider v. Ewing*, 30 Kan. 15, 1 Pac. 300, is cited. There on the second trial of a case a deposition taken on a former trial was offered as the affidavit of a witness, and it was held that this was properly rejected, the witness being present in court. It was also held proper to prove certain conduct and language on the part of the original plaintiff had in the presence of the original defendant. See, also, *C. & W. R. Co. v. Prouty*, 55 Kan. 503, 40 Pac. 909, to the effect that it is error to admit the deposition of a witness who resides outside the county but who is present in court and ready and willing to testify.

Before the enactment of section 2407, it had been held that the stenographer's notes of evidence formerly taken could be read in evidence, and the statute makes it proper to introduce the transcript made and certified by him. In *State v. Stewart*, 85 Kan. 404, 116 Pac. 489, the testimony of a witness voluntarily given in the preliminary examination of the charge for which the accused was on trial was held admissible; the accused having originally had full opportunity to cross-examine, and the direct testimony of the witness having become unavailable by reason of his claiming his statutory privilege of withholding the same. The previous decisions were referred to and followed. It was said that this admissibility did not depend so much on the presence or the availability of the witness as on the availability of the testimony; that the testimony of Stewart, the husband of the defendant, was as unavailable as if he were over the state line. The case of *Pratt v. Patterson*, 81 Pa. 114, was cited, in which both parties to an action having testified, and the verdict having been set aside, and one of the parties having died, and his executor having been substituted, it

was held competent at the next trial to read the testimony given by the deceased at the former trial. Section 5931 provides that the deposition of a witness may be used only when he is a nonresident or absent from the county or unable to attend court or dead. Section 2407 has reference, not so much to the matter of using the deposition in the absence of witnesses, as using the transcript of stenographer's notes instead of reading them, and, while it provides that such transcript may be introduced under like circumstances and with like effect as a deposition, it does not restrict such use to instances in which depositions only may be used. In other words, the object of section 2407 is not to confine transcripts to the limits applied to depositions, but to provide a more convenient way to use testimony formerly taken than by reading the notes, which would be unintelligible to the jury, and reading them might in many cases be tedious and unsatisfactory.

The question remains whether or not this testimony was incompetent because it related to a transaction had by the plaintiff with a deceased person "where either (formerly the adverse party) party to an action claims to have acquired title, directly or indirectly from such deceased person." Laws 1911, c. 229, § 1. The defendant claimed to have acquired title from the wife of the deceased; but, as the husband joined in the deed, he could well claim to have acquired title either directly or indirectly from him. When this testimony was originally given, it did not relate to any transaction or communication had with a person then deceased, and hence it was not barred by the statute invoked by the defendant. At the subsequent trial the testimony by the witness was excluded by reason of this statute, and then it became as unavailable as if Mrs. New had been absent in another state or helpless on a bed of sickness; the situation thus approaching very nearly the one presented in *State v. Stewart*, so nearly, indeed, that the same rule must be held to apply. Authorities are cited which would lead to a different conclusion and which go to the extent of holding that Mrs. New should be deemed to have been actually testifying when her former testimony was read, but we are not persuaded or convinced by this reasoning. In *Collins v. McGuire*, 76 App. Div. 443, 78 N. Y. Supp. 527, it was held by the Appellate Division of the Supreme Court of New York that the competency of a witness depends upon the facts as they exist when his testimony is given. A defendant had testified on his own behalf to personal transactions had with the plaintiff, who died before being called as a witness, and his administrator was substituted, and it was sought to strike out the evidence under a statute similar to ours; but the motion was denied, and this ruling was affirmed, following *Comins v. Hetfield*, 80 N. Y. 261. It is suggested that, when this evidence was orig-



inally given, it was with the understanding that Mr. Schultz should be allowed to testify concerning the same matters, but as a demurrer was sustained to the plaintiff's evidence, the opportunity did not arise in that trial; and that the objection that it covered a conversation between attorney and client was waived in view of the understanding. But this cannot mend matters for the defendant, for the statute does not preclude the client, but only the attorney, from giving such conversation. Gen. Stat. 1909, § 5915, subd. 4 (Code Civ. Proc. § 321, subd. 4).

It is insisted that the court erred in sustaining an objection to questions, in substance, whether or not the defendant when he bought the land believed that the plaintiff had in good faith parted with all her interest in it. It was competent to show his motive, belief, and state of mind, and no one could know so well as he what they were. *Baker v. Railway Co.*, 85 Kan. 263, 116 Pac. 816. But he was permitted to testify that he did not then know there was any claim made by Mrs. New of fraud or failure of consideration, and that he had never heard anything about any controversy as to how Schultz got the deed. No offer was made to show what was indicated by these questions, and no affidavit or showing thereof was produced in support of the motion for a new trial, and it cannot be said that material prejudice appears as to the ruling in question. *Clark v. Morris*, 88 Kan. 752, 129 Pac. 1195; *Caldwell v. Modern Woodmen*, 89 Kan. 11, 130 Pac. 642; *McIntosh v. Oil Co.*, 89 Kan. 289, 131 Pac. 151, 47 L. R. A. (N. S.) 730; *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617; *Treiber v. McCormack*, 90 Kan. 675, 136 Pac. 268; *Leavens v. Hoover*, 145 Pac. 877.

We have examined the instructions given and refused with reference to the complaints made concerning them and to ascertain whether the jury were properly charged, and, while now and then an expression might have been bettered or properly omitted, it appears that the issues were fairly and sufficiently presented and no material error was committed either in those refused or in those given.

[4, 5] The only remaining point requiring consideration is the rightfulness of the defendant's claim to be treated as a mortgagee in possession. This term is a familiar one, but it bears no talismanic charm or potency to confer benefits regardless of the dictates of fairness and equity; on the contrary, it is an expression used to describe a situation in which those very dictates demand that one be made whole for what he has benefited an estate before being required to yield it up to another who would thereby enjoy an unearned advantage. When Mrs. Schultz took her deed to the land, it was incumbered, and these incumbrances remained when Mr. Smith purchased the land. They represented money loaned to a former owner and never

paid by such owner, so that the utmost title Mrs. New could ever rightfully claim is the equity or the fee burdened with these incumbrances. These Mr. Smith has paid, not on account of or at the behest of the plaintiff, but presumably because they had to be paid to save the land which he claimed to own. Is there any reason why, if he should be compelled to turn the land over to Mrs. New, he should also present her with the amount of these mortgages? The only possible reason assigned is that he is tainted with the fraud by which the title was procured from her. But this is not an action for punitive damages. It is one to set aside a deed and regain possession of land on which he has expended under color and claim of title enough money to clear such title from all the incumbrances which his adversary voluntarily placed upon the land. He is not the actor in this drama, but the party assailed, and, if his assailant recovers everything which he ever procured from her directly or indirectly, it would seem enough. And to this effect are the authorities. In *Hofman v. Demple*, 52 Kan. 756, 35 Pac. 803, the defendant had furnished liquor to make the husband of the plaintiff drunk for the purpose of inducing him to convey the homestead, whereupon the husband procured the wife's signature by duress, and it was held that the plaintiff had no right to recover the land freed from an incumbrance cleared by the defendant. True, the grantors had acquiesced for more than a year and a half; but this was not deemed sufficient to bar the recovery of the land, and it was stated to be inequitable that more should be recovered. In *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396, many decisions were reviewed, and it was said that, whatever may be the historical source of the rule, it should be acted upon except where one has acquired possession of property "under such circumstances that it would be inequitable to permit him to assert a right under it." In *Walters v. Chance*, 73 Kan. 680, 685, 85 Pac. 779, it was said that if one obtain possession by force, intimidation, deceit, or fraud, a court of equity will not permit him to profit thereby. Here there is no claim that the defendant obtained possession by fraud committed by him upon Mrs. New—only that he took his title with the knowledge or means of knowledge that one of his grantors had defrauded her. While this may be good ground for requiring him to give up what he obtained and to lose all he paid for it, no reason is apparent why, in addition, he should lose what he has paid out to clear the title from liens placed thereon by the plaintiff. Of course, it is not and cannot be claimed that the defendant is a mortgagee in possession—only that he should be treated as if he were. More correctly stated, the question is: Should he be subrogated to the rights of the creditors

whose liens he satisfied? As said in *Olson v. Peterson*, 88 Kan. 350, 361, 128 Pac. 191, 194: "Subrogation is a creature of equity, invented to prevent a failure of justice." And it was there said to be broad enough to include "every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter." The doctrine of subrogation or equitable assignment was considered in *Fidelity & Deposit Co. v. City of Stafford*, 144 Pac. 852. See, also, *Young & Co. v. Ward et al.*, 115 Ill. 264, 3 N. E. 512, and *Arnold v. Hoshildt*, 69 Minn. 101, 71 N. W. 829. As a matter of simple fairness and in line with the essential principles of equity, we hold that the defendant should not be ousted until made whole for the incumbrances which he has satisfied.

Litigation resulting from the homicide of Joseph New is no new thing in this court. *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Smith v. Becker*, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141; *New v. Smith*, 68 Kan. 807, 74 Pac. 610; *New v. Smith*, 73 Kan. 174, 84 Pac. 1030; *New v. Smith*, 86 Kan. 1, 119 Pac. 380. In order that this litigation may be ended, and in view of the circumstances shown, the amount due the defendant on account of the mortgages paid by him should be ascertained and satisfied before the plaintiff is let into possession. If there is a claim for rents and profits, there is no reason why proper pleadings and proceedings cannot be filed and had to close the entire controversy.

Finding no material error except in the one respect indicated, the case is remanded, with directions to modify the judgment in accordance herewith. All the Justices concurring.

(16 Ariz. 418)

**ADAMS, Sheriff, v. MARICOPA COUNTY.**  
(No. 1395.)

(Supreme Court of Arizona. March 1, 1915.)

**PRISONS (§ 18\*)—COMPENSATION FOR KEEPING PRISONERS—OFFICERS—SALARIES.**

Under Const. art. 12, § 4, authorizing laws fixing sheriffs' salaries, and article 22, § 17, requiring laws placing all officers on fixed salaries, the compensation of a sheriff assuming office on the day of the admission of Arizona to statehood is fixed by Laws 1912, c. 93 (Civ. Code 1913, par. 3228), fixing the salaries of sheriffs in counties of the first class at \$4,000 per annum, and he may not retain, under Civ. Code 1901, par. 2601, repealed by the Constitution, one-half of the amount paid him by the federal government for the support of federal prisoners committed to the county jail.

[Ed. Note.—For other cases, see *Prisons*, Cent. Dig. §§ 47-56; Dec. Dig. § 18.\*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Action by Maricopa County against J. D. Adams, as Sheriff of Maricopa County.

From a judgment for plaintiff, defendant appeals. Affirmed.

Alexander & Christy, of Phoenix, for appellant.

ROSS, C. J. The appellant, who was defendant below, became sheriff of appellee county February 14, 1912, the day of admission to statehood. During his term, 1912-1913 he received from the United States government for and on account of payment for the support and keeping of United States prisoners in the county jail of Maricopa county the sum of \$6,741.75. Of this sum he paid to the county \$3,372, but retained the balance of \$3,369.75, claiming it as his own. This suit was brought by the county to recover the last-named sum, and it had judgment. The defendant has appealed from the judgment.

The appellant's contention is that the sum sought to be recovered from him was "a compensation attached to the office of sheriff at the beginning of defendant's term of office as sheriff of Maricopa county, which compensation could neither be diminished nor abolished during his term of office." Appellant makes his claim to the moneys sued for under the provisions of paragraph 2601, Revised Statutes 1901, which reads:

"The sheriff of the county wherein any United States prisoner is received and kept by him as required by law, shall have, receive, and retain for his own use fifty per cent. of all money allowed and paid by the United States for receiving, supporting and keeping such prisoner or prisoners in said county jail."

Prior to statehood, sheriffs were principally compensated for their services by fees. By paragraphs 2600, 2602, R. S. 1901, the boards of supervisors were empowered to make additional allowances to sheriffs, differing in amount according to class of county, and in paragraph 2602 this additional allowance is designated as "salary." In *Patty v. Greenlee County*, 14 Ariz. 422, 130 Pac. 757, we hold, in effect, that notwithstanding the additional allowance was designated a "salary," still the sheriffs of the state fell within the class of officers who had theretofore been compensated by the fee system, and that, the "fee system" having been abolished by section 17, art. 22, of the Constitution, the Legislature was empowered under the authority of section 4, art. 12, of the Constitution, to enact laws fixing sheriffs' salaries, and that the Legislature had regulated and fixed the salary of sheriffs in chapter 93, p. 591, Session Laws 1912 (chapter 2, tit. 15, Civil Code 1913). While it is true that the contest in the *Patty Case* was as to whether the salary fixed by the board of supervisors or the one fixed by the Legislature should control, in deciding that the legislative act took precedence and regulated the compensation of the sheriff we said:

"The power of fixing, increasing, and decreasing the salaries of all officers of the state is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made a legislative function by the Constitution, and its power in that respect is not limited or qualified, except that the compensation shall not 'be increased or decreased during his term of office.'

And further on in the opinion is this statement:

"The salary of appellant, if ever properly fixed by the board of supervisors, was made at the first session of the Legislature by general law, 'fixed and definite.'"

The effect of that decision was that the salary or allowance mentioned in paragraphs 2600 and 2602, R. S. 1901, that could be allowed to sheriffs in addition to their fees, was not such a salary or compensation as to prevent the Legislature from increasing or decreasing it during their terms of office. For, had we held that the inhibition of the Constitution as to increasing and decreasing of compensation applied to sheriffs, it would have resulted very disastrously to those officers, as in that event, the Constitution having admittedly abolished the fee system, sheriffs' only compensation would have been such sums as the boards of supervisors in their discretion should allow, within the limits prescribed by sections 2600 and 2602, supra, and in certain contingencies the amounts received under paragraph 2601. The constitutional mandate to the Legislature, as contained in section 4, art. 12, was, when taken in connection with section 17, art. 22, that it should enact laws placing all state and county officers on "fixed and definite salaries." Paragraph 3228 provides that:

"In counties of the first class [Maricopa's class], the county officers shall receive respectively, as full compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: \* \* \*

"The sheriff, four thousand dollars per annum."

However, if the sheriff should be allowed or permitted to retain money received by him from the United States for the support and keeping of United States prisoners, his salary would not be fixed and definite, but would be very indefinite; the amount depending upon the number of prisoners committed to the county jail and the length of time confined therein.

We are persuaded that the Legislature would have exceeded its powers, had it in direct terms provided that the salary of sheriff should be \$4,000 and 50 per cent. of amount paid him by the general government for the care and support of its prisoners committed to the county jail, for the Constitution restricts the Legislature's powers to providing "fixed and definite salaries." Inasmuch as the sums that boards of supervisors were allowed to give sheriffs under paragraphs 2600 and 2602 were mere allowances in addition to fees, if the appellant is right in his contention that he is entitled to keep the sum sued for, he would also be entitled to demand and recover the sums as provided

in paragraphs 2600 and 2602, supra. Only those laws of the territory of Arizona were continued in force, after admission, that were not repugnant to the Constitution (section 2, art. 22). We think paragraph 2601, R. S. 1901, is in conflict with, and repugnant to, the provisions of the Constitution abolishing the fee system and providing for "fixed and definite" salaries of officers, by general law.

The appellant is entitled to, as his compensation, either the sums that he may be allowed by the board of supervisors under paragraph 2600, and the sum that he may receive as provided by paragraph 2601 for keeping federal prisoners, or he is entitled as full compensation to the sum of \$4,000 as provided in paragraph 3228. We have already decided in the Patty Case that the salary fixed by the Legislature is the "fixed and definite" salary to which he is entitled.

Judgment affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

(93 Kan. 797)

JINKIAWAY et al. v. FORD et al.  
(No. 19181.)

(Supreme Court of Kansas. Jan. 9, 1915.  
Rehearing Denied Jan. 19, 1915.)

(Syllabus by the Court.)

1. LIFE ESTATES (§ 18\*)—TAXES—PERSONS LIABLE—LIFE TENANT.

It is the duty of a tenant for life in possession, and enjoying the rents and profits of land, to pay the taxes thereon.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 39, 51; Dec. Dig. § 18.\*]

2. REMAINDERS (§ 11\*)—TAX SALE—PURCHASE BY REMAINDERMAN.

A remainderman, not in possession and having no right to the occupancy or use of the land, may purchase and hold a tax title thereon under a sale for delinquent taxes which the life tenant ought to have paid.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 8; Dec. Dig. § 11.\*]

3. REMAINDERS (§ 9\*)—TAX TITLE—MERGER IN LIFE ESTATE—PURCHASE BY REMAINDERMAN.

Where a remainderman purchases a tax title in the circumstances above stated, and enters into possession under it, and afterwards takes a quitclaim deed from the life tenant, the tax title is not necessarily merged in the conveyance of the life estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 6; Dec. Dig. § 9.\*]

4. REMAINDERS (§ 11\*)—PURCHASE BY REMAINDERMAN—TITLE AS TO OTHER REMAINDERMEN.

One of several remaindermen who does not have the possession, or right of possession, or right to rents and profits, who purchases the property at a sale for taxes which the life tenant ought to have paid, to whom a tax deed valid on its face is issued, may hold the tax title for his own use and benefit as against other remaindermen.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 8; Dec. Dig. § 11.\*]

Appeal from District Court, Clay County.

Action by Nora Jinklaway and others against Bertha Ardella Ford and others.

From judgment for defendants, plaintiffs appeal. Affirmed.

C. Vincent Jones and F. L. Williams, both of Clay Center, for appellants. Dawes & Miller, of Clay Center, for appellees.

BENSON, J. This is an action to set aside a tax deed, and also to set aside a quitclaim deed made by the plaintiff Nora Jinklaway to the defendant Bertha Ardella Ford. John Ertz, owner of the land in controversy, died February 1, 1897, leaving a will by which he devised to his wife, Nora, for the use of herself and her children, an estate for life in this land. He left five children by a former wife, and seven children by his wife Nora. His will provided that after the death of his wife the home farm in Clay county, now the subject of this action, should be sold and the proceeds divided equally between 11 of his sons and daughters. Five of the children are joined with the widow (now Mrs. Jinklaway) as plaintiffs, and 7 are defendants. Mrs. Ertz lived on the home farm for about one year after her husband's death, when she leased it for a term of eight years for a grain rent and moved to Clay Center. From Clay Center she moved to Oklahoma and thence to Wichita, where she has lived since November, 1899. The taxes on the land for the year 1897 were not paid, and it was accordingly sold in September, 1898, to Bertha Ertz, who is a defendant in this action by the name of Bertha Ardella Ford. The taxes for the years 1898, 1899, and 1900 were paid by the purchaser, and a tax deed valid in form was issued to her on September 7, 1901. On September 9th Mrs. Ford presented her tax deed to the subtenant, Mr. Dicks, who was in possession of the farm holding under the tenant to whom Mrs. Ertz had leased it, and demanded the rents; Dicks agreed to account to her for rents, and purchased the landowner's share of the oats that had been raised that year on the farm, and agreed to lease the premises from Mrs. Ford for the next year. Afterwards Dicks repudiated this arrangement and threatened to hold possession under the old lease. Mrs. Ford then commenced an action to obtain possession under the statute relating to forcible entry and detainer. An appeal to the district court was taken from the judgment rendered in that action. Pending the trial of that appeal the case was settled, and Mr. Dicks took a lease from Mrs. Ford for one year. Mrs. Ford has been in possession herself ever since the expiration of that lease. On September 23, 1901, Mrs. Jinklaway made and delivered to A. T. Ford, husband of the defendant Bertha Ardella, a deed purporting to remise, release, and quitclaim the land to Mrs. Ford for a consideration of \$1. It appears that \$5 was the amount paid, but there was evidence tending to prove that \$50 was promised, although the evidence on this matter is conflicting. The action in forcible en-

try and detainer was commenced in November, 1901, after the quitclaim deed had been obtained, and in her affidavit in that action Mrs. Ford stated "that on or about the 23d day of September, 1901, said plaintiff became the owner" of this land. It will be observed that the date thus given in the affidavit is the date of the quitclaim deed. In the original petition it was expressly alleged that Mrs. Ford took possession under her tax deed, but concealed the fact, and these allegations were repeated in different parts of the petition, making concealment one of the grounds for setting aside the tax deed. These allegations were repeated in effect, although not so directly and emphatically in the amended petition upon which the case was tried. In this amended petition it was alleged in connection with the charge of concealment, and a promise of the Fords to pay the taxes, that Mrs. Ford and her husband "were at that time actually in possession of said land, having long before ousted plaintiff's tenant, and were claiming to own the same under the tax deed." Two of the plaintiffs were minors, and an offer was made in their behalf to redeem from the tax sales by paying the necessary amounts, which the court was asked to ascertain for that purpose. No special findings were requested. The court found for the defendant Bertha Ardella Ford on her counterclaim to quiet title, and against all the other parties plaintiff and defendant, except the two minors, and dismissed the cause as to them without prejudice. Judgment was rendered in favor of Mrs. Ford, quieting her title as prayed for.

[1-3] The principal legal questions to be considered are: First, whether one of several remaindermen who has no right of possession can lawfully purchase and hold a tax title while the owner of the life estate is in possession enjoying the rents and profits; second, where a remainderman has purchased the land at a tax sale and obtained a tax deed valid upon its face and taken possession of the land, will a quitclaim deed taken from the owner of the life estate impair or affect her rights under the tax deed? third, does the remainderman hold the property under the tax deed for the benefit of all the remaindermen, subject to their contribution of an equitable proportion of the expense?

Proceeding in the order of the questions as stated above it should be remembered that the title acquired under a tax deed is an independent one, vesting in the grantee an estate in fee simple which extinguishes all former rights and titles of individuals. *Board of Regents v. Linscott*, 30 Kan. 240, 265, 1 Pac. 81; *Belz v. Bird*, 31 Kan. 139, 1 Pac. 246. A person who is under an obligation to pay the tax upon land cannot legally acquire and hold a valid tax title upon it. *Keith v. Keith*, 26 Kan. 26; *Phipps v. Phipps*, 39 Kan. 495, 501, 18 Pac. 707; *Delashmutt v. Parrent*, 39 Kan. 548, 556, 18 Pac. 712.

The correlative rule that ordinarily one who is under no such obligation may do so is just as firmly established. *Waterson v. Devoe*, 18 Kan. 223; *Nagel v. Tieperman*, 74 Kan. 32, 85 Pac. 941, 88 Pac. 969, 9 L. R. A. (N. S.) 674, 10 Ann. Cas. 977; *Baldwin v. Gibson*, 85 Kan. 267, 116 Pac. 827; note, 75 Am. St. Rep. 229, 230. In the *Nagel Case* it was held that a wife, not being in possession or receiving rents, and under no other obligation to pay taxes, might acquire a tax title upon her husband's lands. It is also well settled that as between a remainderman and a life tenant the latter should pay the taxes, and that the remainderman, in the absence of some agreement or controlling equity, is under no obligation to do so. 16 Cyc. 632; *Menger v. Carruthers*, 57 Kan. 425, 428, 46 Pac. 712.

Applying these principles, it seems clear that as between the life tenant, Mrs. Jinklaway, whose duty it was to pay the taxes, and Mrs. Ford, holding only as a remainderman, chargeable with no such duty, the tax title is valid so far as the ability of the grantee to acquire it at the time it was purchased is concerned.

Proceeding further in the order suggested above the next proposition to be considered is the effect of the quitclaim deed upon the tax title. The contention of the parties claiming adversely to the tax title is that the immediate effect of taking the conveyance of the life estate was the payment of the taxes covered by the tax deed. This effect is claimed on the ground that the life tenant could not acquire and hold a tax title in the circumstances, and that by accepting the conveyance from her, Mrs. Ford took upon herself the same burden. That is, that if Mrs. Jinklaway had purchased the land and taken the tax deed, the transaction would have been treated as a payment of the taxes, and that one holding under her is subject to the same disability. It has been held, however, that a person rightfully holding a tax deed valid upon its face, who buys an outstanding title, does not thereby necessarily as a matter of law relinquish his tax deed as a muniment of title. It was decided in *Carson v. Fulbright*, 80 Kan. 624, 103 Pac. 139:

"One who is not under any obligation to pay taxes upon land, nor in privity with one so liable, may obtain a tax title thereto, and when in possession and claiming title under such a tax deed, apparently valid, may accept a conveyance from the former owner without incurring thereby the risk of losing his land for failure to pay a mortgage given by such former owner and outstanding when the taxes became delinquent, although the mortgagor had covenanted in the mortgage to pay the taxes." Syl.

It was said in the opinion:

"When the taxes upon which the deed was issued became delinquent, and at the time the deed was issued the defendant was under no obligation to pay the taxes, and by accepting a conveyance *afterward* from the former owner he did not defeat himself of his previously acquired title, although such former owner was bound to pay the taxes. Such an effect

cannot be claimed under the operation of the rule of merger, for merger is very largely a question of intention, and will not be presumed when it would operate to the disadvantage of the party. \* \* \* It will be presumed that the conveyance was obtained for some benefit and not for a burden."

These principles apply, perhaps, with greater force here where the outstanding interest was a life estate only. Taking the quitclaim deed cannot be construed to merge the tax title without doing violence to the *Carson* decision with which the court remains content. The appellants, however, distinguish that case by referring to the fact that the tax deed there under consideration had been of record for over five years and therefore was not assailable for defects not apparent upon its face, while here the tax deed is vulnerable to such an attack. In this situation it is argued that it was the duty of Mrs. Jinklaway to bring a suit to set it aside, and that this duty passed to Mrs. Ford by her acceptance of the quitclaim deed. The proposition is that in buying an interest presumably for her benefit, she imposed upon herself the duty to destroy the title which she already possessed. This presents again the question of merger. Starting with the premise that Mrs. Ford having at the time she purchased the tax title capacity to do so and had acquired a certain interest in the land, the question is whether that interest was merged in the life estate by taking the quitclaim deed. Merger would not depend on the extent of the interest, whether a fee simple, or one that would ripen into a fee by efflux of time. Being, as stated in the *Carson Case*, and others cited in that opinion, largely a question of intention, we are constrained to hold that it cannot be presumed, in the absence of an agreement, express or implied, to do so, that in taking the conveyance of the life estate it was the intention to destroy the tax title, the latter upon its face appearing to create an estate in fee simple. Gen. Stat. 1909, § 9479.

The appellants construe the effect of the quitclaim deed as creating a trust *ex malificio* in the grantee for their benefit. This effect is claimed because of alleged fraudulent representations and concealment in procuring it. The claim was made in the petition and some evidence was offered, supporting it, that the deed was obtained upon the representations that the land was about to be sold for taxes and would be lost to all parties if they were not paid; that Mrs. Ford would pay the taxes if the deed were made, and hold the land for the benefit of the parties in interest. The evidence, however, only presented a question of fact which, in view of the general finding against the appellants and in favor of Mrs. Ford, must be construed as finding that the contention was not true. The weight of the evidence and credence to be given to it were for the court. If a special finding had been desired on that particular issue, a request for it should have been made. Any consid-

eration here of the legal effect of such representations would be unwarranted in view of the findings. In this connection it may be said that the refusal of the court to allow Mrs. Jinklaway to testify whether she would have made the conveyance had she known that Mrs. Ford was then claiming the property under a tax deed is regarded as immaterial, although an answer might well have been allowed. For the purpose of this ruling a negative answer will be presumed. The finding of the court sufficiently indicates that such an answer would not have affected the decision. Errors not prejudicial must, under the mandate of the Code and in pursuance of good practice, be disregarded.

[4] We come now to the third question, whether Mrs. Ford, in the attitude of a remainderman rightfully holding a tax title, holds it for the common benefit of all the remaindermen; that is, whether that is the legal effect of her purchase. This question is important to all the parties except Mrs. Jinklaway and one of the appellants who has conveyed his interest to Mrs. Ford. It should be observed that her coremaindermen, or as they have sometimes been called, cotenants in remainder, are not tenants in common as that term is ordinarily applied, possession, or a common right of possession, being essential to tenancy in common. The remaindermen hold from the same common source, that is, under the will, but independently of each other. One tenant in common may not hold a tax title against his cotenants for by virtue of the common possession he is equally bound with his cotenants to pay the taxes (*Muthersbaugh v. Burke*, 33 Kan. 260, 6 Pac. 252), and for the same reason redemption by one is effectual for all. Not so with coremaindermen. They have no common possession or possession of any sort from which such consequences may flow.

The rights and obligations of life tenants and remaindermen as holders of tax titles were considered in a highly instructive opinion of the Supreme Court of Iowa. The principles decided, so far as relates to this controversy, may be stated without reciting the facts of that case. It was held that remaindermen who are not in possession and have no right of possession at the time of the sale may purchase and hold an outstanding tax title for their exclusive benefit against other remaindermen, but that the purchase of a tax title by a tenant for life in possession does not vest the title in him as against remaindermen, but operates as a redemption from the tax sale. It will be noticed that the first point decided answers the question now under consideration. The court said on that proposition:

"Here, however, the cotenants in remainder were not in possession, nor did they have any right of possession, and they were not chargeable with the duty and responsibility of making payment of taxes. As between themselves, it cannot be said that there were any reciprocal rights or duties. The duty of paying taxes rested upon the life tenants, and, should one

of the remaindermen have seen fit to pay taxes allowed to become delinquent for the protection of the estate, he could not recover any portion of the amount so paid from his coremaindermen. There being no duty to pay, there could be no such thing as an enforced contribution." *Crawford v. Meis*, 123 Iowa, 610, 99 N. W. 186, 66 L. R. A. 154, 101 Am. St. Rep. 337.

Brief reference will now be made to a few of the cases relied upon by the appellants as supporting a contrary view. It was held in *Clark v. Lindsey*, 47 Ohio St. 437, 441, 25 N. E. 422, 425, 9 L. R. A. 740, that where a tenant in dower neglects to pay taxes and one of several tenants in common in remainder purchases the land at a tax sale, the purchase will inure to the benefit of his cotenants in remainder. The opinion, however, refers to an Ohio statute, providing that when a tenant in dower shall neglect to pay taxes so long that the lands are sold for their payment, and there is no redemption in one year, the tenant in dower shall forfeit that estate to the remainderman or reversioner, who may thereupon redeem as other lands are redeemed. A doweress having failed to pay taxes as this statute provided, two of the remaindermen purchased at tax sale. On the question whether another remainderman was divested of his estate by the tax title, the court said:

"In our view, the relations existing between tenants in common—whether in possession of the property or entitled to an estate in remainder—is of a nature to preclude such a result. Just dealing and the confidence necessarily reposed in each other would suggest that owners in common of real estate should consult for the mutual benefit. While one should do no act intentionally to the detriment of the other, good faith should withhold him from all action, in reference to the common property, that would work exclusively to his own advantage."

It will be seen that the Ohio court places remaindermen with respect to each other on the same footing as tenants in common in purchasing tax titles. It does not clearly appear what weight was given to the statute referred to in arriving at the result.

Mississippi decisions are cited by the appellant to sustain the view taken by the Ohio court that remaindermen are to be treated as tenants in common in respect to the purchase of tax titles. In *Harrison v. Harrison*, 56 Miss. 174, it was held that a remainderman, who purchased an outstanding tax title arising out of the failure of the life tenant to pay the taxes, held it in trust for his cotenant in remainder. In a luminous note in 33 L. R. A. 688, upon the effect of a tax sale on land held by a life tenant, it is said that under the decisions of Kansas and other states named, the tax sale extinguishes all prior titles of every kind, while in other states the sale is limited to the life estate. Mississippi is classified with the latter.

In *Defreese v. Lake*, 109 Mich. 415, 427, 67 N. W. 505, 508, 32 L. R. A. 744, 63 Am. St. Rep. 584, it appears that land was devised to a wife for life, then to a son for his

life with remainder to the heirs of the son. Taxes being delinquent during the life of the widow, the land was sold at tax sale to the son. After the widow died the son took possession, and after two years conveyed the land to Lake. After the son's death his heirs claimed the lands as remaindermen, and Defreese claimed under them; that is, one party claimed through conveyances from the son, and the other through conveyances from his heirs. When the son owning the life estate, died, his heirs could not hold the property otherwise than under the tax deed which he had taken while his mother, the first life tenant, was in possession. The court said:

"We have found no case upon all fours with this, and we doubt if it can be said that the law imposes any such duty [to pay taxes] upon the second life tenant during the tenancy of his predecessor. But we think it does not necessarily turn upon a duty to pay. While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remaindermen, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave them an estate, thereby recognizing their right. Good faith toward the testator should forbid such an attempt to defeat his purpose. Were this claim to be sustained, it would make it easy for two life tenants, by collusion, to defeat the remaindermen, under circumstances like these."

The distinguishing feature of the Defreese Case appears to be the fact that there were two successive life estates. The question presented did not relate to the duty of the son to coremaindermen, but to the owners of the succeeding life tenancy created by the same will. The opinion refers to the earlier case of *Blackwood v. Van Vleet*, 30 Mich. 118, where the same court had said:

"To preclude any person from making and relying upon a purchase of lands at tax sale, there must be something in the circumstances of the case which imposes on him a duty to the state to pay the tax, or something which renders it inequitable, as between himself and the holder of the existing title, that he should make the purchase. \* \* \* While a party is not to build up a title on his own neglect of duty, yet, if he can show he owes no duty in the premises, he is as free to become purchaser at a tax sale as any other person."

In the Defreese Case, 109 Mich. 428, 67 N. W. 509, 32 L. R. A. 744, 63 Am. St. Rep. 584, the court also said:

"In *Sands v. Davis*, 40 Mich. 14, the question arose between tenants in common. In that case one bought a tax title that was outstanding at the time of the purchase of his interest in the premises, and therefore which he owed no duty, to the state or his cotenants, to pay, and it was held that he might set up such title against his cotenants. Both of these cases recognize the proposition that one asserting a tax title may be under a disability, owing to his relations to others claiming interests in the land."

Thus it appears that notwithstanding the decision in the Defreese Case the court still adhered to the principle that one may assert a tax title who owes no duty to pay the tax.

In *Freeman on Cotenancy* at section 158 the general rule is stated that a cotenant will not be permitted to assert against his companion a title founded upon taxes imposed on the common property, adding, however:

"But where the purchasing cotenant has paid his taxes, and is therefore free from fault, and *there is nothing in the relations between the parties imposing any obligation on either to pay the charge upon the moiety of the other*, then it is difficult to assign any reason for restraining the tenant not in default from bidding for his own use at the tax sale."

The part we have italicized in the above quotation appears to be in harmony with the proposition that the disability is consequent upon the obligation, and this, notwithstanding the apparent contrariety in decisions is the controlling principle, which is tersely stated in *Crawford v. Mels*, 123 Iowa, 610, 99 N. W. 186, 66 L. R. A. 154, 101 Am. St. Rep. 337, supra:

"It is true, as contended for by counsel for appellants, that where there exists, as between joint tenants or tenants in common, a reciprocal duty of protecting the joint estate, one may not absorb or get rid of the interest of his cotenant by allowing the property to go to tax sale, and thereunder acquired title to the entire estate through the medium of a tax deed. \* \* \* It is to be noted, however, that in each of the cases cited, and in others where the like rule is declared, the cotenants were in possession or entitled to possession, and each was charged with the duty of protecting the joint estate. And it is under such circumstances that payment by one cotenant is held to be presumably for the benefit of all, and he who pays may charge the several interests of his cotenants with the proportionate parts which such cotenants should have paid. *Cooley on Taxation*, 467. The reason for the rule seems to be that, there being a reciprocal duty on the part of the cotenants to pay the taxes assessed, and as a part of the taxes for which the land is sold is a claim upon the purchaser's share, the sale is based in part upon his own default."

It is not deemed necessary to refer further to cases relied upon by the appellants. Following the principle which we believe to be the logical deduction from our own decisions, and the weight of the reasoning in the opinions of other courts, it is held that because there was no obligation or duty at the time Mrs. Ford purchased the tax title, she could assert it, not only against the life tenant, but against the other owners of the estate in remainder.

Two incidental questions remain to be considered. The appellants earnestly and forcibly argue that, notwithstanding the averments of the petition to the effect that Mrs. Ford was in possession under her tax deed before she obtained the quitclaim deed, the proceedings in forcible entry and detainer and her affidavit there filed, estop her from asserting that she had such previous posses-

sion, or conclusively prove that she did not. On the other hand, Mrs. Ford contends that the appellants are estopped by their pleading to deny that she had such prior possession. But the evidence tended to prove that the subtenant attorned to her. If that was the fact, her possession under the tax deed was sufficiently shown. *Sheaff v. Husted*, 60 Kan. 770, 57 Pac. 976. A subsequent action to obtain possession, caused by a repudiation of the agreement by the occupant, would not be inconsistent with previous possession. The affidavit contained evidence tending to show a reliance upon the quitclaim deed, but was not conclusive. The time when possession was taken was a fact to be determined on the pleadings and all the evidence.

The district court by dismissing the case against the minors remitted them to their right of redemption in the manner provided by statute. Gen. Stat. 1909, § 9468. As the remedy there provided is simple, involving only a computation by the proper authorities and payment of the proportionate sum by the redemptioner, no reason appears for resorting to a court of equity. If the statutory right had been denied, or there had been a substantial disagreement over the amount, or other ground for resorting to the court, such action might have been upheld. The rights of the minors were fully protected, and they have no just ground of complaint.

The judgment is affirmed. All the Justices concurring.

(94 Kan. 106)

BISHOP et al. v. FISCHER, District Judge.  
(No. 19817.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. COURTS (§ 207\*)—MANDAMUS (§ 37\*)—INJUNCTION—JURISDICTION—RIGHT TO REMEDY.

The plaintiffs' lessee bored producing gas wells on the plaintiffs' land and on the lessee's land, and connected the wells by pipes which converged in a building erected by the lessee on the plaintiffs' land, where a meter, a pressure gauge, and other gas appliances were installed. From this point the gas produced was conducted to a pipe line located in a highway alongside the plaintiffs' land. The pipe line belonged to a corporation for which a receiver was appointed by the district court. The receiver was authorized by the court to purchase gas from the plaintiffs' lessee, which the receiver distributed to consumers. The plaintiffs took possession of the building, pipes, and appliances on their own land, and stopped the flow of gas into the pipe line under a claim of right predicated upon their contract with the lessee. Upon application made in the receivership suit, the receiver procured an order directing a person designated by the court to remove the obstructions preventing the flow of gas into the pipe line and enjoining the plaintiffs from maintaining such obstructions or interfering with the order. Neither the plaintiffs nor their lessee were parties to the receivership suit, and the order was procured without notice to them. The order having been executed, the plaintiffs moved to set it aside because it had been made without juris-

diction. The court modified the order, but did not vacate it. *Held*, the court had no jurisdiction over the parties or over the property affected by the order, the order was void, and the court may be required by writ of mandamus issuing from this court to set aside the order.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 597; Dec. Dig. § 207;\* Mandamus, Cent. Dig. §§ 81, 82; Dec. Dig. § 37.\*]

2. APPEARANCE (§ 9\*)—GENERAL APPEARANCE—MOTION TO SET ASIDE ORDER.

The contents of the plaintiffs' motion to set aside the order considered, and *held* not to constitute a general appearance in the receivership suit.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.\*]

Original mandamus by George J. Bishop and others against Edward L. Fischer, as Judge of the District Court. Dismissal provisionally ordered.

J. F. Getty, of Kansas City, for plaintiffs.  
E. C. Little, of Kansas City, for defendant.

BURCH, J. The plaintiffs ask for a peremptory writ of mandamus commanding the defendant, as judge of the district court, to set aside an order of the court.

Briefly stated, the essential facts disclosed at the hearing are these: The plaintiffs own a tract of land which they leased for oil and gas purposes. The American Gas Company has gas rights in an adjoining tract. Two producing wells were bored on the plaintiffs' land, and several producing wells were bored on the American Gas Company's land. Pipes were laid on the plaintiffs' land connecting all these wells, whereby gas produced was conducted to a common point on the plaintiffs' land. A building was erected there in which were installed a meter, a pressure gauge, and other gas appliances. From this point gas was conducted to a pipe line laid in the highway alongside the plaintiffs' land. The American Gas Company became the plaintiffs' lessee, and their claim is that the American Gas Company became such lessee upon condition that, if rentals and royalties were not paid, they might terminate the lease and take possession of the pipes, building, and gas appliances on their land. Rentals and royalties were not paid. The American Gas Company became bankrupt, the plaintiffs undertook to forfeit the lease, and, pursuant to their claimed contract rights, they took possession of the pipes, building and gas appliances on their own land. The appliances were chained and padlocked in such a way as to prevent the flow of gas into the pipe line in the highway. The pipe line in the highway belonged to the Mid-Continent Development Company. In August, 1911, in an action entitled *L. E. Insho v. Mid-Continent Development Company*, a receiver was appointed for the development company. Subsequently the court authorized the receiver to purchase all the gas furnished by the American Gas Company, and gas obtained in this way was distributed to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



consumers. Neither the plaintiffs nor the American Gas Company were parties to the receivership suit, and the receiver had no possession of the property involved in this suit, or authority over it. When the plaintiffs took possession of the means whereby gas which the receiver was authorized to buy was delivered, the receiver made an ex parte application to the court for an order, which was granted without notice in the following terms:

"It is therefore considered, ordered, and adjudged that George Holmes, as employé of the American Gas Company, remove the obstructions preventing the flow of gas from the American Gas Company's pipe line to the Mid-Continent Development Company's pipe line, and that James F. Getty and George Bishop no longer maintain any obstruction to the said flow of gas, and in no way interfere with this order, until the further orders of this court."

Holmes was, in fact, an employé of the receiver, and proceeded to execute the order by breaking into the building on the plaintiffs' land and removing locks and chains which obstructed the flow of gas into the pipe line. The order was made on November 11, 1914. After its execution, and on November 14th, the plaintiffs moved the court to set aside the order on the ground that it had been made without jurisdiction. After a hearing the court modified the order in such a way as to permit the plaintiffs to cut off the flow of gas from their own wells, but allowed the order to stand as to gas flowing from the American Gas Company's wells. The court disclaimed jurisdiction over the plaintiffs, but believed that the public, to whom the receiver was distributing gas coming from the American Gas Company's wells, should not have its supply cut off by any summary or arbitrary act of the plaintiffs, and on that ground reserved further judgment until it could consider the proper course to be pursued. Thereupon the plaintiffs brought the present action, which the receiver defends for the judge of the district court.

[1] This court has jurisdiction to issue the writ prayed for. It is granted original jurisdiction in proceedings in mandamus by the Constitution. Article 3, § 3. This jurisdiction is plenary, and may be exercised to control the action of inferior courts, over whom this court has superintending authority. In *re Pettitt*, 84 Kan. 637, 114 Pac. 1071.

The action of mandamus cannot be used as a substitute for appeal, nor in any case where a plain and adequate remedy at law exists. In this case, however, there was no action pending against the plaintiffs in the district court. Without having jurisdiction of the plaintiffs and without having jurisdiction of the property, the district court, without notice, issued a mandatory injunction which, in effect, adjudicated the plaintiffs' rights and deprived them of the peaceable possession of property which no one having a claim upon it was disputing. When the court's lack of authority was called to its attention, it kept the plaintiffs in suspense by reserving final

judgment indefinitely. Meanwhile the plaintiffs were in a situation the practical effect of which was to destroy dominion, not only over property which they claim, but over property which was indisputably theirs. They were obliged to let the receiver, with whom they did not desire to deal, take the gas from their wells or else sit by and run the risk of the common field being depleted by the flow from the American Gas Company's wells. Under these circumstances the plaintiffs were not obliged to submit to the jurisdiction of the district court, nor to await its pleasure in finally disposing of the case, nor to adopt the slower remedy of appeal, if, indeed, they were in a situation to appeal. Their only adequate remedy was one which would free them immediately from the embarrassments of the order. *State v. Graves*, 66 Neb. 17, 92 N. W. 144; *Detroit v. Circuit Judge*, 79 Mich. 384, 44 N. W. 622; *Tawas, etc., R. R. v. Iosco*, Circ. Judge, 44 Mich. 479, 7 N. W. 65.

In the case of *State v. Graves*, 66 Neb. 21, 92 N. W. 145, Reynolds was in possession of land upon which there were removable crops. Phillips brought an action against him to restrain him from exercising proprietary rights over the land and crops. A temporary injunction was issued by Graves, judge of the district court, restraining Reynolds from trespassing on the land and from removing or attempting to remove the crops. Thereupon Reynolds, using the name of the state, brought an action of mandamus in the Supreme Court to compel the district judge to vacate the provisional order. In granting the writ the court said:

"The ground upon which Phillips proceeds in the actions brought by him against the relator is that the relator's lease is invalid, and his possession therefore unlawful. Whether this position is tenable we need not determine. It may be that the lease is void. Conceding that it is, the fact still remains that relator entered under it and was in actual, exclusive, and peaceable possession of the land, and of the crops growing thereon, at the time the injunctions were allowed. This being so, the necessary effect of the orders made by respondent, if heeded or enforced, would be to dispossess the relator, to exclude him from the property, and transfer his possessory right to Phillips, who was left free to enter and reap where he had not sown. Phillips was, it is true, claiming the land, but he did not occupy it, and the injunctions were therefore not granted for the purpose of preventing a threatened invasion of a present actual possession. Clearly the action of respondent in attempting to take from relator, without a hearing or an opportunity to be heard, the possession of real and personal property which he claimed, and still claims, was rightfully his, cannot be justified as an exercise of judicial power. The provisional injunction was never designed to transfer the possession of property from one litigant to another. A court or judge cannot thus dispossess a party, and then compel him to produce evidence and establish his title in order to obtain restitution. 'It has been decided repeatedly,' says Mr. Justice Campbell, in *Tawas & B. C. R. Co. v. Iosco*, Circuit Judge, 44 Mich. 479 [7 N. W. 65], 'that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void, so that no one need respect or obey it.'

In *Calvert v. State*, 34 Neb. 616 [52 N. W. 687], a case which is in no material feature distinguishable from the one at bar, it was held that the provisional injunction allowed by the district judge was absolutely null. In the opinion written by Maxwell, C. J., it is said: "A temporary injunction merely prevents action until a hearing can be had. If it goes further, and divests a party of his possession or rights in property, it is simply void." This statement seems to be fully sustained by the adjudged cases in other jurisdictions, and we have found no decision giving color or countenance to a contrary view. But whether the action of respondent be regarded as absolutely void or only voidable, as his counsel contends, it was manifestly an abuse and perversion of process that ought to be speedily corrected. We have, of course, authority to review and reverse it in an appellate proceeding, but, under the circumstances here disclosed, that remedy is not, in our judgment, an adequate one. The rights of the relator can be adequately protected only by the prompt rescission of the orders of which he complains; and the power to grant this relief by mandamus is certainly vested in this court. The superintendent authority of the king's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of mandamus, included in, and part of, the original jurisdiction given by the Constitution to the Supreme Court."

No other district court had authority to control the action of the Wyandotte district court, and consequently this court was the only one to which the plaintiffs could apply for the desired relief.

That the order in question was made without jurisdiction is scarcely debatable. The plaintiffs were not parties to the receivership suit. Neither was the American Gas Company a party to that suit. The American Gas Company had a claim against the receiver for the price of gas which had been delivered to him, which the gas company had presented and was litigating, but that fact did not virtually subject the gas company to a receivership. The property in controversy was not involved in the receivership suit, and the receiver, a simple purchaser and distributor of gas, could not, in effect, condemn the building, pipes, and gas appliances on the plaintiffs' land, either in his own interest or in the public interest, any more than he could condemn the gas from the plaintiffs' wells. In any event, the court's authority in the receivership suit could not be extended to an adjudication of the plaintiffs' claimed rights, whatever they were and whether they were valid or invalid, without making them parties or giving them notice or allowing them an opportunity to be heard. No provision was made for any of these things.

"If the plaintiff has any rights, the law guarantees to it a time and place and tribunal to enforce them. Those rights cannot be destroyed by a decree to which it is neither party nor privy." *A. T. & S. F. R. Co. v. Com'rs of Jefferson Co.*, 12 Kan. 127, 136.

"The trial court undertook to vest the receiver with the custody of other valuable property which was in no way involved in the action wherein the appointment was made. \* \* \* When the court undertook to reach out and take custody and control of property which was not the subject-matter of the controversy, it

went outside its appointed sphere, and its orders in respect to such property were nullities. The court had no more authority over that property than it would have had over the square on which the state house stands. The fact that the other real estate, which may be termed the outside property, was or had been in litigation between the same parties did not enlarge the court's jurisdiction in the case in which the receiver was appointed. The outside property was entirely distinct from that involved in the action wherein the receiver was appointed, and the orders of the court relating to the former were in excess of its jurisdiction, and to that extent, at least, absolutely void." *Bowman v. Hazen*, 69 Kan. 682, 697, 77 Pac. 589, 595.

It is suggested that a federal court has taken possession of the assets of the American Gas Company and has caused the pipes in controversy to be disconnected from the receiver's pipe line, and consequently that a writ of mandamus to vacate the void order can serve no purpose. What the future course of the litigation in the federal court may be cannot be known, and, if the order should stand, the plaintiffs might at some time suddenly discover themselves to be in contempt of the district court. Besides this, it is no answer for the district court to say that another court has indirectly afforded the plaintiffs protection from the enforcement of the void order.

[2] Finally it is urged that the plaintiffs voluntarily made a general appearance in the receivership suit by the terms of the motion to set aside the order. The motion recited that the plaintiffs were not parties to the *Insho* suit; that the property affected did not belong to the American Gas Company, but belonged to the plaintiffs and was exclusively on their land; that they had not sold gas to the receiver or consented to the receiver's use of the pipes; and that the order was, in effect, a confiscation of the plaintiffs' property, made without jurisdiction. The relief asked was that the order be dissolved, and the motion stated that the plaintiffs appeared specially and for the purpose of the motion only.

Delivering the opinion of the court in the case of *Schwab v. Mabley*, 47 Mich. 512, 515, 11 N. W. 294, 295, Judge Cooley said:

"Defendants are brought into court either by the service of process or some substitute thereof, or by voluntary appearance; and the voluntary appearance may be either general and for all purposes, or specially and for some particular purpose. Where the purpose to make it special appears, the court cannot enlarge it and make it general, for the extent to which defendant submits himself to the jurisdiction when he thus voluntarily comes in, is determined by his own consent."

There is no infallible test for determining when the purpose of an appearance is special and when general. Of course, the mere statement that the appearance is special is not controlling, although it may forestall the ordinary presumption that an appearance is general. Apparently the test applied by the Supreme Court of the United States is whether or not the party applying becomes "an actor in the cause." *Merchants' Heat & L.*

Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488. In reality this supposed test only states the problem in another way.

In the case of Deming Investment Co. v. Ely, 21 Wash. 102, 107, 57 Pac. 353, 354, it is said:

"The test as to whether an appearance is general or special is usually the relief asked. If the granting of the relief requested in the appearance is consistent with a want of jurisdiction over the person, the defendant may appear for a special purpose, without submitting himself to the jurisdiction of the court for any other purpose."

In the case of Blackburn v. Sweet, 38 Wis. 578, 580, it is said:

"Where the moving party asks some relief which can only be granted upon the hypothesis that the court has jurisdiction of the cause and person, this is a submission to the jurisdiction, and waives all defects in the service of process."

In the early case of Adolph Cohen v. C. B. Trowbridge, 6 Kan. 385, which has been followed many times, the syllabus reads:

"A motion in a cause based wholly on an alleged want of jurisdiction is not an appearance generally, or a waiver of any irregularity in the proceedings by which a party is attempted to be brought into court; but a motion grounded wholly or in part upon error in the judgment, or upon irregularities, aside from the question of jurisdiction, is such waiver as constitutes an appearance." (Paragraph 3.)

The plaintiffs' motion may be read in such a way as to indicate a general submission to the jurisdiction of the court, but here, as elsewhere in procedure, substance alone is to be regarded, and it is quite clear that the sole purpose was to challenge jurisdiction. The plaintiffs did not ask to be made parties, and the relief sought—the dissolution of the order—is entirely consistent with want of jurisdiction, and could be granted upon the hypothesis that the court had no jurisdiction. This relief was not asked because of error in granting the order or on the ground of irregularity aside from the question of jurisdiction. The plaintiffs desired no decree that they owned the property. Indeed, it would have been impossible for the court to adjudicate that fact as the case stood, on a simple motion and in the absence of the American Gas Company, which was not a party. The facts concerning the ownership and location of the property were stated to show the character of the right invaded, that the plaintiffs were claimants of absolute property interests which the court lacked power to divest summarily by an ex parte order. Likewise the plaintiffs did not desire a decree that they were free from relations with the receiver in the marketing of gas and use of the pipes. The facts concerning those matters were stated to show that the plaintiffs were not related to the business of the receivership in any way which would give the court jurisdiction over them or over the property in controversy. Read in this way, the motion is consistent throughout with the idea of a special appearance to set aside the order for want

of jurisdiction. While the plaintiffs ran some risk in thus attempting to exclude grounds of jurisdiction, the court is satisfied that such was their purpose, and, such being their purpose, the court will not enlarge the appearance to make it general. This court is all the more ready to adopt this conclusion because it seems to have been the view of the district court. The proposition that the plaintiffs made a general appearance is presented for the first time by the receiver in this court. The district court's view was indicated at the close of the hearing as follows:

"The Court: I have jurisdiction over the receiver, and the receiver and people under him have equities, and they are in court and entitled to the protection of this court to the extent of preventing any one cutting off the supply of the gas without right. Now, I am not sure just what the rights are in regard to that pipe going across this land, but I don't believe Mr. Bishop has any right to jump in there and tear up a main or close it off—that is, a general supply pipe—from customers of wells back behind his land so as to keep it away from whoever acquires the right to use it. \* \* \*

"Mr. Getty: They are using our land.

"The Court: This pipe runs across there and does not hurt your land as I get it. \* \* \* I have no more jurisdiction over Mr. Bishop than anybody else, but he should not interfere with the supply of gas to these consumers."

The judge of the district court acted candidly and conscientiously. His solicitude for people who might be depending in part upon this supply of fuel and light in winter time was commendable, and his reservation of final decision until he could satisfy himself fully as to the proper course to pursue was the result of this solicitude.

Under these circumstances, the present order will be that, if the order of the district court be set aside within ten days from the filing of this opinion, this proceeding will be dismissed without costs, which are practically nominal, to either party. All the Justices concurring.

(93 Kan. 762)

SOMERFIELD et al. v. LAND & POWER CO.  
(No. 19135.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

NEGLIGENCE (§ 39\*)—ATTRACTIVE NUISANCE—INJURY TO CHILD.

An open, unfenced, and unguarded canal about 50 feet wide with perpendicular banks about 13 feet high, carrying a stream of water about 7 feet deep through a populous city, maintained for commercial purposes, and along the banks of which the public passes and children gather to play and fish and swim, and into which a young child of the plaintiffs fell and was drowned, cannot, of itself, be regarded as an attractive nuisance which will render the company owning and operating it liable for the death of the child under the doctrine of the "turntable" cases.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. § 39.\*]

Appeal from District Court, Cowley County.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Clifton Somerfield and others against the Land & Power Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Love & Wright, of Arkansas City, for appellant. C. T. Atkinson, of Arkansas City, and Jackson & Noble, of Winfield, for appellees.

JOHNSTON, C. J. Whether or not an open canal, about 50 feet wide with perpendicular banks about 13 feet high and carrying a stream of water from 6 to 8 feet deep, operated through the corporate limits of a populous city for commercial purposes, is an attractive nuisance is the sole question presented for decision in this case.

The appellant, the Land & Power Company, operates through the corporate limits of Arkansas City a canal such as above described. During December, 1912, Charles Somerfield, a boy about three years of age, the infant son of the appellees, Clifton Somerfield and Gladys Somerfield, his wife, wandered from their home, which was about 50 feet distant from the canal, and, falling into the canal, was drowned. The parents thereupon brought this action against the appellant for \$10,000 damages, alleging, among other things, that the appellant was negligent in failing to properly guard and protect the canal against children of tender years unable to appreciate the dangers of the canal. Appellees further alleged that it was the custom of the children and the general public to cross over the canal and to pass along its side; that children, attracted by the water and the canal, gathered, in season, on its banks, to play, fish, and swim; that several children had been drowned in the canal prior to the death of their son; and that appellant so operated and maintained the canal that it had become a menace to life—all because of the neglect and failure of appellant to properly guard, fence, and protect the canal against the public and particularly against children of tender years. Appellant demurred to appellees' petition, and, the demurrer being overruled, it appeals and contends that the trial court erred in its ruling because such a canal cannot be considered an attractive nuisance within the doctrine of the "turntable" cases as announced by this court.

The canal, as will be observed, has the characteristics of a natural stream, and can no more be regarded as an attractive nuisance than would a river flowing through the city or a pond or lake therein. It has been held that an unprotected pool in a natural water course, to which boys resorted to wade and swim, could not be regarded as an attractive nuisance within the meaning of the "turntable" cases. *Tavis v. Kansas City*, 89 Kan. 547, 132 Pac. 185. In *Harper*

*v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032, it was ruled that a pond in a city park which was substantially a reproduction of a natural pond, although attractive to children, did not come within the rule of attractive nuisances. There is no greater necessity to build a fence or put a cover over the canal than there would be to fence or cover a natural stream, and there can be little distinction made between them so far as the "turntable" doctrine is concerned. There might be ground for the contention of appellees if the appellant had unnecessarily placed or permitted some attractive or dangerous structure to be placed on or over the canal that would imperil the lives of children attracted there to play upon it, as in the case of *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625. In that case there was a fenced reservoir, but the proprietor left an opening in the fence through which boys passed to his knowledge, and then went out to play upon an apron that rose and fell on the water in the reservoir, and this contrivance was, in itself, an attractive danger. The same contention might be made if the appellant had maintained an unprotected and attractive device such as was placed over a pond within the limits of Kansas City. *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626. There the pond itself was not treated as an attractive nuisance, but it was a sewer pipe placed in a sort of trough which extended across the pond to which children were attracted and on which they played, jumping from it into the water, which constituted the allurement and brought the case within the rule. The structure was obviously dangerous as well as attractive. It was unprotected, although the officers of the city knew that children resorted there to play. In another case it was contended that a railway through a city over which children passed was an attractive nuisance because children were tempted to hop on freight trains and ride up to the end of a grade and one of them was injured, but it was there held that while the "turntable" rule had been recognized and applied in this state in a number of cases, the court was not disposed to extend the doctrine farther and declined to apply it to railway trains passing over an ordinary unfenced track. *Wilson v. Railway Co.*, 66 Kan. 183, 71 Pac. 282. The court does not feel warranted in extending the doctrine so as to make appellant liable for failing to fence or guard a water course like the one in question and which, so far as the "turntable" rule is concerned, corresponds with a natural stream.

The judgment of the district court will be reversed and the cause remanded, with directions to sustain the demurrer of appellant and award judgment in its favor. All the Justices concurring.

an. 775)

**BAILLOD v. NELSON GRAIN CO. †**  
(No. 19151.)

Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

**EVIDENCE (§ 481\*)—INJURY TO SERVANT—GUARDED MACHINERY—OPINION EVIDENCE—SUBJECT-MATTER.**

A statute of Missouri provides that: "The belting, shafting, machines, machinery, gearing drums, in all manufacturing, mechanical or other establishments, in this state when so exposed as to be dangerous to persons employed therein, or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Rev. St. Mo. 1909, § 3. In an action under this statute testimony of experienced millers was admissible to show what was the ordinary duty of a miller in a corn mill choked in operation, and it was necessary to remove the cause of such choking.

Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2248-2254; Dec. Dig. § 481.\*]

**MASTER AND SERVANT (§ 228\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

In a brief review of Missouri decisions, it appears that, while the defense of contributory negligence is available in an action under the statute, it is something different from what was understood by that term before the statute, and is not considered in the same light or upon the same basis. This difference, however, does not appear to have been precisely defined.

Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

**MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where a corn mill choked in operation, to prevent the choking, the miller, after failing to remove the cause by taking out the product between the rollers, opened a door above them, and proceeded to rake out the corn or product with his hands about ten inches above the grinding rollers. In doing this work, his foot slipped, and he was thereby thrown off his balance, and his head went down upon and was crushed between the rollers. It is held that the question whether the defendant was guilty of contributory negligence, so as to defeat his action, based on the absence of safeguards required by the statute, is one of fact to be determined upon the evidence.

Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**MASTER AND SERVANT (§ 121\*)—SAFEGUARDING MACHINERY—COMPLIANCE WITH STATUTE.**

The fact that a corn mill is inclosed in a case covering the machinery does not necessarily prove compliance with the Missouri statute. If the service requires that the covering be opened to machinery dangerous to employees, and safeguards underneath or within are possible and practicable, they must be provided. The question is whether the machinery so placed as to be dangerous to employees, while engaged in their ordinary duties, is in fact safely and securely guarded where it is possible, either the guard consists of an outer covering or something else.

Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 228.\*]

Appeal from District Court, Wyandotte County.

Action by Edward G. BailloD against the Nelson Grain Company. From judgment for plaintiff, defendant appeals. Affirmed.

Angevine, Cubbison & Holt, of Kansas City, Kan., and Pierre R. Porter, of Kansas City, Mo., for appellant. J. O. Emerson and D. J. Smith, both of Kansas City, Kan., for appellee.

**BENSON, J.** This is an appeal from a judgment for damages suffered in operating a corn mill in Kansas City, Mo. The plaintiff alleged that:

"On January 3, 1912, the plaintiff was an employe of the defendant \* \* \* in charge of and attending one of the corn mills of the defendant. This corn mill was being used to grind shelled corn into corn chop. It had two large rollers which were revolving at high speed and were so placed that the corn fed from the hopper above the rollers was ground and crushed between them. The machine was propelled by a steam engine, in a distant part of the plant, by means of shafting and belts. Whenever the corn mill became choked up from any cause, and such choke-up was not relieved, the mill would become so choked as to stop the mill itself, and thereby burn and destroy the belts, and it was one of the ordinary duties of the employe in charge, in case of a choke-up, to prevent the destroying and burning of belts. \* \* \* While this plaintiff was in the employ of the defendant in charge of said corn mill, and while it was in operation, it began to choke up under the rollers and was about to choke so tight as to stop the rollers and burn the belts, and thereupon the plaintiff shut off the flow of corn into the hopper and proceeded to clear the corn from above the rollers as it fell from the hopper, and thereby he prevented the belts from burning, but in doing so his left hand was caught and carried between the rollers, and his entire left hand and part of his forearm above the wrist were crushed and severed from his body."

The action is based upon the following statute of Missouri:

"The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." Rev. St. of Missouri 1909, § 7828.

The answer, after a general denial, alleged contributory negligence, and assumption of risk was also pleaded. The following special findings were returned by the jury:

"Q. 1. Was the plaintiff an experienced miller at and before the time he received the injuries of which he complains? Ans. Yes.

"Q. 2. Was the plaintiff familiar with the construction and operation of the mill by which he was injured? Ans. Yes.

"Q. 3. Were the rollers, by which the plaintiff was injured, boxed and so inclosed that the plaintiff could not get his hand between the rollers without first opening the door, and then putting his hand through the opened doorway? Ans. Yes.

"Q. 4. Did the plaintiff voluntarily open the

door in front of the roller, and attempt, by the use of his bare hands, to take the shelled corn away from the rollers, while the rollers were revolving rapidly? Ans. Yes."

"Q. 6. Was there a roller, known as the feed roller, above the two rollers between which the plaintiff's hand was caught and injured? Ans. Yes."

"Q. 8. Was it more dangerous to attempt to remove the shelled corn from the rollers, by the use of plaintiff's hands, while the mill was in operation, than it would have been to signal the engineer and thus stop the mill, and then, after the mill stopped, remove the corn? Ans. Yes."

The findings were made upon the plaintiff's evidence alone; the defendant not having offered any. Error is assigned upon the admission of evidence, upon the order overruling a demurrer to the evidence, upon instructions, and upon the denial of judgment for the defendant on the findings.

The plaintiff alleged that the defendant was negligent in not safely nor securely guarding the rollers and machinery, and in failing to post notice of the danger as the statute required.

The building has three floors, called, respectively, the ground, first, and upper floors. The engine is on the ground floor. The mill is on the first floor, and the corn to be ground is on the upper floor. The mill is about six feet in height. The corn comes down through a spout into a hopper about 14 inches wide and 3 feet long, and through the hopper into the feed roller 3 inches in diameter and 3 feet in length. After passing the feed rollers it drops down 6 or 8 inches into the grinding rollers. The mill is a single stand double roller Barnard mill, and is operated by cog gears and driven by a belt running from pulleys one on each side of the mill. A door below the grinding rollers opens into the space underneath. Another door above is hung on hinges at the bottom and fastened by catches at the top. This door extends the width of the front of the mill and opens into the space above the rollers. There were two other corn mills in the building. An elevator was being operated by the same engine as the mill, when the injury occurred.

The plaintiff is a miller of 15 years' experience, familiar with this type of mill. He had worked two or three months as a hand in the establishment, but had nothing to do with installing this mill. On the day of the accident the plaintiff started the mill to test its capacity. He soon noticed that it was choking. What then occurred is described in his testimony:

"I could tell by the sound the mill was choking, and I opened that door underneath and tried to take the choke out—the door underneath the roll, which is the proper place to take it out, if it is possible—but I found the corn chop had stopped in there so tight that it would not feed if I tried to take it out, so I just pushed the thing shut and opened the door on top, and commenced to take the corn out, because I knew it was only a matter of seconds—which I have no power to tell and cannot tell as to how soon a mill will choke. I reached in to pull the corn out. I used both hands. I reached in

there possibly eight or ten times with both hands. While I was doing that my foot slipped and kind of threw me off of my balance, and my hand went down that way and cut my hand off. It fell right in those grinding rolls and cut it off between the elbow and the wrist. There was no clutch or other apparatus that I could turn that would immediately release the power from the mill. I could not have thrown the belts from the pulleys; that would be impossible. I could have signaled the engineer from near that mill by the whistle string; that was about 18 or 20 feet away, I should judge. That was just a little cord lying on the floor."

"After the mill became in a choking condition I did not go over and pull the cord to signal the engineer to stop because it was not practicable. By all probabilities by the time I went there and pulled the whistle chord the mill would have been down. It would have been choked dead."

"I would think it would stop in half a minute or more, but I have never timed it. That is about the length of time after the steam is turned off. There was no other method of disconnecting the power from the mill. There was a clutch downstairs. The way I would have to do that was over 100 feet from the mill. The first thing for a miller to do when he finds the mill is choking is to go to work and relieve the strain on the mill so they won't stop, because, whenever the mill stops running, the engine is powerful enough to go ahead and drive the belts around and burn them up."

"Q. Is it one of the duties of a miller to prevent the burning of the belts? A. Yes. \* \* \*

"Q. Now, was there another way to relieve that choke-up in time to save the belts, that you know of, than the one you applied? \* \* \*

A. No, there was no other way that I know of."

"Q. The reason you did not stop the machinery was because you thought you didn't have time? A. No, sir. I consider I did not have the time to do it."

The questions copied above were answered over the defendant's objections.

Another witness testified:

"Q. If you have a signal within 15 or 20 feet of you by which you can signal to the engineer, the engineer can stop the machinery just like that, can't he [snapping fingers]? A. Yes, he can stop."

"Q. Don't you think, Mr. Bowers, you could stop the machinery in that way and thus relieve the choked condition quicker than you could by just dipping your hands in above the grinding rollers? A. No, sir. \* \* \*

"Q. What do you mean by saying an engineer could stop the machinery that quick? A. I mean he could cut off the power that quick; the machinery wouldn't stop that quick."

The plaintiff testified that there was a clutch downstairs, 100 feet away, but, on being asked if it was in working order, the defendant objected, and the objection was sustained.

The plaintiff and other millers of experience, who testified that they were familiar with the duties of a miller in the situation of the plaintiff, were allowed to testify, over the defendant's objection, that, when such a mill choked, it was the duty of the miller to relieve the strain, to shut off the feed, open the door under the rollers, and dig out the product, if possible, if not, to open the upper door and rake off the stock with the hands while the rollers are still running; that it was the usual and ordinary custom among millers to do this; and that

It was not the custom or practice of millers to signal the engineer to stop. A competent witness testified over defendant's objection:

"After a choke-up started, if you tried to relieve that by first shutting down the engine, what is the result? A. Well, the result is, you got to get it out. \* \* \* It saves the belts, of course. It only takes a very few revolutions to burn a belt up. If the roll is choked and the engine still running, it takes only a very short time, just a few seconds, to ruin that part of the belt that is on your driving pulley. \* \* \*

Evidence was admitted, over the defendant's objection, that the rollers could be safely and securely guarded to prevent such injuries by placing hopper boards or screens over the grinding rolls on the inside of the machine, leaving a space between them for the corn from the hopper to drop through, so that corn could be scraped out with the hands without danger of injury. There was evidence that other corn mills in the same establishment, one a Lee and Barnard mill, were fitted with such hopper boards, and that it was practicable to put them in this one.

The following special question was presented by the defendant but not allowed:

"Q. 7. Could the plaintiff have stopped the mill by signaling the engineer, and thus relieved the clogged condition of the mill, if it was clogged, with perfect safety to himself? Ans. Withdrawn by the court."

The principal questions to be decided are: (1) Was testimony tending to prove what the ordinary duties of the miller were erroneously admitted? (2) Was the defendant entitled to judgment on the demurrer to the evidence or on the findings?

[1] The Missouri statute requires safeguards when the machinery is dangerous to employes while engaged in their ordinary duties. The evidence referred to in the first question suggested was offered to meet this requirement and to show that the plaintiff was in the line of duty when injured. Similar evidence was admitted in the case of an injury to an employe upon a threshing machine (*Mastin v. Levagood*, 47 Kan. 764, 28 Pac. 977), although its competency is not discussed in the opinion. Evidence to prove the duty of a brakeman in keeping trespassers from trains was considered, but its admissibility was not commented on, in *Kemp v. Railway Co.*, 91 Kan. 477, 138 Pac. 621. Similar evidence was discussed in *Mo. Pac. Ry. Co. v. McCally*, 41 Kan. 639, 649, 655, 21 Pac. 574.

It was held in *Mo. Pac. Ry. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291:

"The inquiry of what are the general duties of a fireman on a switch engine in a certain track yard at a stated time does not relate to a matter which is the subject of expert testimony, and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof."

In the opinion it is said:

"The duty of a fireman on an engine is to keep the engine hot, to keep steam on, and to assist the engineer in watching for signals." It

is claimed by counsel that this testimony was in effect an opinion of the witness that the plaintiff was in the exercise of ordinary care at the time the accident occurred. Not so. There was obviously no purpose to get from the witness his judgment, or an opinion in regard to the manner in which plaintiff had performed this work, or whether he was properly discharging his duty at the time of his injury, nor did the testimony given by him go to that extent. The inquiry went only to the work generally performed by a fireman on an engine in those yards at that time."

The tendency to liberalize the practice respecting such evidence is luminously stated and advocated in volume 3 of *Wigmore on Evidence*, § 1929. The admissibility of this evidence, however, is not violative of any rule or principle heretofore adopted or followed in this court. In *Railway Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819, testimony of an experienced railroad man, regarding the proper position or proper steps for an employe to take in order to pass from a coal car to a box car while in motion, was held to be admissible. It was said that the court could not assume that the jury were as competent as the witness to draw a conclusion from the facts, and that such testimony is excluded only when the jury must be considered as equally competent to judge of the situation. *S. K. Ry. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113, an authority relied upon by the defendant, was examined and distinguished. See, also, *Duncan v. Railway Co.*, 86 Kan. 112, 115, 119 Pac. 356, 51 L. R. A. (N. S.) 565.

[2] The principal ground of the objection to the testimony, tending to prove the ordinary duty or the customary or usual way of relieving the choked condition, is that such evidence cannot excuse the plaintiff from doing an act obviously and plainly dangerous, and reckless. The determination of this particular objection affects the merits of the case presented in the demurrer to the evidence and motion for judgment now to be considered. Referring again to the Missouri statute, it should be observed that it was competent for the Legislature to afford relief even where an employe is guilty of contributory negligence, as our own *Factory Act* is held to do. That being so, the question is not altogether whether the employe was negligent, within the purview of the law as understood before the statute was enacted, but whether he was performing his ordinary duties, within the meaning of that act. This view is supported by decisions of that state, although it is there held, in general terms, that contributory negligence is still a defense under that statute. Interpreting the statute, Judge Woodson in *Huss v. Bakery Co.*, 210 Mo. 44, 59, 108 S. W. 63, in a dissenting opinion, after referring to the deplorable loss of life in the great industries of the land whereby the saying had been given wide publicity in this and foreign countries, that the United States is a "nation of cripples," stated that Missouri



was among the first of the states to enact statutes designed to correct such evils, "to stop as near as possible the mighty slaughter." The opinion is highly instructive throughout, but the following quotation may serve the present purpose:

"The Legislature knew that the human mind and conduct was such that a servant, when in the performance of his duties to his master, surrounded by dangerous machinery, in motion, with his mind concentrated upon his work, oblivious to his surroundings, is liable to slip or take a misstep and fall into the revolving machinery, or thoughtlessly thrust his hand or other portion of his body into the gearing or other portion of the machinery; and, if not 'safely and securely guarded,' he would, in consequence thereof, receive injuries of a serious character. It was the intention of the Legislature and the object and the purpose of the statute to put a stop to all such injuries which grow out of such inattention, inadvertence, mishap, or accidents; that is, such acts of omission. \* \* \* So, in brief, the rationale of the statute is this: That where it is possible to do so, the master must safely and securely guard the belting, shafting, gearing, and drums in his institution; but, when that is impossible, then he must give the required notice. This increases the degree of care required of the master regarding those matters from reasonable care to an absolute duty to safely \* \* \* guard such gearing, etc., where it is possible to do so without materially interfering with the working efficiency of the machinery of the institution; but, if that is impossible, then he must post required notice; and, if he fails in the performance of those duties, then the burden rests upon him to show that the servant was guilty of such contributory negligence that he would have been injured in consequence thereof, even though the gearing, etc., had been so guarded, or that the notice had been properly posted."

The Missouri courts have since approved a part, at least, of the opinion from which we have quoted. In *Simpson v. Iron Works Co.*, 249 Mo. 377, 155 S. W. 810, the scope of the Factory Act of Missouri was stated, and it was decided that the section (as it then stood) now under consideration did not require the safeguarding of a belt which was not moving but was in a state of inertia, over which the employé had stumbled. In the opinion, however, the court said:

"We think, therefore, that the lawmakers, in conditioning the duty to guard upon the phrase above quoted, meant thereby that it should attach when the 'belting,' etc., should be so placed in a factory that its normal operation would injure any employé who should approach near enough to be caught by its force or subjected to its activity. Such accidents are likely to happen to employes who are engrossed in work near such machines, unless they are protected from the workings of the machinery by safe and secure guards. This thought is expressed with clearness, force, and completeness by Woodson, J., in the dissenting opinion of *Huss v. Bakery Co.*, 210 Mo. loc. cit. 67 and 68 [108 S. W. 63]."

This language was followed by the first part of the quotation which we have copied above.

In *Brashears v. Iron Works Co.*, 171 Mo. App. 507, 157 S. W. 360, the dissent in the *Huss* Case is referred to in the following language in the concurring opinion of Judge Sturgis:

"While it is held in *Huss v. Bakery Co.*, 210 Mo. 44, 54, 108 S. W. 63, *Dressie v. Railroad*,

*supra*, 145 Mo. App. 163, 129 S. W. 1012, and *Millsap v. Beggs*, 122 Mo. App. 1, 7, 11, 97 S. W. 956, that plaintiff may be guilty of such contributory negligence as bars a recovery, even in cases where, by statute, the machinery should be, but is not, guarded, yet I do not understand such cases to hold that plaintiff's conduct, as bearing on contributory negligence, is to be measured by the same standard of care, or, more accurately, that such standard rests on the same basis in cases covered by the statute as it would be if such statute did not exist." Page 514 of 171 Mo. App., page 361 of 157 S. W.

Further on quotations are given from the same dissenting opinion, including the following:

"The purpose and effect of this statute in modifying the rule of contributory negligence in cases covered by it by adding a new element to be considered is pointed out in the able dissenting opinion of Woodson, J., in *Huss v. Bakery Co.*, *supra*, and, while his remarks were held not applicable to the particular facts and instructions under discussion in that case, I think the law is there correctly stated. \* \* \* Under the common law, the defendant was required to furnish plaintiff only a reasonably safe place in which to work and reasonably safe means with which to perform his duties, while the statutes require the defendant to safely and securely guard the gearing when possible; and, if impossible, then to conspicuously post a notice calling attention to the dangers. As a corollary to that increased duty of defendant, the care of the plaintiff was correspondingly decreased, and the jury should have been told so in no uncertain words. This proposition of law also finds recognition in the latest decision of the Supreme Court. *Simpson v. Witte Iron Works*, *supra*."

Following this it is said in the *Brashears* Case:

"This case is therefore to be distinguished from the line of cases cited by appellant holding that the servant in somewhat similar circumstances, but where the statute did not apply, was guilty of contributory negligence, as a matter of law; and the trial court did right in not directing a verdict for defendant on that ground."

It seems, from this brief review of some of the Missouri decisions, that, while contributory negligence is still a defense under the statute, it is something different from what was understood by that term before the statute. Judge Woodson declared that the contributory negligence must have been such that the injury would have occurred if the gearing, etc., had been guarded, or the notice had been given. If this declaration is not included in the subsequent approval of other parts of the opinion, it is still apparent that the employes' negligence, in order to afford a defense, is not considered in the same light, or placed upon the same basis, as it was before. As was said in *Millsap v. Beggs*, 122 Mo. App. 1, 97 S. W. 956, "The statute must be allowed to count for something."

[3] The defendant contends that, as matter of law, the danger of raking out the product with the hands was attended with such obvious and glaring peril that we should hold it to be reckless, and should declare that the evidence offered to prove that this was the ordinary manner of relieving the choked condition was inadmissible. But it does not fol-



low that a person is reckless because he places his hands near the parts of machinery which, if touched, will result in grievous hurt. *Delmore v. Flooring Co.*, 90 Kan. 29, 133 Pac. 151, 47 L. R. A. (N. S.) 1220; *Rambo v. Electric Co.*, 90 Kan. 390, 133 Pac. 553; *Bailey v. Spelter Co.*, 83 Kan. 230, 109 Pac. 791; *Bair v. Heibel*, 103 Mo. App. 621, 77 S. W. 1017.

The opinion in the *Heibel* Case contains a full discussion of the statute in question and refers to a distinction between contributory negligence at common law and under the statute. The employé worked about unguarded cogwheels plainly in view and obviously dangerous, but he lost his balance while pushing a board lurching against the wheels. The court said:

"The true question is as to the respondent's contributory negligence; and of that he did not convict himself by simply working around the uncovered cogwheels, unless the danger was so great that a prudent person of his years and capacity would have declined to face it. *Settle v. Railway*, 127 Mo. 336 [30 S. W. 125, 48 Am. St. Rep. 633]; *Pauck v. Provision Co.*, 159 Mo. 467 [61 S. W. 806]. Assuredly the court would have acted unjustly, had it declared the risk to be that extreme, as a legal deduction."

There was nothing to injure the plaintiff in his work until he dropped his hand too low; the grinding rollers being 10 or 12 inches below the door—and that drop was caused by a slip of his foot. Doubtless many a man bending over a revolving saw, wheels, or other mechanism in motion, to examine or adjust the parts or otherwise perform his work, has lost life or limb by a fall caused by some untoward slip or mishap which ordinary diligence could not have foreseen. Before the days of safety coupling, brakemen sometimes lost their lives by being crushed under the wheels after a stumble or fall when doing their perilous work. If the plaintiff, without slip or other mishap, had thrust his hand upon the roller, a different question would have been presented which cannot be decided now. It seems, therefore, that whether the plaintiff was reckless or so negligent in the performance of his work as to afford a defense within the principles already discussed was in all the circumstances a question of fact for the jury. In *Lewis v. Barton*, 82 Kan. 163, 107 Pac. 783, it was said:

"The defendant insists that the plaintiff's own testimony shows that he voluntarily undertook to perform the duty imposed upon him in a manner which he knew to be very dangerous, when he also knew that another method was much safer. To a degree the plaintiff's evidence supports this contention. But there was also testimony of the plaintiff and other witnesses that he performed the task in the customary way, and under such evidence it cannot be said, as a proposition of law, that the injury was caused by his own want of care, but all these matters are for the consideration of the jury."

[4] It is contended that the statutory requirements were complied with; that the mill, being inclosed, afforded the plaintiff immunity from injury; and that he himself

created the danger by opening the door, and thrusting in his hands. It must be presumed, however, that the door was placed there to be opened, and that exigencies of the work might require it. The evidence tended to prove that such an exigency arose by the choking condition. The statutory duty is not necessarily discharged by providing a case or covering for machinery. If the service requires that the coverings be opened in the progress of the work, and safeguards underneath or within are possible and practicable, they must be provided. Otherwise such statutes would be vain and ineffectual. The practical question under this statute is whether the machinery so placed as to be dangerous to employés, while engaged in their ordinary duties, is in fact safely and securely guarded where it is possible, whether the guard consists of an outer covering or something else. Decisions under our statute sufficiently state the principle applicable under the Missouri act. *Caspar v. Lewin*, 82 Kan. 604, 635, 109 Pac. 657, 49 L. R. A. (N. S.) 526; *Alkire v. Cudahy*, 83 Kan. 373, 111 Pac. 440; *Howell v. Cement Co.*, 86 Kan. 283, 120 Pac. 350. The question whether it was possible or practicable to guard the rollers was one of fact, upon which the evidence offered was admissible. *Warfield v. Morgan*, 86 Kan. 524, 121 Pac. 489.

The defendant requested an instruction to the effect that it was the duty of the plaintiff to stop the mill before proceeding to remove the obstruction. This presents the question already considered, which is held to be a question of fact. In *Wells v. Swift & Co.*, 90 Kan. 168, 133 Pac. 732, it appeared that an employé had been injured by the unexpected starting of a rotary motor driven by compressed air. It was held that:

"The fact that a screw valve was provided at another point by which the plaintiff could have cut off the compressed air is not fatal to his recovery, since to have used that valve would have cut the air off from another machine as well as from that which he was using."

It was held in *Rambo v. Electric Co.*, 90 Kan. 390, 133 Pac. 553, that an employé of a telephone company could not be charged with contributory negligence, as a matter of law, merely because he failed to ask that the current be turned off but incurred the danger of contact with high tension wires without doing so, although the current would have been turned off had he so requested.

These cases sufficiently state the principle to be applied in the situation in which the plaintiff was placed.

The instructions given were as favorable to the defendant as could well be given in any recognized application of the doctrine of contributory negligence. Instructions asked by the defendant were drawn upon the assumption that the plaintiff should be held guilty of contributory negligence, as a matter of law, upon the evidence, or certain phases of the evidence, and the findings.

The substance of the requests, so far as they embraced correct propositions, were given. No error is found in the instructions of which the defendant can justly complain.

There was no error in refusing to submit question No. 7. That the mill could have been stopped is beyond dispute, but whether it was the duty of the plaintiff to signal for the stop was a question of fact. The question whether he should have used the clutch was of the same nature, and besides he offered to show that it was not in a condition to use. The fact was material, and the evidence was admissible. Some other incidental matters are discussed in the briefs, but are sufficiently met by what has been said upon the principal propositions.

The judgment is affirmed. All the Justices concur.

(93 Kan. 742)

LOCKARD v. HARTLEY et al. (No. 19108.)  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by Editorial Staff.)

1. HIGHWAYS (§ 71\*)—REPORT OF VIEWERS—CONCLUSIVENESS.

Under Laws 1911, c. 248, § 6, providing that at the first session of the commissioners after the report of the viewers is received, the commissioners shall order the road opened or altered, if they conclude that it should be, and no legal objections appear against the same, but if they conclude that the road is unnecessary or impracticable, no further proceedings shall be had thereon, the commissioners have jurisdiction to relocate a road, though all the viewers report adversely thereto.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 236, 237; Dec. Dig. § 71.\*]

2. HIGHWAYS (§ 72\*)—ORDER FOR RELOCATION—VALIDITY.

An order for the relocation of a highway is not void as against public policy, because it requires the petitioners therefor to pay a part of the assessed damages.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. § 72.\*]

Appeal from District Court, Saline County.

Action by J. B. Lockard against J. O. Hartley and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

David Ritchie, of Salina, for appellant. L. W. Hamner and Z. C. Millikin, both of Salina, for appellees.

PER CURIAM. [1] The petition to relocate the road was sufficient and the board of county commissioners had jurisdiction to relocate the road even if the viewers had all reported adversely. Laws 1911, c. 248, § 6. See *Molyneux v. Grimes*, 78 Kan. 830, 98 Pac. 278.

[2] That the order relocating the road was not void as against public policy because the petitioners were required to pay \$125 of the assessed damages has already been decided by this court. In the case of *Plaster Co. v. Blue Rapids Township*, 77 Kan. 580, 96 Pac. 68, the principle involved was thorough-

ly considered. In the recent case of *Rice v. Ard*, 93 Kan. 165, 143 Pac. 418, the same principle was again considered. While one of the questions in that case was whether or not the order was invalid because conditional, the court went beyond that subject and considered the question whether or not the order was invalid on grounds of public policy. The conflict in the authorities was noted, and language from the opinion in the case of *North Baptist Church v. Orange*, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62 (cited in the *Blue Rapids Case*), was quoted as expressing the views of this court. The court adheres to those views.

The judgment of the district court is affirmed.

(94 Kan. 33)

OLSON v. ORR et al. (No. 19183.)†  
(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

1. BAILMENT (§ 18\*)—ARTISAN'S LIEN—STIPULATION POSTPONING PAYMENT—EFFECT.

The statutory lien given to a mechanic, artisan, or tradesman on an article of property upon which he has bestowed labor and expense (Gen. St. 1909, § 4808) is an extension of the common-law lien, and a stipulation which postpones payment for the labor and expense after completion and delivery does not necessarily destroy such lien.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.\*]

2. BAILMENT (§ 18\*)—ARTISAN'S LIEN—PRESERVATION—SURRENDER OF PROPERTY—SUFFICIENCY OF EVIDENCE.

In order to preserve the lien after the surrender of possession of property to the owner, the claimant must comply with the provision of the statute relating to the filing of a written statement with the register of deeds, but in the present case it is held that the possession of the property was not surrendered to the owner.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.\*]

3. BAILMENT (§ 18\*)—ARTISAN'S LIEN—REQUISITES.

To entitle a mechanic, artisan, or tradesman to a lien, the work and material expended by him upon a chattel must have been done and furnished at the owner's request or with his consent, and it is held that this phase of the law was sufficiently presented to the jury in the instructions given by the court.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.\*]

Appeal from District Court, Wyandotte County.

Action by F. L. Olson against O. E. Orr and another. From judgment for defendants, plaintiff appeals. Affirmed.

McFadden & Chafin and J. C. Lang, all of Kansas City, for appellant. Frank L. Bates and Stanley & Stanley, all of Kansas City, for appellees.

JOHNSTON, C. J. This action was brought by F. L. Olson against C. E. Orr and O. Lasley, to recover the possession of a two-ton Sternberg truck of the alleged value of \$300,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 12, 1915.

which he claimed, was wrongfully withheld from him. In the city court judgment was given in favor of the defendants, and Olson appealed to the district court, which likewise rendered an adverse judgment.

On the trial of the case in the district court there was testimony tending to show that a verbal contract was entered into between Olson, Orr, and Lasley about November 1, 1912, whereby a gasoline engine owned by Orr should be placed in Olson's truck. The terms of the agreement, it is claimed, were that Olson should pay Lasley \$150 when the engine was installed and pay Orr \$150, 90 days after the installation of the engine was completed. There is testimony that the contract was later varied because of Olson furnishing certain material, so that he became liable to pay each of the defendants \$132.50 at the times previously agreed upon. It appears that the truck was completed about February 5, 1913, and it is claimed by Lasley that there was then due to him \$132.50, and Orr claimed that the amount of \$132.50 became due to him on April 6, 1913. Olson offered testimony tending to show that the work done upon the truck was defective and did not measure up to the terms of the agreement, and that he had been compelled to expend considerable sums of money to remedy the defects.

[1-3] It is contended that Lasley was employed by Orr to install the engine, and not by Olson, and that therefore Lasley could not obtain a lien on the truck, except by an employment or the consent of Olson, the owner. It appears to be conceded that Orr could not impose a lien on the truck for the debt of Lasley without the express or implied consent of the owner. There is testimony, however, to support the claim that Olson contracted with Lasley, as well as Orr, and also agreed to pay him when the work was completed. The testimony as to the negotiations between the parties indicate that there was a tripartite contract by which Orr was to furnish the engine at a certain price, and that Lasley was to install it for an agreed sum. Both Orr and Lasley performed work upon the truck. There is a contention that the necessity of employment of both by Olson was not fairly presented to the jury. An instruction was requested by Olson to the effect that, if Olson was not a party to a contract with Lasley, the latter would not be entitled to a lien on the truck. This instruction was not given, but the court, in one of its own construction, told the jury, in effect, that a contract between Orr and Olson and Lasley, either together or separately, was essential to a recovery by either of them. In another instruction the court called attention to the statute which provides that:

"Whenever any person shall intrust to any mechanic, artisan or tradesman materials to so construct, alter or repair any article of value, or any article of value to be altered or repaired, such mechanic, artisan or tradesman shall have

a lien on such article, and, if the same be completed and not taken away, and his fair and reasonable or stipulated charges be not paid, may, after six months from the time such charges become due, sell the same. \* \* \* Gen. Stat. 1909, § 4808.

The jury were told that the claims of Orr and Lasley to a lien must be established by them by a preponderance of the evidence. It appears, therefore, that the issue of whether there was a contract between Olson and each one who claimed a lien was submitted to the jury, and there is competent evidence to support the finding made by the jury.

The contention that the lien was waived by the mere stipulation that one-half of the cost of the repairs was not to be paid until 90 days after the work was completed cannot be upheld. It is argued that, because the right to such a lien rests upon the right of possession, any stipulation or special contract for the delivery of possession before payment is made necessarily operates as a waiver of the right to a lien. Olson cites *Pinney v. Wells*, 10 Conn. 104, and other similar authorities in support of his contention. It was the common-law lien, which permits an artisan, who alters or repairs an article of property, to retain possession of it until he has been paid for the labor and material which he has expended upon it, that was under consideration in that case. As the lien depends upon possession, the surrender of possession amounts to a waiver or abandonment of the lien. It is said that this kind of lien was provided for the benefit of those with whom no contract had been made, and some courts went so far as to hold that any special contract between the parties operated to destroy the lien. In the case cited, however, it is said:

"The rule may now be considered as settled that a lien may exist, although there is a special contract, unless there is something in that contract inconsistent with such lien, or unless it is waived expressly or by fair implication." 10 Conn. 115.

The lien claimed here, however, is a statutory lien; and while the statute is, to a certain extent, declaratory of the common law, it expressly provides that a mechanic, artisan, or tradesman may permit the owner to take the property away without the repairs having been paid for and still retain his lien, provided he files a proper statement with the register of deeds within three days. Gen. Stat. 1909, § 4808. Nothing in the statute indicates that the mere making of a special contract between the owner and artisan will defeat a lien, and it cannot so operate, unless the writing itself expressly or impliedly waives the lien. The statutory lien is an extension of the common-law lien, as it expressly provides that a lien may be retained after the property has been delivered to the owner upon compliance with the prescribed conditions. If the property had been surrendered to the owner without payment and without compliance with the statutory requirements,

the lien would, of course, have been lost. Here, however, possession of the altered and repaired truck was not surrendered, and there was therefore no occasion for the filing of a statement with the register of deeds. After the engine was installed, the truck was tested a number of times, and finally Olson proposed to accept it and pay a certain sum, which was less than the amount agreed upon, but possession was refused, and the truck remained in the garage of Lasley until it was taken under the writ of replevin. When the tests were made, the owner objected to the character of the work done and the condition of the truck when it was declared to be completed; but there was no purpose on the part of the defendants to surrender the possession of the truck to the owner until payment was made; and, there being no waiver of the lien, Olson was not entitled to the possession of the truck.

Whether the engine was properly installed and the work completed according to the contract was the principal subject of controversy between the parties, but that dispute has been settled by the verdict of the jury.

The judgment of the district court is affirmed. All the Justices concur.

(93 Kan. 772)

**ALLEN COUNTY AGR. SOCIETY v.  
BOARD OF COM'RS OF ALLEN  
COUNTY. (No. 19150.)**

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**STATUTES (§ 120\*)—TITLE AND SUBJECT-MATTER—COUNTIES—AGRICULTURE.**

Chapter 144, Laws of 1911, is in conflict with section 16, art. 2, of the Constitution, and therefore void, for the reason that it attempts to impose upon the county boards of certain counties the mandatory duty to issue warrants to agricultural fair associations to assist in the payment of premiums, a subject which is not clearly expressed in the title of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168-172; Dec. Dig. § 120.\*]

Appeal from District Court, Allen County.

Action by the Allen County Agricultural Society, a corporation, against the Board of Commissioners of Allen County. From judgment for defendant, plaintiff appeals. Affirmed.

Baxter D. McClain, of Iola, for appellant. Frank R. Forrest, of Iola, for appellee.

**PORTER, J.** The only question for determination in this case is the validity of chapter 144, Laws of 1911. There was presented to the board of county commissioners of Allen county the claim of the Allen County Agricultural Society for \$836.62, being one-half of the total premiums on certain classes of exhibits paid by plaintiff at its annual fair in September, 1912. At the January meeting of the county board \$500 was allowed an ac-

count of the claim, which was paid and credited thereon, and upon the refusal of the county to pay the balance of the claim this action was instituted to recover a judgment therefor. The case was submitted to the trial court on an agreed statement of facts, upon which the court rendered judgment in favor of the defendant, and the plaintiff appeals.

The validity of the act depends entirely upon whether the title is sufficiently broad to include certain mandatory provisions making it the duty of the county commissioners to issue a warrant in favor of certain county fair associations for a sum equal to one-half the amount of premiums paid by any such association upon its "exhibits of live stock, agricultural products, educational, art and domestic departments." Section 1 of the act declares "that it shall be the duty of the county commissioners in Kansas to issue a warrant," etc. The title of the act reads as follows:

"An act authorizing the county commissioners to assist in payment of premiums for agricultural fair associations that have been holding fairs and in actual operation for three consecutive years and the repealing of all acts and parts of acts in conflict herewith."

The trial court held the act to be repugnant to section 16 of article 2 of the Constitution of the state, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title, \* \* \*" following the case of *State ex rel. v. Com'rs of Wabaunsee County*, 45 Kan. 731, 26 Pac. 483. The title of the act involved in that was:

"An act authorizing the county commissioners of Wabaunsee county to appropriate money for repairing bridge," etc. Chapter 98, Laws 1889.

In the body of the act the Legislature went beyond the title and declared that the commissioners of that county "are hereby authorized and empowered and it is hereby made their duty to appropriate such sum of money as may be necessary to keep in repair" a certain bridge. The act was not declared to be unconstitutional, but it was held that the words "it is hereby made their duty," being broader than the title, should be regarded as of no force or effect. The act was therefore so construed as to leave it discretionary with the commissioners to make the appropriation for such repairs.

Counsel for plaintiff with much insistence urge that the *Wabaunsee Case*, supra, was not well decided, that it is at variance with well-established rules of statutory construction, and that it is entirely out of harmony with previous and subsequent decisions of this court involving the same provision of the Constitution. The cases relied upon do not, in our opinion, support these contentions. The decision does not rest upon a technical interpretation of the language of the act; nor does it involve a mere question of fancied or actual discrepancies between the body and title,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which can be so construed as to uphold all the provisions of the act. For these reasons, the cases cited need not be reviewed, for the purpose of pointing out the distinction.

Nor do we think anything said in the case of *State v. Everhardy*, 75 Kan. 851, 90 Pac. 276, throws any light upon the question. There the rule declared in *State v. Barrett*, 27 Kan. 213, was reaffirmed, to the effect that the title may be so broad and comprehensive as to include innumerable minor subjects, where these are capable of being comprehended within the general title. That rule has no application here. There are many things the county board is given authority in its discretion to do, and there are many other things it is required to do. The purpose of the act, as appears from a reading of the title, is to empower the board in its discretion to do a thing which the body of the act declares the board shall do. It was based upon the plain provisions of the Constitution and a reasonable construction of the language used by the Legislature. It announced a salutary rule, which squarely fits the present case, and which should not be overturned. In that case, as was observed, that Legislature in express terms authorized, and in other express language made it the duty of the board to appropriate money for a certain purpose. The act involved in the present case contains no provision authorizing the county board to make the payment, but merely declares that it shall be the duty of the county commissioners to issue a warrant in favor of such an association. Our conclusion is that no part of the act can be upheld. The subject of imposing upon the county board the mandatory duty of making such payments is not embraced or clearly expressed in the title of the act. It follows, therefore, that the judgment is affirmed. All the Justices concurring.

(94 Kan. 28)

BLACK et al. v. MISSOURI, K. & T. RY. CO. (No. 19174.)

(Supreme Court of Kansas. Jan. 9, 1915.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 96\*)—PLEADING—AMENDMENT.

In an action before a justice of the peace to recover damages for a fire alleged to have been caused in the operation of defendant's railway, an amendment allowing the addition of the name of a party plaintiff does not substantially change the claim or defense, where it appears that the amended claim is for the same damages caused by the same fire referred to in the original bill of particulars.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 328-332; Dec. Dig. § 96.\*]

Appeal from District Court, Anderson County.

Action by Francis M. Black and Susan B. Black against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. W. Brown, of Parsons, and J. G. Johnson, of Garnett, for appellant. Noah L. Bowman, of Garnett, for appellees.

PORTER, J. Francis M. Black brought this action before a justice of the peace to recover damages from a fire alleged to have been caused by the defendant in the operation of its railway. The bill of particulars alleged that he was the owner of the land burned over and of the crops destroyed. At the trial plaintiff obtained leave of court to amend the bill of particulars by adding the name of Susan B. Black as one of the plaintiffs, but the amendment was not written into the bill of particulars. The court thereupon rendered judgment in favor of both plaintiffs for \$103, damages, costs, and \$10 attorney fees. The defendant appealed the case to the district court, the appeal bond reciting a judgment in favor of both plaintiffs. In the district court defendant objected to any evidence on behalf of Susan B. Black on the ground that she was not named as a plaintiff in the summons, and contended that the justice had arbitrarily made her a plaintiff, and therefore defendant was not in court for the purpose of answering an action to which she was a party. The court permitted the pleadings to be amended in accordance with the order made by the justice, and the trial proceeded to judgment in favor of both plaintiffs. If there was no error in these rulings, the judgment must be affirmed.

The defendant cites the case of *St. Louis & S. F. Ry. Co. v. McReynolds*, 24 Kan. 368, to the effect that the filing of an appeal bond is not such an appearance as will waive defects in a bill of particulars. But in that case there was a fatal defect in the bill of particulars. In the present case a good cause of action was stated before any amendment was made. Section 140 of the Code (section 5733, Gen. Stat. 1909) in express terms authorizes the court to permit such amendments where the claim or defense is not substantially changed.

In *Hucklebridge v. Railway Co.*, 66 Kan. 443, 71 Pac. 814, it was expressly held that in an action for damages the addition of the name of a party plaintiff does not substantially change the claim or defense. Here the claim was for the same damages caused by the same fire alleged to have been set out by the operation of defendant's railway. The defense was necessarily the same as it would have been had the action been prosecuted in the name of the original plaintiff. The defendant appealed from the judgment in favor of both plaintiffs, and had the same opportunity to defend the action in the district court upon the amended bill of particulars that it would have had if no amendment had been made.

"The filing of amendatory and supplemental pleadings rests largely within the discretion of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the trial court, and, unless there is a clear abuse of that discretion, its ruling will not be reversed." Syl. 1, *Rogers v. Hodgson*, 46 Kan. 276, 28 Pac. 732.

There was no abuse of discretion in the ruling complained of, and the judgment will be affirmed. All the Justices concurring.

(93 Kan. 766)

**BUCK STOVE & RANGE CO. et al. v. VICKERS et al.** (No. 19138.)

(Supreme Court of Kansas. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**FRAUDULENT CONVEYANCES (§ 11\*)—FRAUD OF CREDITORS—WHAT CONSTITUTES.**

A debtor in failing circumstances and being pressed by numerous creditors conveyed all his real estate, including his homestead, to his wife's father for a consideration considerably less than its value. A part of the consideration was \$1,000 in cash, which was at once applied to satisfy the debtor's indebtedness to a bank of which he was president. Another part of the consideration was the assumption of a mortgage on the land. The remainder of the consideration was represented by the two promissory notes of the grantee due in 6 and 12 months, respectively. The debtor was without other resources. *Held*, the transaction disclosed an intent to hinder and delay creditors and had that effect within the purview of the statute of frauds and perjuries. Gen. Stat. 1909, § 3834.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

Appeal from District Court, Saline County.

Action by the Buck Stove & Range Company and others against C. C. Vickers and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Allen & Allen, of Topeka, for appellants. Nicholson & Pirtle, of Council Grove, for appellees.

**BURCH, J.** The action in the district court was commenced by creditors to set aside a deed of real estate made by their debtor while in a failing condition. The plaintiffs recovered, and the defendants appeal.

In 1891, C. C. Vickers, a resident of Morris county, became a member of a firm engaged in the hardware and implement business at Wichita Falls, Tex. In 1894, the firm became financially embarrassed and proved to be insolvent. In July, 1894, while being pressed by firm creditors and by the bank of Dunlap, of which Vickers was president and to which he was indebted, he conveyed all the real estate he owned to his wife's father, P. B. Maxson. His wife joined in the deed. The real estate conveyed was worth \$9,500. It consisted of a ranch of about 840 acres in Morris county, part of which was a homestead, and some town lots in Dunlap. The ranch was mortgaged for \$3,000. The consideration for the conveyance was \$1,000 in cash, two promissory notes of \$2,250 each, payable in 6 and 12 months, and the assumption

tion of the mortgage on the ranch. At the time of the conveyance, Vickers had little or no personal property with which to pay debts. The cash portion of the consideration was applied immediately to satisfy the claim of the Dunlap bank. The court made, among others, the following findings of fact:

"(21) When C. C. Vickers signed the deeds, he realized that he was in failing circumstances, and that if his creditors pressed their claims against him it would mean financial failure; and, while it was not his purpose to defraud any of his creditors, it was his purpose to place his property beyond the reach of his creditors, and to hinder and delay them in the collection of their claims against him until he could arrange for the payment of all claims against him.

"(22) At the time of the execution of the deeds by C. C. Vickers and his wife, Mary P. Vickers, and the delivery of the deeds to P. B. Maxson, said Maxson knew, or was in possession of sufficient information to lead an ordinarily prudent person to believe, that it was the purpose of C. C. Vickers in disposing of all his real estate to put his property beyond the reach of his creditors, in order that he might hinder and delay them in the collection of their claims against him."

Judgment was rendered setting aside the deed to Maxson and ordering the land attempted to be conveyed, except the homestead, to be sold to satisfy the judgment of the plaintiffs.

The defendants insist that the findings quoted are not sustained, but the court regards them as well sustained by the facts embraced in other findings. The defendants further insist that the sale to Maxson placed the creditors of Vickers in a better position than that which they occupied before, and consequently that it could not be fraudulent as to them.

The statute reads as follows:

"Every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." Gen. Stat. 1909, § 3834.

It will be observed that the statute is in the disjunctive—"hinder, delay or defraud." A specific meaning is attached to each of the words, and it is sufficient to avoid a conveyance to show that any intent which the statute condemns prompted the transfer.

Vickers is not permitted to say that the sale of the real estate for less than its value was a good thing for his creditors, or that his creditors were not hindered and delayed by taking away from them land subject to execution immediately upon the rendition of judgment and substituting for it personal notes of a stranger, due in the future.

In *Bigelow on Fraudulent Conveyances* it is said:

"The grantor may honestly intend to pay all his debts, and honestly believe that the particular course taken by him will work best

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that end; but he is not to be judge in respect of the creditor's interests." Revised Ed. 16.

a Bump on Fraudulent Conveyances it is 1:

The time for the performance of a contract both in morals and in law an essential part of the contract itself, and a debtor who attempts to postpone the time of payment endeavors to deprive his creditors of a valuable right, and thus it may justly be said that a motive intent to defraud always exists where inducement to a conveyance is to hinder delay creditors, since the right of creditors to receive their demands when due is as absolute as their right to receive them at all. Therefore where the debtor places his property out of the reach of legal process so as to defraud creditors, this is a legal fraud, although he may intend ultimately to appropriate it for the benefit of all, or a part of them. The law provides a mode for the appropriation of a debtor's property to the payment of his debts, and the interposition of any obstacle to prevent such appropriation in the due course of legal proceedings is a delay and hindrance within the meaning of the statute." 4th Ed. 18.

Other matters presented in the brief of the respondents do not require discussion, and judgment of the district court is affirmed. The Justices concurring.

Nev. 112)

STATE ex rel. CENTRAL PAC. RY. CO. v. NEVADA TAX COMMISSION et al.  
(No. 2153.)

Supreme Court of Nevada. Jan. 22, 1915.)

TAXATION (§ 348\*)—ASSESSMENT—VALUATION—STATUTES.

Rev. Laws, § 3624, directing the assessor to determine the true cash value of the property, is not in control section 3838, subsequently enacted, which provides that no patented or state tract land shall be assessed for less than \$25 per acre.

Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589; Dec. Dig. § 348.\*

TAXATION (§ 348\*)—ASSESSMENT—VALUATION—STATUTES—"CASH VALUE."

Acts 1913, c. 134, creating a state tax commission with power to district the state geographically in assessment districts according to relative uniformity of land valuation, and establish minimum acreage valuations for the assessors in each district, and that if, in the opinion of the commission, any tract, by reason of special conditions, would be improperly assessed the application of the classified acreage valuations, the tract may be excluded therefrom and specially appraised, and providing that any tract shall be assessed at its true full "cash value," defined to mean the valuation in money which an investor in such character of property would be reasonably willing to pay therefor. This implies that the commission may fix the valuation lower than the minimum of \$1.25 per acre, as fixed by Rev. Laws, § 3838, and an assessor, feeling aggrieved on the ground that the minimum is too high, may appear before the commission and prove that the cash valuation is less than the minimum, and, on the commission's so finding, they must make a deduction in valuation accordingly, and to this extent section 3838 is superseded, but it still applies to

county assessors making the original assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589; Dec. Dig. § 348.\*

For other definitions, see Words and Phrases, First and Second Series, Cash Value.]

3. STATUTES (§ 225\*)—CONSTRUCTION.

Two statutes on the same subject must be construed together, so as to give effect to the language of both, as far as consistent, and, where a conflict is apparent, the later statute controls.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

4. CONSTITUTIONAL LAW (§ 46\*)—VALIDITY OF STATUTES—NECESSITY FOR ADJUDICATION.

Constitutional questions, not necessary for an adjudication of the rights of the parties, will not be determined.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 104, 107; Dec. Dig. § 46.\*]

Application for a writ of mandate by the State, on the relation of the Central Pacific Railway Company, against the Nevada Tax Commission and others. Writ awarded.

Brown & Belford, of Reno, for relator. Geo. B. Thatcher, Atty. Gen., for respondents.

TALBOT, C. J. In its application for a writ of mandate, directing respondents, as Nevada Tax Commission, to give relator a hearing and allow the introduction of evidence regarding the value for taxation of relator's lands, granted by act of Congress July 2, 1864 (13 Stat. 365, c. 217), to aid in the construction of the Central Pacific Railroad, it is in effect alleged: That the Central Pacific Railway Company owns and for the year 1914 has returned to the assessor of Churchill county for assessment 246,607.91 acres of patented lands and 132,228.60 acres of unpatented lands, situated in Churchill county; that the assessor assessed the patented lands at \$2.50 per acre and the unpatented lands at \$1.25 per acre, producing an aggregate assessment of \$718,808 upon the lands of petitioner in that county; that thereafter, and on September 28, 1914, petitioner appeared before the board of county commissioners of Churchill county, sitting as a board of equalization, and filed two written applications for the reduction of the assessed valuations as fixed by the assessor, and offered testimony as to the value of these lands. On a large part and more than 100 sections of the lands assessed at \$2.50 per acre, or \$1,600 per section of 640 acres, and the lands assessed at \$1.25 per acre, or \$800 per section, the company asked to have the assessed valuation reduced to \$10 per section. The board refused to consider the petitions for the reason given by the board that section 3838 of the Revised Laws of Nevada requires that the minimum value placed on all lands for assessment purposes shall be \$1.25 per acre.

On October 13, 1914, petitioner presented

its petition in writing to the Nevada Tax Commission, asking for the reduction of the assessment on the lands in Churchill county, described in the petitions presented to the county board of equalization, to values of less than \$1.25 per acre. The commission refused to hear the petition for the reason, as entered in its minutes, that it appeared to the commission that section 3838 of the Revised Laws requires that the minimum value placed on all lands for assessment purposes shall be \$1.25 per acre.

On behalf of relator, it is urged that section 3838 of Revised Laws, in so far as it provides that all lands shall be assessed at not less than \$1.25 per acre, is in conflict with section 3624 of Revised Laws and in conflict with section 8 of the act of the last Legislature creating the Nevada Tax Commission (Laws 1913, c. 134), and also unconstitutional because it does not meet the requirement of uniformity under section 1 of article 10 of the state Constitution, and also in conflict with section 1 of the Fourteenth amendment to the Constitution of the United States in that it deprives relator of property without due process of law, and denies to relator and all other owners of land within the state, whose value is less than \$1.25 per acre, the equal protection of the laws.

[1] Section 3624 of Revised Laws of Nevada, as amended in 1893, which directs that the assessor shall determine the true cash value of the property, is not regarded as controlling section 3838, which was passed in 1911, and which provides that no patented or state contract land shall be assessed for less than \$1.25 per acre.

[2] It is more important to consider the provisions of the act of 1913, creating the Nevada Tax Commission, and defining its powers and duties. Section 5 of this act provides that the commission may "district the state geographically in land assessment districts \* \* \* according to relative uniformity of land valuations, and establish minimum acreage valuations for such classes in each such district: Provided, that if in the opinion of said commission any tract of land, by reason of special conditions would be improperly assessed by the application of such classified acreage valuations, such tract may be excluded therefrom and specially appraised."

Section 8 of the same act provides that all property subject to taxation shall be assessed at its full cash value, and defines the term "cash value" to mean the valuation in money which an investor in such character of property would be reasonably willing to pay therefor in order to acquire ownership. We are not unmindful that an earlier special provision may control a later general one. But, as between the two special provisions relat-

ing to the minimum acreage valuation, we conclude that the one passed by the last Legislature, and providing that the commission may fix such minimum valuation and specially appraise lands, controls or supersedes, so far as the duties and powers of the commission are concerned, the act of the prior Legislature which fixed the minimum valuation of all lands at \$1.25 per acre. As that was the minimum price fixed by the general government and by the state for the sale of lands, the Legislature of 1911 may have concluded that all patented or contract land was worth at least that much. Without modification, the statute still stands directing the assessor in the first instance to assess all lands at not less than \$1.25 per acre.

Section 5 of the act of 1913 authorizes the commission, but not the assessor, to fix the minimum acreage valuation, which implies that the commission may fix it lower than \$1.25 per acre. It follows that any owner, feeling aggrieved and that the minimum of \$1.25 is too high, should be allowed to appear before the commission and prove that the cash valuation on his land is less than \$1.25 per acre, and, if the commission finds that the land is worth less than such minimum, a deduction in the valuation should be made accordingly.

[3] The two acts of the Legislature should be construed together, so as to give effect to the language of both, as far as consistent, and, where a conflict is apparent, the later statute will control. *State v. La Grave*, 23 Nev. 373, 48 Pac. 193, 674; *Hettel v. District Court*, 30 Nev. 382, 96 Pac. 1062, 133 Am. St. Rep. 731; *State v. Martin*, 31 Nev. 493, 103 Pac. 840; *Ex parte Prosolo*, 32 Nev. 378, 108 Pac. 630; *State v. Glenn*, 18 Nev. 34, 1 Pac. 186.

The act of 1911 may stand, so far as it applies to county assessors making the original assessment at a minimum of \$1.25 per acre, because there is nothing in the later act varying it in this regard; but as the Nevada Tax Commission, a final board of equalization, is authorized by the act of 1913 to establish minimum acreage valuations and specially appraise lands, it is the duty of the commission to fix the proper minimum valuation at the full cash value, although this may be less than \$1.25 per acre.

[4] Following precedent, the constitutional questions involved are not determined because not necessary for an adjudication of petitioner's right to the writ.

By reason of these views, the court has directed the commission to hear the proofs of petitioner regarding the valuations of the lands and to fix the valuations in accordance with the proofs.

NORCROSS and McCARRON, JJ., concur.



Nev. 92)

RYAN v. MANHATTAN BIG FOUR MINING CO. (No. 2096.)

Supreme Court of Nevada. Dec. 30, 1914.)

WORDS AND PHRASES—"PUSHER"—"JIGGER BOSS."

In mining parlance a "pusher" or "jigger boss" is one engaged for the purpose of encouraging or hastening the men.

MASTER AND SERVANT (§ 118\*)—SAFETY APPLIANCES—CAGES IN MINES—STATUTORY PROVISIONS.

Rev. Laws, § 6799, making it unlawful to let or work through any vertical mining shaft a greater depth than 350 feet unless the shaft provided with an iron-bonneted safety cage to be used in lowering and hoisting employes, was not complied with by having such a cage somewhere about the workings of a mine without using it, though the employes did not demand use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. 118.\*]

MASTER AND SERVANT (§ 118\*)—SAFETY APPLIANCES—CAGES IN MINES—STATUTORY PROVISIONS.

A bucket and crosshead used in a mine for lowering and raising employes did not comply with Rev. Laws, § 6799, requiring an iron-bonneted safety cage where a shaft is deeper than 350 feet, in view of section 4222, which provides that the cages in shafts over 350 feet in depth all be provided with sheet iron or steel casing at least one-eighth inch thick, or with a lining composed of wire not less than one-eighth in diameter, and with doors of the same material, provided that when the cage is used in sinking only it need not be equipped with the required doors, as this completely describes what is termed in section 6799 an "iron-bonneted safety cage."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. 118.\*]

MASTER AND SERVANT (§ 105\*)—SAFETY APPLIANCES—CAGES IN MINES—STATUTORY PROVISIONS.

That it was customary to work through and sink in vertical mining shafts by means of crosshead and bucket for raising and lowering employes did not justify a violation of Rev. Laws, § 6799, requiring the use of an iron-bonneted safety cage; it not appearing that the apparatus used was generally and customarily regarded as better or safer than that provided by the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 15.\*]

MASTER AND SERVANT (§ 270\*)—ACTIONS FOR INJURIES—EVIDENCE.

In an action for injuries to an employe in mine caused by the failure to provide an iron-bonneted safety cage as required by Rev. Laws, § 6799, evidence that the employer was unaware of the existence of such statute was not admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. 270.\*]

MASTER AND SERVANT (§ 204\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employe in a mine did not assume the risk of injury from an employer's failure to provide an iron-bonneted safety cage for lowering and raising employes as required by statute, though the same equipment was used for that

purpose when he applied for and accepted employment as at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

7. MASTER AND SERVANT (§ 129\*)—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

An employer's noncompliance with Rev. Laws, § 6799, requiring the use of iron-bonneted safety cages in mining shafts more than 350 feet deep, did not entitle an injured employe to damages, unless such noncompliance was the proximate cause of his injuries, and unless a compliance therewith would have avoided the accident and prevented the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

8. MASTER AND SERVANT (§§ 204, 228\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

If a mining company's failure to provide an iron-bonneted safety cage for raising and lowering employes as required by statute was found by the jury to be the proximate cause of injuries to an employe thrown from the hoist in use, assumption of risk and contributory negligence were out of the case, except that contributory negligence might be considered in mitigation of damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.\*]

9. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.

The jury's finding as to the cause of injuries to an employe in a mine, thrown from the bucket in which he was riding, when supported by substantial evidence, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

10. MASTER AND SERVANT (§ 129\*)—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

The failure of a mining company to provide an iron-bonneted safety cage for raising and lowering employes as required by Rev. Laws, § 6799, was the proximate cause of injuries to an employe thrown from the bucket on which he was riding, though the swinging of the bucket against the sides of the shaft or its entanglement with a bell cord were intervening agencies, as the culminating catastrophe would not have happened in the absence of either the omission of the safety appliance or the intervening agencies, and hence they operated concurrently.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

11. APPEAL AND ERROR (§ 1004\*)—REVIEW—AMOUNT OF DAMAGES.

Where there was a substantial conflict as to the nature and duration of the injuries sued for, and the amount of the verdict was reasonably supported by the evidence, the injured person testified as a witness, the jury had ample opportunity to observe his manner, conduct, and condition, and he was subjected to a long and careful cross-examination, the verdict will not be disturbed as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Appeal from District Court, Nye County.

Action by John Ryan against the Manhattan Big Four Mining Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

[1] John Ryan, the respondent in this case, a miner of some 8 or 10 years' experience, entered the employ of the appellant corporation as a miner in their property at Manhattan, Nye county, Nev., on or about the 1st day of June, 1912. The nature of his employment was that of sinking a vertical shaft, and in that line of work he was a coworker with one James Cushing and one John Pace. Cushing was acting in the capacity of "pusher" or "jigger boss," a term used in mining parlance to designate one who is engaged for the purpose of encouraging, or hastening, the men. The shaft in which the respondent, Ryan, was employed had attained a depth of approximately 500 feet on the 13th day of June, 1912, the day on which respondent was injured. During all of the time that respondent was engaged in the employ of the appellant company the means of lowering and raising the employes, of whom respondent was one, from the surface to the bottom of the shaft, was a bucket and crosshead at the end of a cable, lowered and raised by means of a gasoline hoist. For the purpose of signaling the hoisting engineer on the surface, a bell cord extended from the surface, or gallows frame on the surface, to the bottom of the shaft. This bell cord was a three-quarter or seven-eighth inch rope.

On the 13th day of June the respondent and his coworkers went on shift at the usual hour, and, pursuant to their duties, drilled and charged a round of holes, seven in number. For the purpose of setting off the shots, hot irons were lowered from the blacksmith shop to "split" the fuse. In order to get access to the 14 lines of fuse running to the respective holes, a signal was given, and the bucket, which had rested on the floor of the shaft, was raised a little off the floor and held there by the engineer, awaiting further signal. After the fuses were "spit," the respondent, Ryan, and his coworkers, Pace and Cushing, mounted the rim of the bucket in their customary way, and one of them, Cushing, gave the signal to hoist. After they had ascended a distance of from 15 to 20 feet, Ryan and Pace were thrown from the bucket. Pace prevented himself from falling to the bottom of the shaft by grabbing the timbers on the sides of the shaft. Respondent, Ryan, however, was thrown to the bottom of the shaft, where 14 lines of ignited fuse, connecting with the seven charged holes, were burning. He succeeded, however, in climbing to the second set of timbers, and there protected himself from the explosion which followed. As a result of the fall, the respondent was more or less severely injured, receiving, among other things, a broken collar bone. After the explosion the bucket was again lowered by Cushing, who had ascended to the 400-foot level, and Ryan and Pace were picked up and taken to the surface. The respondent, Ryan, received medical and surgical treatment for the injuries sustained. The testimony of plaintiff himself is to the

effect that since sustaining the injuries he has been unable to perform his usual line of avocation, and has been unable to perform work incidental to his usual avocation, by reason of the ill health caused directly and indirectly by the injuries sustained in falling to the bottom of appellant's shaft.

The trial of this case before a jury in the court below resulted in a verdict and judgment for the sum of \$2,500 in favor of the respondent. From the judgment, and from the order denying a motion for a new trial, appeal is taken.

H. R. Cooke, of Tonopah, for appellant.  
P. M. Bowler, of Tonopah, for respondent.

McCARRAN, J. (after stating the facts as above). [2] The evidence presented by the record in this case as to the manner in which the accident was caused out of which respondent sustained his injuries is conflicting. It was the contention of respondent in the court below, and the case was tried solely upon the theory, that the accident which resulted in the injury of respondent was brought about by reason of the unstapled bell cord, swinging in the shaft, coming in contact with and in some manner becoming entangled with the men, Pace and Ryan, while they were ascending on the rim of the bucket, the contention being that entanglement with the bell cord caused Pace and Ryan to be thrown from the rim of the bucket, the position and theory of the respondent being that the accident was brought about by the willful negligence of the appellant company in failing to comply with the provisions of section 6799, Revised Laws of Nevada, which is as follows:

"It shall be unlawful for any person or persons, company or companies, corporation or corporations, to sink or work through any vertical shaft, at a greater depth than three hundred and fifty feet, unless the said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employes of such person or persons, company or companies, corporation or corporations. The safety apparatus shall be securely fastened to the cage and shall be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. In any shaft less than three hundred and fifty feet deep where no safety cage is used and where crosshead or crossheads are used, platforms for employes, to ride upon in lowering and hoisting said employes shall be placed above said crosshead or crossheads. Any person or persons, company or companies, corporation or corporations or the managing agent of any person or persons, company or companies, corporation or corporations, violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of five hundred dollars, or imprisoned in the county jail for a term of six months, or by both such fine and imprisonment."

The evidence in this case discloses that an iron-bonneted safety cage was somewhere about the workings of the mine, but not in use at any time during the period in which the respondent, Ryan, was an employe of the appellant company. It is the contention of

appellant that, inasmuch as this safety cage was on the premises, although not used for the purpose of lowering and hoisting the employes while so engaged in sinking the shaft, the appellant company had sufficiently complied with the law, nevertheless.

It is unnecessary for us to comment on the absence of evidence in the record as to the condition of this safety cage, which appears to have been on the premises. It may or it may not have been in working order; there is nothing in the record that would explain its condition in this respect. But, aside from this phase of the question, which plays no part in the case, it is our judgment that the contention of appellant with reference to this phase is untenable.

A statute is not susceptible of interpretation such as that which appellant would seek to put upon it. Clearly, by the terms of the statute it is made unlawful to sink or work through any vertical shaft at a greater depth than 350 feet, unless in the lowering and hoisting of employes, in conducting such work or such sinking, the shaft be provided with an iron-bonneted safety cage.

[3] It is unnecessary for us to dwell upon the fact that a bucket and crosshead such as that which was used in the vertical shaft of appellant on the date on which respondent was injured is not such an appliance as that which is contemplated by section 6799.

Section 4222, Revised Laws—being section 25 of an act entitled "An act creating the office of inspector of mines; fixing his duties and powers," etc.—is as follows:

"The cage or cages in all shafts over 350 feet in depth shall be provided with sheet iron or steel casing, not less than  $\frac{1}{8}$  inch thick, or with a netting composed of wire not less than  $\frac{1}{8}$  inch in diameter and with doors made of the same material as the side casing, either hung on hinges or working in slides. These doors shall extend at least four feet above the bottom of the cage and must be closed when lowering or hoisting men, except timbermen riding on the cage to attend to timbers that are being lowered or hoisted; provided, that when such cage is used for sinking only, it need not be equipped with such doors as are hereinbefore provided for. Every cage must have overhead bars of such arrangement as to give every man on the cage an easy and secure handhold.

Reviewing this provision in conjunction with section 6799, a complete description of that which is in the latter section termed "an iron-bonneted safety cage" is given; and in section 4222 special provision is made for the unusual necessities attendant upon the sinking of shafts such as that which was being accomplished on the property of appellant company when this accident occurred. In other words, the statute provides that, when such cage is used for sinking only, it need not be equipped with such doors as are otherwise required. This special provision was undoubtedly enacted by the Legislature with a view to meeting the conditions which are ever attendant where the work of sinking is being carried on. The mere having

upon the premises such an apparatus as that which is contemplated by section 6799 does not meet the requirements of the law, where the master, in hoisting or lowering employes working through a vertical shaft, makes no use of the appliance; and the mere fact that the employes failed to demand such an appliance to be used in lowering or hoisting them through the shaft where it had attained a depth greater than 350 feet does not relieve the master of the force and effect of the statute. *Peabody Alwert Coal Co. v. Yandell*, 179 Ind. 222, 100 N. E. 758. This statute is not only a penal statute in its nature, but it is a remedial statute, intended not primarily to subject the violator to fine or imprisonment, but rather intended to safeguard life and limb of those who, in the pursuit of their vocation, are called upon to go into places where danger is attendant at every moment; and science and practical experience have brought about this legislation, providing the designated appliance as a practical fulfillment of the common-law rule that requires the master to furnish reasonably safe appliance and a reasonably safe place with which and in which for the servant to work. The equipment prescribed being, in the judgment of the legislative body, the best means for affording reasonable safety to the employed, that equipment or its equivalent in safety efficiency is made obligatory on the employer. *Miles v. Central Coal & Coke Co.*, 172 Mo. App. 229, 157 S. W. 867; *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657, 49 L. R. A. (N. S.) 526. This statute was not enacted with its primal object that of punishment for its violation, but the penalty imposed for the violation was rather prescribed as a reminder that the law is a police regulation, enacted for the purpose of minimizing casualties which entail suffering, privation, and death on those who may be the unfortunate victims.

In order that the employer might know and realize the imperative character of the act, criminal procedure was by the Legislature made a method by which compliance with the statutory provision should be enforced. The primal object and purpose of the statute, as we have already said, was the safety of those whose avocation took them into such places of employment; it was to prevent the unnecessary sacrifice of human life, and the unnecessary infliction of human suffering upon those who became the victims of accidents such as the one detailed in this record. This being the object of the law, this being the relief sought to be afforded by the legislation, the contention that the apparatus contemplated by the law was on the premises, and could have been demanded by the employes, in our judgment, falls far short of a compliance with the spirit or the letter of the legislation. *Miles v. Central Coal & Coke Co.*, *supra*.

As was said in the case of *Cheek v. Railway Co.*, 89 Kan. 269, 131 Pac. 625:

"Whenever the law requires the employer himself to take a precautionary measure for the safety of his employé, it is not enough that he make provision for the performance of the act. The precautionary act itself must be performed."

[4] Appellant in this case sought, in the court below, to justify the use of the cross-head and bucket by proving that it was customary to work through and sink in vertical shafts by such apparatus; but we deem it sufficient to say, in this respect, that custom, however prevalent, would not justify an employer in an act which disregards the specific provision of a statute. If the means adopted by the master for caring for and protecting the servant in the performance of his duty are generally and customarily regarded as being better or more liable to insure safety than that which is provided by the statute, then a different rule might prevail; but such cannot, we apprehend, be contended for by appellant in this case. *Cheek v. Railway Co.*, supra; *Miles v. Central Coal & Coke Co.*, supra.

[5] Appellant sought to prove, in the court below, that they were unaware of the existence of the statute requiring iron-bonneted safety cages to be used in vertical shafts of a greater depth than 350 feet; but, in our judgment, no error could be assigned to the trial court if it refused to admit such evidence. *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45. It has been held that an inadvertent failure to comply with the provisions of a statute similar to this is no less a defense than is an intentional evasion thereof. *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103; *Princeton Coal Mining Co. v. Lawrence*, 176 Ind. 469, 95 N. E. 423; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060; *Peabody Alwert Coal Co. v. Yandell*, supra. It has been held, as a general proposition, that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action, and that the violation of the law is the basis of the right to recover and constitutes negligence per se. *Messenger v. Pate et al.*, 42 Iowa, 443.

In the case of *McRickard v. Flint et al.*, 114 N. Y. 222, 21 N. E. 153, the Court of Appeals of New York had under consideration a case growing out of the violation of a statute of the state of New York which provided that:

"In any store or building in the city of New York in which there shall exist or be placed any hoistway, elevator, or wellhole, the openings thereof, through and upon each floor of said building, shall be provided with and protected by a substantial railing, and such good and sufficient trapdoors with which to close the same as may be directed and approved by the superintendent of buildings, and such trapdoor shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same."

The trial court in that case instructed, in substance, that any one constructing or using an elevator upon his premises is considered as doing so with knowledge of the law in that respect, and, if such person fails to comply with the requirements of the statute, he is prima facie guilty of negligence. The Court of Appeals held that, as an abstract proposition, there was no error in the charge, as it had reference to the failure to perform a statutory duty. Holding to the same general effect is the case of *Siven v. Temiskaming Mining Co.*, 25 Ont. Law Rep. 524.

[6] It is the contention of appellant that, inasmuch as the equipment used for lowering and raising employes from the bottom of the shaft was the same when he applied for employment and accepted such employment as it was on the 13th day of June, the date of the accident, that therefore he assumed the risk attendant upon the use of such equipment. This position, in our judgment, cannot be maintained; and in this respect we quote approvingly from the case of *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131:

"Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions, and willfully disregards the safety of miners employed therein. Where such owner, operator, or manager willfully disregards a duty enjoined on him by legislation of this character, and places in danger the life and limbs of those employed therein, he cannot say that, because one enters a mine as a miner with knowledge that the owner has failed to comply with his duty, he is guilty of contributory negligence. Neither can it be said that by using the means provided by the owner, operator, or manager for entering the shaft the miner is guilty of contributory negligence. Mere contributory negligence on the part of a miner will not defeat a right of recovery where he is injured by the willful disregard of the statute, either by an act of omission or commission, on the part of the owner, operator, or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine because the owner, operator, or manager totally disregarded the statute, as in other cases of negligence, is to totally disregard the provisions of the Constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute, and in no manner regard the duty of protecting the life and safety of miners."

In applying and construing statutes such as this, courts cannot and should not close their eyes to the primary calculated object and purpose of the act itself, namely, minimizing, so far as legislation can minimize, the opportunity for injury to those required to perform service where latent danger is ever present. The statute under consideration in the *Carterville-Abbott Case*, supra, was one growing out of a specific constitutional provision of the state of Illinois. While our Constitution contains no such provision, the statute in question here is a wholesome police-regulation, enacted for a humane object; and

the reasoning set forth in the Carterville-Abbott Case, *supra*, is none the less applicable.

The Supreme Court of Illinois, in considering this question under a somewhat similar condition, said:

"The rule that the servant assumes the ordinary risks incident to the business presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. It is these risks alone, which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes." \* \* \* The law is that the servant does not assume risks that are unreasonable or extraordinary, \* \* \* nor risks of the master's own negligence." *City v. Kostka*, 190 Ill. 135, 60 N. E. 72; *Great Western Coal & Coke Co. v. Coffman* (Okla.) 143 Pac. 30; *Great Western Coal & Coke Co. v. Cunningham* (Okla.) 143 Pac. 28.

The Supreme Court of Illinois, in a number of cases, has held consistently that any conscious omission or failure of an employer to comply with a statute which requires of him that he furnish certain reasonable appliances for the protection of life and limb of the employed renders him liable for ensuing injuries. *Donk Bros. Coal & Coke Co. v. Peton*, 192 Ill. 41, 61 N. E. 330; *Carterville Coal Co. v. Abbott*, *supra*; *Odin Coal Co. v. Denman*, *supra*; *Donk Bros. Coal Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29.

[7] In determining whether or not the plaintiff, respondent herein, was entitled to damages for the injuries sustained, the failure on the part of the defendant company to provide the safety appliances prescribed by statute, while a vital question to be determined by the jury, was not the principal question. The principal fact to be determined was as to whether or not the noncompliance with the statute on the part of an employer and its failure to afford that protection which the statute intended to be afforded to the employed was responsible for the accident in which the employed was injured. In other words, the mere noncompliance with the statute on the part of the appellant company would not entitle the respondent to damages for injuries sustained, unless the noncompliance with the statute furnished the proximate cause of the accident, and unless a compliance with the statute would have avoided the accident and saved the respondent from the injuries.

[8] This was a question of fact to be determined from all of the evidence presented at the trial of the case. It was one for the jury to determine. If the jury found, as they undoubtedly did find in this case, that, but for the failure on the part of the employer to provide the safety appliance which the statute prescribed should be provided and used, the respondent would not have been thrown to the bottom of the shaft and thereby injured—if the jury found this as a fact—then the elements of assumed risk and contributory negligence were out of the case (*Odin Coal Co. v. Denman*, *supra*), excepting, however, that the defense of contributory

negligence might be considered by the jury under proper instructions, for the purpose of mitigating damages (*Cameron v. Pacific G. & G. Co.* [Or.] 144 Pac. 446; *Love v. Chambers Lumber Co.*, 64 Or. 129, 129 Pac. 492).

It is the contention of respondent that the bell cord from the collar to the floor of the shaft was not properly stapled, and hung loose and unfastened from the 400-foot level to the point where respondent was working, and that, in ascending the shaft after having "split" the fuse, respondent and his coworkers became entangled with the bell cord, and due to this fact, the coworker of respondent, was thrown off the bucket, and in being thrown off he so engaged respondent as to drag respondent with him, the latter falling to the bottom of the shaft and sustaining the injuries mentioned.

The record discloses a very sharp conflict in the evidence as to what did really happen as respondent and his coworkers ascended the shaft, standing, as they were, on the rim of the bucket. Appellants contend, and there is some evidence in the record which bears out their contention, that in mounting the bucket the men caused it to swing from side to side in the shaft, and, after having signaled the engineer to hoist, the bucket struck the timbers on the sides of the shaft, and respondent and Pace were thereby thrown off.

[9] As to whether or not the contention of respondent in this respect was correct was one of fact for the jury to determine; and, there being, in our judgment, substantial evidence to support this contention, we would not disturb their findings in this respect.

[10] It might be observed, however, that even though the contention of appellant be correct that respondent was thrown off by reason of the bucket striking the timbers on the sides of the shaft, the jury, in our judgment, would have been warranted in finding that, had a safety cage been provided for conveying respondent and his coworkers to the surface, the impossibility, or at least improbability, of such an accident would be manifest. It is the contention of appellant that the bell rope, and not the absence of a safety cage, was the proximate cause of the accident.

In the case of *Konig v. Nevada-California-Oregon Ry.*, 135 Pac. 155, we said:

"However difficult it may be, in the first instance, to formulate a proper definition of proximate cause, and, in the second instance, to apply such definition to a set of facts, one general rule is applicable to all cases, regardless of the facts that may be presented in any particular case, and that is, where the evidence discloses a succession of events so linked together as to make a natural whole, and all so connected with the first event as to be in legal contemplation the natural result thereof, the latter will be deemed the primary cause, or 'proximate cause,' as it is more often termed. There may be concurrent circumstances, and there may be intervening

agencies, and one of the intervening agencies may be the acts of the party injured; but if the culminating fact, or the resultant catastrophe, came about by reason of all these agencies working together concurrently, then the first negligent act is, and should properly be, deemed the proximate cause."

If, as is contended for by appellant, the bell rope was the proximate cause of the accident, or if, as might be contended, the swinging of the bucket and its impact against the timbers on the sides of the shaft caused the accident, in either event it was within the province of the jury to determine as to whether or not either entanglement with the bell cord or contact with the timbers on the sides of the shaft could have occurred if the safety appliance prescribed by the statute were in use; and if the jury determined, as they undoubtedly did determine in this case, that the accident would not have happened had the respondent, Ryan, been ascending in an iron-bonneted safety cage such as that required by the statute, their determination in this respect, being, in our judgment, supported by substantial evidence, will not be disturbed. As we have already stated, it is not sufficient in an action of this kind to establish merely a willful omission of statutory duty. It is necessary to establish that the injury complained of resulted from the omission; in other words, that the omission was the proximate cause of the injury. *Odin Coal Co. v. Denman*, supra. In this instance there may have been intervening agencies, and these may have been the swinging of the bucket, or entanglement with the bell cord, or both. But the culminating catastrophe would not have happened in the absence of either the primary omission of the safety appliance or the intervening agencies; hence they operated concurrently; hence, the primary negligence—the omission of the safety cage—must be deemed to be the proximate cause of the injury of respondent. *König v. Nevada-California-Oregon Ry.*, supra.

A number of assignments of error are asserted by appellant, relative to instructions given by the trial court; but, in view of our consideration of the law applicable to this case, we deem it unnecessary to dwell upon these. Suffice it to say that we find no error in the instructions as given. Many of the instructions offered by the appellant, and refused by the trial court, were not properly applicable to this case, in view of the law governing its various phases.

[11] It is the contention of appellant that the verdict in this case is excessive, and that the jury were actuated by passion and prejudice in finding the amount. The evidence showed that the plaintiff, respondent herein, had for some years prior to the accident followed mining as a general vocation. His specific vocation, in most instances, in so far as the record discloses, was that of manual laborer. The evidence, and especially

that coming from the plaintiff, tended to establish that subsequent to the accident in which he sustained the injuries he was unable to perform work required of miners, such as he had been accustomed to perform prior to the accident. There is nothing in the record from which we could even assume that the jury acted other than with cool, calculating impartiality. The respondent was a witness at the trial in his own behalf. The jury had ample opportunity to observe his manner, conduct, and condition. He was subjected to a long and careful cross-examination by the skilled attorney for appellant. If his testimony brought home to the minds of the jury a belief that his injuries, even though they might not be permanent, were at least debilitating, painful, and long-continued, then it was for them, the jury, acting under proper instructions, to assess the damages. On this particular phase, the record discloses a most substantial conflict as to the nature and duration of the injuries sustained by respondent; but it is our judgment that the verdict is reasonably supported by the evidence, and it will therefore not be disturbed. *Muskogee Electric Traction Co. v. Mueller*, 39 Okl. 63, 134 Pac. 51; *Nilson v. Kalispell*, 47 Mont. 416, 132 Pac. 1133; *Pasarel v. Anderson*, 74 Wash. 312, 133 Pac. 441; *Bateman v. Middlesex*, 27 Ont. Law Rep. 122; *Railroad Co. v. Osborne*, 149 S. W. 954; *Railroad Co. v. Limberg*, 152 S. W. 1180.

It follows from the foregoing that the judgment of the lower court, entered pursuant to the verdict, and the order of the lower court denying appellant's motion for a new trial, should be sustained.

. It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

(38 Nev. 119)

MIRODIAS et al. v. SOUTHERN PAC. CO.  
(No. 1946.)

(Supreme Court of Nevada. Dec. 31, 1914.)

#### 1. RAILROADS (§ 17\*)—AUTHORITY OF AGENT.

The authority of an agent cannot be inferred from his conduct, and the fact that a station agent and section foreman of a railroad assume to generally manage the company's business in the vicinity warrants no inference of authority to lease or permit the construction of private dwellings on the right of way or to give away materials belonging to the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 36-38; Dec. Dig. § 17.\*]

#### 2. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where plaintiffs contended that defendant railroad company had converted a building which they constructed on its right of way with the permission of the company's station agent and section foreman, an instruction that in such case the company was estopped to claim the building if the agents had a reasonably general control of its affairs at that point was not warranted, where there was no testimony

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at such agents exercised a reasonably general control.

Ed. Note.—For other cases, see Trial, Cent. g. §§ 505, 596-612; Dec. Dig. § 252.\*]

**RAILROADS (§ 26\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

As there was no evidence of the authority such agents, the instruction, which did not fine what was meant by reasonably general control, was misleading.

Ed. Note.—For other cases, see Railroads, nt. Dig. § 58; Dec. Dig. § 26.\*]

**EVIDENCE (§ 222\*)—ADMISSIONS BY PARTY.**

Where plaintiffs claimed to own a building which they constructed on defendant's right way, partly out of materials owned by defendant, evidence that, in a prosecution for theft of such materials, plaintiffs' counsel in their presence stated that the building materials belonged to defendant, and that had not been deprived of its ownership, wasmissible as an admission.

Ed. Note.—For other cases, see Evidence, nt. Dig. §§ 786-800, 803-808; Dec. Dig. § 2.\*]

Appeal from Second Judicial District Court; W. H. A. Pike, Judge.

Action by James Mirodias and others against the Southern Pacific Company. From judgment for plaintiffs and an order denying new trial, defendant appeals. Reversed and remanded for new trial.

Charles R. Lewers, of San Francisco, Cal., appellant. James Glynn, of Reno, for respondents.

**PER CURIAM.** This is an action for damages for the conversion of a certain frame dwelling house in the town of Mina and for certain articles of personal property within said dwelling house at the time of the alleged conversion. The prayer of the complaint is for \$813 actual damages and \$1,000 exemplary damages. The case was tried to a jury, and a verdict rendered for the plaintiffs \$375 damages. From the judgment and on an order denying a motion for a new trial, defendant has appealed.

At the time of the alleged conversion or shortly prior thereto, the plaintiffs, respondents herein, had been employes of defendant, appellant herein, as car repairers, and had been living in a construction car of defendant provided for such purpose, and which was on a side track in the town of Mina. The issue in question was constructed by the plaintiffs upon the right of way of the defendant. In the construction of the house defendant conceded that some of the lumber used was obtained from the defendant, but the evidence is conflicting as to the amount of defendant's lumber so used.

[1] It was the contention of defendant at trial that the plaintiffs were trespassers, and hence could acquire no rights of property by means of such trespass, and further that a considerable portion of the material used in the construction of the house was the property of defendant, taken without the consent of defendant and commingled with

other material purchased by plaintiffs. It was the contention of plaintiffs that they had authority from the car foreman and the station agent to construct the building on the land of defendant and use of defendant's material in its construction. The evidence as to the claim of authorization to do the acts in question given to the plaintiffs by the station agent and car foreman was sharply conflicting. The testimony of the plaintiffs in this respect, conceding it to have been accepted by the jury, presented a number of questions of law relative to the authority of the station agent and car foreman as agents of the defendant corporation to bind the latter. The station agent and car foreman, not only testified that they did not give consent to construct the building or use the material, but testified that they had no authority so to do. The proof of agency upon the part of the plaintiffs rested largely, if not entirely, upon the mere fact that Stanton was station agent at Mina, and Medill was car foreman in charge of plaintiffs in their work. But, as said by Huffcut on Agency:

"It is the conduct of the principal, and not of the agent, from which authority must be inferred." Section 137.

Stanton and Medill may have acted in such a way as to lead the plaintiffs to suppose that they had authority to do nearly anything at Mina. As indicated by Mr. Huffcutt, this is not enough. There must be some sort of a showing that the defendant held them out as having power to do the particular things which they are alleged to have done. It cannot be assumed, in the absence of proof, that a railroadman in charge of a freight and passenger business has authority to lease land belonging to the company or to give away its property; nor can it be assumed, in the absence of proof, that a mere car foreman in charge of repair work has authority to permit houses to be built on company land and to permit material belonging to the company to be used in the construction of these houses.

[2, 3] Among the instructions given to the jury, at the request of the plaintiffs and excepted to by defendant, was the following:

"You are instructed that, if you believe from the evidence that the witness Stanton \* \* \* was an agent of the defendant, the Southern Pacific Company at Mina, Nev., having a reasonably general control of the defendant's affairs at Mina, and that during said time he had knowledge that the plaintiffs were building the house in question, and that the house was upon ground claimed by the defendant, then it was his duty to notify the plaintiffs that they were building on the company's ground, and, having such knowledge, and failing to so notify the plaintiffs, the defendant is estopped from claiming ownership of said house by reason of its being built on such ground."

There is no substantial evidence in the record that will support this instruction. There is testimony that Stanton was the agent of the defendant at Mina, and also showing exactly what powers he had. There is no tes-

timony that he had "a reasonably general control of the defendant's affairs at Mina." There is nothing in the instruction to define what the court meant by "a reasonably general control." The instruction was therefore misleading, because it permitted the jury to find against the defendant if he (Stanton) had whatever might accord with their individual ideas as to "a reasonably general control." It was part of the plaintiffs' case to prove the extent of the authority possessed by Stanton. They failed to introduce any testimony showing his authority, and it was manifestly improper for the court to give an instruction permitting such a wide range of speculation on the part of the jury as was necessarily incident to the vague description of authority given by the court. See *Schlitz Brewing Co. v. Grimmon*, 28 Nev. 235, 81 Pac. 43; *Travers v. Barrett*, 30 Nev. 402, 97 Pac. 128.

We think also the court erred in refusing to give defendant's requested instructions Nos. 12 and 17, relative to the law of commingling of property. The law was correctly stated in those requested instructions, and we think there was evidence in the case which rendered them appropriate.

[4] It appears from the record that at about the time the defendant took possession of the house in question the plaintiffs were prosecuted for the larceny of certain of the lumber in the house, and that, in their presence, during the trial of this larceny case, their attorney made certain statements concerning the rights of the defendant to the possession of the building and premises. The defendant offered testimony showing that these statements were, which testimony was excluded on objection of the plaintiffs. From the record it appears that the defendant offered to prove that it had been admitted by the attorney for the plaintiffs, and in their presence, that part of the building was constructed of lumber belonging to the defendant, and that the defendant had a right to the possession of the building, and that, as it was on the defendant's land, the defendant owned the building. The court excluded this offer, and an exception was duly taken.

This testimony was offered to show that the plaintiffs had made a different claim with reference to the house at a prior time through their attorney. As this statement was made in their presence, and not objected to by them, it was error on the part of the court to exclude the offered testimony. At the trial of this case plaintiffs claimed that they had actual and lawful authority to construct the house on the defendant's land and to take the defendant's lumber. At the former trial they contended that the lumber had never been taken out of the possession of the defendant, as it was still on the defendant's land, and that they merely thought they had authority to take it.

The record contains numerous other assignments of error, but we think the views already expressed make it unnecessary to determine them.

The judgment and order are reversed, and the cause remanded for a new trial.

(33 Nev. 338)

**TURNER LUMBER CO. v. TONOPAH LUMBER CO. (No. 1898.)**

(Supreme Court of Nevada. Jan. 2, 1915.)

**1. SALES (§ 32\*)—CONTRACTS OF SALE—NEGOTIATIONS BY LETTER.**

Defendant wrote the S. Company that it would like to contract for 1,000,000 feet of lumber and would close a contract at that time, the lumber to be cut during the following season and delivered when dry, and prices to be based on a specified price list then in vogue, and that, if this was satisfactory, it would consider the matter closed until the cutting started, when it would forward a cutting list. The company replied that it would furnish the quantity specified to be cut that season and shipped when dry, the prices to be based on the specified list. Thereafter plaintiff wrote defendant asking for a cutting order, and defendant replied asking if plaintiff would be in a position to furnish 1,000,000 feet. In response plaintiff wrote defendant referring to the previous correspondence and stating that it had succeeded the S. Company. Defendant thereafter sent a cutting order for 700,000 feet. *Held*, that these letters created a contract between the parties, as they evidenced a meeting of the minds as to the amount of lumber, the season in which it was to be cut and the time of delivery.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 59; Dec. Dig. § 32.\*]

**2. SALES (§§ 128, 170\*)—PERFORMANCE OF CONTRACT—DELAY IN DELIVERY—REFUSAL TO ACCEPT.**

Defendant contracted to purchase from plaintiff 1,000,000 feet of lumber to be cut during the season of 1907 and delivered when dry, and sent plaintiff a cutting order for 700,000 feet. Plaintiff milled and manufactured all of the lumber for which the cutting order was given. There was some evidence that plaintiff was unable to make prompt delivery of specific shipping orders due to climatic conditions and scarcity of transportation facilities on a railroad; but no complaint as to this was made by defendant, and it never gave notice of a rescission or cancellation of the contract or did any acts from which a rescission could be inferred. By reason of defendant's delay in furnishing plaintiff with specifications as to surfacing and sizing the lumber and to its acts in canceling shipping orders previously given and not reviving such orders owing to unsettled conditions, plaintiff was delayed in making deliveries, and, to meet the convenience of defendant, all of the lumber was not delivered during 1907. In 1908, plaintiff wrote defendant insisting that it take the lumber, and defendant replied stating that plaintiff was unable to take care of the orders offered it by defendant and that for that reason defendant would ignore plaintiff's letter and that plaintiff might take any action it might deem fit. *Held*, that plaintiff did not break the contract by failing to deliver the lumber during 1907, especially as there was nothing from which a failure to deliver the lumber when dry could be inferred, while defendant repudiated the contract by its letter mentioned.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 257, 277, 318, 320, 321, 424; Dec. Dig. §§ 128, 170.\*]



### 3. SALES (§ 81\*)—CONTRACTS OF SALE—TIME FOR DELIVERY.

Under a contract for the sale of lumber to be cut during the season of 1907 and delivered when dry, the seller might justifiably have shipped the lumber to the buyer when the lumber was dry without further shipping orders.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.\*]

### 4. APPEAL AND ERROR (§ 1033\*)—REVIEW—ERRORS FAVORABLE TO APPELLANT.

A party could not complain of the trial court's adoption of an erroneous measure of damages which inured to its benefit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

Appeal from District Court, Washoe County; John S. Orr, Judge.

Action by the Turner Lumber Company against the Tonopah Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The respondent, Turner Lumber Company, plaintiff in the court below, was a corporation engaged in the wholesale milling and manufacturing of lumber and its various products. Their mill was located in the vicinity of Sattley, Sierra county, Cal. The members of the corporation were the Turner Bros. (H. A. Turner, J. M. Turner, and T. K. Turner); and they, together with others, had formerly been known as the Sunset Lumber Company. Some time during the latter part of the year 1906, or the first part of the year 1907, they organized a corporation known as the Turner Lumber Company, which corporation is respondent herein. The appellant, Tonopah Lumber Company, defendant in the court below, was a corporation engaged in the business of retailing lumber and its various products in Tonopah, Goldfield, Rhyolite, Lovelock, and other towns and mining camps in Nevada. This action grows out of a contract entered into between the parties, wherein the contractual relations and the terms of the contract are established by and contained within a series of letters passing between the parties, as follows:

"Dec. 6th—

"Sunset Lumber Co., Sattley, Cal.—Gentlemen: In receiving communication from you we were given to understand that you had sold out your holdings to the Truckee Lumber Company. We would like to have you verify this and if same is not the fact would like to contract with you for a portion of your cut, if not all, for next season. We were very much satisfied with the class of material you have shipped, together with the pleasant business relations existing between us.

"A. R."

Yours very truly,

"Sattley, Sierra Co., Cal., Dec. 24, 1906.

"Tonopah Lumber Co., Tonopah, Nevada—Dear Sirs: In answer to your letter of Dec. 6, beg to say that while we have sold our timber interests here, the writer, and perhaps all of our firm, expect to continue in the lumber business in this immediate vicinity, and would be pleased to contract with you for between 500 M & a million feet, either at the prices quoted in the Truckee river price list of Sept. 1, 1906, or

to be billed according to Truckee river lists at date of shipment.

"Yours very truly, Sunset Lumber Co.,  
"By Jas. M. Turner."

"Tonopah, Nev., December 27-06.

"Messrs. Sunset Lumber Co., Sattley, Cal.—Gentlemen: We are in receipt of your letter of December 24th and are pleased to hear that you do not intend to discontinue the lumber business entirely. We would like very much to enter into a contract with you for 1,000,000 feet or as near that as possible, providing, of course, that you will cut the same quality of lumber that you did during last year and if agreeable to you, we are willing to close this contract at the present time, the lumber to be cut during the coming season and delivered when dry. Prices to be based on Truckee river price list September 1st-06 which is at present in vogue. If this is satisfactory to you, write us a letter to this effect and we will consider the matter closed until such time as you start cutting, when we will forward to you a cutting list.

"Awaiting your reply, we are,

"Yours truly, Tonopah Lumber Co.,  
"By A. J. Crocker.  
"R."

"Sattley, Sierra Co., Cal. 1/7/07.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: Replying to your favor of the 27th ult. addressed to the Sunset Lumber Co., beg to say that the writer and those associated with him will be pleased to furnish you the 1,000,000 feet or more of No. 1 common pine and fir to be cut this season and shipped when dry. The prices to be based on the Truckee river price list of Sept. 1st, 1906. We expect to cut 3,000,000 feet including all grades, and would be pleased to furnish you some uppers, such as finish, rustic, ceiling, flooring, ship-lap, moldings, etc. based on the same list as above. Should you desire to have any of this, please let us know as soon as convenient. We expect to do business under a new name, and will notify you of the same as soon as our articles of incorporation are filed.

"Awaiting your reply, we remain,

"Yours respectfully,

"Sunset Lumber Co.,  
"By Jas. M. Turner."

"Tonopah, Nev., January 12th, 1907.

"Sunset Lumber Co., Sattley, Cal.—Gentlemen: We are in receipt of your letter of Jan. 7th, and note that you will accept our cutting order for 1,000,000 feet of No. 1 common pine and fir; price to be based on Truckee river price list of Sept. 1st, 1906. In regard to the other grades of lumber, we will say that if your grade of finish is up to the standard of the mills in that section, we will undoubtedly be able to take some of it, and possibly, also some ship-lap. We will not be able to use any rustic, ceiling or flooring unless something unforeseen happens, as we handle this material only in the Oregon pine. We would be pleased to receive a list from you as to how much lumber you still have on hand for us awaiting shipment.

"Yours very truly,

"Tonopah Lumber Co.,  
"By A. J. C.  
"2."

"Sattley, Cal., 4/23/07.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: Please send us as soon as convenient a cutting order of the lumber you desire on the contract between us. We have made arrangements with the Washoe County Bank for money on the strength of this order, and therefore ask that you make all future remittances direct to the bank. We also suggest that you

write that bank to the effect that we have notified you to make all remittances on this order direct to them.

"Thanking you, we remain

"Yours respectfully,

"Turner Lumber Co.,

"By F. H. Turner."

"Tonopah, Nev., April 24th, 1907.

"Turner Lumber Co., Sattley, Calif.—Gentlemen: Kindly let us know at once if you will be in a position to furnish us with one million feet, a cutting for which will be sent you later on. And also the prices on same f. o. b. cars.

"Tonopah Lumber Co., by A. Revert."

"Sattley, Cal., Apr. 27, '07.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: Replying to your favor of the 24th, will say that we wrote you on the 23d inst., regarding a copy of cutting order of your requirements. On Jan. 7, Jas. M. Turner, of the Sunset Lumber Co., wrote you, stating that we would be in a position to furnish you a million feet of lumber, but would do business under another company name, but we overlooked the fact that we were to inform you of the new name of our company. In the letter of Jan. 7, Mr. Turner stated that we would accept your order for a million feet, based on Truckee river price list of Sept. 1st, 1906, as per your letter of the 27th of Dec. '06. We are now doing business under the above name, having incorporated and succeeded the Sunset Lumber Co., and lumber firm of the writer.

"Trusting that the above fully explains matters, we are,

"Yours respectfully,

"Turner Lumber Co.,

"By F. H. Turner."

"Sattley, Cal. May 2, 1907.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: We are in receipt of your favor of the 29 ult., containing cutting order for 700,000 feet lumber. We note that you will send additional orders soon for 300,000 feet. We also note that the order calls for a large percentage of small stuff, and we would ask if you can make the additional orders for large stuff, such as 6x6, 6x8, and 8x8?

"Thanking you, we are,

"Yours respectfully,

"Turner Lumber Co.,

"By F. H. Turner."

Plaintiff's Exhibit 9 is an instrument purporting to be what is termed a "cutting order," sent to respondent company by appellant company pursuant to the correspondence that had previously passed between them, and is for 700,000 feet of lumber.

Pursuant to the agreement between the parties, entered into by these letters, respondent was to receive \$18 per thousand for the lumber, delivered at Boca, a point on the main line of the Southern Pacific Railroad. It appears that, of the 1,000,000 feet of lumber mentioned in the letters, only 700,000 feet was ever put in the form of a cutting order by appellant; and, of the 700,000 feet described in the cutting order, only 319,087 feet was received by appellant.

The trial court established as the basis of the measure of damages the difference between the contract price of the lumber, \$18, and its value in the market at the time the suit was brought, fixing the same at \$14.50 per thousand. For the lumber disposed of to third parties by respondent, the court allowed damages for the difference between the

price received and the contract price, taking into consideration the cost of production and transportation. Judgment was entered for respondent in a sum equal to the difference between the market price at the time of the bringing of the suit and the contract price, for the lumber yet remaining in the hands of respondent, basing the damages on 380,913 feet. Pursuant to the finding of the court in this respect, judgment was entered in favor of respondent for the sum of \$2,148.20.

Mack & Green, of Reno, for appellant.  
Summerfield & Curlier, of Reno, for respondent.

McCARRAN, J. (after stating the facts as above). [1] There can be no serious attempt to deny the existence of a contract between the parties to this action. The terms of the contract may be found in the several letters set forth in the statement of facts, and especially in the letter from appellant to respondent dated December 6th, and from respondent to appellant December 24th, and from appellant to respondent December 27th, and from respondent to appellant January 7, 1907. This contractual relation established by these respective communications was manifested by the letter of April 24th from appellant to respondent, in reply to which respondent referred to former communications between the parties, and especially to respondent's letter of January 7, 1907, wherein they accepted appellant's order for 1,000,000 feet of lumber as per appellant's letter of the 27th of December, 1906. This contractual relation was established at the instance and invitation of appellant, as is evidenced by their letter of December 6, 1906.

The terms of the contract essential to the principal issue in this case are set forth in appellant's letter of December 27, 1906; and this letter, together with respondent's letter in reply thereto, to wit, of date January 7, 1907, in our judgment evidenced a meeting of the minds of the parties as to three essential things in this case; that is, the amount of lumber, the season in which the lumber was to be cut by respondent, and the time of delivery—the latter limited only by a specific condition, to wit, "when dry." In this respect, it may be well to note that respondent's letter of January 7, 1907, in reply to appellant's letter of December 27, 1906, specifically mentions these terms in detail. The letters referred to are as follows:

"Tonopah, Nev., December 27-06.

"Messrs. Sunset Lumber Co., Sattley, Cal.—Gentlemen: We are in receipt of your letter of December 24th and are pleased to hear that you do not intend to discontinue the lumber business entirely. We would like very much to enter into a contract with you for 1,000,000 feet or as near that as possible, providing, of course, that you will cut the same quality of lumber that you did during last year and if agreeable to you, we are willing to close this contract at the present time, the lumber to be cut during the coming season and delivered when dry. Prices

be based on Truckee river price list September 1st-06 which is at present in vogue. If it is satisfactory to you, write us a letter to that effect and we will consider the matter closed until such time as you start cutting when we will forward to you a cutting list.

Awaiting your reply, we are,

"Yours truly, Tonopah Lumber Co.,  
"By A. J. Crocker.  
"R."

"Sattley, Sierra Co., Cal., 1/7/07.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: Replying to your favor of the 27th ultimo addressed to the Sunset Lumber Co., beg to say that the writer and those associated with him will be pleased to furnish you the 1,000,000 feet or more of No. 1 common pine and fir to be cut this season and shipped when dry. The prices to be based on the Truckee river price list of Sept. 1st, 1906. We expect to cut 3,000,000 feet, including all grades, and would be pleased to furnish you some uppers, such as ash, rustic, ceiling, flooring, ship-lap, molds, etc., based on the same list as above. Should you desire to have any of this, please let us know as soon as convenient. We expect to do business under a new name, and will notify you of the same as soon as our articles of incorporation are filed.

"Awaiting your reply, we remain,

"Yours respectfully, Sunset Lumber Co.,  
"By Jas. M. Turner."

Appellant's letter of January 12th amounts merely to a confirmation of the terms agreed upon in the two former communications.

The cutting order sent by appellant to respondent April 29, 1907, pursuant to the contract, for 700,000 feet of lumber, says nothing as to "sizing" or "surfacing."

On June 10, 1907, respondent wrote to appellant as follows:

"Sattley, Cal., 6/10/07.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: Referring again to your letter of the 9th of April, we would ask if you want the lumber surfaced. And if so, please give us a memo of the thicknesses and widths wanted. We would also like to receive your cutting order for the 300,000 feet, as per your letter of May 6th, as we will soon be ready to commence cutting on it.

"Yours respectfully,

"Turner Lumber Co.,  
"By F. H. Turner."

Another letter from respondent to appellant, dated July 24, 1907, on the same subject, is as follows:

"Sattley, Cal., 7/24/07.

"Tonopah Lumber Co., Tonopah, Nevada—Gentlemen: On the 18th ult., we wrote you asking if you would want some of the lumber in the cutting order you gave us surfaced, and if so, please let us know what thicknesses it should be. As yet, we have not received a reply. Kindly let us know as soon as convenient. Would also like to receive your cutting order for the balance of 300,000 feet on the contract, per your letter of May 6th. We can commence shipping soon after the first of next month.

"Yours respectfully,

"Turner Lumber Co.,  
"By F. H. Turner."

Respondent's letter of September 20th pertains to the same subject, namely, the sizing of the lumber, and urges appellant to give them information on that subject. It is as follows:

"Sattley, Cal., Sept. 20, 1907.

"Tonopah Lumber Co., Tonopah, Nev.—Gentlemen: We have written you twice asking you if any of the lumber on the order you gave us is to be surfaced or sized. As yet we have received no reply. We have quite a lot of the order on hand and as the season is getting late we are anxious to commence moving the lumber as we have to haul it with teams to the railroad. If you will kindly advise us as to the lumber you want surfaced or sized—if any—and give the thicknesses and widths desired we can commence running it out and hauling it to the R. R. and have it ready to ship when occasion requires.

"Hoping to hear from you soon, we remain,

"Yours respectfully,

"Turner Lumber Co.,  
"By F. H. Turner."

As appears from the record, the first shipping order was sent to respondent by appellant on the 29th day of September, 1907; and nowhere does it appear that appellant gave any instructions to respondent as to surfacing and sizing the lumber contained in the cutting order of 700,000 feet, except in so far as the respective shipping orders, sent in on September 29, 1907, and subsequent thereto, designated the surfacing and sizing of each particular order. With respect to this phase of the contract, the letter of appellant to respondent of date November 23, 1907, is significant. It is as follows:

"Tonopah, Nev., November 23d, 1907.

"Turner Bros., Sattley, California—Gentlemen: There will be no necessity for surfacing any of the material mentioned in our previous letter. We cannot give you any assurance as to when this material will be ordered shipped, but will do our best to clear it up in as short a time as possible.

"Yours truly,

"Tonopah Lumber Company,  
"Per A. Revert.  
M. F."

"AR/MF.

As appears from the record, and from the undisputed testimony of respondent, the entire 700,000 feet of lumber, as contained in the cutting order of April 29, 1907, was milled by respondent. Some of the lumber was hauled to the railroad at Loyaltown, and some held in the mill yards. It appears from the record that several shipping orders were sent to respondent by appellant subsequent to September 29th; and it also appears from the record that respondent was in a position to fill these orders, having previously cut the lumber as per appellant's cutting order of April 29th. Some delays appear on the part of respondent, which they contend were due to their having to size and surface the lumber after receiving the order, and on other occasions were due to the lack of cars.

It is the contention of appellant that respondent was unable, or at least failed, to comply with the terms of the contract, by failing to ship the lumber within the season of 1907; but in this respect the letter from appellant to respondent of October 26th is significant:

"Tonopah, Nev., October 26, 1907.

"Turner Bros. Lumber Company, Sattley, California—Gentlemen: Owing to depressed condi-

tions here, will ask that you cancel order 1120, for a car of 2x12. Also cancel all orders that you may have for us for the present. Just as soon as conditions improve in this locality, we shall notify you to ship our orders. Kindly acknowledge receipt of this letter.

"Very truly,

"Tonopah Lumber Company,

"Per A. Revert.

"M. F."

This cancellation of previous orders was recalled on October 27th by the letter of appellant to respondent, as follows:

"October 27, 1907.

"Turner Bros. Lumber Company, Sattley, California—Gentlemen: Last evening we wrote you to cancel order 1120 for a car of 2x12 and also all other orders that you may have for us. We wish to recall this cancellation and ask that you let shipments come forward sending the 1x12 & 2x4 first. We are badly in need of the 1x12. Kindly give this matter your prompt attention, and oblige.

"Very truly,

"Tonopah Lumber Company,

"Per \_\_\_\_\_."

"AR/MF.

Following this, the record discloses a telegram, as follows:

"Tonopah, Nev. Turner Bros. Sattley. Cancel all orders except on by twelve Tonopah Lumber Co."

This wire is acknowledged by respondents by their letter of October 30, 1907, as follows:

"10/30/07. Tonopah Lumber Co., Tonopah, Nev. Gentlemen: Your wire of today at hand. Two cars were shipped to you yesterday but we will hold further shipment until advised by you. Yours respectfully."

So far as the record discloses, the shipping orders canceled by appellant's wire of October 30, 1907, were never revived, and, so far as we may determine from the record, were held by respondent pursuant to their letter of October 30th, wherein they stated they would hold further shipments "until advised by appellant."

It is the contention of appellant that respondent was guilty of a breach of the contract, inasmuch as the record discloses that on the last day of the year 1907 respondent was in arrears, or, in other words, had failed to deliver, 311,843 feet of lumber.

[2] There are many elements in this case that might be considered as decisive of the controversy, and there are many phases of the law that might apply; but we deem it sufficient to say that, so far as the facts presented by the record disclose, the court had good and substantial evidence to warrant its finding that the defendant company, appellant herein, due to its delay in furnishing respondent with specifications as to surfacing and sizing, and due to its acts in canceling orders previously given, and never reviving the orders, was responsible for the delay in delivery.

There is some evidence in the record which goes to show that on some occasions respondent was unable to make prompt delivery of specific orders, due to climatic conditions and scarcity of transportation facilities on the

railroad. But nowhere does the record disclose any complaint as to these minor details, coming from appellant.

Moreover, the record fails to disclose any notice of rescission or cancellation of the contract given by appellant to respondent; nor does the record disclose any acts on the part of appellant from which or by reason of which respondent could reasonably have inferred that appellant considered the contract as rescinded, or that appellant intended rescission of the contract.

On March 1, 1908, respondent addressed a letter to appellant, part of which is as follows:

"We have on hand in Loyalton, ready for immediate shipment, the following lumber: \* \* \* We would be very much pleased to ship this in the near future, as this is stock cut for you; would ask you to strain a point and take it."

To this letter, appellant replied:

"We are in receipt of your letter of March 1st, and beg to advise that we cannot at this time use any of the material contained in your letter of that date."

On May 25, 1908, respondent communicated with appellant, as follows:

"After looking over all our communications with you, we do not see any reason why you should not take the balance of the lumber you ordered from us on April 29th, 1907,—your order No. 1028. We therefore insist that you take this lumber as you agreed. The lumber was to have been shipped when dry, and we have held it ever since last fall, and now that the market has declined, we do not feel that this should be our loss. We would like to know just what you are going to do about this matter."

To the foregoing communication, appellant replied:

"We are in receipt of your letter of May 25th, and are surprised at the tenor of the same. If you will refer to our letters and orders, you will find that you were simply unable to take care of the orders that we would offer you, and for that reason we will ignore your letter entirely. You may take any action you may deem fit regarding our attitude and desire to say that under no circumstances will we take a foot of your lumber, as bluffing with us don't go. Furthermore, we intend to insist upon the payment of amount due Verdi Lumber Company. You have our sentiments in the matter, and now, gentlemen, proceed."

This letter might properly be termed a repudiation of the contract by appellant, and in our judgment the court was warranted in finding that the breach of the contract took place on the date of this letter, to wit, May 27, 1908.

In this case, respondent had not only the means whereby to comply with the terms of the contract as made, but the record discloses that they did, in fact, mill and manufacture all of the lumber for which a cutting order was given them by appellant.

[3] The contract required the lumber to be shipped when dry, and there is nothing in the record from which we could infer failure on the part of respondent to perform under this condition. This was a definite time, contingent upon the accomplishment of a certain

condition of the product to be furnished; and, so far as the terms of the contract were concerned, respondent might justifiably have shipped the lumber to appellant without further order, when the lumber was dry.

The record discloses a letter in which respondent notified appellant that much of the lumber milled pursuant to the cutting order was dry and ready for shipment.

It was by appellant's request that, "owing to unsettled conditions," the lumber should not be shipped until further notice from them. This was a change in the conditions of the original contract, for which change appellant was responsible, and which change was made to suit the convenience and welfare of appellant. Moreover, appellant, in order to suit its convenience, delayed its orders for sizing and surfacing, and thereby caused new conditions to enter into the performance of the contract which were not contemplated in its original making; and these conditions, as we have already said, were brought about at the instance and request, and to suit the convenience of appellant.

If the entire 700,000 feet of milled lumber was not shipped within the year 1907, it was because respondent sought to meet the convenience of appellant, at appellant's suggestion and request, by shipping the lumber in quantities and at times as and when appellant ordered, thus delaying the delivery of the lumber.

As we have already stated, so far as the terms of the contract prescribe, the respondent had a right to deliver the entire 700,000 feet of lumber, included within the cutting order, when the same was dry; and the record discloses that the lumber had been milled and was ready for shipment in the condition contemplated by the contract, to wit, dry, before the close of the year 1907.

It was due to respondent's act in acceding to a change from the original terms of the contract, which change was required by and for the convenience of appellant, that the lumber was not shipped within the year 1907.

We deem it unnecessary to cite the many authorities available to bear out our reasoning and conclusion in this case. Suffice it to say that in our judgment the reasoning set forth by Mr. Justice Miller, speaking for the Supreme Court of the United States, in the case of *Amoskeag Mfg. Co. v. United States*, where the conditions and questions were almost identical with those at bar, is applicable to this case and conclusive of the principal question of law raised. *Amoskeag Mfg. Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715. To the same effect are the cases of *Roone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 128, and *Bennie v. Becker-Franz Co.*, 14 Ariz. 580, 134 Pac. 280.

It is contended that the court erred in fixing the damages, for the reason that in computing the same the court did so on a basis of the market price at the time of the trial.

[4] If the computation of damages on this basis was error, we are convinced from the record that it was such an error as rather inured to the benefit of appellant, and therefore they cannot complain.

It follows that the judgment of the lower court, made pursuant to its findings of fact, should be affirmed. It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

(38 Nev. 64)

## STATE v. SALGADO. (No. 2129.)

(Supreme Court of Nevada. Dec. 30, 1914.)

### 1. JURY (§ 129\*)—CHALLENGE FOR ACTUAL BIAS—SUFFICIENCY—"ACTUAL BIAS."

Rev. Laws, §§ 7145, 7146, allow a challenge for cause on the general ground that a juror is disqualified for want of any qualification prescribed by law, and on the particular ground that he is disqualified from serving in the action on trial. Section 7147 allows a challenge for such a state of mind on the part of the juror as leads to a just inference that he will not act with entire impartiality, designated "actual bias." Section 7150 provides that in a challenge for actual bias it must be alleged that the juror is biased against the party challenging him, but that no one shall be disqualified by reason of a formed or expressed opinion on the matter in issue, provided it appears to the court that he can act impartially in the trial. *Held*, that a challenge "for actual bias," not stating any ground upon which the challenge rested or any reason on which it was made or the party against whom the juror was biased, was in form insufficient.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 559; Dec. Dig. § 129.\*]

For other definitions, see Words and Phrases, First and Second Series, Actual Bias.]

### 2. JURY (§ 97\*)—COMPETENCY—BIAS.

A juror in a trial for murder who, from what he had read and heard, had formed and expressed an opinion going to the merits of the case, and had talked about it with several persons, none of whom had witnessed the homicide, and who on inquiry stated that he had an opinion as to defendant's guilt which would require testimony to remove, but that he would lay such opinion aside and try the case on the evidence, was not incompetent on the ground of actual bias.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-433, 435-437; Dec. Dig. § 97.\*]

### 3. HOMICIDE (§ 338\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for homicide, where the age of the deceased girl was not a material issue in the case, error, if any, in allowing a state's witness to answer a question calling for her apparent age, was harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

### 4. CRIMINAL LAW (§ 454\*)—OPINION EVIDENCE—AGE OF DECEDENT.

In a trial for murder, a witness for the state was competent to express his opinion as to the age of the deceased girl, based upon his observations made at the time of the homicide, where such evidence was not very important under the issues.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1043½; Dec. Dig. § 454.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

# 5. HOMICIDE (§ 174\*)—EVIDENCE—ACTS AND DECLARATIONS.

A statement by accused a very short time after the stabbing, which he was seen to do, that he had no knife and had not cut decedent, was admissible as showing a consciousness of guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.\*]

# 6. CRIMINAL LAW (§ 369\*)—EVIDENCE—COLLATERAL OFFENSES.

In a prosecution for killing by stabbing, evidence that defendant stabbed another man during a fight over the deceased a few minutes before he stabbed the deceased was admissible under the exception to the rule excluding evidence of collateral crimes, in that it was with reference to a contemporaneous crime, the circumstances of which were inseparable from the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

# 7. HOMICIDE (§ 173\*)—EVIDENCE—POSSESSION OF WEAPONS.

In a prosecution for killing by stabbing, evidence that defendant had had in his possession a knife similar to the one found in close proximity to the scene of the stabbing was admissible; objection thereto going rather to its weight than its admissibility.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 374; Dec. Dig. § 173.\*]

# 8. CRIMINAL LAW (§ 404\*)—EVIDENCE—DEFENDANT'S POSSESSION OF WEAPON—IDENTIFICATION.

The identification of a knife as that in defendant's possession the afternoon before the homicide and as the one used by defendant when he stabbed the deceased held to warrant its admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

Appeal from District Court, Elko County; E. J. L. Taber, Judge.

Jose Salgado was convicted of murder in the first degree, and he appeals. Affirmed, with direction as to sentence.

Emanuel A. Klein and Harold P. Hale, both of Elko, for appellant. Geo. B. Thatcher, Atty. Gen., and E. P. Carville, of Elko, for the State.

McCARRAN, J. The defendant was convicted of murder in the first degree for the killing of an Indian girl known as Bessie Andy. From the judgment, and from an order denying a motion for a new trial, defendant has appealed.

The killing took place on the main street of the town of Elko. The defendant, after throwing the girl into a mud puddle in the street, and after stabbing another party, who appears to have been a companion of the girl on that afternoon, returned to the spot where the girl stood, and plunged his knife into her body some three or four times, causing almost instant death.

The record in this case, in so far as the testimony is disclosed thereby, falls to set forth, with any degree of satisfaction, any particular motive for the killing. The defendant testified in his own behalf during the trial, and stated that he was a native of

Mexico, 23 years of age, and from his statement it may be gathered that the defendant and the woman whom he killed had been living together for a number of years. The deceased was an Indian woman, about 20 years of age. The defendant stated that on occasions when he came to town a certain Mexican, or half-breed, who, it appears, met the defendant and Bessie Andy, the deceased woman, immediately before the homicide, was always trying to make trouble with him, and it might be gathered by inference from his various statements that bad blood existed between the defendant and this half-breed Indian or Mexican and that Bessie Andy, the deceased, was the "woman in the case" about whom the unfriendly relations had grown up between the defendant and the half-breed. The defendant in his testimony, in relating occurrences immediately preceding the homicide, said that the half-breed wanted Bessie to go with him, and had made a threat that if Bessie did not go with him that he would kill Bessie and the defendant. Counsel for defendant asked, "What did the Mexican say he wanted with Bessie?" to which the defendant replied, "He wanted to take her to Golconda."

The father of Bessie Andy testified that the defendant had been about the Indian camp for some weeks prior to the homicide, and that the defendant and Bessie, daughter of the witness, had been together at least a part of this time. Just prior to the killing, the defendant and Bessie Andy, together with the father and mother of the latter, had dinner together at a Chinese restaurant. It appears from the testimony of the father of the girl that they had liquor, and that he became quite intoxicated. After the dinner the four, consisting of the defendant and the deceased girl, and the father and mother of the latter, left the restaurant and started toward the Indian camp, passing through the business section of the town of Elko on the way. The defendant and the deceased girl, who were traveling together on the way from the restaurant toward the Indian camp, met the half-breed Indian boy, or half-breed Mexican, as he is sometimes termed in the testimony of the several witnesses. The latter was in company with one Jim Odell on the occasion of the meeting, and from the deposition of Odell, taken at the preliminary examination and admitted in evidence, it appears that the defendant asked where they were going, and the half-breed boy replied:

"We are going to sleep."

"Then," said Odell, "the Indian girl, Bessie, said something to the (half-breed) Indian boy in Indian. I don't know what she said, and he answered her, and then he (meaning Jose Salgado) turned around and started to hitting Bessie. Q. Then what followed, if anything? A. Then she fell at my feet, and she begged me and the Indian boy to make him stop, and she got up on her feet and started across the street, and the defendant run around in front of her, and pushed her down in the water and went on

of her and started to beating her, and the Indian boy told him to stop, and he wouldn't do so the Indian boy hit him, and then the Indian boy stepped back, and I tried to pull him, and he started to fighting with me. As I was fighting with him, I happened to get the st of him, and he reached in his pocket and took a knife. As I seen him pull a knife I let n go and ran towards the S. P. track. The Indian boy then said something to him, and he ased him into the saloon. After he came out the saloon he walked right over to Bessie, d the first stroke cut her on the left side of neck. He then started to walk away, and don't know where they caught him, but I ees somewhere up here. Q. Did you see Jose ike Bessie with the knife? A. Yes, sir. Q. ow many times, as near as you remember? Well, I seen the first stroke, and then he bbed her around the neck and made several okes. I do not know how many."

Witness Odell was asked:

How many times did you hit him (the defendant)? A. I don't remember, but I hit him eral times in the face."

A conviction of murder in the first degree s the result of the trial, and, the jury hav-; failed to designate the punishment, the irt sentenced the defendant to death by oting.

A statement of defendant's counsel, made the jury before the presentation of his e, is significant, inasmuch as it may have ne bearing on the principal assignments error. In part, it is as follows:

If the court please, and gentlemen of the y, we are not taking the position that this n should not be punished for the crime. We in no way attempting to prove that this n is not guilty of killing Bessie Andy, and we not going against the rules and laws of our ial life so far as to say that you should not ish Joe Salgado for killing Bessie Andy. t we have disagreed with the state in this y: That he is not guilty of murder in the it degree, but, under the circumstances of s case, we expect to make it clear and plain you gentlemen that he is guilty of a lesser me, and that is why, we are asking you to him—to fix his punishment as will meet the umstances. Therefore, understand us, gemen, because we are in this courtroom and ending this case, we are not putting the untly of Elko to the expense of trying this n because we contend that he is not guilty a crime, but we are putting the county of to to the expense merely because we con- tentionously believe that this man is not ened to the most extreme punishment of the r, and therefore we will ask you, after we e shown to you to the best of our ability umstances surrounding this case, to take law and the instructions of the court, or the dence and the instructions of the court, and gh everything carefully, and do with Joe lgado as you think ought to be done."

The principal assignment of error relied on by the appellant charges the trial court h error for having denied the defendant's illenge to the juror F. R. Jacoby. The dant challenged the juror "for actual s," and in this respect we deem it suffi- nt to say that the juror, by his answers interrogatories propounded to him, signi- l that he had read of the case and had ked to several people with reference to the e: that from what he had read and rld he had formed and had expressed an

opinion going to the merits of the case. It appears that none of the parties with whom he had conversed witnessed the homicide. His condition of mind with reference to the case is set forth in the following:

"Q. Well, right now then you have an opin- ion as to whether this man be guilty of murder in the first degree, or otherwise, haven't you? A. I have. Q. And if you sat as a juror on this case right at the outset of the trial one of the parties would be under a disadvantage in your mind, wouldn't they? A. Yes, sir. Q. It would require a certain amount of testimony to remove that disadvantage from your mind? A. It would."

He further stated:

"I mean at the present time I have what you may call a fixed opinion, but, if the evidence disagreed with the opinion that I have formed and what I have read, I could change my opin- ion."

In response to questions propounded by the court, the juror answered that he could, if accepted as a juror, lay his opinion aside and try the case on the evidence presented at the trial. In view of the form of the ob- jection interposed, the substance of the an- swer given by the juror Jacoby and the state- ments made by him are not subject to the same consideration as they would be if the objection had assumed another form.

[1] The statute relative to this subject pro- vides that a challenge for cause may be tak- en by either party relative to a particular juror, for reasons:

First: General; i e., that the juror is disqualified from serving on any case by reason of his having been convicted of a felony; for want of any qualifications pre- scribed by law; or is of unsound mind or has physical defects which would render him incapable of performing the duties of juror.

Second: Particular; i e., that he is dis- qualified from serving in the action on trial.

R. L. Nev. §§ 7145, 7146.

Particular causes of challenge are by our statute divided into classes: First, such a bias as, when the existence of the facts is ascertained, in judgment of law, disqualifies the juror—designated implied bias; second, such a state of mind on the part of the juror as leads to a just inference, in reference to the case, that he will not act with entire impartiality—designated actual bias. R. L. Nev. § 7147.

Section 7150 of our Revised Laws pre- scribes how a challenge for either implied or actual bias may be taken. It is as follows:

"In a challenge for implied bias, one or more of the causes stated in section 298 must be al- leged. In a challenge for actual bias, it must be alleged that the juror is biased against the party challenging him; but no person shall be disqualified as a juror by reason of having form- ed or expressed an opinion upon the matter or cause to be submitted to such jury, founded up- on public rumor, statements in public press, or common notoriety, provided it appears to the court, upon his declaration, under oath or other- wise, that he can and will, notwithstanding such an opinion, act impartially and fairly up- on the matters submitted to him."

Under our former procedure, a challenge for actual bias required that the court should appoint triers to determine it. The new procedure adopted in 1912 did away with the process of determination by triers, and made the court the forum in which both implied bias and actual bias should be determined. It is unnecessary for us to determine in this instance as to the qualification of the juror as disclosed by his answer made on voir dire, nor is it essential that we pass upon the question of implied bias, inasmuch as the challenge was not for implied bias, but intended rather to constitute a challenge for "actual bias."

Under our former Practice Act, where triers were required to determine the truth or falsity of a challenge, it was essential that the challenge, when made, should conform to the statutory prescription. The change of the forum by which the challenge should be determined, from triers, as formerly prescribed, to the court, as under the new procedure, did not, in our judgment, in any way change the force and effect of the statute as to the essential grounds upon which the challenge should be based, or the essential form of the challenge. The statute in that respect remains the same as that formerly in force, the ground being, as prescribed:

"The existence of a state of mind on the part of the juror which leads to a just inference, in reference to the case, that he will not act with entire impartiality"

—the form of the challenge being, at least in substance, as prescribed by statute, "that the juror is biased against the party challenging him."

The mere assertion, "Challenge the juror for actual bias," fails to state any ground upon which the challenge rests or by reason of which it is made, or as to the party against whom he is biased, and hence the requirements of the statute are not followed, and no statutory challenge is interposed. *People v. Hopt*, 3 Utah, 398, 4 Pac. 250; *Robinson v. Territory*, 16 Okl. 241, 85 Pac. 451. In the case of *People v. Hopt*, supra, the Supreme Court of Utah passed upon the question here under consideration, and in the light of a statute identical to ours, and under almost identical conditions. To the same effect is the case of *State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061. This question was passed upon in an early decision by the Supreme Court of California under a statute similar to our former Practice Act requiring triers, and the reasoning there set forth we deem applicable to this case. *People v. Reynolds*, 16 Cal. 130. It has repeatedly been held by this court that a challenge for implied bias which fails to state one or more of the statutory grounds as a basis for challenge is insufficient. *State v. Raymond*, 11 Nev. 98; *State v. Vaughan*, 22 Nev. 296, 39 Pac. 733; *State v. Gray*, 19

Nev. 212, 8 Pac. 456; *State v. Simas*, 25 Nev. 449, 62 Pac. 242.

The determination of the question of actual bias being by our more recent practice left with the court, the same forum as that to which the question of implied bias is submitted for determination, the reasoning which was followed by this court on the question of the sufficiency of a challenge for implied bias should, in our judgment, warrant us now in holding, as was held by the Supreme Court of Utah in the case of *People v. Hopt*, supra, that, in order for the challenging party to raise any point for the consideration of the court, there must be a declaration of cause substantially complying with the provisions of the statute, and the form of the challenge must be in substantial compliance with that prescribed by statute; i. e., "that the juror is biased against the party challenging."

The challenge was insufficient in form; and, while it does not appear from the record as to whether the court denied the challenge for this reason, or because he deemed the juror free from objection, the ruling must be sustained for failure to declare a ground of challenge known to the statute. *State v. Vaughan*, supra; *Robinson v. Territory*, 16 Okl. 241, 85 Pac. 451; *State v. Myers*, 198 Mo. 248, 94 S. W. 242.

[2] From the record in this case with reference to the voir dire examination of the juror Jacoby, it appears that, if he was disqualified at all, it was only such a disqualification as would subject him to a challenge for implied bias, and was not such as would in any way subject him to a challenge for actual bias. He was not challenged on the ground of implied bias; hence it is unnecessary for us to deal with that phase; suffice it to say that, had a challenge for implied bias been interposed to the juror Jacoby, the trial court, following the rule laid down by this court in the case of *State v. Roberts*, 27 Nev. 449, 77 Pac. 598, would have been required to allow the challenge and excuse the juror.

Assuming that the challenge interposed had been made in substantial compliance with the statute, we find nothing in the examination of the juror which would indicate to our mind that he was subject to such a challenge; hence, laying aside the question of the sufficiency of the challenge as to form, there was no error in the denying of the challenge on the issue made. Statements of the juror made on voir dire failed to disclose that he had ever known or seen the defendant. In fact, the defendant was a man who was apparently but little known in the community. The juror's answers disclosed nothing from which we may infer a personal feeling or bias toward or against the defendant or any one connected with the defense. He had read of the case, had heard the case talked of, had heard the matter of the killing



of the Indian girl discussed, had entered into the discussion perhaps, and from what he had read and heard he had formed an opinion. The parties with whom he had talked or who had discussed the incident in his presence were not witnesses to the killing. The opinion which he had said was not fixed or set, but that he could lay it aside and determine the guilt or innocence of the defendant on the evidence produced at the trial. Having all of these disclosures as to the condition of the juror's mind with reference to the defendant, the party challenging, in view of the position taken by defendant as to the commission of the act, and in view of the declaration of defendant's counsel made as a preliminary statement to the jury, it can scarcely be seriously contended that the court could have been successfully charged with error if it denied the challenge in the event that the same had been properly interposed.

[3, 4] The appellant assigns error to the trial court for having permitted the state's witness McNamara to respond to a question calling for the apparent age of the dead girl. The objection to the interrogatory was upon the ground that it called for a conclusion, was incompetent, and immaterial. The age of the girl was not a material issue in the case, and hence, even if the contention of appellant was well founded, the error would be harmless, but, aside from that, the witness was a competent witness to express his opinion as to the age of the deceased, based upon his observations made at the time of the homicide. The relevancy of such testimony depends upon the nature of the issues being tried. If the issues were sharply drawn on the question of age, a different rule might apply, but that is not before us for consideration. Opinion evidence gains its sanction in the law by reason of the rule of necessity. No hard and fast rule has been promulgated by which evidence of this character may be judged. In cases where the age of a person is an issue, such as cases involving carnal knowledge of a female under the age of consent, the opinion of witnesses as to the age of the prosecutrix, based on their observation, has been held competent. *Walker v. State*, 25 Tex. App. 448, 8 S. W. 644; *Bice v. State*, 37 Tex. Cr. R. 38, 38 S. W. 803; 17 Cyc. 98.

[5] The witness Carter was permitted, over the objections of defendant's counsel, to testify as to a statement made by defendant a very short time after the stabbing. The statement testified to as having been made by defendant was in denial of the affair in which he said: "Me no got a knife; me no cut." There is no contention that the testimony was not properly *res gestæ*. Utterances made by the defendant after the act of which he is accused, which are intended to set up a false defense, are admissible in cases of this character as tending to show consciousness of guilt. 2 Wharton, Criminal

Evidence, 1752, 1753; *Rex v. Steffoff*, 20 Ont. L. R. 103; *State v. Clark*, 160 Iowa, 138, 140 N. W. 821.

[6] The evidence produced by the prosecution as to the act of the defendant in stabbing another man a few minutes before stabbing the Indian girl was properly received. It was directly a part of the main event in which the deceased lost her life, so closely connected as to be inseparable in a narrative as to acts of the defendant at the time of the homicide. This evidence was admissible under the exception to the rule excluding evidence of collateral crimes, in that it was with reference to a contemporaneous crime, the circumstances surrounding which were, as we have said, essential to a sequential narrative of the main event.

[7] We find no error in the admission of the evidence as to the defendant having had in his possession a knife similar to the one found in close proximity to the scene of the homicide. Testimony as to the former possession of weapons similar to those found in possession of, or traced even by circumstantial evidence to, the defendant, is always admissible. Objection to this class of evidence is rather to its weight than to its admissibility. 2 Wharton, Criminal Evidence, 1748.

[8] The knife received in evidence was identified as having been in the defendant's possession the afternoon before the homicide, and the witness Odell identified the knife as being the one used by defendant when he stabbed the girl. No further identification was necessary for its admission in evidence. There is therefore no merit in appellant's contention in this respect.

We find no other assignments of error which we deem sufficiently important to require extended comment. The killing of the girl was admitted by counsel for defendant to the jury in his preliminary statement. Appellant only sought to have the punishment mitigated. While it was within the power of the jury to have returned a verdict fixing the punishment at life imprisonment or one fixing the punishment at death, they refused to do either, but rendered their verdict fixing only the degree of the crime. We find nothing in the record from which it might be inferred that appellant received other than a fair trial, or that a different result might flow from another trial.

The judgment is affirmed, and the court below is directed to fix a time and make all necessary and proper orders for having its sentence carried into effect by the warden of the state prison.

TALBOT, C. J., concurs.

NORCROSS, J. I concur in the judgment and in the opinion generally of Mr. Justice McCARRAN. There are, however, some portions of the opinion of my learned associate, relative to the rulings of the court below

upon the objections to the juror Jacoby, in which I am not entirely in accord. The juror was first challenged upon the ground of "actual bias," and later a further challenge was interposed upon the ground "that the juror has answered that he has a fixed opinion as to the guilt or innocence of this man." It must be conceded that the challenges interposed were not technically and strictly in the form prescribed by the statute; yet I am of opinion that, had the examination of the juror disclosed that he was disqualified either for actual or implied bias, the right of the defendant to be tried by a fair and impartial jury ought not to turn on the mere technical form of the objection, where the form of the challenge was not questioned by the court or opposing counsel, and where the course of the examination of the juror indicated that a proper challenge was assumed to have been made. A challenge for actual bias should, as the statute prescribes (Rev. Laws, § 7150) allege "that the juror is biased against the party challenging him." But should a failure to allege that the bias is "against the party challenging" operate to make the challenge unavailing, in the absence of objection to its form, where the whole line of the examination of the juror indicates that, if the juror is biased at all, it is against the party interposing the defective challenge, and that question is apparent to the court and the prosecuting attorney to be the one actually under investigation? I think not.

The same situation is presented with regard to the challenge interposed, "that the juror has answered that he has a fixed opinion as to the guilt or innocence of this man." Strictly and technically this challenge should have been for "implied bias," and the eighth cause should have been designated:

"(8) Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged."

The examination of the juror discloses, however, that this was the question under investigation, and that neither the court nor the prosecution was misled by the form of the challenge. In *State v. Raymond*, 11 Nev. 107, this court, speaking through Hawley, J., regarded a "deliberate or fixed opinion" and an "unqualified opinion" as synonymous. See, also, *State v. Roberts*, 27 Nev. 449, 77 Pac. 598.

The tendency of modern decisions is to disregard technicalities. Judgments of conviction will not be disturbed for errors which do not affect the defendant's substantial rights. Certainly as much reason exists for supporting a rule that a defendant in a criminal case will not be held to have lost a substantial right because of any mere technicality in the form of an objection which has not misled the prosecution or the court in its ruling.

The examination of the juror Jacoby as to his qualifications was gone into quite thor-

oughly and at considerable length. From the whole examination it appears quite clear, I think, that the court did not err in denying the challenge either for actual or implied bias. While the juror, in answer to a question of counsel for the defendant, replied, "At the present time I have what you might call a fixed opinion," other portions of his examination show clearly that he did not have a "fixed" opinion in the sense of an unqualified opinion. As further indicating the character of opinion entertained by the juror, the following excerpt is taken from the examination upon the part of the prosecuting attorney:

"Q. Then the opinion that you have is conditioned, is it not, upon what you have heard of the facts being true; that is, if what you have heard of the facts differs from the evidence here, the opinion which you have already formed you would entirely disregard, would you not? A. I would. Q. Now, would you to any extent as a juror be influenced by what you have heard of this case? A. I think not. Q. Do you feel that you could sit as a juror in this case and do equal justice to the state and to the defendant? A. I think so."

Also the following excerpt from the examination of the juror by the court:

"Q. Mr. Jacoby, if you should be accepted as a juror and sworn to try the case with the other 11, would the opinion which you have at this time have any influence upon your verdict? A. No; I don't think it would. \* \* \* Q. Now, the important thing with you is: Could you and would you, if accepted as a juror, act with entire impartiality in this case? A. I think I would; yes, sir. Q. Well, do you feel sure that you could and would do that? A. I think so."

Also the following excerpt from the further examination of the juror by counsel for defendant:

"Q. Mr. Jacoby, wouldn't it be necessary for one side to introduce a certain amount of evidence to overcome that opinion? A. No; I don't think so. I think if I sat as a juror I would give a decision strictly according to the evidence."

It nowhere definitely appears from the examination that the juror had formed or expressed an unqualified opinion. Such opinion as the testimony discloses the juror had was clearly a qualified opinion based "upon public rumor, statements in public press, or common notoriety." It further quite clearly appears that, "notwithstanding such an opinion," the juror would "act impartially and fairly upon the matters submitted to him."

Assuming, as I do, that a sufficient challenge for implied bias was interposed, I cannot agree with the prevailing opinion that the challenge is good under the rule laid down by this court in *State v. Roberts*, 27 Nev. 449, 77 Pac. 598. The statute upon which the Roberts' Case was based has been materially modified since that decision. The only proviso existing in the statute at the time of the Roberts' decision which operated to prevent the formation or expression of an unqualified opinion from becoming an absolute disqualification upon proper challenge was the following:

"That such unqualified opinion or belief shall not have been formed or expressed or based upon the reading of newspaper accounts of the transaction." Cutting's Compiled Laws 1900, § 4305.

A reference to Rev. Laws, § 7150, quoted in the prevailing opinion, will show the change in the law made by the later statute.

(38 Nev. 108)

# STATE v. SWITZER. (No. 2148.)

(Supreme Court of Nevada. Dec. 31, 1914.)

## 1. ROBBERY (§ 17\*) — INDICTMENT — INTENT — "FELONIOUSLY."

An information, substantially following the form of the statute, charging that defendant willfully, unlawfully, and feloniously took from a person certain goods and chattels of such person, was not defective because not specifically charging a taking with an intent to commit a larceny; the word "feloniously" being a sufficient averment of the intent necessary to constitute the offense.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16-23, 26; Dec. Dig. § 17.\*]

For other definitions, see Words and Phrases, First and Second Series, Felonious.]

## 2. INDICTMENT AND INFORMATION (§ 110\*) — LANGUAGE OF STATUTE—ROBBERY.

An indictment charging robbery in the language of the statute is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

## 3. CRIMINAL LAW (§ 825\*)—TRIAL—REQUEST FOR INSTRUCTIONS.

Where the court defines the crime in the language of the statute, defendant desiring a more particular instruction should request it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

## 4. JURY (§ 117\*) — OBJECTIONS TO PANEL — TIME FOR INTERPOSING.

Under Rev. Laws, § 7134, providing that a challenge to the panel must be taken before a juror is sworn, an objection to the panel, first made after the jury was sworn, on the ground that the court had issued a second venire after excusing a portion of the first venire, came too late.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 544; Dec. Dig. § 117.\*]

## 5. JURY (§ 75\*)—EXCUSING JURORS—SECOND VENIRE—TWO JUDGES.

Under Rev. Laws, § 4903, providing that the two judges of the district court shall have concurrent and coextensive jurisdiction, one judge of the district court has power to excuse jurors and to issue a second venire to fill out the panel.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 384-390; Dec. Dig. § 75.\*]

## 6. CRIMINAL LAW (§ 1144\*)—REVIEW—PRESUMPTIONS.

In the absence of a showing in the record of the grounds on which jurors impaneled were excused, it will be presumed on appeal that the court properly exercised its discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3010-3037; Dec. Dig. § 1144.\*]

## 7. JURY (§ 116\*) — CHALLENGE TO PANEL — GROUNDS.

Under Rev. Laws, § 7133, providing that a challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of

the jury, or on the intentional omission of the proper officer to summon one or more of the jurors, an objection to the panel, on the ground that the court having summoned a panel of jurors excused a portion of them and issued a second venire, is not well taken.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.\*]

## 8. ROBBERY (§ 23\*)—EVIDENCE—POSSESSION OF WEAPON.

Evidence that defendant, a few days prior to the alleged robbery, had in his possession a revolver similar in appearance to that used in the commission of the robbery and found on his person on his arrest a few days after the offense was committed, was admissible.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 29-31; Dec. Dig. § 23.\*]

## 9. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Such evidence was not within the rule prohibiting evidence of a separate and distinct crime unconnected with that for the commission of which the defendant was on trial, where there was nothing to show that at the time witnesses saw the revolver in defendant's possession he was engaged in the commission of any criminal offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

Appeal from Second Judicial District Court; Thos. F. Moran, Judge.

William Switzer was convicted of robbery, and he appeals. Affirmed.

Thomas E. Kepner, of Reno, for appellant. Geo. B. Thatcher, Atty. Gen., for the State.

**NORCROSS, J.** The appellant was convicted of the crime of robbery, and appeals from the judgment and from an order denying a motion for a new trial.

[1] It is contended by counsel for appellant that the information is fatally defective because of the absence of a specific charge that the property was taken with intent to commit a larceny. The information charges that the defendant did "willfully, unlawfully, and feloniously take from the person of and in the presence of Jack Vera \* \* \* of the personal goods and chattels of the said Jack Vera," etc. In *State v. Hughes*, 31 Nev. 274, 102 Pac. 563, we said:

"The word 'feloniously,' used in the body of the indictment, in a legal sense, means, 'done with intent to commit crime.' Its use in an indictment has uniformly been held to be a sufficient averment of the intent necessary to constitute the crime."

[2] The indictment follows substantially the form of the statute, and an indictment in the identical form, so far as the question here raised is concerned, was held to be sufficient in *State v. Luhano*, 31 Nev. 278, 102 Pac. 260. See, also, *State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091; *Holland v. State*, 8 Ga. App. 202, 68 S. E. 861; *State v. Henry*, 47 La. Ann. 1587, 18 South. 638.

As said by Hawley, J., in *State v. McKlerman*, 17 Nev. 224, 30 Pac. 831:

"The technical exactness which existed under the rules of the common law has been superseded-

ed by statutory provisions, and it is now sufficient if the offense is 'clearly and distinctly set forth in ordinary and concise language \* \* \* in such a manner as to enable a person of common understanding to know what is intended.'"

Notwithstanding the many authorities cited by counsel for appellant, holding that an indictment for robbery must specifically charge an intent to commit a larceny, we are not disposed to change the former ruling of this court that the indictment is sufficient. The defendant could not have been misled to his injury by the form of the indictment.

[3] The same reasoning will apply to the instruction defining the offense in the language of the statute. If defendant had felt that a more particular instruction should have been given, he should have requested it.

[4] It is next urged that the court erred in denying defendant's challenge to the jury panel. It appears from the record that this challenge was not interposed until after 12 of the jurors were called to the jury box and sworn for their examination. Section 284 of the Criminal Practice Act (Rev. Laws, § 7134) provides: "A challenge to the panel must be taken before a juror is sworn." The objection to the panel was upon the ground that two venires were drawn, one on the 5th of August and one on the 7th of August, the first venire containing 30 names and the second 15 names; that only 30 were in attendance, a portion of both venires; that both venires were drawn and made returnable in the chamber of the court presided over by Judge Salisbury.

[5-7] The venires in question are not embodied in the record. It does not appear upon what day they were made returnable. It appears, however, to have been conceded that upon the return of the first venire a number were excused, and that Judge Salisbury then considered that there was not a sufficient number remaining for the purposes of the court, and that, consequently, an additional venire was drawn and returned. While the Second judicial district court has two judges, there is but one court; the two judges thereof having "concurrent and coextensive jurisdiction." Rev. Laws, § 4903. The district court has power to excuse jurors from attendance. Rev. Laws, § 4933. There is no showing or contention that this power was abused or any showing as to the grounds upon which jurors impaneled were excused. The presumption, of course, is that the court properly exercised its discretion. Finally, the objection does not go either to the drawing or the return of the jury panel. Section 283 of the Criminal Practice Act, (Rev. Laws, § 7133) provides:

"A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn."

The court did not err in denying the challenge to the panel.

[8, 9] Error is assigned in admission, over defendant's objection, of the testimony of two witnesses for the state. These two witnesses testified to seeing a revolver in the possession of defendant about four days prior to the alleged robbery, described its appearance, and, when shown state's Exhibit A, the revolver taken from defendant at the time of his arrest and previously testified to by the complaining witness as similar to the one used upon him the night of the alleged robbery, testified that it was similar in appearance to the revolver they had seen in defendant's possession on the previous date. The witnesses testified to seeing the revolver in the possession of defendant at the car barn of the Reno Traction Company about 4 or 5 o'clock of the afternoon of July 7th. One of the two witnesses, C. S. Nichols, testified that he was a member of the Reno police force dressed at the time in citizen's clothes. There was nothing in the testimony of the witnesses showing, or tending to show, that at the time they saw the revolver in defendant's possession the latter was engaged in the commission of any criminal offense, was under arrest, or was exhibiting the revolver in any other than a lawful manner. There is nothing in the testimony objected to which brings it within the general rule prohibiting the introduction of evidence of an entire, separate, and distinct crime unconnected with the crime for the commission of which the defendant is on trial.

It was an evidentiary circumstance, proper to be considered together with other evidence and evidentiary circumstances in the case, that defendant, a few days prior to the robbery, had in his possession a revolver similar in appearance to that used by the robber in the commission of the robbery and found on the person of defendant at the time of his arrest a few days after the offense was committed. *People v. Oldham*, 111 Cal. 654, 44 Pac. 312.

Judgment affirmed.

TALBOT, C. J., and McCARRAN, J., concur.

(38 Nev. 156)

BURRUS v. NEVADA-CALIFORNIA-OREGON RY. (No. 2031.)

(Supreme Court of Nevada. Jan. 22, 1915.)

1. COURTS (§ 489\*)—CONTRACTS FOR SPECIAL TRAIN—INTERSTATE COMMERCE—JURISDICTION OF STATE COURT.

One contracting with a railroad company for a special train to run from a point in the state to a point in a sister state and return may sue the company in a state court for a breach of the contract, without previous application to the Interstate Commerce Commission.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. PLEADING (§ 258\*)—AMENDMENTS—ANSWER.**

Where a railroad company, when sued for a breach of contract for a special interstate train, filed a demurrer which was overruled, and a motion to strike out parts of the complaint, which was denied, and then filed an answer, refusal to permit amendment of the answer during the trial many months after the filing of the complaint, by setting up a failure to comply with the interstate commerce act in the establishment of rates for special trains, and to plead the invalidity of the contract by reason thereof, was proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.\*]

**3. CARRIERS (§ 277\*)—BREACH OF CONTRACT—MENTAL ANGUISH.**

A railroad company, breaching its contract to furnish a special train to carry speedily for medical treatment a son of the person contracting for the train, is liable to the person for mental anguish caused by the breach causing delay in the son's removal, where the company was, at the time of the making of the contract, advised of the necessity of the speedy removal of the son for medical treatment and the danger to his life by any delay in removal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

**4. CARRIERS (§ 263\*)—CONTRACTS FOR SPECIAL TRAINS—BREACH.**

One contracting and paying for a special train is entitled to the services of the train, and the carrier running it to a farther point under false representations, and attaching other cars to it, is guilty of a breach of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1035-1074; Dec. Dig. § 263.\*]

**5. DAMAGES (§ 91\*)—PUNITIVE DAMAGES—WHEN ALLOWED.**

Punitive damages should be awarded only where the wrongdoer is unduly negligent or the acts are unnecessarily aggravated.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

**6. CARRIERS (§ 277\*)—CONTRACTS FOR SPECIAL TRAIN—BREACH—PUNITIVE DAMAGES—MENTAL ANGUISH—EXCESSIVE DAMAGES.**

Where a railroad company contracting to furnish a special train for the speedy removal of plaintiff's son to a place for medical treatment breached the contract by delaying the removal for three hours with knowledge of all the facts, a verdict for \$10,000 was excessive, though punitive damages could be allowed and compensation for mental anguish could be recovered, and the verdict must be reduced to \$5,000.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

Appeal from District Court, Washoe County; L. N. French, Judge.

Action by Joseph Burrus against the Nevada-California-Oregon Railway. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

James Glynn, of Reno, for appellant. Mack, Green, Brown & Heer, of Reno, for respondent.

**TALBOT, C. J.** This action was brought to recover damages in the sum of \$20,000 for the breach of a contract to furnish a special train. From the verdict and judgment in favor of the plaintiff for \$10,000, and from

an order denying motion for a new trial, this appeal is taken by the company.

Defendant operates a railroad from Reno in this state to Doyle and Amedee in California. On the evening of January 21, 1911, the plaintiff was informed that his son, who had been caught in a storm and frozen, was suffering from blood poisoning, near Doyle, and it was necessary that he be removed speedily to Reno for medical treatment, and that death would likely result if such removal and treatment were delayed. Under the allegations and evidence of plaintiff it appears that the plaintiff contracted with the appellant, for the consideration of \$125, which he paid in advance, for a special train to leave Reno at 6 o'clock the next morning and to take him to Doyle and return immediately to Reno with him and his son. According to the testimony of the plaintiff, at the time of the agreement for the special train, the plaintiff informed the appellant that he wished to bring his son to Reno for medical attention, of the location and serious illness of his son, and the necessity for his speedy removal to Reno for treatment, and the danger to the life of his son for delaying such removal. The train was not started at 6 o'clock as agreed, but about 20 minutes later. Instead of being held in readiness and returning immediately with the plaintiff and his son to Reno, after its arrival at Doyle it was represented to plaintiff by defendant that it was necessary to run the train to Amedee, 20 miles farther, for the purpose of procuring fuel oil for the return trip. Plaintiff believed and relied upon this representation, and was not aware until later that it was not necessary to go to Amedee for fuel oil, and that none was taken on there. In going to Amedee and returning the train was gone for about two hours. No oil was obtained at Amedee, and it was not necessary to procure any upon the whole trip. At Amedee the defendant took on the train a number of passengers for Reno and collected from them the usual fare. The train was further delayed upon the return to Doyle by attaching to it a freight car loaded with cattle. By reason of the trip to Amedee and the impeding of the train with the cattle car, it is claimed that the train was delayed for more than three hours in reaching Reno. It is alleged that the running of the train to Amedee, the misrepresentations as to the reasons therefor, and the taking on of the passengers and the car of cattle, and the delay consequent, were willful and malicious, and that by reason of such wanton, wrongful, and negligent acts the plaintiff was caused to suffer much anxiety and great mental pain and anguish. Damages were claimed by reason of the premises and of the wrongful, wanton, willful, and negligent acts of the defendant.

[1] The appellant contends that, as recovery is sought for the breach of an interstate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contract and for damages for mental suffering, the case is one primarily and exclusively within the jurisdiction of the Interstate Commerce Commission to make proper findings and preparations before any action could be maintained, and that the district court was without jurisdiction. We are cited to *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and other cases holding that a shipper cannot maintain an action at common law in the state court for excessive freight rates exacted on interstate shipments, where the rates charged were those duly fixed by the carrier according to the act and had not been found by the Interstate Commerce Commission to be unreasonable. If it be conceded that the Interstate Commerce Commission has exclusive original jurisdiction to determine the unreasonableness of interstate rates, it should be remembered that this is a different kind of a case and one to recover damages for the failure of the appellant to properly run a special train as agreed. If the amount of damages, or the reasonableness of rates, or whether charges are according to schedule, must first be determined by the Interstate Commerce Commission before suit on the various causes for damages, or torts, or breach of contracts of interstate carriers could be maintained, great would be the burdens of the Commission, and long, troublesome, and expensive the delays which would result to litigants.

[2] There is an assignment that the court erred in its refusal to allow the defendant to amend the answer by setting up its failure to comply with the requirements of the interstate commerce act in the establishment of rates for special trains, or to plead the illegality of its contract by reason of its failure to comply with the law. The original complaint was filed on April 3, 1911, and after demurrer was sustained the amended complaint was filed on June 24, 1911, to which a demurrer was filed on July 3d, which demurrer was argued and overruled on August 16th. It did not specify the point covered by the proposed amendment. On November 3, 1911, appellant obtained an order further extending its time to answer until November 13th. On November 8th defendant filed a motion to strike out certain portions of the amended complaint; this motion was heard and denied on the following day. On November 13th, more than eight months after the filing of the complaint and more than six months after the filing of the amended complaint, defendant filed its amended answer, upon which the cause was heard.

Two days after the beginning of the trial on November 20th, and after the jury had been impaneled, defendant objected to the taking of the testimony on the grounds that the complaint was insufficient because it did not show compliance by the defendant with the interstate act. The objection was over-

ruled, and no effort was made to amend the answer until after evidence had been heard during that day and part of the next, when defendant, without notice, applied to the court for leave to file an amendment to its answer. Later, and after the defendant had introduced testimony and upon the following morning, motion for leave to amend the answer was renewed upon the affidavit of the defendant's attorney. This motion was overruled. As often held and as usual in general practice, amendments should be liberally allowed; but it is not every character of amendment which should be allowed after months of dilatory tactics and after the trial has progressed. Different courts have held that an amendment will not be permitted to an answer at any stage of the proceedings for the purpose of setting up such an unconscionable defense as the statute of limitations. The court properly refused to allow such a character of an amendment after so long a delay and because it sought to set up the appellant's own wrong by failing to comply with the law in matters not strictly germane to the cause of action or justifying the appellant in afflicting suffering and damage upon the plaintiff. Without the amendment there is no allegation or proof and no presumption that the appellant failed to comply with the law in having its rates for special train fixed and published, if any such failure and noncompliance with the law could be deemed a defense which would relieve the appellant from the payment of the damages occasioned by its failure to properly run the special train. If, by charging more or less than scheduled or approved rates, common carriers may be relieved from their wrongful acts, the public might have little protection.

[3] It is urged that no recovery may be had for mental anguish aside from physical suffering. Many of the cases, and especially the older ones, so hold. Some of these decisions have already been reversed, and the tendency of modern authority is to allow damages for mental anguish where it is clearly within the terms of the contract or transaction and the knowledge of and negligently or wantonly caused by the defendant. *Western Union Telegraph Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Western Union Telegraph Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56, 59 N. W. 453; *Kelley v. Kelley*, 8 Ind. App. 606, 34 N. E. 1009, 36 N. E. 165; *Willis v. Western Union*, 69 S. O. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52 and note p. 55, and cases cited. Regarding freight: *Engle v. Simmons*, 148 Ala. 92, 41 South. 1023, 7 L. R. A. (N. S.) 96, 121 Am. St. Rep. 59, 12 Ann. Cas. 740 and note. This court has already put itself in accord with this modern and better doctrine in *Barnes v. Western Union*, 24 Nev. 125, 56 Pac. 438, 77 Am. St. Rep. 791, which case has been considered favorably and followed

by courts in other states. The defendant here, as well as all common carriers, dependent upon the right of eminent domain, its franchise, and the people of the community for its support, owes a duty to the public and its patrons, in addition to the moral obligation upon it and all honest men, to make due effort to keep the terms of its contract.

[4] Aside from any question of mental suffering, the plaintiff was entitled to the proper service of the special train for which he paid. Under *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1, and cases there cited, the company is liable for punitive damages. If unaware of the ethics which should guide men in business transactions or unwilling to honestly observe its agreement for which it had collected a due consideration, it should be enlightened by being required to pay the damages incurred by the flagrant and intentional breach of the plain terms of its contract made under misrepresentation, and not allowed to thwart justice on the claim that it was guilty of a crime because it had not filed schedules required by the law—a matter over which plaintiff had no control. It must be assumed that, aside from the false pretense that the train had to go to Amedee for fuel oil, the company was well aware that, when a father paid for a special train in an effort to save the life of his son, he was entitled to something more than an accommodation cattle train. It was the duty of the company to send a regular train to care for its regular passengers and cattle shipments if the special train was able to cover the road.

[5] Recovery for mental suffering should be limited to special cases, and punitive damages should be awarded only where the defendant is unduly negligent or the acts are unnecessarily aggravated. Exemplary damages may be allowed for refusing to set off baggage at a station to which a ticket has been purchased. *Webb v. Railroad Co.*, 76 S. C. 193, 56 S. E. 954, 9 L. R. A. (N. S.) 1218, 11 Ann. Cas. 834, and note p. 837.

The company was fully informed regarding the serious condition of the plaintiff's son, the necessity that he be speedily brought to Reno for medical treatment in order to save his life, and consequently of the great anxiety which would result to a fond parent who had paid for a special train in order to save his son. There is no excuse, legally or morally, for the willful, flagrant, and deceptive breach by the appellant of the contract for the special train. Many cases appear in the books where common carriers have been held liable for failure to furnish transportation in accordance with ordinary tickets, and a railroad company should be likewise liable for a failure to comply with its contract for a special train. In reviewing many decisions in the *Forrester* Case, we said:

"In the case of *Morrison v. The John L. Stephens*, 17 Fed. Cas. 838, the libellant Mor-

rison paid for passage and the exclusive use of a stateroom for himself and for his wife, who was an invalid, from New York to San Francisco. Relying on the waybill, which was different from the ticket Morrison had secured, the agent at Panama attempted to place a male passenger in the stateroom with Morrison and his wife. Morrison objected, and pleaded for the exclusive use of the room for himself and wife, but she was given a berth in a stateroom with two other females from Panama to San Francisco, and he was deprived of having the exclusive company of his wife. Damages in the amount of \$2,500 were awarded."

[6] However, considered as compensation for mental anguish for the plaintiff under the peculiar circumstances of this case, or as punitive damages, either of which theories would support the verdict against appellant, we regard the amount as awarded to be excessive in consideration of the delay of about three hours occasioned by the breach of a contract for a trip which, necessarily occupied nearly three times as many hours. If several thousand dollars an hour were not held to be excessive and the train had been long delayed, it might take the little railroad to satisfy a judgment in favor of the plaintiff.

We have examined other assignments upon which so much reliance does not appear to be placed, and we find no error in the record aside from this.

If within ten days the plaintiff files in this court his consent that the judgment be modified so as to reduce the amount allowed him for damages to \$5,000, an order will be made that the judgment stand as so modified; otherwise the district court will be directed to grant a new trial.

NORCROSS and McCARRAN, JJ., concur.

(38 Nev. 150)

NESBITT v. CHERRY CREEK IRR. CO.  
et al. (No. 2022.)

(Supreme Court of Nevada. Jan. 2, 1915.)

1. PRINCIPAL AND AGENT (§ 145\*)—UNDISCLOSED PRINCIPAL—ACTION AGAINST AGENT AND UNDISCLOSED PRINCIPAL—ELECTION OF REMEDIES.

Where an undisclosed principal denied all liability for goods sold to his agent, without asserting that the seller should elect whether to hold the agent or the undisclosed principal, he waived his right to compel an election, and could not complain of a prior default judgment against the agent, rendered in the same action.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.\*]

2. CORPORATIONS (§ 431\*)—PURCHASE OF GOODS FOR ITS BENEFIT—LIABILITY.

Where goods furnished by a seller were furnished for the use of a corporation after its incorporation, the corporation was equitably and legally liable, though the purchase for it was made by its undisclosed agent.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1742; Dec. Dig. § 431.\*]

3. PRINCIPAL AND AGENT (§ 145\*)—UNDISCLOSED PRINCIPAL—LIABILITY—ELECTION

Where a seller brought an action against the agent and the undisclosed principal, and ob-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 145 P.—59

tained a default judgment against both, which was set aside as to the undisclosed principal, who denied all liability, the seller, prosecuting the action against the principal, elected to hold him responsible, and he could not complain of the judgment against the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.\*]

**4. PRINCIPAL AND AGENT (§ 145\*) — UNDISCLOSED PRINCIPAL—LIABILITY—ELECTION.**

A seller, who sued an agent and his undisclosed principal, without knowledge that the agent acted as agent, did not elect to hold the agent alone, and the principal could not escape liability.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513-520; Dec. Dig. § 145.\*]

**5. CORPORATIONS (§ 410\*) — PURCHASE OF GOODS BY AGENT—LIABILITY.**

Where an agent of a corporation purchased goods for it, the fact that the corporation, after being served with summons in an action for the price, gave the agent property to reimburse him for the merchandise sold by the seller, and for advances made by the agent before and after the corporation was incorporated, did not defeat liability of the corporation to the seller.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1629-1632; Dec. Dig. § 410.\*]

Appeal from District Court, Lincoln County; E. J. L. Taber, Judge.

Action by James A. Nesbitt against the Cherry Creek Irrigation Company and another. From a judgment for plaintiff, defendant Irrigation Company appeals. Affirmed.

Clay Tallman, of Washington, D. C., for appellant. Charles Lee Horsey, of Pioche, for respondent.

**TALBOT, C. J.** This action was brought to recover \$1,814.39 for goods, wares, and merchandise furnished by the plaintiff, and for \$100 alleged to have been advanced and loaned by plaintiff, and for \$1,544.29 for goods sold and delivered by the Hodges-Cook Mercantile Company on a claim assigned to the plaintiff. Judgment by default was entered against both defendants. Thereafter the Cherry Creek Irrigation Company, the only appellant, moved to set aside the default and judgment entered against that company, asserting that it had a meritorious and complete defense to the action. This motion was accompanied by affidavits, including one by the defendant G. G. Davis, stating that he was familiar with the causes of action set forth in the complaint; that all of the goods and merchandise was purchased by him from James A. Nesbitt and the Hodges-Cook Mercantile Company, and that they well knew that he was personally liable for the indebtedness, and that the Cherry Creek Irrigation Company was not responsible for the same; that the \$100 loaned by James A. Nesbitt was loaned to Davis personally. The court granted the motion to set aside the judgment, and that company filed its separate answer, denying the allegations of the

complaint and the liability of the company, and the case went to trial on its merits.

There was no dispute over the goods furnished or the amounts of the claims sued upon. The company contended that Davis alone was liable. The essential facts shown by the evidence and the findings of the court are undisputed. Davis investigated and undertook an extensive irrigation project for storing and conserving the waters of Cherry, Cottonwood, and Pine creeks, mainly in Nye county, by means of a reservoir at the junction of these creeks. The water so conserved was to be used in Lincoln county. Davis secured in his own name from the state engineer a permit to appropriate the waters of the three creeks, and also secured in his own name a reservoir right of way from the United States. It was a part of his original plan to organize a corporation for his irrigation project. Before commencing the actual construction of the dam, Davis arranged with a number of men to work for a share of stock a day, this stock to be issued as soon as the corporation was formed, and their supplies were to be furnished free of charge. At that time the stock was valued at \$3 per share. About the time the construction work was commenced Davis began buying supplies from Nesbitt, to be used at the project, and for many months he purchased from Nesbitt from \$500 to \$800 a month. For a long time these were practically cash transactions, and the accounts did not run more than one or two months without being fully paid. Davis paid Nesbitt all that was owing up to May 1, 1909, and did not pay any more to Nesbitt after that date, but continued to purchase supplies from Nesbitt in May, June, and July of that year, and also in the summer of that year obtained supplies from the Hodges-Cook Mercantile Company.

At the "organization meeting of the incorporators and stockholders" of the Cherry Creek Irrigation Company on December 16, 1908, G. G. Davis was elected secretary and treasurer. At that meeting the directors adopted a resolution authorizing the issuance of 130,000 shares to Davis, and the issuance of not to exceed 12,000 shares of stock for distribution to the men for their work in pursuance of their understanding with Davis. The stock was issued accordingly in April, 1909. Thereupon Davis executed and delivered a deed to the company, dated April 2, 1909, conveying to the company the reservoir, right of way, water rights, and improvements, with the appurtenances, privileges, and franchises incident thereto, and all the interests of Davis in the property, including the reservoir site, dam, headgates, culverts, ditches, and spillways. The deed was recorded in the office of the county recorder in Lincoln county on the 3d day of April, 1909. Davis was president and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



manager of the affairs of the company at all times after the directors' meeting, and thereafter had full charge of all that was done at the project.

The court found that in selling goods to Davis, the plaintiff and his assignor, while they necessarily gave credit to Davis, not knowing any other person in the transaction, still held to the project, and extended credit to Davis chiefly because of his extensive operations in connection with this irrigation work. In May, June, and July, 1909, Davis and some 30 or 40 men were engaged in completing a 12-mile canal in connection with the project. The court further found that Davis, in purchasing goods and supplies from plaintiff and his assignor, did not buy any of the goods for himself or for his own benefit, but purchased all of them as the agent of the defendant company, and that it was, in fact, the company that bought all of the goods and supplies, through its manager and general agent, G. G. Davis, from the plaintiff and his assignor; that all of the goods were used by the company at the irrigation project, and that the company received the exclusive benefit of all goods and merchandise furnished; that Davis, in paying out his own money, did so, at least at all times subsequent to the organization of the company, not for himself, but for the company, and that the understanding on the part of the directors of the affairs of the corporation was that the money was to be spent in behalf of the corporation for its exclusive benefit, and that Davis was to receive stock, not only for all property which he was to deed over to the company, but for all moneys expended by him in connection with the project.

The judgment was rendered in favor of the plaintiff for the amount claimed and for the supplies furnished as alleged in the second and third causes of action of the complaint. The \$100 alleged to have been loaned in the second cause of action was found to be for Davis personally and is not included in the judgment.

[1] The main objection urged upon the appeal is that, as Davis was the agent and the company the undisclosed principal, the plaintiff should have elected to hold either Davis or the company, and is not entitled to a judgment against both. It does not appear that, at the time the judgment was taken by default against Davis and the company, the plaintiff was aware of this condition. If, in moving to set aside the default, by answer, and at the trial, the company, instead of denying and trying to avoid all liability, had claimed, as now asserted, that the plaintiff must elect which it will hold, the company would be in a better position to have its contention determined. Having contested on the ground that it is in no way liable, without asserting at the trial that the plaintiff should elect, we think the company has waived its

right, if any, to now assert that the plaintiff cannot recover because it did not elect to hold either the company or Davis when it was making a contention against any liability.

[2, 3] As all the goods for which payment was not made, and for which recovery is now sought, were furnished for the use and benefit of the company after its incorporation, and after it had acquired the property by deed, the company is equitably and legally liable for the merchandise so furnished. The sole defense being on the merits at the trial, the main doctrine of election should not apply. It is apparent that the plaintiff, by suing the company, by going to trial, and upon this appeal, elects to hold the company responsible for the goods furnished. If under these circumstances Davis were before the court, claiming that he should be released from the judgment because the plaintiff has elected to hold the company for the value of the supplies furnished to the company and for the company on his order, it would become necessary to determine the questions presented by the briefs, relating to whether the plaintiff is entitled to judgment against both or only one of the defendants.

[4] It should not be held that the plaintiff's act in bringing suit against both Davis and the company before the plaintiff was aware that Davis was acting as the undisclosed agent of the company, amounted to an election by plaintiff to hold Davis, and that therefore the company cannot be held responsible. With as much reason it could be said that, by suing both, the plaintiff elected to hold the company, and that therefore Davis was released, and that consequently neither the company nor Davis would be liable. If the plaintiff had first sued Davis, and had later brought an action against the company for the same debt, the company would be in a better position to claim that the plaintiff elected to hold Davis, and that therefore the company was released. In his opinion the learned district judge said:

"In the present case both the principal and the agent were joined as defendants. No motion was made by either of the defendants at any time that the plaintiff be required to elect which of the defendants he would look to. Even after the evidence was in, no such motion was made. Certainly the plaintiff did not elect to hold either the principal or agent by commencing suit against both, and the judgment which now stands upon the record against the agent was entered simultaneously with the judgment that was entered against the defendant company; both judgments being entered by the clerk of the court by default. The defendant company succeeded in having the default against it set aside, thus leaving the default judgment against the agent in full force and effect. In view of all the circumstances of this case, the court does not believe that it would be within the spirit of the rule to hold that the plaintiff had elected to hold only the agent."

[5] If the company had raised an issue in the answer, or had asserted at the trial that, if the company were liable at all, it was only as an undisclosed principal, and that there

fore the plaintiff must elect which he will hold, or if the goods for the price of which recovery is sought had been sold and delivered to Davis before, instead of to the company after, it had been incorporated, and the property had been deeded by Davis to the company, more serious questions would be presented. The court found under the testimony of Davis that he regarded himself as the company. The fact that he had the company give him stock after the property had been deeded to the company, and after the company had been served with summons in this action and had notice of the plaintiff's claims, to reimburse Davis for the merchandise sold by the plaintiff and his assignor, and for advances made by Davis before and after the company was incorporated and the property deeded to the company, is no reason why the company should not pay the plaintiff for the merchandise furnished.

The judgment of the district court is affirmed.

NORCROSS, J., concurs. McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

(38 Nev. 123)

**FIRST NAT. BANK OF SAN FRANCISCO  
v. NYE COUNTY.** (No. 2042.)

(Supreme Court of Nevada. Dec. 31, 1914.)

**1. STATUTES (§ 120\*)—SUBJECT AND TITLE.**

Act March 13, 1903 (Laws 1903, c. 78) §§ 6, 7 (Rev. Laws, §§ 3831, 3832), authorizing county commissioners, in case of great necessity or emergency, to make a temporary loan, and requiring them at the next tax levy to make a levy for its payment, does not, in violation of Const. art. 14, § 17, relate to a subject not embraced in the title, "An act relating to county government and the reduction of the rate of county taxation."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168-172; Dec. Dig. § 120.\*]

**2. COUNTIES (§ 171\*)—COMMISSIONERS—POWERS—NEGOTIABLE NOTES.**

County commissioners cannot issue negotiable notes unless power is given expressly or by clear implication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 260; Dec. Dig. § 171.\*]

**3. COUNTIES (§ 171\*)—COMMISSIONERS—POWERS—NEGOTIABLE NOTES.**

Under Act March 13, 1903 (Laws 1903, c. 78) §§ 6, 7 (Rev. Laws, §§ 3831, 3832), authorizing county commissioners, in case of great necessity or emergency, to make a temporary loan, and requiring them at the next tax levy to levy an extra tax to pay it, no power to execute a negotiable note to secure the payment can be implied.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 260; Dec. Dig. § 171.\*]

**4. COUNTIES (§ 171\*)—COMMISSIONERS—POWERS—NEGOTIABLE NOTES—"STRICTLY NECESSARY."**

Giving negotiable notes for temporary loans made by county commissions in case of great necessity or emergency, to be paid for from the next tax levy, under authority of Act March 13, 1903 (Laws 1903, c. 78) §§ 6, 7 (Rev. Laws, §§

3831, 3832), is not within Act March 8, 1865 (Laws 1864-65, c. 80) § 8, subd. 13, empowering county commissioners to do things "strictly necessary" to the full discharge of their powers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 260; Dec. Dig. § 171.\*]

**5. COUNTIES (§ 153\*)—LOANS BY COMMISSIONERS—ESTOPPEL.**

A county having had the benefit of money obtained by county commissioners on a temporary loan under Act March 13, 1903 (Laws 1903, c. 78) § 6, is estopped to assert that there did not exist a case of great necessity or emergency authorizing the commissioners making the loan.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214; Dec. Dig. § 153.\*]

**6. COUNTIES (§ 213\*)—CLAIMS—PRESENTATIONS FOR ALLOWANCE—NOTES OF COMMISSIONERS.**

The orders of county commissioners authorizing issuance of notes, and their subsequent issuance thereof, constitute them approved liquidated demands against the county, which therefore need not be presented to the board for allowance before action thereon, and this though they be not negotiable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 342, 343; Dec. Dig. § 213.\*]

**7. COUNTIES (§ 171\*)—NOTES OF COUNTY COMMISSIONERS—NEGOTIABILITY.**

County commissioners having no power to issue negotiable notes, notes issued by them will be regarded as nonnegotiable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 260; Dec. Dig. § 171.\*]

**8. BILLS AND NOTES (§ 320\*)—NONNEGOTIABLE—ACTION BY ASSIGNEE—DEFENSES AND SET-OFF.**

By express provision of Civ. Prac. Act, § 46, action on a nonnegotiable note by its assignee is subject to any set-off or defense existing at the time of or "before notice of" the assignment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 760-761½, 762½; Dec. Dig. § 320.\*]

**9. BANKS AND BANKING (§ 135\*)—INSOLVENCY—SET-OFF OF DEPOSIT AGAINST NOTE.**

No demand is necessary for a deposit in an insolvent bank in order to set it off against a note of the depositor in the hands of the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 375-379; Dec. Dig. § 135.\*]

**10. BILLS AND NOTES (§ 459\*)—ACTION BY ASSIGNEE—NECESSARY PARTIES.**

In an action against a county on its note, given a bank, by the assignee thereof, neither the receiver of the bank nor its preferred creditors are necessary parties; any questions of preference being for the receivership matter.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1424-1433; Dec. Dig. § 459.\*]

Appeal from District Court, Nye County; John S. Orr, Judge.

Action by the First National Bank of San Francisco against Nye County. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

This action is one to recover on four distinct causes of action, three of which are based upon three promissory notes executed by the county commissioners of Nye county

to the Nye & Ormsby County Bank, dated respectively October 2, 1907, October 15, 1907, and April 8, 1908. The fourth cause of action is for the amount of the aggregate of the three notes upon the theory of money had and received.

The demurrer of the defendant to the amended complaint having been overruled, the defendant answered, and to the answer of defendant the plaintiff demurred, and made a motion to strike, the demurrer and motion to strike reaching every allegation and defense in the answer. The demurrer was sustained, and the motion to strike granted. The defendant declined to amend its answer, and a judgment was given for the plaintiff, from which judgment appeal is taken to this court.

The facts, therefore, must be taken from the allegations of the answer. It therefore appears that on September 5, 1907, the board of county commissioners of the defendant, Nye county, adopted a resolution purporting to authorize the negotiation of an emergency loan, which resolution was thereafter approved by the state board of revenue on the 23d day of September, 1907, and the resolution of the state board of revenue was, on the 25th day of September, 1907, recorded in the minutes of the board of county commissioners of Nye county. Assuming to act under and by virtue of the authority of said resolution, the county commissioners of Nye county executed, on the 2d day of October, 1907, on the 15th day of October, 1907, and on the 8th day of April, 1908, three promissory notes in respectively the sums of \$2,514.95, \$10,000, and \$10,000, each of these notes bearing interest at the rate of 12 per cent. per annum from the date thereof until paid, and being payable, under the terms thereof, on December 31, 1908, and also providing for attorney's fees in the event of suit. The notes all being in the same form, except as to date and amount, a copy of one only will be set out. It reads:

"Whereas, on the 5th day of September, A. D. 1907, the board of county commissioners of Nye county passed and entered upon their minutes a resolution indorsed by the respective members of that board to the effect that a loan be negotiated in the sum of forty thousand dollars in order to conduct the affairs of Nye county; and

"Whereas, the said resolution was forwarded to the honorable state board of revenue; and

"Whereas, that body, consisting of the Honorable John Sparks, as Governor, J. F. Eggers, as Comptroller, and the Honorable R. C. Stoddard, as Attorney General, duly authorized the said board of county commissioners of Nye county in accordance with law to negotiate said emergency loan:

"Now, therefore, the said board of county commissioners, consisting of W. T. Cuddy, as chairman, and S. F. Lindsay and J. J. McQuillan, in order to carry out the provisions of said resolution as passed on September 5th, do hereby enter into this promissory note binding the credit of Nye county for the payment hereof:

"Tonopah, Nevada, October 2, 1907.

"On or before December 31, 1908, without grace, the county of Nye, in the state of Ne-

vada, promises to pay to the Nye & Ormsby County Bank, or order at its banking office in Tonopah, Nye county, Nevada, the sum of two thousand five hundred and fourteen (\$2,514.95) dollars and ninety-five cents, in gold coin of the United States, with interest at the rate of twelve (12%) per cent. per annum from date until paid, for value received, and in case of suit or action being instituted to collect this note, or any portion thereof, the said county promises to pay such additional sum as the court may adjudge reasonable as attorney's fees in the said suit or action.

"[Signed] W. T. Cuddy,  
"Jas. J. McQuillan,  
"S. F. Lindsay,

"County Commissioners of Nye County, Acting in and for Said County, Binding the Said County for the Payment of the Above Note."

Some time prior to December 31, 1908, the Nye & Ormsby County Bank assigned these notes to the First National Bank of San Francisco, the plaintiff in the action. The notes were never presented to the board of county commissioners for allowance and approval either within six months, or at any time thereafter.

It also affirmatively appears from the pleadings of the case that the note of April 8, 1908, was executed pursuant to said resolution of the 5th day of September, 1907, and after the first Monday in March, 1908, the time for the first tax levy following the passage of the emergency resolution.

It further appears from the answer that for a long time prior to the 23d day of February, 1909, the Nye & Ormsby County Bank was a designated depository of Nye county, and that the county treasurer had, at divers and sundry times during the period intervening, placed on special deposit for safekeeping, and as a trust, with the Nye & Ormsby County Bank at its branch office at Tonopah, upon open account for the use and benefit of the defendant, a balance aggregating the sum of \$66,686.36; that the Nye & Ormsby County Bank became insolvent, and finally closed its doors upon the 23d day of February, 1909, at which time it had upon deposit of the moneys of Nye county aforesaid said sum of \$66,686.36; that no part of that amount has ever been paid to the county by the Nye & Ormsby County Bank; that the defendant never had any notice or knowledge of the assignment of the so-called promissory notes or indebtedness from the Nye & Ormsby County Bank to the plaintiff; and that the plaintiff failed and neglected to apprise the defendant, Nye county, of the transfer of said notes, or the amount due thereon, until long subsequent to the maturity thereof, and a long time subsequent to the 23d day of February, 1909, after the Nye & Ormsby County Bank had closed its doors and ceased business.

It is further alleged in the answer that at the time of the transfer and indorsement of the promissory notes set forth, and of the transfer of all the causes of action set forth in plaintiff's complaint, by the Nye & Ormsby County Bank, the said Nye & Ormsby

County Bank was insolvent and unable to pay plaintiff, or any of its depositors or other creditors, and that the plaintiff in this action well knew the same.

It is further alleged that on the 31st day of December, 1908, this defendant had on deposit with the Nye & Ormsby County Bank ample funds with which to liquidate and pay the notes, together with the interest thereon, having on deposit \$77,753.79, which sum included the \$22,703.09, the emergency tax fund, which had been levied and collected against the taxable property of Nye county for the express purpose of paying the indebtedness set forth in plaintiff's complaint, all of which the plaintiff well knew and was fully advised; that the amount of said emergency tax fund on deposit with the Nye & Ormsby County Bank on the 31st day of December, 1908, and thereafter and up to the 23d day of February, 1909, the date of the closing of said Nye & Ormsby County Bank, was ample and sufficient to settle the emergency indebtedness and pay the so-called notes and obligations held by the plaintiff; that the demands of plaintiff are counter-claimed by the deposit aforesaid, and thereby amply paid and compensated.

It further appears that the defendant had no notice at any time prior to March, 1909, of the transfer of the so-called promissory notes from the Nye & Ormsby County Bank to the plaintiff in this action, and that, on the contrary, they were given to understand and were informed by the officers of the Nye & Ormsby County Bank that no transfer of any kind had ever been made of the said notes, and that this defendant relied upon such information; that at the time of the transfer of said notes from the Nye & Ormsby County Bank to the plaintiff the Nye & Ormsby County Bank was insolvent, and that plaintiff had knowledge and notice of its insolvency, and that these notes, and other notes and collateral in the hands of the Nye & Ormsby County Bank, were transferred to the plaintiff as collateral security for pre-existing indebtedness due plaintiff from the Nye & Ormsby County Bank, and that the plaintiff in this case knew, and had knowledge, that the Nye & Ormsby County Bank was a depository of the public funds of defendant, Nye county, and in constant receipt of money from the defendant.

It is further alleged in the answer that the plaintiff, in connection with the Nye & Ormsby County Bank, and with its officers, and well knowing the insolvency of said bank, conspired and contrived to obtain an undue advantage and preference over other creditors and depositors of the bank, and particularly to the wrong and injury of the defendant, and did obtain an unlawful preference in the payments of its obligations from the Nye & Ormsby County Bank to the wrong and injury of this defendant.

It is further alleged in the answer, as a

defense, that the First National Bank of San Francisco obtained an unlawful preference over this defendant in having transferred to it, not only the notes of Nye county, but other collateral securities and negotiable commercial paper, all of which were transferred, according to the allegations of the answer, as security for pre-existing indebtedness due and payable from the Nye & Ormsby County Bank to the plaintiff; that the pre-existing indebtedness due from the Nye & Ormsby County Bank to the plaintiff consisted of two negotiable promissory notes dated March 6, 1908, made and executed by the Nye & Ormsby County Bank to the plaintiff in the sum of \$50,000, with interest at 6 per cent. per annum, and a further promissory note bearing date of December 28, 1907, made and executed by the Nye & Ormsby County Bank to the plaintiff for the principal sum of \$100,000, with interest at the rate of 7 per cent. per annum from date until paid; that each of said loans were made long prior to the transfer of the notes mentioned in the complaint and the other negotiable and commercial paper thereafter transferred to the plaintiff; that each of said notes, upon the respective dates of issuance and execution and delivery, were respectively indorsed by Frank Golden, and at said time said Frank Golden, as said indorser, did by said indorsement waive presentation thereof to the maker, demand, protest, and notice of nonpayment, and did guarantee the payment of the same; that at the time of making said indorsements and personal guarantee of each of said promissory notes Frank Golden was, and at all times thereafter, until the closing of said institution on the 23d day of February, 1909, the president and a director of the Nye & Ormsby County Bank; that said preference was unlawful, illegal, and void.

As a further defense, the answer alleges that between the 1st day of January, 1907, and the 23d day of March, 1909, R. F. Gilbert was the duly elected treasurer of Nye county, and that at all times and dates between the 1st of August, 1907, and February 23, 1909, the Nye & Ormsby County Bank was the duly designated and appointed depository of the funds of Nye county, especially those coming into the custody and control of the treasurer; that the First National Bank of San Francisco, the plaintiff herein, was at all times between January 1, 1908, and February 23, 1909, fully informed and acquainted with the relation that existed between the Nye & Ormsby County Bank and the defendant Nye county, and knew that the Nye & Ormsby County Bank was a depository of funds and moneys of said Nye county, particularly the funds of the county coming into the hands of the treasurer, Mr. Gilbert; that at the times and dates mentioned in the plaintiff's complaint, and under and pursuant to the authority of section 6 of an act of the Legis-

lature entitled "An act relating to county government and the reduction of the rate of county taxation," approved March 13, 1903, Nye county negotiated an emergency loan from the Nye & Ormsby County Bank at Tonopah, in the sum of \$22,514.95, and issued as evidence thereof the alleged promissory notes specifically set out in plaintiff's complaint; that at the first tax levy thereafter, and for the purpose of paying off said loan, and in compliance with section 7 of said act, the defendant, Nye county, levied and collected an emergency tax upon the property in Nye county sufficient to pay said emergency loan; that said loan was due and payable according to the terms thereof, upon December 31, 1908, at the banking office of the Nye & Ormsby County Bank at Tonopah, Nev.; that on the day of maturity the defendant, Nye county, had on deposit with the Nye & Ormsby County Bank, at its Tonopah office and branch, \$79,753.79, which sum included the emergency tax which had been levied for the purpose of paying said emergency loan; that on January 5, 1909, Nye county, by and through its county auditor, after a demand for payment by the Nye & Ormsby County Bank had been made, presented, offered, and tendered to the Nye & Ormsby County Bank at Tonopah a check on said Nye & Ormsby County Bank, and upon the deposit of Nye county therein, and drawn against said emergency fund in the sum of \$22,703.09, in payment of said loan, principal, and interest; that the Nye & Ormsby County Bank informed the auditor of this defendant that the alleged notes were in the branch office at Carson City, and that they would send and get them; that said notes were never presented, nor was any claim or demand ever made for the same until long thereafter, and after the failure and closing of the Nye & Ormsby County Bank, when, upon demand for payment being made by the plaintiff, defendant, Nye county, learned that plaintiff was the holder thereof; that the Nye & Ormsby County Bank, being insolvent, closed its doors on February 23, 1909, and was insolvent on the 31st day of December, 1908; that on February 23, 1909, the date of the closing of the said Nye & Ormsby County Bank, this defendant had on deposit the sum of \$66,689.36, which included the emergency fund amounting to \$23,917.91 which had been levied and collected for the purpose of paying said loan; that at all times between December 31, 1908, and February 23, 1909, defendant, Nye county, had on deposit with the Nye & Ormsby County Bank more than \$60,000, and had on deposit with the Nye & Ormsby County Bank the emergency fund, and was ready and anxious and willing to pay up said loan; that Nye county relied upon and believed the representations of the Nye & Ormsby County Bank and its officers that they were the owners and holders of the notes, and were lulled into a sense of security by the nonpresentation of said

notes, and by the neglect and negligence of the plaintiff to present the same for payment, and, having no knowledge of the transfer thereof to plaintiff, or of the insolvency of the Nye & Ormsby County Bank, made no attempt to withdraw its deposits from the Nye & Ormsby County Bank, but, on the contrary, relying upon its absolute solvency, continued to make said Nye & Ormsby County Bank a depository of county funds, and between December 31, 1908, and February 23, 1909, deposited funds of Nye county to the extent of \$32,759.15; that the plaintiff, during all of these times, was a large creditor of the Nye & Ormsby County Bank, and, having full knowledge of the relations existing between the Nye & Ormsby County Bank and the defendant, contrived and conspired, purposely and willfully, with the Nye & Ormsby County Bank and its officers, and for the purpose of deceiving and defrauding and damaging the defendant, to withhold the presentation of said notes and notification to defendant that it was the owner and holder thereof, in the hope and expectation that, by reason and virtue of the large deposits continuously being made by the defendant, Nye county, in the defunct Nye & Ormsby County Bank, the said Nye & Ormsby County Bank could continue and remain open for a considerable period of time, and could make payments, in part at least, upon its obligations to the First National Bank of San Francisco; that pursuant to the failure, neglect, and negligence of the plaintiff to present said notes for payment at maturity, and by reason of the wrongful acts of plaintiff in withholding the presentation thereof, and withholding notice that it was the owner and holder of the alleged notes, the emergency fund collected for the purpose of paying said emergency loan, together with the balance of defendant's deposit in the Nye & Ormsby County Bank, was forever lost to this defendant, by reason of which this defendant was damaged in the sum of \$66,689.36.

The answer also alleges that the various county governments and counties are preferred creditors against all banking institutions; that Esmeralda and Ormsby counties also lost money in the Nye & Ormsby County Bank; and that they should therefore be made parties to the action.

Geo. B. Thatcher, of Carson City, and P. M. Bowler, of Tonopah, for appellant. H. R. Cooke, of Tonopah, for respondent.

NORCROSS, J. (after stating the facts as above). [1] The notes sued upon in this case were issued under by virtue of the provisions of sections 6 and 7 of an act entitled "An act relating to county government and the reduction of the rate of county taxation," approved March 13, 1903 (Rev. Laws, §§ 3831, 3832), which read:

"Sec. 6. In case of great necessity or emergency, the board of commissioners by unanimous vote, by resolution reciting the character

of such necessity or emergency, may authorize a temporary loan for the purpose of meeting such necessity or emergency, but such resolution shall not take effect until it has been approved by resolution adopted by a majority of the state board of revenue, and the resolution of the state board of revenue shall also be recorded in the minutes of the county commissioners.

"Sec. 7. It shall be the duty of the commissioners at the first tax levy following the creation of such emergency indebtedness to levy an extra tax sufficient to pay the same, which shall be designated 'emergency tax.'"

It is contended that boards of county commissioners are not empowered to issue negotiable promissory notes under the provisions of section 6, and, further, that sections 6 and 7 are unconstitutional and void, because relating to a subject not embraced in the title of the act, in violation of section 17, art. 4, of the Constitution.

The sections in question, we think, are not within the constitutional inhibition. The act provides for a gradual reduction of the tax rate in the several counties of the state until a certain prescribed rate is reached, which should thereafter be the maximum rate. Boards of commissioners are required annually, prior to the first Monday in March, to make a budget of the amount estimated to be required to meet the expenses of conducting the public business of the county for the next ensuing year. Such boards are prohibited from allowing or contracting for any expenditure unless the money for the payment thereof is in the treasury and especially set aside for such payment. A violation of this provision subjects the commissioners to removal from office. Recognizing that unforeseen necessities or emergencies might arise requiring the expenditure of additional money not provided for in the general tax levy, sections 6 and 7 were inserted in the act to make provision for meeting such necessities or emergencies. These provisions are therefore in harmony with the general purposes of the act.

[2, 3] We think the language of sections 6 and 7, *supra*, will not justify a construction implying a power in the board of county commissioners to execute a negotiable promissory note as security for money borrowed under the provision of said section 6. It will be noted that there is no express authority for the execution of any negotiable instrument as security for the money borrowed. It has been repeatedly decided by this court that boards of county commissioners are of special and limited jurisdiction, and that authority to do any act must have specific statutory provision therefor, or must be clearly implied from other language contained in the statute. The loan authorized under the provisions of the section in question is specified to be "temporary" in character. A tax is required to be levied at the next annual tax levy to meet the same; hence the duration of the indebtedness is only contemplated to be a year or less. The special emergency tax re-

quired to be levied under the provisions of section 7 provides a certain and sure method of extinguishing the debt at the earliest possible date. The shortness of the duration of the loan and the special tax to secure its liquidation negative an intent upon the part of the Legislature to authorize the issuance of a negotiable instrument. The security provided for the repayment of the sum borrowed is ample and absolute, and it cannot be assumed that a negotiable instrument is manifestly necessary to secure the payment of such a debt. It is a well-established general rule, supported by numerous authorities, that boards of county commissioners are without power to issue negotiable bonds or notes, except by virtue of express provision of statute or where the language of the statute is such that the right to issue negotiable instruments is clearly implied. For example, it has been held that, where a board of county commissioners has been empowered to issue bonds payable a long time in the future, without express provision that such bonds should be negotiable in form, the right to issue the same in form negotiable was implied. *Ashley v. Board*, 60 Fed. 55, 67, 8 C. C. A. 455.

Judge Thayer, speaking for the Circuit Court of Appeals, Eighth Circuit, in *Ashuelot National Bank v. School District*, 56 Fed. 197, 199, 5 C. C. A. 468, 470, said:

"It is unnecessary for us to assert that the decision last referred to (*Brenham v. Bank*, 144 U. S. 173 [12 Sup. Ct. 559, 36 L. Ed. 390]) goes to the full extent last indicated of holding that a municipal corporation can only acquire authority to issue negotiable securities, by a statute which confers such power in express language, and that the power will not be implied under any circumstances. We think, however, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: First, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself carry with it an authority to issue negotiable securities; second, that the latter power will never be implied in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and, third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities the doubt should be resolved against the existence of any such right."

In *Coffin v. Board of Commissioners*, 57 Fed. 137, 140, 6 C. C. A. 288, 292, Judge Thayer, speaking for the same court, also said:

"Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable paper to be clearly made out and established whenever the existence of such a power is called in question. A power of that nature will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it."

11 Cyc. 551, says:

"Express authority is not in all cases required for the issuance of negotiable paper, but may be implied from other express powers granted. There is, however, no room for any implication of such power where a statute makes other specific provision for the payment

of indebtedness, as by taxation, etc., or by warrant on the treasurer for money payable out of a designated fund or any money in the treasury not otherwise appropriated."

See, also, *County of Hardin v. McFarlan*, 82 Ill. 138; *Clairborne Co. v. Brooks*, 111 U. S. 400, 411, 4 Sup. Ct. 489, 28 L. Ed. 470; *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; *Gause v. City of Clarksville*, 5 Dill. 165, Fed. Cas. No. 5,276; notes, 30 Am. Dec. 193, and 51 Am. St. Rep. 830.

It is urged by counsel for respondent that this court, in the case of *Douglass v. Virginia City*, 5 Nev. 147, sustained the view that a municipal corporation, unless in some way restricted by its charter, could enter into any contract necessary to enable it to carry out the powers conferred upon it—execute and deliver negotiable promissory notes in discharge of its legitimate powers—and that such decision is an authoritative declaration of this court directly in point in this case. The suit involved in the *Virginia City Case* was upon a promissory note negotiable in form, but the question of the power of the municipal authorities to issue a negotiable instrument does not appear to have been raised in that case or specifically considered by the court. All the objections urged against a recovery in that case would have applied with equal force if the notes sued upon had been nonnegotiable. The only authority cited in the decision was that of *Ketchum v. City of Buffalo*, 14 N. Y. 356. This latter decision sustained the power of a municipal corporation to issue a negotiable instrument in order to carry out certain express powers conferred by the city charter. But this court, in considering the *Virginia City Case*, made no reference to this part of the decision in the *Buffalo Case*.

When the case of *Douglass v. Virginia City* was before this court, there were comparatively few authorities available upon the question of the power of counties and municipal corporations, in the absence of express authority, to issue negotiable instruments. The question had not then received the consideration which courts and text-writers have subsequently devoted to it. It would also appear from the authorities that a more strict rule prevails in reference to the exercise of such a power by county authorities than in the case of strictly municipal corporations.

In the case of *Gause v. City of Clarksville*, 5 Dill. 165, Fed. Cas. No. 5,276 (decided in 1879, ten years later than the *Douglass v. Virginia City Case*), Judge Dillon, speaking for the Circuit Court of the United States, said:

"We are aware that the American courts, as to private corporations organized for pecuniary profit, have very generally held a different doctrine, and affirmed their implied or incidental power to make commercial paper. Dillon on Municipal Corporations, §§ 81, 82, 407, and cases cited. But the powers of private corporations in this regard are not here material. The American judgments which have affirmed the

like power in municipal corporations have done so upon this course of reasoning: The corporation, they argue, has power to contract a debt, and it is assumed to be incident to that power to give a note or bill or bond in payment of it. Thus, in *Kelley v. Brooklyn*, 4 Hill (N. Y.) 263, Cowen, J., makes the basis of the judgment the erroneous proposition that, independent of any statute provision, all corporations, private and municipal, may issue negotiable paper for a debt contracted in the course of its business; and other courts have, without examination, adopted this mistaken view of the law. *Galena v. Corwith*, 48 Ill. 423 [95 Am. Dec. 557]; *Clarke v. School District*, 3 R. I. 199; *Sheffield v. Andreas*, 56 Ind. 157; *Tucker v. Raleigh*, 75 N. C. 267; *Ketchum v. Buffalo*, 14 N. Y. 356; *Douglass v. Virginia City*, 5 Nev. 147; *Sturtevant v. Alton*, 3 McLean, 393 [Fed. Cas. No. 13,580]. It sufficiently appears from the foregoing that it is a mistake to affirm that the power to issue negotiable paper necessarily or legally results from the corporate power to create debts."

The decision in the case of *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557, cited supra by Judge Dillon, was subsequently materially restricted, if not entirely overruled, in *Hardin v. McFarlan*, 82 Ill. 138, and in *Commissioners v. Newell*, 80 Ill. 587.

We would not, we think, be warranted in sustaining the judgment in this case upon the authority of *Douglass v. Virginia City*, for the reasons stated.

[4] It is contended by counsel for appellant that subdivision 13 of section 8 of an act entitled "An act to create a board of county commissioners in the several counties of this state, and to define their duties and powers," approved March 8, 1865 (Laws 1864-65, c. 80), is applicable to section 6, supra, of the act of 1903. The subdivision in question reads as follows:

"To do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board." Comp. Laws, § 1598.

We think this subdivision is only applicable to the section of which it constitutes a part, but, even if it could be said to be applicable to section 6, supra, of the act of 1893, it cannot be said, we think, that the issuance of negotiable promissory notes is strictly necessary to the full discharge of the powers prescribed in said section 6.

[5] It is next contended by counsel for appellant that the notes sued upon were issued without authority of law, for the reason that the recitals contained in the resolution adopted by the board of county commissioners of Nye county, and purporting to state the facts constituting a great necessity or emergency, were insufficient to authorize the negotiation of the loan for the payment of which the notes were issued. It is admitted that the county received the money represented by the principal of the several notes sued upon, used the same in the business of the county, and levied and collected a tax for the payment of the same. While at the time the county was negotiating the loan in question any taxpayer of Nye county might by appropriate proceed-

ings have tested the question whether the alleged emergency or necessity, as set forth in the resolution of the board of county commissioners, was strictly an emergency or necessity contemplated by the law, the county itself will not be heard to question the sufficiency of its own resolution for the purpose of defeating the payment of the loan which it has secured and the money from which the county has received the benefit of. The resolution adopted by the county commissioners also met with the approval of the state board of revenue, the two bodies empowered by the statute to determine the question, and the county is estopped from questioning the regularity of its own proceedings when it has received all the benefit of the money paid to it by virtue of such loan. *Orleans v. Platt*, 99 U. S. 877, 25 L. Ed. 404; *Gas Co. v. San Francisco*, 9 Cal. 453; *Illinois Co. v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Herring v. Modesto Irr. Dist.* (C. C.) 95 Fed. 705; *Cronin v. Patrick Co.* (C. C.) 89 Fed. 79; *Argenti v. San Francisco*, 16 Cal. 258; *Chicago v. R. R. Co.*, 244 Ill. 220, 91 N. E. 422, 135 Am. St. Rep. 316; *Coffin v. Kearney Co.*, 57 Fed. 137, 6 C. C. A. 288; *Bissell v. Jeffersonville*, 24 How. (65 U. S.) 287, 16 L. Ed. 664; *Lynde v. County*, 16 Wall. (83 U. S.) 6, 21 L. Ed. 272; *Com'rs v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Com'rs v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Board v. Randolph*, 89 Va. 614, 16 S. E. 722; *County v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Evansville v. Dennet*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; 1 *Dillon, Municipal Corporations* (4th Ed.) § 549.

[8] The contention of appellant that the complaint fails to state a cause of action because of the absence of an allegation that the notes sued upon were presented to the board of county commissioners for allowance prior to the institution of the action is without merit. The orders of the board of county commissioners authorizing the issuance of the notes and their subsequent issuance by the board constitutes the same approved liquidated demands against the county which do not require subsequent presentation before suit, in the event that they are not paid in accordance with their terms. The fact that the notes cannot be regarded as negotiable instruments will not affect their character as approved liquidated demands. *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; *Vincent v. Lincoln Co.* (C. C.) 62 Fed. 705; *Lorsbach v. Lincoln Co.* (C. C.) 94 Fed. 963; *Ayres v. Thurston Co.*, 63 Neb. 96, 88 N. W. 178; *Greene Co. v. Daniel*, 102 U. S. 191, 26 L. Ed. 99; *Parker v. Saratoga Co.*, 106 N. Y. 392, 13 N. E. 308; *Washoe Co. v. Humboldt Co.*, 14 Nev. 123; *State v. Lander Co.*, 22 Nev. 71, 35 Pac. 300; 7 *A. & E. Enc. of Law* (2d Ed.) 966; 11 *Cyc.* 587.

[7-9] The board of commissioners of Nye county being without power to issue negotiable paper as security for the loan obtained

from the Nye & Ormsby County Bank, the notes sued upon must be regarded as non-negotiable instruments. Viewing the notes as nonnegotiable instruments, the question is presented whether the answer of defendant sets up a good defense to this character of security.

Section 46 of the Civil Practice Act (Rev. Laws, § 4988) provides:

"In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration, before due."

Under the provisions of this section, which is the only statute in this state bearing on the question, the defendant has the right to interpose against the plaintiff any defense which it might have against the Nye & Ormsby County Bank, were suit instituted by the latter corporation, which defense accrued prior to notice of the assignment. *Elder v. Shaw*, 12 Nev. 82; *Haydon v. Nicoletti*, 18 Nev. 299, 3 Pac. 473; *Huntington v. Chittenden*, 155 N. Y. 401, 50 N. E. 49; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

In the case of *Stadler v. Bank*, 22 Mont. 190, 56 Pac. 11, 74 Am. St. Rep. 583, it was held that, notwithstanding a statute like ours supra, the holder of nonnegotiable securities was only subject to such defenses as existed at the time of the transfer. This decision however, is based on the language of another statute which only referred to defenses existing at the time of the transfer, and the latter statute was deemed controlling. Notwithstanding statutory provisions substantially the same as were considered by the Montana court, the Supreme Court of California has so construed the two statutes together as to subject the assignee of a non-negotiable instrument to all defenses which the defendant might have against the assignor prior to notice of the assignment. *McCabe v. Grey*, 20 Cal. 510; *Bank v. Gay*, 101 Cal. 286, 35 Pac. 876; *Haskins v. Jordan*, 123 Cal. 161, 55 Pac. 786. See, also, to the same effect, *Martin v. Pillsbury*, 23 Minn. 175.

As before stated, the only statute in this state upon the question is the one quoted supra, and this leaves no room even for construction.

It is alleged in the answer that the defendant had no notice of the assignment until long after the Nye & Ormsby County Bank went into the hands of a receiver and shortly before the suit was instituted. It is alleged in the answer that defendant had on deposit in the Nye & Ormsby County Bank on the day the notes, by their terms, became due and on the day the bank closed its doors, a sum of money much greater than the total amount of the notes with accrued interest; that the defendant offered to pay the notes at the time they became due, or



within a few days thereafter. It is well settled that no demand is necessary for a deposit in an insolvent bank in order to set it off against a note in the hands of the receiver. *Colton v. Drover, etc.*, 90 Md. 85, 45 Atl. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431; *Thompson v. Trust Co.*, 130 Mich. 508, 90 N. W. 296, 97 Am. St. Rep. 494.

On the day the Nye & Ormsby County Bank closed its doors and went into the hands of a receiver, the defendant was entitled to set off the amount of its deposit in the defunct bank pro tanto, not only against the receiver, but against any assignee of the bank holding the notes of the defendant county; such county having no notice of such assignment prior to the suspension of the bank.

[10] We think the court did not err in refusing to make the receiver of the Nye & Ormsby County Bank and the counties of Ormsby and Esmeralda parties to the action. Questions presented in this answer, as a basis for bringing in additional parties, can all be presented in the receivership matter, and, we think, have no proper place in this action.

Many other questions have been discussed in the briefs which we deem unnecessary to determine.

The judgment and the order sustaining the demurrer to the answer are reversed, with directions to the court below to also modify its order to strike, if necessary, so as not to exclude allegations in support of defendant's alleged defense of set-off.

TALBOT, C. J., and McCARRAN, J., concur.

(88 Nev. 143)

# KNOCK v. TONOPAH & G. R. CO.

(No. 1931.)

(Supreme Court of Nevada. Jan. 2, 1915.)

## 1. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

Where the evidence is conflicting, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

## 2. MASTER AND SERVANT (§ 235\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A railroad employe's failure to discover that the tongue in the knuckle on a car was broken was not contributory negligence, where the tongue was broken on the previous day and the inspector failed to detect it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.\*]

## 3. APPEAL AND ERROR (§ 1003\*)—QUESTIONS OF FACT.

Where testimony as to matters essential to a recovery is contradicted by physical facts, a verdict contrary to the physical facts must be set aside, but testimony contrary to a physical fact as to a matter not controlling affects only the credibility of the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

## 4. NEW TRIAL (§ 49\*)—CONDUCT OF COUNSEL AND JUROR.

That the attorney for the successful party dined at the same table with a juror in a hotel does not alone justify the setting aside of the verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 97-99; Dec. Dig. § 49.\*]

## 5. APPEAL AND ERROR (§ 261\*)—EXCEPTIONS—IMPROPER ARGUMENT.

Where statements made before the jury by counsel for the successful party were to some extent provoked, and no exception was taken to them, the judgment would not be reversed, though the statements were erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1500; Dec. Dig. § 261.\*]

## 6. DAMAGES (§ 91\*)—PUNITIVE DAMAGES—INJURY TO SERVANT.

Where injury to a railroad employe resulted from a broken tongue and a knuckle on a car not easily observable, or from the engineer backing his engine without signal, a verdict for punitive damages was unauthorized.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

## 7. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict for \$25,500 for the loss of the right arm below the elbow of a man 29 years of age, with 11 years' experience in railroading in various positions, and earning about \$170 a month as conductor and brakeman, is excessive, and will be reduced to \$15,000.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by Frederick A. Knock against the Tonopah & Goldfield Railroad Company. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

Campbell, Metson & Brown, of Tonopah, for appellant. Berry & Cole, of Tonopah, and V. S. Thomas, of Wilmington, Del., for respondent.

TALBOT, C. J. The plaintiff, a man 29 years of age, with 11 years of experience in railroading in various positions, and earning on an average about \$170 a month as a conductor and brakeman, instituted this action to recover \$25,500 damages for the loss of his right forearm, which was crushed between the couplers of ore cars while he was endeavoring to effect a coupling. The accident necessitated the amputation below the elbow. A verdict was rendered in favor of the plaintiff for the full amount claimed. On this appeal from the judgment and from the order denying the motion for a new trial, it is contended that the evidence is insufficient to justify the verdict; that misconduct of counsel for respondent warrants a reversal; that the court improperly instructed the jury; and that the damages are excessive.

[1] The opening brief gives a careful analysis of the conflicting testimony. At other times and on the previous day he had acted as conductor of the appellant company. On the morning of the accident appellant was

serving as brakeman. On his theory of the case, and under his testimony, the engineer backed up twice on his signal, but no coupling was accomplished on either compact, and for the purpose of ascertaining whether ore had fallen into it he went to examine the knuckle of the car, which was one of four or five desired to be coupled to the cars attached to the engine, and while he was making such examination the engineer, without signal, backed up the third time and crushed respondent's arm. His evidence in this regard is contradicted by the engineer and fireman, and appellant claims that the accident resulted from respondent's own carelessness in trying to make a gravity coupling while the cars, which were free from the engine, were moving on the grade. Under the conflicting evidence it was within the exclusive province of the jury to determine whether the accident was caused by the backing up by the engineer without signal, and, if it was so caused, the plaintiff is entitled to recover.

[2] For appellant it is also claimed that Knock should have been aware of the broken tongue in the knuckle which failed to couple, because, on the previous day, while he was acting as conductor, the engineer, owing to Knock's failure to signal, had backed into some cars, including this one, with such force as to break a knuckle on another car upon which a new knuckle had been placed, after examination by the company's inspector. If the tongue in the knuckle were broken on the previous day, the inspector failed to detect it, and the failure of Knock to become aware that it was broken was not such carelessness, or want of care on his part as would warrant the engineer to back up without signal.

[3] It is urged that the case should be reversed because the plaintiff's testimony is contradicted by physical facts. If any physical fact made it impossible for the engineer to back up without signal and crush the respondent's arm, such fact would control, and the testimony in case of respondent would fall. If his testimony regarding any matter essential to his recovery were contradicted by any physical fact, the case would have to be remanded. Testimony contrary to a physical fact regarding a matter which is not controlling may weaken the credibility of the witness, but is not ground for reversal.

[4, 5] It appears that one of the counsel for respondent dined at the same table with one of the jurors in the hotel, but it is not shown he paid for the juror's meal, nor that anything improper in regard to the case appeared between them. It is urged that statements made before the jury, by counsel for respondent, were erroneous, but, as they were to some extent provoked, and no exception was taken to them, they do not warrant a reversal.

The court instructed the jury that, under the law of this state, common carriers are

liable to employes for damages which may result from negligence of the officers, agents, or employes of the common carrier, or by reason of any defect or insufficiency due to their negligence in its cars, engines, and appliances. The statute upon which this instruction is based, the liability act of 1907 (Laws 1907, c. 214), has been sustained as constitutional by this court in *Lawson v. Halifax Mining Co.*, 36 Nev. 591, 135 Pac. 611, 138 Pac. 261, writ of error to Supreme Court granted 86 Nev. 646.

[6] If the accident resulted from a broken tongue and a knuckle not easily to be observed, or from the engineer backing without signal, or if the facts be as claimed by either the appellant or the respondent, there is nothing in the case which would warrant a verdict for punitive damages against the appellant, and respondent's recovery should be limited to a just and full compensation for the injury sustained.

[7] Counsel for appellant say that, if it be held that there is a liability against the appellant, and if damages are to be allowed, they are of the opinion that, considering all the circumstances, and the Burch Case as a fair standard of measurement, a verdict of \$10,000 would have been fair and ample. Counsel for respondent contend that, under the Burch Case, the full amount of the verdict should be allowed.

In that case (32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166) we sustained a verdict for \$20,000. When injured, Burch was 37 years old, earning about \$100 a month, and was gradually advancing in the defendant's employment. While boarding a caboose, he was struck by a switch stand, thrown upon the track, and the cars ran over his left leg and right foot, necessitating amputation of the left leg three inches above the knee and three toes of his right foot. He grew weaker physically, and lost from 15 to 18 pounds. At times an artificial leg could be worn, but it irritated the stump and made it sore. By the contesting of his case in different courts, Burch had been delayed for many years in obtaining relief, and he had previously obtained a verdict for \$18,000.

Although the respondent's was a most severe injury for the loss of an arm below the elbow, and, as said by counsel for respondent, the loss of a right arm is more serious than that of the leg, when we consider all the circumstances relating to the two cases, we conclude that the injury resulting to Knock was not as serious as the one caused to Burch.

Among the many cases in the books, we do not find any in which a sum as large as that awarded to respondent by the verdict was allowed to stand for the loss of an arm under conditions and results no more serious than those which relate to or flow from the accident suffered by respondent.

Among the largest verdicts sustained for somewhat similar injuries is that in the *Ful-*

lerton Case, 167 Fed. 1, 92 C. C. A. 463, in which there was an award of \$16,500 to the first mate of a vessel, earning \$150 per month, for the loss of his right arm near the shoulder, accompanied with much pain and suffering.

"In Cleveland, Cinn., C. & St. L. Ry. Co. v. Hadley, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1, the Supreme Court of Indiana sustained a judgment for \$10,000 for an injury to the elbow joint, caused by the falling of a window sash, affecting chiefly the ulnar nerve, resulting in a numb feeling in the arm and the little and ring fingers, and shrunken condition of the muscles of the arm, and loss of grip." *Forrester v. S. P. Co.*, 36 Nev. 296, 134 Pac. 769, 48 L. R. A. (N. S.) 1.

Verdicts have been sustained for the loss of an arm, for \$10,000 in *St. Louis S. R. R. Co. v. Groves*, 44 Tex. Civ. App. 63, 97 S. W. 1084, in favor of a brakeman 21 years of age, earning \$100 per month, who lost the right arm between the shoulder and elbow; for \$12,500 in *Rodney v. St. Louis S. R. R. Co.*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, in favor of a switchman 28 years of age, earning \$100 per month; for \$7,000 in *Atchison R. R. Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111, in favor of a switchman 23 years of age, earning \$80 per month; in *Sobleski v. St. Paul R. Co.*, 41 Minn. 169, 42 N. W. 863, for \$5,000, in favor of a switchman 30 years of age, for loss of arm below the elbow; for \$5,000 in *Mobile R. Co. v. Harmes*, 52 Ill. App. 650, in favor of a brakeman.

Verdicts have been held excessive for the loss of an arm, for \$20,000 in *Chicago R. Co. v. Kane*, 70 Ill. App. 676, in the case of a laborer 19 years of age, earning \$1 per day, and who had the arm amputated near the shoulder; for \$13,000 in *Louisville R. Co. v. Lowe* (Ky.) 66 S. W. 736, in favor of a train inspector 34 years of age earning \$1 per day; for \$10,000 in *Illinois Central R. R. Co. v. Welch*, 52 Ill. 184, 4 Am. Rep. 593, in favor of a brakeman who lost the left arm.

Verdicts for \$15,000 for the loss of an arm were reduced to \$10,000 in the case of *Texas R. Co. v. Hartnett*, 33 Tex. Civ. App. 103, 75 S. W. 809; injury to locomotive engineer who lost the left arm near the elbow joint, in *Silberstein v. Houston Str. Co.*, 52 Hun, 611, 4 N. Y. Supp. 843; and in *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307, 58 N. Y. Supp. 640, in which case a laborer lost the right arm below the elbow.

Reference is made to numerous other cases relating to such injuries in the extensive note in 16 Ann. Cas. 21.

We are not unmindful of the serious consequences relating to the loss of an arm; and, considering respondent's health and general condition, and occupations which he may learn to pursue, but in which he may not earn nearly so much as in his former employment, and the disability under which he must labor through life, we conclude that, under

the circumstances disclosed by the present record, \$15,000 would be a fair compensation for the injury which he sustained.

If within 15 days respondent file in this case his written consent that the judgment be modified by reducing the amount allowed for damages for the injuries sustained to \$15,000, an order may be made that the judgment be modified accordingly, and that it stand as so modified. If such consent be not so filed, the case will be remanded for a new trial.

NORCROSS, J. I concur in the judgment.

(38 Nev. 164)

**HERRING-HALL-MARVIN SAFE CO. v. BALLIET.** (No. 1900.)

(Supreme Court of Nevada. Jan. 2, 1915.)

**1. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT.**

The finding of the jury on controverted issues of fact, if supported by substantial evidence, cannot be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**2. SALES (§ 359\*)—ACTIONS BY SELLER—EVIDENCE—MUTUAL RESCISSION.**

In an action for the purchase price of a safe which, after being rejected by the buyer, was delivered by order of the salesman to a firm in which the original buyer was a partner, evidence held sufficient to warrant the jury in finding that there had been a mutual rescission of the original contract of sale if the salesman had authority to make such rescission.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 611, 1056-1059; Dec. Dig. § 359.\*]

**3. SALES (§ 363\*)—ACTIONS BY SELLER—QUESTIONS FOR JURY—CONDITION.**

Where a written order for the purchase of a safe had a question mark in the place left in the order for the lettering to be put on the safe, and no designation as to the interior arrangement of the safe, it was a question of fact whether the order was conditioned, as claimed by the buyer, upon his future determination as to the lettering and the interior arrangement.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1064; Dec. Dig. § 363.\*]

**4. EVIDENCE (§ 411\*)—PAROL EVIDENCE—INCOMPLETE CONTRACT.**

The order was on its face incomplete, so that parol evidence was admissible to supply the missing terms.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1874-1899; Dec. Dig. § 411.\*]

**5. PRINCIPAL AND AGENT (§ 123\*)—EXISTENCE OF RELATION—SUFFICIENCY OF EVIDENCE.**

In an action for the purchase price of a safe, evidence held sufficient to warrant the jury in finding that the salesman of the seller had authority to rescind the contract.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.\*]

**6. PRINCIPAL AND AGENT (§ 24\*)—EXISTENCE OF RELATION—QUESTION FOR JURY.**

The existence or nonexistence of an agency is a question of fact for the jury.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.\*]

**7. PRINCIPAL AND AGENT (§ 23\*)—EXISTENCE OF RELATION—CIRCUMSTANTIAL EVIDENCE.**

Agency may be shown by circumstances and the course of dealing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

**8. APPEAL AND ERROR (§ 1052\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—IMMATERIAL EVIDENCE.**

Where the jury found that a contract for the sale of a safe had been mutually rescinded, the seller was not prejudiced by the admission of evidence as to a warranty that the safe was fireproof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by the Herring-Hall-Marvin Safe Company against Letson Balliet. Judgment for defendant, and plaintiff appeals. Affirmed.

McIntosh & Cooke, of Tonopah, for appellant. P. M. Bowler, of Tonopah, for respondent.

**MCCARRAN, J.** This is an action brought by Herring-Hall-Marvin Safe Company, a corporation, against Letson Balliet, to recover the price of two safes. The complaint alleged two causes of action; one for the sum of \$616, less a set-off of \$42.80 for safe No. 187; the other for \$469 for safe No. 194. Respondent by his answer admitted the indebtedness of \$616, less \$42.80 paid upon said sum, for safe No. 187, but denied the indebtedness of \$469 on safe No. 194, the subject of the first cause of action. The action proceeded to trial by a jury, upon the right of the plaintiff to recover for safe No. 194.

The record discloses an instrument purporting to be an order, in words and figures as follows:

20923

Herring-Hall-Marvin Safe Company  
Successor to  
Hall's Safe and Lock Company,  
San Francisco.

"Please ship as directed one Number 194 safe of the dimensions and plans of interior as specified on back of this order, marked to L. Balliet, town of Tonopah, county of Nye, state of Nevada, via Hazen, for which I agree to pay to your order the sum of (469.00) four hundred sixty-nine dollars gold coin, rent as follows: Cash on receipt of safe.

Freight and delivery charges to be paid by f. o. b. Sacramento.

Cash paid with this contract \$—

L. Balliet.

Read This Carefully Before Signing.

Approved: N. O. S. Ford, Asst. Mgr.  
Order for 194 Safe. 52465.  
For L. Balliet.

J. F. Waterhouse, Salesman.

Inside Measure { 56 inches high  
38 inches wide  
18 inches deep

Lettering to be put on safe.....

Plan of interior: (When safe is to have regular plan, it is unnecessary to draw any diagram, but simply say, "Plan usual style.")

[Seal of Herring-Hall-Marvin Safe Company.]  
1948.

This instrument was signed by respondent, Balliet, on or about November 27, 1906, and on the same day respondent gave a similar order, a copy of which is also contained in the record, for safe No. 187, the subject of the second cause of action. Safe No. 187 was received by respondent pursuant to the order given. On the arrival of safe No. 194 in Tonopah it appears from the record that notice was sent to respondent, Balliet. Respondent refused to accept the safe. It is the contention of appellant that order No. 194, when approved by appellant through its agent, N. O. S. Ford, constituted a complete contract.

Subsequent to the refusal of respondent to accept safe No. 194, respondent entered into a copartnership with one Murphy, which copartnership was known and designated as Murphy-Balliet Company, with its headquarters in Tonopah, Nev. Some time after the formation of the copartnership the record discloses that safe No. 194 was removed from the depot of the Tonopah & Goldfield Railroad Company by the Wittenberg Warehouse Company to the place of business of Murphy-Balliet Company; and it is the contention of respondent that there was a mutual rescission of the contract established by the terms of order No. 194, and that the sale and delivery of the safe to Murphy-Balliet Company was an independent transaction and a resale by appellant of safe No. 194 to Murphy-Balliet Company by and through the agent of appellant, J. F. Waterhouse.

At the opening of its case, appellant called respondent, Balliet, to the stand to identify order No. 194, and also to identify order No. 187. It appears from the testimony of respondent, Balliet, as we find it in the record, that the safe mentioned in order No. 194 was not to be shipped to respondent until he should designate the interior plan and cabinet work, and also direct the lettering that was to be put on the safe. It appears from the testimony of both respondent Balliet and J. F. Waterhouse, who was at least acting in the capacity of soliciting salesman for appellant, that the order was left blank as to lettering to be put on the safe, and that the order contained nothing in the way of designating the cabinet work for the interior of the safe.

Order No. 194, as it appears in the record, contains a question mark following the words "lettering to be put on safe," and this question mark was the subject of some considerable testimony in way of explanation during the course of the trial. It also appears from order No. 194, as we find it in the record, that there is an absence of instruction as to interior cabinet work. The testimony of the soliciting salesman, Waterhouse, is sharply in conflict with the testimony of respondent, Balliet, as to this phase.

[1] However this may be, if the jury found

—as they undoubtedly did find—that the safe No. 194, designated by plaintiff's "Exhibit A," was not to be shipped to respondent until he had given instructions as to lettering and as to interior construction, their finding in this respect, being, in our judgment, supported by sufficient and substantial evidence, must not be disturbed.

[2] From the testimony of the witnesses C. F. Wittenberg and J. H. McQuillan, members of the firm of Wittenberg Warehouse & Transfer Company, on whose premises the safe remained from the time of its delivery by the Tonopah & Goldfield Railroad Company until the time at which it was removed to the office of Murphy-Balliet, it is disclosed that the storage charges on the safe were paid by J. F. Waterhouse, and these charges were paid by him at the time at which he gave orders to the Wittenberg Warehouse & Transfer Company to deliver the safe to the office of Murphy-Balliet. Moreover, it is disclosed that the freight charges from Sacramento to Tonopah on safe No. 194 were paid by the check of Murphy-Balliet.

On the question as to whether or not the contract for safe No. 194 was executory on the part of respondent, and as to whether or not the same was mutually rescinded and terminated, the respondent, by way of defense, interposed matters in avoidance, which were questions of fact for the jury to determine. These questions primarily were as to whether or not certain lettering, to be placed upon the safe, should be designated before the time of shipment; as to whether or not interior equipment should be designated before the time of shipment; as to whether or not the order, signed by respondent, but incomplete as to these features, should be withheld by the soliciting salesman, and not sent to the main office until the instructions should be given by respondent. All of these features were questions of fact to be determined by the jury; and the condition of order for safe No. 194, with the question mark contained in the body of the order, and the absence of instructions as to internal equipment, together with the testimony of the witness McQuillan as to the positive refusal of the respondent Balliet to receive the safe; and the further fact that the freight charges on the safe from Sacramento to Tonopah were never paid by the respondent, Balliet, but were paid by the check of Murphy-Balliet, a copartnership; and the further fact, disclosed by the testimony of the witness McQuillan, that the storage charges on the safe were paid by the soliciting salesman, Waterhouse, into whose hands the incomplete order for safe No. 194 had been placed by respondent—these matters, disclosed by the record, constituted, in our judgment, substantial evidence upon which the jury was warranted in finding that there was a rescission of the contract.

[3] The testimony of the respondent, Balliet, was to the effect that the order for safe

No. 194 was a conditional order, and that the terms and conditions were reserved by him for future determination, and in this respect his testimony is supported by a physical fact; namely, the order itself, with its contained interrogation mark following the words "lettering to be put on safe," which at least was a circumstance strongly corroborative of the testimony of respondent, Balliet. As to whether or not the order for safe No. 194 was a conditional order was a question of fact of which the jury were the exclusive judges.

[4] It is the contention of appellant that the court erred in admitting parol evidence with reference to the terms and conditions of the contract. Appellant's contention in this respect might be well taken, if the contract did not bear evidence of incompleteness. Here was an instrument, bearing upon its face a sign which called for an answer or explanation, and which of itself constituted the very strongest evidence of something lacking—something to be supplied by some one before the party who was to assume the obligation of filling the order could do so. The interrogation mark on the face of the order, and the absence of designation as to internal equipment, were evidences of incompleteness, and were also evidences of a something absent, unexplained, and essential to the complete fulfillment of the contract; hence parol evidence was properly admissible in explanation.

[5] The organization of the copartnership of Murphy-Balliet Company, and its organization to do business, is not disputed. It cannot be seriously contended, in our judgment, that the subsequent delivery of the safe by the soliciting salesman, Waterhouse, to the copartnership of Murphy-Balliet constituted a delivery to respondent.

[6] The existence or nonexistence of an agency is a question of fact for the jury. *Cook v. Smith et al.*, 73 Ill. App. 483; *Iroquois Furnace Co. v. Ross*, 76 Ill. App. 549.

[7] Agency need not be proved by direct proof, but may be shown by circumstances and the course of dealing. *Crosno v. Bowser Milling Co.*, 106 Mo. App. 236, 80 S. W. 275; *Nutting v. Kings County L. El. Ry. Co.*, 21 App. Div. 72, 47 N. Y. Supp. 327.

If the jury found as a fact that Waterhouse did negotiate for a sale of the safe to the copartnership of Murphy-Balliet after the refusal of respondent, Balliet, to accept the same, then this act of itself constituted the very strongest evidence of mutual rescission of the original contract, if Waterhouse had the authority to enter into such mutual rescission. It is the contention of appellant that Waterhouse acted in no other capacity than that of soliciting salesman; but in this respect we deem it sufficient to say that the oath of J. F. Waterhouse, made in verification of plaintiff's complaint, together with the affidavit of J. F. Waterhouse, made pursuant to the is-

suance of the writ of attachment, was sufficient, in our judgment, to warrant the jury in believing and finding that J. F. Waterhouse was the duly authorized and acting agent of plaintiff, and, as such, had sufficient authority to bind his principal in the mutual rescission. The verification is as follows:

"State of Nevada, County of Nye—ss.:

"J. F. Waterhouse, being first duly sworn according to law, on his oath deposes and says: That he is the duly authorized and acting agent of the plaintiff above named, and makes this verification for and on behalf of plaintiff and for its use and benefit, and for the reason that affiant is more familiar with the facts above stated than any other agent or officer of plaintiff; that affiant has heard read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge, except as to those matters therein stated to be on information or belief, and as to those matters he believes it to be true. J. F. Waterhouse.

"Subscribed and sworn to before me this 8th day of June, 1908.

"H. R. Cooke, Notary Public."

Another matter of evidence, which would have warranted the jury in finding that Waterhouse had authorization to bind his principal, was the fact that on the original order for safe No. 194 certain printed matter, bearing upon the right of the salesman or representative of appellant to change the terms and conditions of the order, were by act of Waterhouse himself, as admitted by him in his testimony, stricken out with indelible lead pencil; and this order, with such portions stricken out, was received by N. O. S. Ford, assistant manager of the appellant corporation, at its offices in San Francisco, and was by the said Ford approved, as appears from the instrument itself, and also from the testimony of the witness Giesting. The approval on the part of the assistant manager of the appellant corporation of the acts of Waterhouse in striking from the contract certain salient features thereof was, to say the least, strongly indicative of a wide scope of authority conferred on Waterhouse by the appellant company. If Waterhouse, acting as soliciting salesman for the appellant com-

pany, had authority to strike from the uniform contract, authorized by the appellant company, certain features which of themselves had a more or less salient effect upon the transaction, then, in our judgment, the jury was warranted in finding that the authority conferred by appellant upon their soliciting salesman was sufficient in scope to bind appellant by the acts of Waterhouse in a rescission of the contract, if they found that Waterhouse agreed to a rescission when the safe arrived at Tonopah and was refused by respondent, Balliet. *Clarke v. Lyon County*, 8 Nev. 188; *Ellis v. Central Pacific Railroad Co.*, 5 Nev. 256; *Rankin v. New England & Nevada Silver Mining Co.*, 4 Nev. 78.

If the jury found, as it undoubtedly did find by its general verdict in favor of respondent, that as to order for safe No. 194 there was a mutual rescission of the contract, and also found that subsequent to such mutual rescission there was a resale of the safe to Murphy-Balliet, there being, in our judgment, substantial evidence to support their findings in this respect, the same should not be disturbed.

In this case, the briefs of appellant and respondent touch upon many side issues which, in our judgment, have no bearing upon the principal issue in the case, and hence will not be discussed.

[8] It is the contention of appellant that the court erred in admitting evidence as to an alleged fireproof warranty, alleged to have been given by Waterhouse to Murphy-Balliet. We deem it unnecessary to pass upon this matter, inasmuch as, if the same was error, it was harmless error, and the rights of appellant were not materially affected thereby. The question as to the fireproof character of the safe, or as to any warranty given with reference thereto, has nothing to do with the main issue in the case.

The judgment of the lower court, and the order denying a new trial, are affirmed.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

(50 Mont. 192)

BELLER v. LE BOUEF et al. (No. 3450.)

(Supreme Court of Montana. Jan. 20, 1915.)

**1. APPEAL AND ERROR (§ 529\*) — RECORD — MATTERS TO BE INCLUDED.**

Under Rev. Codes, § 7113, providing that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of the papers used on the hearing below, on appeal from an order vacating a default judgment, the judgment roll is no part of the record, but the papers used on the hearing, resulting in such order, constitute the record and must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2389-2393; Dec. Dig. § 529.\*]

**2. APPEAL AND ERROR (§ 613\*) — RECORD — MATTERS TO BE INCLUDED.**

On appeal from an order vacating a default judgment, a transcript certified by the clerk as a true copy of plaintiff's bill of exceptions, and purporting to be a narrative of the proceedings had and done in respect to the motion to vacate the judgment and to contain all the papers relative thereto, and settled and certified by the judge as a true and correct record of the proceedings had and done in the action, sufficiently complied with Rev. Codes, § 7113, requiring a copy of the papers used on the hearing below to be furnished on appeals from orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. § 613.\*]

**3. APPEAL AND ERROR (§ 934\*) — REVIEW — PRESUMPTIONS.**

Where, on a motion to vacate a default judgment, there was no showing whatever of excusable neglect or of the existence of any meritorious defense, it must be assumed that the order vacating the judgment was not made on discretionary grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

**4. APPEAL AND ERROR (§ 1011\*) — REVIEW — QUESTIONS OF FACT.**

Where, on a motion to vacate a default judgment, the affidavits were conflicting as to whether the amended complaint was served within 20 days before the entry of defendant's default and of the judgment, it was for the trial judge, and not the Supreme Court, to determine which was correct, and, having determined in favor of defendant, he would not be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

Action by Alfred Beller against Gilbert Le Bouef and others, partners under the firm name and style of Moser & Campbell. From an order opening defendants' default and vacating a default judgment, plaintiff appeals. Affirmed.

I. R. Blaisdell and H. J. Burleigh, both of Plains, for appellant. Gerard Young and H. C. Schultz, both of Thompson, for respondents.

SANNER, J. In this action a demurrer to the complaint on behalf of defendants Moser and Campbell was sustained. Thereafter an amended complaint was filed by plaintiff and a copy thereof served on counsel for said defendants. The date of the filing is September 18, 1913. The date of the service is disputed. On October 4, 1913, the plaintiff filed his praecipe for the default of said defendants for their failure to answer or demur, which default was noted in due form, and on the same day judgment by the clerk was entered conformably to the plaintiff's prayer. Thereafter a motion on behalf of said defendants was made to open the default and vacate the judgment, which motion was accompanied by affidavits intended to be in support thereof. The motion was granted. Hence this appeal.

[1, 2] The respondents (defendants below) challenge the right of appellant to be now heard, upon the ground that:

"The transcript herein fails to show either the judgment roll or an authentication and identification of the papers used on the hearing of the motion, \* \* \* either in the body of the bill of exceptions or in the certificate of the presiding judge, and the certificate of the clerk fails to certify to all the papers in the transcript."

There is nothing in this. The case is before us on appeal, not from the judgment, but from an order made after judgment. The judgment roll is therefore no part of the record (*Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121); but the papers used on the hearing, which resulted in the order appealed from, constitute the record, and these must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge. *Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680. Now, the transcript before us is certified by the clerk as "a full, true, and correct copy of plaintiff's bill of exceptions." This bill of exceptions purports to be a narrative of "the proceedings had and done" in respect to the motion in question and to contain all the papers relative thereto; and it is settled and certified, by the judge who made the order, as "in all respects a true and correct record of the proceedings had and done in the above-entitled action." While this cannot be acclaimed as a model of precision, it would be refinement of technicality for us to say that we do not have a copy of the papers used on the hearing in the court below. Rev. Codes, § 7113.

[3, 4] Accepting the record, then, we find but two suggested grounds on which the district court could possibly have acted, viz.: (a) As a matter of discretion, upon a showing of excusable neglect upon the part of respondents, coupled with the existence of a meritorious defense; and (b) as a matter of law, on the theory that the judgment was void because the amended complaint was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fatally defective, or because the default was prematurely entered. There was no showing whatever of excusable neglect or of the existence of any meritorious defense. It must therefore be assumed that the order was not made on discretionary grounds. Nor is there any substance in the contention that the amended complaint is essentially defective. It not only states one but 17 causes of action. If, therefore, the ruling can be upheld, it must be upon the legal ground that the default and judgment were void as premature. *State ex rel. Hickey v. District Court*, 42 Mont. 496, 113 Pac. 472, Ann. Cas. 1912B 246. Whether the default and judgment were premature depends upon when the amended complaint was served, and when that occurred is a matter of evidence, as presented by the affidavits of Mr. Blaisdell for appellant and Mr. Schultz for respondents. Mr. Blaisdell avers that on September 12, 1913, he deposited a copy of the amended complaint in the United States post office at Plains, postpaid, and addressed to counsel for respondents, who lived at Thompson, which is 25 miles away. Assuming this to be correct, and allowing one day for the distance between points (*Rev. Codes, §§ 7147, 7148*), the respondents' time for answer expired on October 3d. But Mr. Blaisdell's affidavit was not made until October 4th, the day default was entered, and 21 days after the alleged deposit. In the absence of circumstances showing the contrary, it is inferable at least that his statement was to some extent a matter of recollection, and therefore not necessarily exact. From the affidavit of Mr. Schultz, on the other hand, certain inferences are permissible, viz., that there was in September, 1913, a regular and due course of mail between Plains and Thompson through and by means of at least two trains per day; that the amended complaint came to him in the course of such mail addressed to "H. G. Schultz and Gerard Young, attorneys, Thompson Falls, Mont."; that the same was delivered to him on the evening of September 14, 1913; that a letter mailed at Plains before the departure of either mail-carrying train would in the due course of mail arrive at Thompson on the same day; and that said amended complaint was not mailed from Plains until September 14th or until September 18th after all mail-carrying trains had departed. If this be accepted, the respondents' time for answer did not expire until October 4th, and the default was premature. It is not for us to say which of these affiants was correct; but it was the function of the presiding judge to choose between their respective representations, and, as it was possible for him to choose the one which would enable the respondents to defend the action, we are not disposed to overrule him.

The order appealed from is therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(50 Mont. 159)

**BARNARD REALTY CO. v. CITY OF BUTTE et al. (No. 3446.)**

(Supreme Court of Montana. Jan. 15, 1915.)

**1. TAXATION (§ 348\*)—BURDEN OF PROOF—EXEMPTION.**

While ordinarily one claiming an exemption from taxation must establish it, the state, to impose taxes on mining property in excess of the amount paid the United States government, must show, under Const. art. 12, § 2, and *Rev. Codes, § 2500*, that the property is used for a purpose independent of mining and has a value for such purposes apart from its value as mining property; such provisions not relating to "exemption," but to state revenue.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 584-589; Dec. Dig. § 348.\*]

**2. TAXATION (§ 348\*)—ASSESSMENT—MINING PROPERTY.**

Because mining property has a value independent of the mineral wealth of the land, in that it is located within the limits of a city, and streets and sewers have been constructed through it, does not subject it to taxation at an assessed value greater than provided by Const. art. 12, § 2, and *Rev. Codes, § 2500*, in the absence of showing of intent on the part of the owner to use it for a purpose other than mining.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 584-589; Dec. Dig. § 348.\*]

**3. APPEAL AND ERROR (§ 1002\*)—REVIEW—FINDINGS.**

A finding of the trial court against which the evidence does not decisively preponderate is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**4. TAXATION (§ 608\*)—RESTRAINING COLLECTION—SCOPE OF REMEDY—IRREGULARLY LEVIED.**

Although *Rev. Codes, § 2743*, as amended by *Laws 1909, c. 135*, declares that injunction will not lie to restrain the collection of taxes "irregularly levied or demanded," and provides for objection to the board of commissioners, which remedy section 2745 declares shall be exclusive, injunction will lie to restrain the collection of a tax wholly void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by the Barnard Realty Company against the City of Butte and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Alex Mackel, W. F. Davis, and N. A. Rotering, all of Butte, for appellants. E. B. Howell and Edwin M. Lamp, both of Butte, for respondent.

BRANTLY, C. J. This action was brought to obtain a decree declaring null and void an assessment and tax levied in pursuance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



thereof by the authorities of the defendant city, upon property belonging to plaintiff and situated within the corporate limits of the city, and perpetually enjoining the defendant Daniel Shovlin, the city treasurer, from enforcing the collection of the tax by sale of the property. The trial court granted the relief demanded. The defendants have appealed from the decree and an order denying their motion for a new trial.

Patent to the Barnard placer mining claim was issued by the United States to Anthony W. Barnard and George McCausland on November 15, 1875. The claim covers an area of 34.75 acres, lying along Missoula Gulch, which extends from north to south, immediately west of the city as originally surveyed and platted. For several years after the patent was issued the mine was profitably worked for placer gold. When the deposits were so far exhausted as to render this character of mining unprofitable, Anthony W. Barnard, who in the meantime had become the sole owner, caused a portion of the claim to be subdivided into blocks and lots and to be made an addition to the city as the Barnard addition. The lots in this addition have heretofore been sold, Barnard reserving the mineral rights. The addition covers the central portion of the claim, leaving portions of it to the north and south as reserves for mining purposes, or to be devoted to other uses. The plaintiff subsequently became the successor to all of Barnard's rights. Lands to the west owned by other persons were also subdivided and made additions to the city, with the result that at the present time the southern portion of the claim, an irregular area of several acres, is bounded on the north, east, and west by lots occupied by buildings. A fair understanding of the situation may be gained by reference to the diagram found in Barnard Realty Co. v. City of Butte, 48 Mont. 102, 136 Pac. 1064, with the accompanying explanatory statement. The area designated "Barnard placer," extending from the alley on the north to and south of Silver street, is the property involved in this controversy. The entire area of the claim as originally patented was assessed by the county assessor for the year 1912 as placer mining property at \$2.50 per acre. Subsequently the assessor, at the instance of the city authorities, again assessed the area in controversy at a valuation of \$19,000, upon the theory that it had an independent value to this amount and for use as city lots. In the first assessment the plaintiff was named as the owner; in the second Anthony W. Barnard was named as the owner. Both assessments were extended by the county clerk upon the county assessment roll and upon the duplicate delivered by him to the city treasurer as a basis for the levy of city taxes. The plaintiff paid the amount of the tax levied upon the first assessment, but refused to pay that levied upon the second, and,

when the city treasurer proceeded to advertise and sell the property as delinquent, brought this action. Two questions have been submitted for decision, viz., whether the second assessment and the tax levied in pursuance of it were authorized by law, and whether injunction is the proper remedy.

[1] Section 2 of article 12 of the Constitution specifically declares all property, with certain exceptions, subject to taxation. The same provision permits the Legislature in its discretion to exempt other property devoted to certain purposes. The following section (3) provides as follows:

"All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law."

Section 2500 of the Revised Codes is substantially an enactment of this provision in the form of statute.

The purpose had in view by the convention in formulating the provision of the Constitution was to bring into the class of taxable property mines and mining claims, and to provide a method by which the owners of them might be compelled to bear their equitable proportion of the expense of government. Theretofore this species of property had generally been exempt. Northern Pac. Ry. Co. v. Mjelde, 48 Mont. 287, 137 Pac. 386. Recognizing the fact that such property is not generally susceptible of profitable use unless the deposits therein are extracted and put into commercial form, and in order to encourage the work of profitable development by protecting it against exactions which might prevent this result, it was deemed that the owner of a mining claim would fully acquit himself of his obligation to the public by paying a tax: (1) Upon the acreage at the price paid to the United States; (2) upon the machinery used in mining and surface improvements, etc., upon or appurtenant to the claim, which have a value independent thereof; and (3) upon the net proceeds of the product. So long as the claim is used and held exclusively for mining purposes, the owner of it is not required to bear any other burden; but when the property, having by its location acquired a value for some independent use, is devoted by the owner to such use, it becomes at once subject to taxation at that value as is other real estate, to be ascertained by the assessing officer just

as he ascertains the value of other land for the purpose of taxation. By devoting it to the new use, the owner, so to speak, creates an estate which, in the eye of the law, is regarded as independent of the original estate and is subject to taxation as such. It will be noted, however, that two conditions must concur to justify the imposition of the additional burden; viz., the surface ground, or some part thereof, must be used for other than mining purposes, and it must have an independent value for that purpose. When these conditions concur, but not otherwise, the owner must assume the additional burden.

[2] While it is the rule that he who alleges that his property is exempt from taxation must sustain the burden of establishing the exemption, the provision in question not being an exemption provision, but really a revenue measure apportioning to the owners of mining claims what the convention deemed to be their just proportion of the public burden (*Northern Pac. Ry. Co. v. Mjelde*, supra), before the additional burden can be imposed, the taxing authorities must ascertain that the conditions authorizing its imposition in fact exist. In *Hale v. Jefferson county*, 39 Mont. 137, 101 Pac. 973, was involved the question whether a ditch appurtenant to a placer mining claim and used to convey water upon it to work it had a value independent of the claim, and was therefore subject to taxation upon the basis of such value. It was held that the burden was upon the taxing authorities to establish such value. The rule was recognized and applied in the earlier case of *Murray v. Hinds*, 30 Mont. 466, 76 Pac. 1039. The question at issue in that case was whether a tax levied upon a portion of the surface of a mining claim which had been subdivided into blocks and lots conforming to the streets and alleys of the city of Butte, and held for sale as opportunity offered, was valid. Upon the facts adduced showing this condition, this court held that it was. The court said:

"Merely claiming a portion of the premises as reserved for mining purposes, and at the same time disclosing a state of facts absolutely inconsistent with the basis of their (plaintiffs') contention, places them in the position of having adopted a subterfuge to escape paying taxes on the property."

The platting of the property for the purpose of putting the lots upon the market for sale and selling them as there was demand for them was sufficient to show an actual use and an independent value for that purpose. This conclusion was clearly correct; for such a use, at least so far as concerned the surface of the claim, was inconsistent with any possible intention on the part of the owner to use it thereafter for mining purposes. It was entirely competent for the owner of the claim to treat the surface right as a separate interest from that represented by the mineral reserved beneath, and sell it to others if he

chose to do so. *Northern Pac. Ry. Co. v. Mjelde*, supra. The interest so held was property and subject to taxation upon the same footing exactly as if the title to the land had been acquired for agricultural purposes.

We shall not enter into a detailed examination of the evidence. It is not disputed that the area of the Barnard placer in controversy has an independent value for town-site purposes. This attribute it has in common with every foot of land within the limits of the city of Butte, including many mining claims. This alone, however, is not sufficient to make it subject to the burden sought to be imposed upon it. As heretofore stated, before the burden can be lawfully imposed in any case, the surface must have been devoted to an independent use. The evidence does not disclose such a use of the area in dispute. While it does furnish a basis for an inference that it may be the purpose of plaintiff at some future time to plat it into blocks and lots and put them upon the market, this has not been done, nor has it heretofore been occupied or used for any purpose. It is true that portions of the surface have been filled in by other parties with the consent of the plaintiff. Missoula Gulch has for many years been used as a dumping ground for waste dirt taken from excavations within the city. Other portions of the surface rendered uneven by excavations during the process of placer mining have been leveled off. It is also true that Silver street has been extended over the southern portion of it. Again it is true that a storm sewer has been extended through it by the city from north to south, and that other similar improvements have been installed for the accommodation of lot owners to the north and east. With the exception of Silver street, which was opened by plaintiff's consent, all these improvements have been installed without plaintiff's consent, or that of any of its officers. With reference to them it may be said that all of them might have been installed even against the consent of plaintiff, the city acquiring the right of way through the property by virtue of condemnation proceedings. On the other hand, it is not disputed that in this portion of the claim there are silver-bearing lodes which have been worked with some profit in past years, and which, Anthony W. Barnard testified, it is the intention to work in the future if silver reaches such a price in the market as to justify it. He stated further that, though in recent years the plaintiff had been frequently solicited to sell the property to persons who desired to plat it and put it upon the market, it had consistently refused to sell and held it as a reserve for mining purposes whenever circumstances would permit its use for this purpose. If such is the intention, as the trial court found, the tax sought to be imposed is wholly unauthorized and illegal.

[3] The most that can be said of the evi-

dence touching the present or future intended use is that it does not decisively preponderate against the finding of the trial court, and hence must be accepted by this court as conclusive.

[4] Contention is made that this action cannot be maintained, for the reasons that it is not alleged in the complaint nor shown by the evidence that plaintiff appeared before the board of county commissioners while sitting as a board of equalization, and made objection to the assessment, and that the remedy provided by section 2743 of the Revised Codes, as amended by the act of 1909 (Laws of 1909, c. 135), is exclusive. It is true that the complaint does not allege that the plaintiff appeared before the board and made timely objection to the assessment, nor is it disclosed by the evidence that it did so. It is sufficient to say in this connection however, that if the taxing authorities undertake to levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and void. *Clark v. Maher*, 34 Mont. 401, 87 Pac. 272. It is not necessary to cite authorities to sustain the assertion that the right of the owner of property to relief by injunction is not in any wise affected by his failure, either upon notice by the assessor (amended section 2743, *supra*) or by the board itself (Rev. Codes, § 2581), to make timely objection. The assessment being wholly illegal, because without authority, its validity may be questioned by any available method. The same may be said as to the exclusive character of the remedy provided by amended section 2743, *supra*. It is true section 2745 declares that the remedy provided by the amended section *supra*, "shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate." Notwithstanding this declaration, when the tax or the proceeding resulting in the levy of it is wholly illegal, as was pointed out in *Montana Ore Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13, the remedy by injunction is available. In this case it was said:

"A consideration of sections 4023 (Rev. Codes, § 2741) and 4026 (Rev. Codes, § 2745) leads us to believe that the phrase 'irregularly levied or demanded' was used by the Legislature advisedly, and as prescribing the limits wherein the statutory remedy is exclusive, as distinguished from those cases of illegal taxes the collection of which may be restrained by injunction. In other words, if the action of the assessor or board of equalization was such that the tax complained of is manifestly void under any circumstances, injunction will lie to restrain its collection; but, if the error complained of is only an irregularity on the part of the assessor, the board of equalization, or the treasurer which may be subject to explanation so as to cure the apparent defect, or, in other words, where the tax complained of is not necessarily void under

all circumstances, then the remedy provided by sections 4024 (Rev. Codes, § 2742) and 4025 (Rev. Codes, § 2744), namely, payment under protest and an action to recover back, is exclusive, except in those unusual cases mentioned in section 4026."

See, also, *Cobban v. Hinds*, 23 Mont. 338, 59 Pac. 1, and *Western Ranches, Ltd., v. Custer County*, 28 Mont. 278, 72 Pac. 659.

The judgment and order are affirmed.  
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(50 Mont. 168)

JONES v. ARMSTRONG. (No. 3448.)

(Supreme Court of Montana. Jan. 16, 1915.)

1. SALES (§ 354\*)—RESCISSION—PLEADING—SUFFICIENCY.

In a suit on a note given in payment for a plow, where the allegations of defendant's answer include an offer to return the plow and a demand for the return of the note, but also include many allegations that indicate the defendant does not rely upon a right to rescind the sale for fraud and failure of consideration, such as an allegation of breach of warranty as a defense, and as a basis for damages, the answer does not allege a defense on ground of rescission.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1005-1024; Dec. Dig. § 354.\*]

2. SALES (§ 359\*)—RESCISSION—EVIDENCE.

In a suit on a note given in payment for a plow, where the allegations of defendant's answer set up as a defense a breach of warranty and damages thereby, rather than a right to rescind, and where the evidence shows that no demand was made upon plaintiff for the return of the note, and that there was no offer to return the plow, but merely a notification that defendant held it at plaintiff's disposal, the evidence does not tend to establish any defense by way of rescission under the allegations of the answer.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 511, 1056-1059; Dec. Dig. § 359.\*]

3. SALES (§ 262\*)—WARRANTIES—REPRESENTATIONS AS—RELIANCE UPON.

Plaintiff's statement that the plow he sold defendant had done good work for him at sod breaking is not a warranty unless relied upon as such.

[Ed. Note.—For other cases; see *Sales*, Cent. Dig. §§ 736-739; Dec. Dig. § 262.\*]

4. SALES (§ 441\*)—WARRANTIES—EXPRESS WARRANTIES—EVIDENCE.

Evidence held insufficient to show that the buyer relied on the seller's representation that the plow had done good work, so as to render it an express warranty.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

5. SALES (§ 262½\*)—WARRANTIES—IMPLIED WARRANTIES—ELEMENTS—STATUTES.

Under Rev. Codes, § 5104, providing that no warranty is implied from a mere sale of personalty, no implied warranty as to the fitness of a plow for sod breaking can be found to have been made, where defendant had had experience with the particular make of plow, and started out to buy one, going to the plaintiff because he had one to sell, where defendant did not rely on plaintiff's knowledge of the plow as superior to his own, and where defendant knew that plaintiff was not a manufacturer or dealer, and that the plow was secondhand.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 740-748; Dec. Dig. § 262½.\*]

# 6. SALES (§ 441\*)—WARRANTIES—BREACH OF EVIDENCE.

Evidence held insufficient to show breach of warranty that a plow was fit for sod breaking.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

Appeal from District Court, Teton County; H. H. Ewing, Judge.

Action by Evan D. Jones against Bart Armstrong. From a judgment for plaintiff, defendant appeals. Affirmed.

David J. Ryan, of Conrad, for appellant. R. Ferguson, of Conrad, for respondent.

**SANNER, J.** Action by Evan D. Jones against Bart Armstrong, upon a promissory note given by the latter to the former for the sum of \$800, with interest at 8 per cent. per annum. The answer consists of denials and "a further and separate defense" wherein it is alleged that said note was given in payment of an Emerson plow purchased of Jones by Armstrong for sod breaking; that Jones, who knew of the purpose for which the plow was desired, warranted and represented the same to be capable of first-class work in that respect; that these representations were untrue, and were known to Jones to be untrue; that Armstrong did not know, and could not ascertain, without a trial of the plow, that these representations were not true, and he relied upon them; that he took possession of the plow and gave it an immediate and fair test, as a result of which it was ascertained that the same was wholly unfit, and could not be used, for breaking or any other purpose; that notice was forthwith given to Jones by Armstrong, who tendered back the plow and demanded the return of said note; that, in consequence of the failure of the plow to meet the representations made by Jones, Armstrong became unable to perform certain contracts which he had entered into, and lost the profits which would have accrued therefrom, and also sustained special damage in certain other respects, all in the sum of \$1,100, for which judgment is prayed. All these affirmative allegations are traversed by a general denial in the reply.

Upon the trial, which was to the court sitting with a jury, the plaintiff contented himself with the introduction of the note and testimony to the fact that it was due and wholly unpaid. On cross-examination it was elicited by defendant's counsel that the note was given in payment for the plow which he (Jones) had previously bought and used, and which had done satisfactory work for him.

The evidence on the part of the defendant was given by Armstrong himself and by the witnesses Hughes, Cawood, and Price. Armstrong testified:

"I went to see Mr. Price, and asked him if he had what is known as the Emerson plow, sod-bottom plow, and disc plow. He said he didn't have one. He was the agent for this plow at

Conrad at this time, and I asked him if he knew of one, if I could locate one. He said he thought Evan Jones over east of town had a plow that he wanted to sell. So Mr. Price drove me out there in his automobile, and we saw Mr. Jones and saw the plow. The plow at this time had the discs. It was not rigged for sod-bottom plowing. It was a three-section Emerson plow, susceptible of sod-bottom, as all are supposed to be. Mr. Jones made a price on this plow of \$800. Mr. Price and I went back, and I talked to Mr. Price about this plow, and I asked him if this plow could be guaranteed to give satisfaction or to do good plowing. He said it could; that the Emerson was behind the plow as long as a man saw fit to operate it.

"\* \* \* I met Mr. Jones two times. I am not sure which time it was that he spoke about the plow. He said the plow did good work for him; that was with the sod-bottoms on. I think he said he plowed 60 acres with sod-bottoms—probably not that much. I told him I wanted to use the plow for sod-bottom breaking. When I got the plow it was hitched to the engine, and I took it out to the ranch. I used it two or three times; we tried it out on the prairie sod. After the plow was used three times, I guess there were some 10 or 12 acres we had gone over and tried to plow. It was not a good piece of plowing. I don't know that I knew what was the trouble with it. One of the front sections cut too deep; the rear section would not run deep enough; and each section in the middle or center is worked by one lever. If the front section run too deep, you raised the lever, and that throws the plows of the rear section out of the ground. There was no adjustment as to the depth of the plows, other than the four levers. These four levers covered the plow or the depth of all the plows that was strung on the two sections from this frame. I had the same man on the engine that plowed for Mr. Jones, and I was looking after the plows myself also. The fault was not in the plow; the fault was in the place that it seemed to swing on—in the frame of the plow. The plow would not plow uniformly. It had that fault of running too deep and running too shallow, and also had the fault of piling the sod up instead of folding it over. After using the plow for three times, I wrote Mr. Jones that the plow was there at his disposal. I could not use the plow. I told him it would not do the work and did not answer the purpose for which I purchased it."

Upon cross-examination Mr. Armstrong further testified:

That he had operated an Emerson plow before this in the disc frame, but not in the sod-bottom frame. "To say that I know why the plow did not work properly would involve a good deal. The construction frame that carries these plows was not so mechanically built as to carry the plows evenly and regulate them in the ground. There would be two cables to adjust, and you must have these cables so they would carry the beams squarely in front of the plow, or carry the beam in right angles behind the engine or parallel with the rear of your engine. When I first went to see Mr. Jones about buying the plow it was the time I talked to Mr. Price; I went out once, and I might have gone twice. I asked him to reduce the price, but he said I could take it for \$800 or leave it."

On redirect examination he said with reference to Jones' statement that the plow had done good work for him:

"I took the statement for what it was worth. I relied upon Mr. Price as agent for the Emerson plow people. I relied upon both

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Mr. Price's statement and Mr. Jones' statements in purchasing the plow."

David Hughes testified:

"I was plowing for Mr. Jones with an Emerson plow, sod-bottom breaking part of the time. \* \* \* I don't think the moldboard was not good plowing. This plowing was good. \* \* \* The work did not suit Mr. Jones. \* \* \* It was the bottoms—the moldboards. \* \* \* I had no experience before that in handling Emerson plows. I adjusted the cables on the plows. I don't know the regulation length of the cable for No. 1 beam or No. 2; we adjusted them and changed them so as to try to make the plows work."

Cawood testified that:

He "saw some ground that had been plowed by this Emerson plow. \* \* \* The plowing \* \* \* was poor. \* \* \* I do not know what was wrong with the plow. \* \* \* I do not know whether it was the fault of the plow or the fault of the man that operated it that accounted for the bad plowing."

Price testified that the plow was second-hand when sold to Mr. Jones and thirdhand when sold to Mr. Armstrong.

At the conclusion of the testimony the plaintiff moved the court to direct the jury to return a verdict in favor of the plaintiff, which was done, and, upon the verdict so returned, judgment was entered. Thereafter motion for new trial was made and overruled. The defendant has appealed from this judgment and order.

[1, 2] The only question presented is whether the evidence on the part of the defendant tended to establish any defense under the allegations of the answer. He contends that it did, upon what theory we are unable to precisely determine. The first part of his argument is devoted to a discussion of the right of rescission for fraud and for failure of consideration. Neither the answer nor the evidence affords any warrant for the application of rescission. While the answer alleges an offer to return the plow and a demand for a return of the note, it presents no other allegations pertinent to rescission, but contains many that indicate a contrary position, viz., reliance upon a breach of warranty as a defense and as the basis for an award in damages. Upon the evidence, the case is still worse, so far as rescission is concerned. Demand for the note is not mentioned, and the offer to return dwindles to a mere notification—insufficient as a return or offer to return—"that the plow was there at his disposal." *Berlin Machine Works v. Midland C. & L. Co.*, 45 Mont. 390, 123 Pac. 396.

[3, 4] The defendant also insists that he made a sufficient showing to go to the jury upon the theory of a breach of warranty; such warranty being both express and implied. Plaintiff argues that one cannot defend upon an express and implied warranty touching the same quality. This we need not consider, for reasons presently to appear. To begin with, no express warranty on the part of plaintiff was shown, in our opinion. So far as the plaintiff himself is concerned, this express warranty is supposed to

exist by virtue of his statement that the plow had done good work for him at sod breaking. This was not a warranty. 30 Am. & Eng. Ency. Law, 142; *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198. It was a representation which, to become a warranty, had to be relied on as such. 30 Am. & Eng. Ency. Law, 143. That it was not relied on is clear from defendant's testimony that he "took it for what it was worth"; that he "relied on Mr. Price as agent for the Emerson plow people"; that he "relied on both Mr. Price's statement and Mr. Jones' statements in purchasing the plow." In avoidance of this the defendant, in a vague and indefinite sort of a way, seems to contend that Price was an agent of plaintiff, and that his declarations, together with those of Jones, are sufficient to establish the warranty. We think it clear that Price was not the agent of anybody in this transaction; his function being merely that of an obliging merchant whose assistance had been solicited by the defendant himself.

[5] As to the implied warranty, the defendant's situation is no better. He did not go to Jones as the dealer or manufacturer of an article with which he was unacquainted. He had had some experience with the Emerson plow; that was the plow he started out to buy. He applied to plaintiff because that was the sort of plow the plaintiff had to sell. Defendant knew that plaintiff was not a dealer or manufacturer, and that the plow was a secondhand one. From these circumstances no implied warranty by the plaintiff can arise touching the original fitness of the plow for sod breaking. 35 Cyc. 408; 15 Am. & Eng. Ency. Law, 1240; *Ramming v. Caldwell*, 43 Ill. App. 175; *Cogel v. Kulseley*, 89 Ill. 598; *Joy v. Nat. Exch. Bank*, 32 Tex. Civ. App. 398, 74 S. W. 325. Our statute (Rev. Codes, § 5104) provides:

"Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty."

And the only exceptions, so far as warranty of quality of examinable merchandise is concerned, are when the buyer relies upon the seller's judgment, the latter knowing that fact, and where the sale is made by the manufacturer or dealer. That neither exception can be applied here is obvious.

[6] Assuming, however, that there was a warranty of the plow as fit for sod breaking, the evidence, we think, falls short of establishing its breach. To show that upon a test it did poor work is not to show its incapacity to do good work. Clearly deducible from the evidence is the fact that adjustment and operation had much to do with the results achieved, and the defendant failed to show that the adjustment and operation were correct upon the test. The burden of showing unfitness was upon the defendant, and Cawood's remarks, "I don't know whether it was the fault of the plow or the fault of the man that operated it," must have expressed

the view of the trial court upon the whole evidence, as it certainly expresses ours.

We think the order directing a verdict for the plaintiff was justified. That being so, the judgment and order appealed from were correct and must be affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(50 Mont. 196)

**COMERFORD v. JAMES KENNEDY CONST. CO. (No. 3453.)**

(Supreme Court of Montana. Jan. 21, 1915.)

**1. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

In an action for the death of a laborer killed by the caving in of a sewer trench, evidence held not to show contributory negligence so clearly that a verdict against the employer should be set aside.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

**2. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**

The burden of proving that a servant's negligence contributed to his injury is upon the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**3. APPEAL AND ERROR (§ 1005\*)—REVIEW—VERDICT—WEIGHT OF EVIDENCE.**

Where upon the evidence as a whole the jury might discredit the testimony of the only witnesses to the accident as to the contributory negligence of a servant, or draw therefrom an inference that he exercised due care for his own safety, a verdict against the employer will not be reversed after approval of the trial court upon a motion for new trial, though the testimony of the witnesses, if believed, would support an inference of contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Appeal from District Court, Missoula County; A. L. Duncan, Judge.

Action by Agnes M. Comerford, as administratrix of the estate of Thomas Comerford, deceased, against the James Kennedy Construction Company and another. From a judgment for the plaintiff against the Construction Company, that company appeals. Affirmed.

Woody & Woody, of Missoula, for appellant. Jas. L. Wallace, Chas. N. Madeen, and Hall & Whitlock, all of Missoula, for respondent.

**HOLLOWAY, J.** This action was brought to recover damages for the death of Thomas Comerford, caused by the alleged wrongful acts of the city of Missoula and the James Kennedy Construction Company, committed in the course of installing a public sewer. Comerford was a laborer employed

by the construction company in excavating a trench for the sewer pipe, and while so engaged was killed by a cave of the trench. The defense was a denial of negligence and a plea of contributory negligence on the part of the deceased. The trial resulted in a general verdict against the construction company, and it has appealed from the judgment and from an order denying its motion for a new trial.

[1-3] There is not any difference of opinion as to the rules of law governing this case, but appellant insists that the verdict is contrary to the evidence offered in support of the plea of contributory negligence, and conflicts with certain instructions given by the trial court. Whether either of these contentions should prevail depends altogether upon the consideration of that evidence.

According to counsel for appellant, but two witnesses, John Gustafson and John Murtz, gave testimony tending to disclose negligence on the part of Comerford which contributed to his death; but that evidence is to be viewed in the light of the further testimony that the deceased was a practical miner of some experience in that occupation.

The testimony of Gustafson may be summarized as follows: He was foreman of the construction company, in charge of the men at the time of the cave which caused the death, and was upon the surface some 10 feet east of Comerford, who was facing east, shoveling dirt into a bucket at the bottom of the sewer trench, which was 17 or 18 feet deep. The trench was shored with sheathing placed perpendicularly with three or four sets of heavy stringers, placed transversely, and these kept in place by screw jacks. From 4 to 6 feet west of Comerford, with his face to the west, was Murtz, laying the sewer pipe, and west of him was a helper. About 2:30 o'clock on the afternoon of September 24, 1910, while Gustafson was overseeing the work, he noticed the sheathing "going down," and, surmising a cave, called to the men, "Come up, boys; the sheathing is giving way," or words to that effect, and this was repeated immediately, but he did not have time to call again. At this warning Murtz also called to Comerford to get out, and Murtz and the helper went to the west and escaped. "Comerford stood and looked up, but did not make any attempt to move away." When the timbers started to give they moved slowly. It was three or four minutes between the time the first warning was given and the cave occurred. By going to the east 4, 6, or 10 feet past his bucket and under the lowest screw jack, which was 2 or 3 feet above the bottom of the trench, or between that jack and the one, 2 or 3 feet above it, Comerford could have reached a place of safety. The witness further testified: "I think he could

have seen the wall moving." The body of Comerford was held down in the trench by a piece of one stringer broken by the cave.

In the main, the testimony of Murtz is corroborative of that of Gustafson. He testified, however, that the warning given by the foreman was "loud enough so we all heard it." And again:

"As soon as he said 'Get out!' I left my shovel on top of the pipe and ran back west. I did not run; I walked—walked as fast as I could. I was scared when the foreman told us to get out of there, because the bank was cracking, I had to get out. I left my shovel down and walked as fast as I could ten feet, and then the crash came. Comerford did not say anything to me when I told him to get out. He looked up. \* \* \* I could not see that the bank was cracking, then, nor could I see the sheathing move. It was not belied; there were no indications as far as I could tell that anything was wrong."

It is now urged upon us that this evidence was uncontradicted; that it established the defense of contributory negligence, and, in returning a general verdict for plaintiff the jury must have disregarded it arbitrarily. Upon the assumption that Gustafson and Murtz were credible witnesses, and their testimony should be accepted as true, and the further assumption that Comerford heard and understood the warning in time to escape, an inference of contributory negligence might well be drawn, but the burden of proving contributory negligence was upon the defendant, and if upon the evidence as a whole the jury were justified in discrediting these witnesses or in drawing an inference favorable to the deceased with respect to the care exercised by him, or if they were unable to say that the evidence preponderated in favor of the claim that his own negligence proximately contributed to his death, then the finding of the jury must be accepted by this court after it has been reviewed and approved by the trial court upon the motion for a new trial. Doubtless the jurors, viewing the conflicting statements of Gustafson and Murtz with reference to the period of time which elapsed between the warning and the catastrophe in the light of common experience, concluded that Murtz was much more nearly correct in his estimate, and that three or four seconds prob-

ably elapsed, rather than three or four minutes.

The testimony of Gustafson discloses that at the time of the cave, the contractors had cross-ties laid over the sewer trench to which rails were attached, and on this track a combination tram and hoist was running back and forth, lowering and raising the buckets in the trench and disposing of the dirt taken therefrom. The trial court by instruction 27 directed the jury that it was not enough that the warning was given in time for Comerford to escape, but that it must have been given loudly and distinctly enough to be heard and understood by a person of ordinary hearing at the place where decedent was working. By instruction 20 the court declared that a presumption, which had the effect of evidence, existed in favor of the deceased that he exercised due care for his own life and safety; such care as a person of his age, ability, capacity, and experience ordinarily exercises. Viewed in the light of that presumption, and of the evidence that Comerford was a miner of experience, and of the circumstances surrounding him, his position in the trench 17 or 18 feet deep, with the noise of the tram overhead, and in the absence of any direct evidence that he heard the warning or understood its meaning, or saw the threatening danger, the jury might well have concluded from the entire case-made that he did not hear Gustafson, or, if he heard the call, that he did not understand it to be a warning, and that the circumstances were not such that he ought to have heard and understood. This construction of the evidence disposes of the contention that the verdict is against the law as declared by the court in its instructions.

There are, however, facts and circumstances disclosed by the record which might well have prompted the jury to discredit the testimony of Gustafson and Murtz, but, in view of our conclusion above, these need not be considered.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, O. J., and SANNER, J., concur.

(50 Mont. 177)

**McLAUGHLIN v. BARDESEN et al.**

(No. 3442.)

(Supreme Court of Montana. Jan. 18, 1915.)

**1. STATUTES (§ 211\*)—CONSTRUCTION—MEANS AVAILABLE.**

The arrangement and classification of statutes, their titles and headnotes, are all proper and available means from which to determine legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

**2. MINES AND MINERALS (§ 92\*)—PENAL STATUTE—EXTENSION BY IMPLICATION.**

Rev. Codes, § 8535, declaring a penalty for sinking any "shaft" or running any "drift" or "cut," without guarding it, cannot be extended by implication to a ditch of any character more than ten feet deep, by the exception of "mining, irrigating, and other ditches" not more than ten feet deep.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**3. MINES AND MINERALS (§ 92\*)—PENAL STATUTES—"CUT."**

"Cut," in Rev. Codes, § 8535, declaring a penalty for sinking any shaft or running any drift or cut, without guarding it, is not used, in its broad sense, so as to include a trench for laying a sewer pipe, but, being used in conjunction with "shaft" and "drift," means a surface opening in the ground intersecting a vein.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

For other definitions, see Words and Phrases, First and Second Series, Cut.]

**4. MINES AND MINERALS (§ 92\*)—ORDINANCES—"OTHER EXCAVATION."**

"Other excavation," in an ordinance of Butte, declaring it unlawful to allow any shaft, drift, prospect hole, "or other excavation" to remain open and unguarded, under the rule of "ejusdem generis" or "noscitur a sociis," means an excavation made in the course of prospecting or active mining, and does not include a trench for a city sewer.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**5. EVIDENCE (§ 60\*)—PRESUMPTION—LAWFUL OCCUPANCY.**

In the absence of evidence to the contrary, one's occupancy of a house must be treated as rightful; no inference of wrongful occupancy being permissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.\*]

**6. NEGLIGENCE (§ 33\*)—INJURY TO TRESPASSER—DUTY OF OWNER.**

At common law landowners are required, as respects a trespasser, merely to refrain from any intentional or wanton acts occasioning injury to him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.\*]

**7. NEGLIGENCE (§ 54\*)—INJURY TO TRESPASSER—LANDOWNERS.**

As respects liability for injury to a trespasser, persons in possession at the place of injury, and there having an easement, are to be treated as the landowners.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 66, 67; Dec. Dig. § 54.\*]

**8. NEGLIGENCE (§ 33\*)—INJURY TO TRESPASSER—WANTONNESS OF LANDOWNER.**

Wantonness of landowners causing injury to a trespasser, rendering them liable, may be shown by acts of omission, where the facts disclose a reckless disregard of the lives or safety of others.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.\*]

**9. NEGLIGENCE (§ 33\*)—INJURY TO TRESPASSER—WANTONNESS OF LANDOWNER.**

As to whether there is wantonness, making a landowner liable for injury to a trespasser, every case depends on its own peculiar facts and circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.\*]

**10. APPEAL AND ERROR (§ 927\*)—REVIEW—JUDGMENT ON NONSUIT.**

On appeal from a judgment on a nonsuit, the evidence will be considered in the view most favorable to plaintiff, and every fact, which the evidence tends to prove, treated as proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

**11. NEGLIGENCE (§ 134\*)—WANTONNESS—PRIMA FACIE SHOWING.**

A prima facie showing of reckless disregard of the lives and safety of others, rendering landowner liable for injury to a trespasser, is made out by evidence of the excavating and leaving unguarded of a dangerous trench in to or across a well-defined path, over uninclosed lands across which the public, along such path, has for years been accustomed to pass.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Katie McLaughlin against R. M. Bardsen and others, partners as R. M. Bardsen & Co. Judgment for defendants, and plaintiff appeals. Reversed and remanded for a new trial.

J. M. Hinkle, of Butte, for appellant. J. L. Wines and T. J. Harrington, both of Butte, for respondents.

**HOLLOWAY, J.** In September, 1912, the city of Butte let a contract to Bardsen, Hammer, and Larson to install a public sewer for the city, and in execution of the agreement the contractors caused to be excavated a trench in which to lay the sewer pipe. The line of sewer was parallel with and about 100 feet from Anaconda Road, a public street of the city. One portion of the sewer trench within the city limits was in front of, and but a few feet from, the house occupied by Dan Martin, designated No. 27 Anaconda Road. During the progress of the work the contractors were delayed for 15 days or more, and during that interval the trench in front of the Martin home was left open. As soon as the pipe could be laid after work was resumed, the trench was filled. There was a path or roadway leading from Anaconda Road to the north to the Martin home and to other houses in the immediate neighborhood, and the section of the trench in front of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Martin house, about 3 feet wide, 12 feet long, and 12 or 13 feet deep, extended across, or at least 2 or 3 feet into, this path or roadway and was left open and unguarded, and without lights or other signals to indicate danger. During the time the work was interrupted, and on the evening of October 13, 1912, when it was so dark that the excavation could not be seen, and when its existence was unknown to her, Katie McLaughlin, while traveling along this path or roadway north from Anaconda Road, to visit at the Martin home, fell into the trench in front of the Martin house and was severely injured. She brought this action against the contractors to recover damages, but the trial court nonsuited her, and these appeals are prosecuted to have determined whether upon the agreed facts, and the evidence offered by the plaintiff supplementary thereof, there is shown any liability on the part of the contractors.

Concerning the path or roadway, the witness Martin testified:

"There was a well-beaten road or traveled way leading from Anaconda Road up to my house and on up beyond my house that people traveled on going back and forth from Anaconda Road up to and past my house. There were many people traveled that way. It was the only way to go from Anaconda Road up in that neighborhood. There were a good many houses up in that neighborhood. The defendants dug this ditch easterly and westerly in front of my house. My house faces south toward Anaconda Road."

Frank Reynolds testified:

"I have known that traveled way leading up from Anaconda Road for about 17 years. I traveled over it that long ago, and have traveled over it different times since. It was a well-beaten traveled way. It ran up between two dumps, about 12 or 15 feet apart, from Anaconda Road up past where Dan Martin's house is to the neighborhood beyond, and was the only way of going up that way. There is a crossing in the sidewalk where this traveled way leaves Anaconda Road. There were no sidewalks on either side of this traveled way. \* \* \* I have traveled over that traveled way from Anaconda Road up that way in the last 17 years about 4 times. After you get up to Dan Martin's house then the paths branch off different ways to go to the different places and houses in that neighborhood."

Mrs. Martin and the plaintiff were intimate friends, accustomed to visit each other at their respective homes, and the path or roadway leading to the Martin home from Anaconda Road was well known to the plaintiff. There is not any evidence in the record as to who owned the land at the point where the accident occurred; but defendants had secured a right of way for the sewer, and from that fact it may be inferred that the land was held in private ownership. It was, however, open and uninclosed. There is not any evidence that the owner knew of the use of his property by the people of the vicinity or the existence of the path or roadway, which, so far as the record discloses, was not a public thoroughfare of any character.

[1-3] *Statutory Liability.* Section 8535, Revised Codes, provides:

"Every person who sinks any shaft or runs any drift or cut, or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town, or within three hundred feet of any street, road or public highway, and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars (\$1,000). \* \* \* Mining, irrigating and other ditches may be dug or cut to a depth not exceeding ten feet without incurring the penalty if this section."

This statute was first enacted in 1871 (Codified Stat. 1871, p. 593), and with very slight amendments has been brought forward to the present time. The arrangement and classification of statutes, their title and headnotes, are all proper and available means from which to determine legislative intent. *Hardesty v. Largey Lumber Co.*, on rehearing, 34 Mont. 160, 86 Pac. 32; *In re Wisner*, 36 Mont. 298, 92 Pac. 958. Chapter 81 of the Laws of 1871, above, was entitled "Mines and Prospectors." The statute made it a misdemeanor for any one to sink a shaft or run a drift or cut within 20 feet of a trail, road, or public highway, unless within 10 days such opening was protected by a substantial covering or fence. With slight modifications, the statute was incorporated in the Compiled Statutes of 1887 (section 255, fourth division) under the headnote, "Leaving open shaft or cut within twenty feet of highway." Substantially the same statute was brought into the Penal Code of 1895 (section 704), without title or headnote. The Sixth Legislative Assembly passed an act entitled:

"An act to amend section 704, in title X of part I, of the Penal Code of \* \* \* Montana, relating to exposed shafts, and providing a penalty for failure to inclose and protect the same." Laws 1899, p. 149.

This amendment extended the statute so as to prohibit such open shafts, cuts, and drifts within the limits of any city, town, or village, and increased the maximum punishment for its violation. Into the Revised Codes of 1907 the statute, as amended in 1899, was brought forward under the heading "Protecting Mining Shafts in City." Section 8535, above. In the acts of 1871, 1887, and 1895, certain mining and irrigating ditches were particularly excepted from the operation of the respective statutes. In the amendment of 1899, mining, irrigating, and other ditches, not more than ten feet deep, were excepted, and such is the state of the law to-day.

Counsel for appellant contends that, by excepting mining, irrigating, and other ditches not more than ten feet deep, the Legislature must have intended that a ditch of any character more than ten feet deep was intended to be included within the prohibited list. But this argument if given effect, would operate to extend a highly penal statute by implication merely, in violation of the

most elementary rule of statutory construction. In *re Wisner*, above; 36 Cyc. 1186.

"In order to enforce a penalty against a person, he must be brought clearly within both the spirit and letter of the statute." 36 Cyc. 1187.

In every one of the acts above mentioned, the only things prohibited are sinking a shaft or running a drift or cut. When the statute was first enacted, each of these terms had, and ever since has had, a well-defined and generally understood meaning. Each referred to an operation in mining, and to nothing else; at all times each has been a strictly mining term. In its broad significance, the word "cut" may have a meaning other than that employed in mining; but when used in conjunction with "shaft" and "drift" it means a surface opening in the ground intersecting a vein. "Copulatio verborum indicat acceptationem in eodem sensu." Our conclusion, from the history of section 8535 and the prohibitive language employed, is that it was never intended to apply to a ditch or trench temporarily opened for the purpose of laying sewer pipe.

[4] *Liability under City Ordinance.* At the time this accident occurred there was in force an ordinance of the city of Butte (No. 218) which declared it to be unlawful "for any person or persons, company or corporation to permit or allow any shaft, drift, prospect hole or other excavation owned or controlled by them or it to remain open and unguarded by a proper covering of two-inch planks or a suitable fence at least four feet high and substantially constructed within the limit of the city of Butte, unless the same is properly guarded or patrolled by one or more persons "during the entire day and night." A fine of \$100 might be imposed for a violation of this ordinance.

It is very clear that the sewer trench in question cannot be classified as a "shaft," "drift," or "prospect hole." Each of those terms has a well-defined and generally understood meaning in this state, and particularly in Butte, where mining is the principal industry. But it is insisted that the terms "or other excavation" are sufficiently broad to include the trench in question. If the prohibition of the ordinance was directed against any excavation being left unguarded, appellant's contention would prevail. But since the words "or other excavation" follow immediately after the specific enumeration "shafts," "drifts," "prospect holes," the rule of statutory construction exemplified by the expression "ejusdem generis," or "noscitur a sociis," requires the word "excavation" to be employed to mean some other opening in the ground of the same class of shafts, drifts, and prospect holes. As applied to the ordinance in question, the rule requires the conclusion that it was the intention of the city council of Butte to use the terms "other excavation" as meaning, and to refer to, some other excavation made in the course of prospecting or active min-

ing. *City of Kalispell v. School District*, 45 Mont. 221, 122 Pac. 742, Ann. Cas. 1913D, 1101; *Helena L. & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446. The record fails to disclose liability on the part of these respondents arising from any supposed violation of Ordinance 218.

[5] *Common-Law Liability.* Because of the extreme meagerness of this record and the absence thereof of material facts which it is apparent could have been proved, we are required to treat this appellant, in the first instance, as a technical trespasser at the time of the accident and determine her rights, if any she has, accordingly. In the absence of any evidence as to the ownership of the Dan Martin house, and the other houses in that neighborhood accommodated by the path or roadway leading north from Anaconda Road, no inference of wrongful occupancy can be drawn. Martin's occupancy must be treated as rightful for the purpose of this case, if that is a material fact. *Bourke v. Butte El. Ry. Co.*, 33 Mont. 267, 83 Pac. 470.

[6-11] The rule at common law imposed upon the landowner the duty only to refrain from any intentional or wanton acts occasioning injury to a trespasser upon his property. *Egan v. Mont. C. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 28. The exceptions to that rule are not material here. Since these defendants were in possession of the land at the place of injury and had an easement in the property, they are to be treated as the owners for the purposes of these appeals. That wantonness may be shown by acts of omission as well as by acts of commission, where the facts disclose a reckless disregard of the lives or safety of others, is a rule of law now generally recognized and was referred to approvingly by this court in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373. There cannot be any rigid standard by which to determine whether wantonness in a given instance has been shown. Every case must depend upon its own peculiar facts and circumstances. It is the rule, repeated so often that it may fairly be said to have become axiomatic in the law of this state, that, on appeal from a judgment rendered on a nonsuit, this court will consider the evidence in the view most favorable to the plaintiff and treat every fact as proved which the evidence tends to prove. Tested by that rule, the evidence discloses that the path or roadway, where the accident happened, was so plainly marked on the ground and had been subjected to such general and notorious use, and for such length of time, that the defendants knew of its existence and use, or, what amounts to the same thing, will be held chargeable with that knowledge. The facts, then, disclose uninclosed lands over which the public (that is, the people of a considerable community or neighborhood) had been accustomed to pass for several years, until a well-defined path or

roadway had become plainly marked upon the ground, and the owners of that ground excavating a dangerous trench into or across such path or roadway, and leaving the same uncovered, unguarded, and unprotected for two or three weeks, without warning or notice of any kind or character, and with the knowledge that people accustomed to use the path or roadway might reasonably be expected to use it under such circumstances that injury to them would result. If this does not make out a prima facie case of reckless disregard of the lives and safety of others, then it would be difficult to imagine a state of circumstances which would do so. The authorities bearing upon this subject, and cases presenting similar facts and declaring liability under them, are 29 Cyc. 470; Wharton on Negligence, § 849; Morrow v. Sweeney, 10 Ind. App. 626, 38 N. E. 187; Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727; Penso v. McCormick, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211; Connally v. Woods, 39 Okl. 186, 134 Pac. 869.

From the admitted facts, the evidence of plaintiff, and the fair inferences to be drawn therefrom, we conclude that a prima facie case, based upon the defendants' common-law liability, was made out, and that the trial court erred in sustaining the motion for nonsuit.

In what has preceded we have treated the plaintiff as a technical trespasser. It is an open question whether she was not shown to be a licensee (Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559), or present at the place of danger by the implied invitation of the defendants (De Tarr v. Brewing Co., 62 Kan. 188, 61 Pac. 689).

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(50 Mont. 142)

# IN RE WILLIAMS' WILL

WILLIAMS v. DAVIS et al.

(No. 3435.)

[Supreme Court of Montana. Jan. 13, 1915.]

## I. NEW TRIAL (§ 157\*)—HEARING OF MOTION—AUTHORITY OF JUDGE.

Where a motion for new trial for insufficiency of the evidence is addressed to a judge who did not preside, he may reject testimony which, from the record, appears unworthy of belief, though he can only determine the preponderance of the evidence from the dead record, and the presumptions ordinarily invoked to sustain the action of the trial judge do not prevail.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 314, 317, 318; Dec. Dig. § 157.\*]

## 2. NEW TRIAL (§ 163\*)—MOTIONS—ORDER.

An order denying new trial, made by a judge who did not preside at the trial, is special in so far as it contained a recital that tes-

timony offered by the prevailing party was rejected.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. § 163.\*]

## 3. WILLS (§ 293\*)—GIFTS TO WITNESSES.

Rev. Codes, § 4732, declaring that gifts to subscribing witnesses are void, has no application to witnesses to the due execution of a will who did not subscribe thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

## 4. WILLS (§ 293\*)—WITNESSES—DISQUALIFICATION—"DEVISE"—"LEGACY"—"BENEFICIAL GIFT."

Under Rev. Codes, § 4732, declaring that all beneficiaries, devisees, legacies, and gifts made to any subscribing witness are void, the fact that a witness to the due execution of a will was named as an executor, and as such would receive compensation, does not disqualify him, for the compensation to be received is not a "legacy," "devise," or "beneficial gift."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

For other definitions, see Words and Phrases, First and Second Series, Devise; Legacy.]

## 5. WILLS (§ 293\*)—PROCEEDINGS TO PROBATE—WITNESSES.

Rev. Codes, § 7400, declares that, when a will is contested, all the subscribing witnesses present in the county must be produced and examined. One of the subscribing witnesses was present in the county, while the deposition of another, who was absent, was taken by the contestants. Held that, as the statute merely requires the testimony of the subscribing witnesses in the first instance, and one of them was absent, his deposition being used, one not a subscribing witness could testify to the due execution of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 666-672, 675-678; Dec. Dig. § 293.\*]

## 6. WILLS (§ 119\*)—EXECUTION—PUBLICATION.

Under Rev. Codes, § 4726, providing that the testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will, there is insufficient execution of a will where the testatrix did not inform the subscribing witnesses that the instrument which they signed was her will, and the paper was folded in such a manner that they did not see what the nature of the instrument was.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 805-313; Dec. Dig. § 119.\*]

## 7. WILLS (§ 303\*)—PROOF—PROBATE.

Where the testatrix did not acknowledge or declare to the other subscribing witness that the instrument was her will, the impeachment of one of the subscribing witnesses, who denied acknowledgment, does not warrant probate of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.\*]

## 8. WILLS (§ 119\*)—PUBLICATION—SUFFICIENCY.

Where an instrument was folded so that the subscribing witnesses could not read it or see the attestation clause, the recitals in the attestation clause do not show a valid execution of the instrument as a will, as against the testimony of the subscribing witnesses that there was no publication.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 305-313; Dec. Dig. § 119.\*]

## 9. APPEAL AND ERROR (§ 837\*)—REVIEW—MOTIONS FOR NEW TRIAL.

Where the court denying a motion for new trial disregarded some of the evidence of the

prevailing party, such evidence cannot on appeal be considered on the propriety of the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

**10. WILLS (§ 119\*)—PUBLICATION—SUFFICIENCY.**

That one of the subscribing witnesses knew the nature of the instrument does not show that there was a publication as to the other, necessary for the valid execution of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 306-313; Dec. Dig. § 119.\*]

**11. EVIDENCE (§ 123\*)—PROBATE—RES GESTÆ.**

In a proceeding for the probate of a will, evidence of statements by one of the subscribing witnesses, who testified that there was no publication, made directly after the execution, that testator had told him it was a will, not being part of the *res gestæ*, was not admissible on proponent's case in chief.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.\*]

**12. WITNESSES (§ 388\*)—CONTRADICTION.**

A witness cannot be impeached by his contradictory statements, when no foundation has been laid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

**13. TRIAL (§ 66\*)—REOPENING CASE—AUTHORITY OF TRIAL COURT.**

The trial court may, in its discretion, refuse to reopen the case and receive testimony impeaching a witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 156; Dec. Dig. § 66.\*]

**14. WILLS (§ 288\*)—PROBATE—BURDEN OF PROOF.**

As the contestant is bound, under Rev. Codes, § 7397, to file grounds for contest, and the proponent joins issue thereon, the contestant has the burden of proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664; Dec. Dig. § 288.\*]

**15. WITNESSES (§ 374\*)—IMPEACHMENT—BIAS.**

In a will contest case, the contestant's witness, who testified by deposition, may be impeached by a letter tending to show bias in favor of contestant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.\*]

Appeal from District Court, Silver Bow County; J. B. Polindexter, Judge.

Proceeding by Andrew J. Davis and another for the probate of the will of Rachel E. Williams, deceased, contested by Dorothy Alice Williams, by her guardian, Sibyl Scott. From a judgment admitting the instrument to probate, and from an order denying new trial, contestant appeals. Reversed and remanded.

J. E. Healy, of Butte, for appellant. George F. Shelton, E. N. Harwood, and Fred J. Furman, all of Butte, for respondents.

SANNER, J. Rachel E. Williams died on March 3, 1907, leaving an estate worth approximately \$100,000 and only one near relative, a granddaughter, then aged seven years, the appellant in this court. An instrument in writing, purporting to be the last will and testament of Mrs. Williams, was offered

by respondents for probate, by the terms of which the sum of \$500 is given to the appellant, \$1,000 to Mary Sullivan, a domestic, and all the balance of the estate to Andrew J. Davis, of Butte. Mr. Davis and Mr. Lyman M. Harley are named as executors. This instrument is not holographic, but, with the exception of the signatures and the places of residence of the attesting witnesses, it is entirely written in the handwriting of a distinguished attorney of Butte, who was not present at its execution. It occupies the whole of one and part of a second page. On the first page is the body of the instrument, the signature of Mrs. Williams, and the following part of the attesting clause: "The foregoing writing was signed, published and declared by Rachel E. Williams." On the second page is the remainder of the attesting clause in due form, the signature of Frank C. Norbeck, with his place of residence, and the signature of Warren A. Estabrook, with his place of residence.

The right to have this instrument received and regarded as the last will and testament of Mrs. Williams is contested by the appellant on several grounds, the chief of which is that Mrs. Williams did not declare to the attesting witnesses that it was her will, and that they were not requested by her to attest it as such. Trial was to the court, Hon. J. B. Polindexter judge presiding without a jury. Mr. Norbeck was not personally present or within the county, but his deposition, taken at the instance of appellant, was on file. So far as the question now involved is concerned, the respondents rested upon the attesting clause, the testimony of Mr. Estabrook, which was received without challenge, and the testimony of Mr. Harley, which was admitted over the vigorous contention of appellant that it was inadmissible because of his interest in the outcome and because both attesting witnesses were before the court. The deposition of Mr. Norbeck was then read into the record as part of appellant's contest, and it was agreed, to save repetition, that all the testimony given should be considered in the record for all purposes. Findings of fact and conclusions of law were filed in favor of the will, and a decree was entered admitting the same to probate. Notice of intention to move for a new trial was served and filed; and, Judge Polindexter having been disqualified, this motion was heard by Hon. R. Lee McCulloch as judge presiding. The motion was denied; the order expressly stating, however, that "the testimony of Lyman M. Harley has been disregarded." From this order, as well as from the judgment, the contestant has appealed.

[1, 2] It is advisable at the outset to determine the nature and effect of the order appealed from. In this connection counsel for respondents say:

"It will be presumed, we believe, that Judge McCulloch did not assume that it was his prov-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ince to reject evidence properly introduced and received at the trial before Judge Poindexter. If it was Judge McCulloch's opinion that the findings made by Judge Poindexter, who tried the contest, were fully sustained by the evidence, without considering the testimony of Mr. Harley, his expression of such opinion was entirely proper and is fully sustained by the record. But the insertion of such opinion in the order overruling the motion for a new trial was not proper."

The inference sought to be drawn is that the order is in effect a general one, to be considered by this court as having been made upon all the evidence, including the testimony of Mr. Harley, if that testimony be necessary to an affirmance. To this we cannot assent. The order denying a new trial expressly disregards the testimony of Mr. Harley and excludes it from consideration. The order is, in effect, a special one, and must be reviewed by this court as such, unless the rejection of Harley's testimony was itself improper. The assumption that, because Judge McCulloch did not preside at the trial, he was powerless to reject the testimony of Mr. Harley is wholly unwarranted. It is quite true that, when a motion for new trial for insufficiency of the evidence is decided by a judge who did not preside at the trial, "he ought not to go further than to determine upon the dead record whether there is a decided preponderance of evidence against the verdict or decision," and the presumptions commonly invoked to sustain the trial judge in like circumstances do not apply (*Gibson v. Morris State Bank*, 40 Mont. 60, 140 Pac. 76); but this does not mean that the reviewing judge is deprived of all judicial faculty in considering the record before him; he must still "determine upon the dead record" where the preponderance of evidence rests; he must still estimate, as best he can, the weight and sufficiency of the evidence as a whole and the value of its component parts, for his legal powers and duties in determining the motion are the same as those of the trial judge. That the trial judge, in passing upon a motion for new trial, can, in the exercise of a sound discretion, disregard any testimony which he deems unworthy is not open to doubt, and we can see no reason why a reviewing judge should not similarly determine whether any given evidence was improperly received or was so unsatisfactory in character that its want of value is patent on the printed page.

[3-5] We do not hold, however, that Harley's testimony was improperly received, and do not assume that Judge McCulloch so held. The contentions of appellant are that Harley was disqualified for interest under section 4732, Revised Codes; and that his testimony was inadmissible, at least when received, under section 7400, Revised Codes. Neither position is sound. Section 4732 has no application, for the reason that Harley was not a subscribing witness, was not put forward as one, and was not treated as such. While the

fees to accrue to the executor might well be called an interest, to be considered in weighing his testimony, they are, in the eye of the law, but compensation for services, and can in no sense be denominated a "legacy," or a "devise," or a "beneficial gift," within the meaning of section 4732. Section 7400 is sought to be applied on the theory that both attesting witnesses were "present in the county," for which reason, it is asserted, other testimony to prove due execution could not be received at all, and certainly not until after they had been called and examined. Where the attesting witnesses are present in the county, they must be called and examined, and this means, of course, that under such circumstances other testimony to prove the will cannot be received to the exclusion of theirs; but their testimony, when given, is not necessarily conclusive upon either party. *Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319. It was therefore the right of respondents to have the testimony of Harley at some stage of the proceeding and to have it on their preliminary proof, if they deemed it necessary to the establishment of a *prima facie* case. Norbeck, however, was not present, and his deposition did not make him so; he could not be "called and examined." The fact that the deposition could be used for probative purposes only, upon the condition that he was absent, ought to settle the question of his presence; and, since he was not present, his deposition, taken at the instance of the appellant, furnished no legal obstacle to respondents' right to supplement the testimony of Estabrook by that of Harley.

We are required to conclude, then, that Harley's testimony was disregarded by Judge McCulloch because he placed no credence in it; and the question is, not whether this estimate is correct, but whether, upon the cold record, it must be branded as a clear abuse of discretion. We do not think so. Without entering at large upon a discussion of this testimony, we express the view that many reasons of record combine to at least authorize, if they did not compel, the action of the reviewing judge. This being so, his order must be taken as it stands—an adjudication of the question of execution upon the evidence of the attesting witnesses alone.

[6] The substance of Mr. Estabrook's testimony is as follows: On January 21, 1907, he was asked by Mr. Harley to go that evening to the room of Mrs. Williams and witness a paper which he was given to understand was a will. He went to the room at the time appointed, entering with Mr. Norbeck and Mr. Harley. There Mrs. Williams was found sitting at a small table, upon which were pens and ink. She had in her hands the instrument in question. He and Mr. Norbeck took seats at the table. Mrs. Williams opened the paper, wrote upon the first page of it, folded the first page back, and passed the

paper thus folded to Mr. Norbeck. She also proffered Mr. Norbeck the pen with which she had signed, but he declined it, preferring a fountain pen which he carried. Mr. Norbeck then placed upon the second page of the paper his name and place of residence and passed the paper to Mr. Estabrook. Mr. Estabrook asked Mr. Norbeck if he should sign in full, and Mr. Norbeck answered, "Yes," whereupon Mr. Estabrook put his name and place of residence upon the second page. At the time of doing so he saw, and may have glanced at but did not read, the declaration under which he wrote. He knew from Mr. Harley's previous intimation that he was signing as a witness to a will, but there was nothing said by Mrs. Williams. So far as he heard—and his hearing was good—neither "will" nor "testament" was mentioned at any time by her or by any one else in her presence, nor did she in any way request the witness to sign, other than by her passing the paper and pen. He thought, but would not swear, that there was some talk while he was signing. If there was, its purport did not reach him at the time. During this time Mr. Harley was present, but immediately afterwards retired for a very few minutes at Mrs. Williams' request to procure some wine.

Mr. Norbeck deposed:

"On January 21, 1907, Mr. Harley asked me to go to Mrs. Williams' room and witness a paper for her. I went in company with Mr. Harley and Mr. Estabrook. When we entered, she was sitting rather propped up in a large chair, with a small table at her side, on which were the papers. I went over to where she sat, and, to relieve the situation, remarked that she was looking very well, to which she replied, 'I have suffered so much you would be surprised how thin I am.' Mr. Estabrook and myself sat down at the table across from her on which were the papers. Mrs. Williams then asked Mr. Harley to go out and get us some wine, which he did. Mrs. Williams then wrote on one of the sheets of paper on the table and turned that sheet over, which exposed a second sheet, on which I signed. I did not see her signature, for the sheet she wrote on was turned back, covering the writing. I signed on the sheet which, as I remember, was fastened to the sheet she signed by a pin or fastener or otherwise. There was nothing said by Mrs. Williams or any one else about the nature of the contents of the paper, and I therefore did not ask any questions or attempt to investigate. I just signed my name in a perfunctory sort of way. I then passed the paper over to Estabrook, after which he signed the same. There were no other persons in the room when we signed, except Mrs. Williams, Estabrook, and myself. Mr. Harley did not come back with the wine until after Mrs. Williams had written on the paper and Estabrook and I had signed our names to it. When he arrived, we partook of a small glass of wine, and Estabrook and I left immediately thereafter."

Mr. Norbeck further deposed:

That nothing at all was said by Mrs. Williams while they were in the room, "except to order the wine and answer our comments about her health." "As I remember, Estabrook said nothing. My conversation was limited to remarks about her health. \* \* \* She made no signs or motions, except to write on the paper.

She did not give by words or signs, or at all, any statement or means of knowing the kind of paper that she had signed or we had signed." With regard to publishing and declaring or acknowledging the paper as her will and testament, "she did nothing and said nothing upon that subject." "I first learned and knew that I witnessed the paper purporting to be her will and testament at that time after her death. Mr. Will Scott of Helena came to Wallace, Idaho, where I was then living, and told me that I was a witness to her will. I did not see her after the 21st of January, 1907."

Taking this evidence at face value, the conclusion indicated is well established. Our statute (Civ. Code 1895, § 1723; Rev. Codes, § 4726) provides:

"The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will."

Compliance with this is essential. *Noyes' Estate*, 40 Mont. 178, 105 Pac. 1018; *In re Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; *Estate of Seaman*, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; *Gilbert v. Knox*, 52 N. Y. 125; *Brinckerhoof v. Remsen*, 8 Paige (N. Y.) 488; *Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *Bloren v. Nesler*, 77 N. J. Eq. 560, 78 Atl. 201; *Ludwig's Estate*, 79 Minn. 101, 81 N. W. 758; *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; *Foley's Will*, 76 Misc. Rep. 168, 136 N. Y. Supp. 933; *Reed et al. v. Watson et al.*, 27 Ind. 443. Such declaration, it is true, need not be in words. Where, for instance, the testator is rational, the will is read to and signed by him in the presence of witnesses, and they, in his presence and with his intelligent acquiescence, are requested by another to attest the same and do so, the requirements of the statute have been sufficiently met. *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935; *In re Beckett*, 103 N. Y. 167, 8 N. E. 506; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161. It is imperative, however, that the witnesses, at the time they attest, be informed in some way by the testator himself that the instrument he has subscribed is his will. Knowledge of this fact, derived from any other source or at any other time, will not suffice. *Gilbert v. Knox*, supra. Why this is so was explained in *Noyes' Estate*, 40 Mont. 178, 105 Pac. 1018, from which we quote:

"The right to make a testamentary disposition of property is not an inherent right; nor is it a right guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the Legislature, as expressed in the statute enacted on the subject. It can withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases. It may declare the rules which must be observed, touching the execution and authentication of the instruments necessary to indicate the testator's intention and make a compliance with them mandatory. \* \* \* The purpose of the formalities prescribed is to prevent simulated and fraudulent writings from being probated and used as genuine. While the application of the strict rule of construction may sometimes defeat

the intention of the testator as manifested by an imperfectly executed and authenticated writing, yet in the long run such statutes tend to promote justice, by lessening, so far as possible, the opportunity for fraud, which history and experience have demonstrated to be feasible and measurably safe in the absence of them. \* \* \* Since the right to make testamentary disposition is dependent upon the will of the Legislature, it is no hardship upon any one that the mode and formalities by which it may be effectively done are made mandatory by the same power. This rule of interpretation is recognized and applied by the courts generally, both in England and in this country, whether the particular formality involved refers to the place of the signature of the testator, or the fact that he signed or made acknowledgment in the presence of the witnesses, or that he made publication, or that the witnesses have properly signed in his presence, and in the presence of each other and at his request. All of these formalities stand as of equal importance, and all must be observed."

[7, 8] The conclusion which would be commended by the evidence of the attesting witnesses is challenged upon the grounds that one of them, Mr. Norbeck, has been successfully impeached, and that every requirement of the law is shown by the attesting clause as well as by the testimony of Mr. Harley to have been fully observed. The statute requires publication to both witnesses, and it surely cannot be supposed that such publication is established by showing that one of the witnesses is unworthy of belief. Assuming that Norbeck's testimony should be disregarded, notwithstanding its agreement in all essentials with that of Estabrook, the latter still stands unassailed, and its effect, if credited, is just as fatal to the respondents. *Noyes' Estate*, supra; *Bryant's Estate*, 163 App. Div. 890, 148 N. Y. Supp. 917; *Abbey v. Christy*, 49 Barb. (N. Y.) 278. In neither witness, however, is any motive to falsehood adequately shown; yet both assert that they did not read the attesting clause, and both agree that the paper, when passed to them, was folded over so that the part so important to this inquiry was hidden from their sight. It was physically possible for them to have turned the paper back, but such an act might well have seemed an impertinence to them. They were laymen; the paper was not theirs; they were not charged with the knowledge that the portion they saw and did not read, coupled with the portion they did not even see, constituted a complete attesting clause, or that the testatrix knew it to be such. Under such circumstances and against such testimony, the recitals are unavailing. *Brinckerhoof v. Ramsen*, supra; *Hitchler's Will*, 25 Misc. Rep. 365, 55 N. Y. Supp. 642; *Darnell v. Buzby*, 50 N. J. Eq. 725, 28 Atl. 676; *Woolley v. Woolley*, 95 N. Y. 231.

[9] Mr. Harley's testimony was in all respects singularly apt and complete. We need not pause to inquire under what circumstances the testimony of a person named as executor in an unnatural will ought to prevail over the evidence of both attesting witnesses, one of whom it was not even sought

to impeach. Suffice it to say that since the attesting witnesses, whether they speak directly or through the attesting clause, are open to contradiction, it is possible to prefer other testimony to theirs, and cases can be imagined in which this ought to be done, especially where there is a complete attesting clause. Obviously, however, any testimony to prevail must be accepted. Mr. Harley's testimony was not accepted but expressly disregarded; and the case, so far as this court is concerned, stands as though he had never spoken. His was the only evidence of record upon which the due execution of this will could possibly be asserted, and to deny a new trial, after its rejection, was wrong.

[10-13] A number of alleged errors of minor character are assigned on the part of both sides. Respondents complain, for instance, of the refusal to admit a conversation between Norbeck and Estabrook after they had left the room of Mrs. Williams, to the effect that Mrs. Williams had told Norbeck that the instrument in question was her will, and also of the refusal to receive the record of Norbeck's conviction for embezzlement. These are in no sense compensatory. The legal effect of the evidence is simply to impeach Norbeck, and not to establish any fact in issue. But, even if the court believed that Norbeck had knowledge, that fact would not establish a publication by the testatrix to both witnesses, as required by law, and, in view of what has been said, could be of no particular value to the respondents upon the merits of this proceeding. In view of a retrial, however, we say that there was no error in refusing to receive the conversation between Norbeck and Estabrook upon respondent's original case, because it was not part of the *res gestæ*, nor in refusing it in rebuttal as contradiction of Norbeck, because no foundation had been laid. As to the conviction, the offer of proof was not made at the trial but upon a motion to open the hearing after the court had taken the cause under advisement. It was entirely within the discretion of the court to refuse the offer at that time. *Cole v. Helena L. & Ry. Co.*, 49 Mont. 443, 143 Pac. 974.

[14, 15] The principal assignments of appellant have been disposed of by what is said above. The only ones of consequence remaining are those which complain because the burden of proof was put upon her, and the one relating to the admission of a letter from Norbeck to Estabrook. There was no error in either instance. Where the burden of proof lies in the contest of a will is not open to question in this state. The proponents must, under their petition, make formal preliminary proof of the due execution of the will, sufficient, but for the contest, to authorize probate; that is the door to any further proceedings, whether there be a contest or not. But the contest is not tried upon issues tendered by the petition for pro-

bate and joined by the plea of contestant; it is tried upon issues tendered by the contestant and joined by the answer of the proponents. Rev. Codes, § 7397. Upon the trial of these issues the contestant is necessarily the plaintiff and has the burden of proof. *Murphy's Estate*, 43 Mont. 353, 116 Pac. 1004, Ann. Cas. 1912C, 380; *Farleigh v. Kelley*, supra. Of *Norbeck's* letter it may be said: It was written after his deposition had been taken, and it detailed, with emphasis on some points by underscoring, the substance of his testimony. This neither contradicted Mr. *Norbeck* nor furnished any basis for imputing falsehood to him, but it tended to show a state of mind—partisanship or pride of opinion, perhaps—which, though not necessarily important, was proper to be considered in weighing his testimony.

The judgment and order appealed from are reversed, and the cause is remanded for retrial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(38 Nev. 117)

FAPP et al. v. McQUILLAN et al. (No. 1958.)  
(Supreme Court of Nevada. Dec. 31, 1914.)

1. REPLEVIN (§ 12\*)—ACTIONS—DEFENSES.

In an action in claim and delivery to recover possession of personalty, which defendants held as warehousemen, proof that whatever interest they had as such had been transferred to a corporation which succeeded to the business is a good defense.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 98-110; Dec. Dig. § 12.\*]

2. REPLEVIN (§ 22\*)—PARTIES—NECESSARY PARTIES.

In claim and delivery to recover personalty held by warehousemen, the successors to the business, as well as the one whom the warehousemen asserted was the owner, are necessary parties.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 122; Dec. Dig. § 22.\*]

Appeal from Fifth Judicial District Court; Mark A. Averill, Judge.

Action by Mrs. J. W. Fapp and husband against J. S. McQuillan and C. F. Wittenberg, copartners doing business as the Wittenberg Warehouse Company. From a judgment for plaintiffs, and an order denying new trial, defendants appeal. Reversed and remanded.

McIntosh & Cooke, of Tonopah, for appellants. D. S. Truman, of Goldfield, Nev., and J. A. Sanders, of Tonopah, for respondents.

NORCROSS, J. This was an action in claim and delivery of personal property to

recover possession of certain mining machinery alleged to be the property of the plaintiff Mrs. J. W. Fapp, and wrongfully detained by respondents. Judgment was for the plaintiffs. From the judgment and from an order denying a motion for a new trial, defendants have appealed.

[1] The answer denied that the defendants, appellants herein, were copartners as alleged in the complaint or were such copartners subsequent to the 13th day of September, 1907. The answer further denied that plaintiffs, or either of them, were owners of or entitled to the property in question. The answer further alleged that the property in question, at the time of filing the complaint, and for a long time prior thereto, was and now is the property of one F. E. Attux; that prior to the time of filing the suit the defendants transferred all of their interests as copartners to a corporation, duly formed under the laws of the state of Nevada, and named the Wittenberg Warehouse & Transfer Company, which said corporation at the time of bringing the action was and ever since has been in the actual possession of said property.

It appears from the record that respondents contended at the trial that the said Attux, having or claiming to have an interest in the property as owner thereof, and the said corporation, Wittenberg Warehouse & Transfer Company, should be made parties and be brought into the case. The court declined to make an order of this character. The evidence appears, without conflict, to show that whatever interest the defendants had in the property as warehousemen was, prior to the institution of the action, transferred to the Wittenberg Warehouse & Transfer Company, a corporation. Upon this showing judgment should have been for the defendants. *Gardner v. Brown*, 22 Nev. 158, 37 Pac. 240.

[2] We think it also clear that F. E. Attux and the Wittenberg Warehouse & Transfer Company were necessary parties to the proceeding. *Robinson v. Kind*, 23 Nev. 330, 338, 47 Pac. 1, 977.

A number of other questions have been argued in the briefs which are unnecessary now to determine.

The judgment and order are reversed, and the cause remanded.

TALBOT, J., concurs.

McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(33 Wash. 638)

**RICHARDSON et al. v. CITY OF OLYMPIA.**  
(No. 12342.)

(Supreme Court of Washington. Jan. 25, 1915.)

**MUNICIPAL CORPORATIONS (§ 324\*)—PUBLIC IMPROVEMENTS — PROCEEDINGS — COLLATERAL ATTACK.**

Under Laws 1909, p. 569, providing for the improvement of shore lands whenever the city council shall deem it necessary on account of the public health, sanitation, general welfare, or other causes, and making the provisions of the act for levying and collecting assessments for public improvements applicable to the proceedings under that statute, and Laws 1905, p. 281, which precludes a collateral attack upon local assessments except for fraud, the determination of the city council that it was necessary to fill in certain shore lands cannot be collaterally attacked by a suit to quiet the title against the lien for the assessments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 847-849; Dec. Dig. § 324.\*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Consolidated actions by H. G. Richardson and wife and Frank C. Owings against the City of Olympia. Judgments for the defendant, and plaintiffs appeal. Affirmed.

Frank C. Owings and Troy & Sturdevant, all of Olympia, and Tucker & Hyland, of Seattle, for appellants. Geo. R. Bigelow, of Olympia, and Peters & Powell, of Seattle, for respondent.

**HOLCOMB, J.** Appellants are the owners of certain property within alleged assessment districts created by the respondent city. The lands owned by the appellants Richardson were entirely covered with water at flood tide and practically bare at low tide. A portion of the lands of appellant Owings, consisting of two lots, was in the same condition, while the remainder of the lots were above the line of ordinary high tide, but on extraordinary tides at rare intervals this remainder was also covered by water. Respondent city, purporting to act under the authority of chapter 147, p. 569, Laws 1909 (Rem. & Bal. Code, § 7971 et seq.), created two assessment districts for the purpose of filling in these properties, together with a large amount of surrounding and contiguous land. The city proceeded regularly to make the assessments, passed its resolutions of intention to improve, and its ordinances creating the districts, fixed the time for the hearing of protests, and gave notice of such hearing, let its contract to a dredging company, and, after the completion of the work, assessed the entire cost of the alleged improvements upon all of the lots and blocks situated in the respective districts. After this had been done, but before any of the installments of said assessment had matured, appellants brought separate suits against the city to quiet their title to, and to remove the cloud occasioned

by said assessments from, their respective properties. Respondent answered the complaint, setting forth in detail the steps taken by the city to perfect its liens under said assessments. Appellants replied, denying the validity of the assessments. On stipulation of the parties, the two causes were consolidated for the purposes of trial. At the trial respondent and appellants stipulated as to the record facts of the assessment, and appellants produced the testimony of two doctors, of long residence in Olympia and of long familiarity with the lands in question, to the effect that no unsanitary conditions existed in or about the properties of appellants prior to the fills, and in fact anywhere along the water front of the city where the fills were made, and that there had been no epidemics along the water front not common to the city as a whole. This testimony was uncontroverted. The lower court gave judgment for respondent, and directed a dismissal of both actions. Such judgment was duly entered in both actions, and each appellant gave separate notice of appeal and filed a separate cost bond on appeal. Thereafter, by stipulation between the parties, said causes were consolidated on appeal so as to have but one transcript, one statement of facts, one set of briefs, and one oral argument.

There is no dispute as to the facts. The questions presented are purely questions of law. Appellants assign as error: (1) The court erred in entering its judgment of dismissal. (2) The court erred in not entering judgment in favor of appellants, quieting title in them as against the pretended lien of such special assessment and removing the cloud upon their titles thereby created.

Appellants concede in their brief that:

"For the purpose of this appeal, the court may assume that all of the record proceedings before the city council were regular."

This being so, the question before the court for determination is the jurisdiction of the council to make assessments. In both cases exactly the same questions arise. Appellants made no appearance before the city council, so that if the council had jurisdiction, the judgment of the lower court must be affirmed.

Chapter 147, p. 569, Laws 1909 (Rem. & Bal. Code, § 7971 et seq.), provides for the improvement of low lands in all cities of the second and third classes in this state, "when-ever the city council \* \* \* shall deem it necessary or expedient on account of the public health, sanitation, general welfare, or other cause." This act has been before this court for interpretation and construction on two occasions: *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214. In the *Aberdeen Case* the constitutionality of the act of 1909 was attacked, and was upheld in the decision upon the ground that it was within the police power of the state to allow cities to fill low land where unsanitary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conditions exist and the same constitute a menace to the public health. In the Olympia Case the validity of local improvements ordinances such as the ones under consideration was upheld. The appellants contend it is clear from the reasoning in the foregoing cases that, if the statute attempts to confer this power upon such cities where no unsanitary conditions exist, the same is unconstitutional. They further contend that the testimony of the physicians in the instant cases, being uncontroverted, establishes beyond question the facts so testified to, and therefore that the conditions which would have authorized the council to provide for the improvements involved herein did not exist.

The statute of 1909, referred to, in section 8 makes all existing provisions of the act for the levying and collecting of assessments for public improvements applicable to the proceeding under this statute. The act of 1905, c. 150, p. 281, entitled "An act to validate assessments made, or which may be made, to pay for local improvements, by an incorporated city in this state, and to prohibit the setting of such assessments aside or declaring the same invalid upon any ground other than upon the ground of fraud," is probably applicable to these proceedings. This court, construing that act in *Real Estate Investment Co. v. Spokane*, 59 Wash. 416, 109 Pac. 1057, held that this act in effect precluded all collateral attacks upon local assessments save on the ground of fraud. In the record put in by the respondents it appears by the ordinance that the city did find that the facts exist, with reference to that portion of the city of Olympia justifying the improvements in question. It is a well-established principle that the question of the necessity of improvements in the nature of public improvements is, in the first instance, a legislative question to be determined by the legislative body, and does not become a judicial question except when the method pursued is irregular and subjects the body to judicial investigation, or when the proceedings are based upon fraud. On collateral attack it will be conclusively presumed that the city council found the existence of the conditions justifying the improvement, and that such findings were correct. *Tumwater v. Pix*, 18 Wash. 157, 51 Pac. 353; *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241.

The contention of appellants here is, not that the city of Olympia did not have power to fill these tide lands as a sanitary measure, but that, having this power, the occasion which justified it did not arise, because it was not necessary or expedient from a sanitary standpoint. Whether such condition of expediency and necessity existed, however, was one of the things that the council was required to determine in the first instance. Under the act the council had authority to

determine these matters, and furthermore it was its duty so to do.

"If power exists, the question whether the public improvement is necessary or expedient is considered a legislative one, and is for the determination of the municipal legislative body, and the courts will not review their decision in this regard." *McQuillin, Mun. Corp.* vol. 4, p. 4289; *Camden v. Mulford*, 26 N. J. Law, 49.

"\* \* \* Courts will not inquire into the motives of legislators where they possess the power to do the act and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them." 2 *McQuillin, Mun. Corp.* § 703; *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647; *Abbott, Mun. Corporations*, vol. 1, p. 283.

Finding no error, the judgments are affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and PARKER, JJ., concur.

(33 Wash. 648)

BROWN BROS. LUMBER CO. v. PRESTON MILL CO. (No. 12168.)

(Supreme Court of Washington. Jan. 28, 1915.)

1. VENDOR AND PURCHASER (§ 25\*) — CONTRACTS—DELIVERY.

Where an agent for the vendor handed to the purchaser for his examination a copy of the contract for the purchase of the land, executed by the vendor, together with the abstract of title and other papers to be executed by the purchaser, there was no delivery of the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 30; Dec. Dig. § 25.\*]

2. CONTRACTS (§ 45\*)—DELIVERY—PRESUMPTIONS.

The presumption of delivery arising from possession of an instrument is less strong when applied to an executory contract than when applied to a deed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 169, 191, 205, 213, 214; Dec. Dig. § 45.\*]

3. VENDOR AND PURCHASER (§ 25\*) — CONTRACTS—DELIVERY—INTENTION.

The acts of the parties to a contract for the purchase of land should be construed according to practical business rules in determining whether there was an intention to deliver the contract without which intention there is no delivery.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 30; Dec. Dig. § 25.\*]

4. VENDOR AND PURCHASER (§ 16\*) — CONTRACTS—ESTOPPEL.

Where a vendor gave the purchaser a reasonable time to comply with its offer for the sale of the land, and then withdrew the offer, it is not estopped from refusing to carry out the contract because the purchaser, with the vendor's knowledge, had bought a tract of land to enable him to accept the offer.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

5. VENDOR AND PURCHASER (§ 16\*) — CONTRACTS—EVIDENCE—ACCEPTANCE OF OFFER.

Where a vendor's agent, in making an offer for the sale of land, stated that the deal ought to be closed within a month, but the purchaser

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had to acquire the interest of another in land to be given in exchange, and was given more than three months' time to acquire such interest, and then was given one week's notice that the offer would be withdrawn, after he had stated that he would be ready to close the deal within a week, the purchaser had a reasonable time within which to accept the offer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the Brown Bros. Lumber Company against the Preston Mill Company to quiet title, in which defendant asked for specific performance of a contract for the purchase of the land. Decree for defendant, and plaintiff appeals. Reversed, with directions to enter decree for plaintiff.

Alexander & Bundy, of Seattle, for appellant. Corwin S. Shank and H. C. Belt, both of Seattle, for respondent.

CHADWICK, J. The plaintiff, a Wisconsin corporation, commenced this action to quiet title. The defendant answered, alleging facts which it thought entitled it to specific performance, and prayed for that relief. The court entered a decree granting the relief asked by the defendant. Plaintiff has appealed.

The admitted facts are these: On the 21st day of August, 1911, Charles J. Erickson and August Lovegren, with their wives, were the owners of certain land in Mason county. Erickson was the president of the respondent corporation. At the same time the appellant owned certain timber and easements for its removal from the land in King county situated near the respondent's plant, upon which it owed the sum of \$4,750 to the owners of the land on which the timber stood. The appellant was also under obligation to pay the taxes assessed against the land and timber until 1920. One R. D. Brown, who resided in Seattle, was its local agent. On August 18, 1911, Brown wired the appellant: "Preston offers eighteen, eight cash, balance five per year. Answer"—meaning that the respondent offered to pay \$18,000 for the King county timber, \$8,000 cash, balance \$5,000 per year. The offer also included, although not expressed in the telegram, the Mason county land then owned by Erickson and Lovegren. On the same day the appellant wired Brown: "Accept Preston offer, eight cash, balance five per year. Will forward papers"—and wrote Brown a letter confirming its telegram, and inclosing an abstract of the King county land, duplicate originals of contract for a deed to the respondent of the timber both of which it had executed, two notes for the signature of the respondent, and duplicate originals of deed to the respondent, one of which it had executed and acknowledged. It advised Brown:

"We also think it necessary that we should have an indemnity bond \* \* \* for at least \$5,000" to secure the payments to become due to the owner of the land. "If papers are O. K. please turn over to Preston Mill Company one copy of the contract for deed which is executed, and one copy of the deed itself which is not executed. All other papers to be returned to us."

By the terms of the contract the appellant agreed to sell the timber and easements to the respondent for \$18,000, \$8,000 cash, \$5,000 payable in one year, and \$5,000 payable in two years, the deferred payments to bear interest at the rate of 7 per cent. per annum interest, payable annually, and to be evidenced by two promissory notes to be signed by the respondent, payable to the order of the appellant at the Merchants' State Bank of Rhinelander, Wis. The contract further provided that the respondent should pay all taxes levied against the land and timber, beginning with the year 1911, and make all payments to become due from the appellant to the owner of the land, aggregating about \$4,750.

The appellant's agent, Brown, testified that on or about September 1st he delivered to Erickson, as the president of the respondent, for examination, one copy of the contract which had been executed by the appellant, and a copy of the deed, two promissory notes for the signature of the respondent, and the appellant's letter of instructions of date August 21st. He further testified that on the 24th day of August he learned that Lovegren had an interest in the Mason county land. He said Erickson said that it might take a month to get title from Lovegren, and that he told Erickson the appellant was "very anxious" to have the deal closed as soon as possible, and that "I did not think the negotiations ought to go over a month." On September 7th the appellant wrote Brown, inquiring, "How about the Preston Mill Company deal? Is it going through this time or are they refusing to close?" On September 21st it again wrote Brown: "What, if any, information can you give us regarding the Preston Mill Company deal? Did they refuse to close?" On September 24th Brown wrote the appellant that he had received and forwarded the abstract of the Mason county land to have it brought to date, saying, in addition: "This Preston deal has been dragging in bad shape." On October 12th Brown wrote the appellant that Erickson had not bought Lovegren's interest in the Mason county timber; that, in order to close the trade, the respondent would have to pay Lovegren \$7,000 therefor; that he had had the abstract examined, and found the title good; and that he had "been pushing them to come to some settlement." He further advised that Erickson had made him an offer that morning of \$28,000 cash for the timber. On October 17th the appellant wrote Brown acknowledging his letter of the 12th inst.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and directing him to have the King county timber cruised. On October 20th it again wrote Brown, to the effect that it was awaiting "with considerable interest" the result of the cruise on the King county timber. On November 3d Brown wrote the appellant:

"Erickson was in again to-day, saying he had a definite answer from Lovegren to-day saying he would neither buy nor sell the Mason county lands. He says that he is going down to Oregon Monday to thresh it out with him. This means a long delay and possibly legal difficulties before this deal goes through. In the meantime I expect to have the boys' cruise on it by the first of this next week."

On November 13th Brown wrote the appellant, inclosing a summary of the cruise of the King county timber, stating that it ran over 100 per cent. higher than he had estimated, and that:

"Friday afternoon [about November 10th] Mr. Erickson was in and stated that the deed was on the way to Lovegren's wife to sign; that we ought to be able to close up this week."

He further advised in this letter that he intended to inform Erickson that if the deal was not closed by the 20th he would decline to close it at all. His testimony shows that on that date he left a note to that effect in Erickson's office, and that he advised him to the same effect verbally the next day. On November 17th the appellant wired Brown:

"Estimate received. Withdraw Preston timber from market until further advice."

On November 18th the appellant wrote Brown, confirming its telegram of the 17th. It further advised him:

"Should the deal be closed before receiving this telegram, we of course would have to stand pat on the proposition."

On December 13th the respondent, through Erickson, its president, tendered the appellant \$8,000 in gold coin, two promissory notes executed by the respondent conformably to the contract, and a deed from Erickson and wife to the Mason county timber, and demanded that the appellant comply with the terms of the contract upon its part. Upon the same day it signed the duplicate contract and filed it for record in King county.

Mr. Erickson admitted upon the witness stand that Brown had notified him, on or about the 14th of November, that the deal had to be closed by November 20th. He says he did not remember the precise date, but that it may have been about November 14th. It appears that, about the 10th of November, Erickson received a deed from Lovegren, but that it had not been signed by Lovegren's wife. He thereupon returned it for her signature, and it was returned to him with her signature about the 1st of December. The Lovegrens lived in Oregon about 40 miles southwest of Portland. There is nothing in the record to indicate any real cause for the delay, unless it was because Lovegren did not want to sell, or Erickson was not willing to pay him the price he demanded. Erickson admits that Brown was continually hurrying him to close the trade. He does not deny

that he told Brown, about the 3d day of November, that he had received a definite answer from Lovegren, saying that he would neither buy nor sell the Mason county land. Nor does he deny that Brown told him, on the 24th day of August, that the deal ought to be closed within a month. Neither does he deny that, about the 10th day of November, he told Brown that the deed was on the way to Lovegren's wife, and that "we ought to be able to close up this week."

Brown further testified that, on the 20th of November, at the request of Erickson, he went with him to the office of Erickson's attorney and that while there he (Brown) took from the office of such attorney one copy of the contract, the copy of the deed, the two notes, the abstract of title to the King county timber, and his letter of instructions, and that Erickson refused to deliver one copy of the contract. At the time of the trial Brown was in possession of all the papers, except the one copy of the contract. Erickson says that he delivered the abstract of title to Brown after he made the tender on December 13th. In obedience to the appellant's direction, Brown had the timber cruised, and the cruising was completed about November 10th. The cruise disclosed that the land contained much more timber than the appellant had theretofore estimated.

[1] The court found as a fact that Brown delivered the contract to the respondent, and concluded, as a matter of law, that the appellant was estopped from calling off the deal. There is nothing in the record to support the finding that the contract was delivered. Brown testified that he handed it, with the other papers, with the exception of the executed deed, over to Erickson for examination. All the circumstances of the case support this testimony. Under the contract the appellant was to receive, in exchange for the timber, the Mason county land, valued at \$14,000, \$8,000 in cash, and two promissory notes for \$5,000 each. The respondent did not even make a tender of performance until the 13th day of December. It was then that it signed the notes and the duplicate contract and caused the contract to be recorded. The respondent did not know, at the time the papers were turned over to it, whether it could acquire the Lovegren interest in the Mason county land. It is obvious therefore, we think, that Brown did not intend to deliver the contract.

[2] On the question of delivery the respondent has cited *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946; and *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081. These cases announce the rule that the mere possession of an executed deed by the grantee is prima facie evidence of delivery, "which can be overthrown only by clear and convincing evidence." The rule of evidence is less stringent, however, as applied to execu-

tory contracts. 13 Cyc. 564; Hicks v. Goode, 12 Leigh (Va.) 493, 37 Am. Dec. 677; Dietz v. Farish, 79 N. Y. 520.

[3] The Dietz Case was quite similar to this. It was an action to compel a specific performance of a contract. The court said that the transaction was not an unusual one, and the court should construe the acts of the parties according to practical business rules. The same rule applies here, and, by construing the acts of the parties according to practical business rules, we have no doubt that there was no delivery of the contract. Whether there was a complete delivery depends upon the intention of the parties, and this intention must, of course, be ascertained from what was said and done, and from all the known attendant circumstances. Matson v. Johnson, 48 Wash. 256, 93 Pac. 824, 125 Am. St. Rep. 924.

[4, 5] The real question in this case is one of estoppel: Is the appellant estopped upon the facts stated from refusing to carry out its contract? Mr. Erickson testified that he told Brown before he received the papers that, if the bid was not going through, he did not want to buy Lovegren's interest. This Brown does not deny. The correspondence between Brown and his principal and his oral testimony both show that he knew, as early as August 24th, that Erickson would be required to acquire the Lovegren interest in order to carry out the transaction. It must not be forgotten, however, that he told Erickson that the deal ought to be closed within a month, and that Erickson told Brown on the 10th of November that he ought to be able to close the deal within a week. On the 13th day of November, Brown gave Erickson notice that the deal must be closed by the 20th. This, we think, under all the circumstances, was a reasonable time. Indeed, there is nothing in the record to indicate, as we have said, that with due diligence Erickson could not have acquired the Lovegren interest long prior to November 20th. Lovegren and his wife were living within 200 miles of the city of Seattle, where both Erickson and Brown resided. Erickson testified that there was nothing to delay closing the deal, except acquiring the Lovegren interest. He did not undertake to explain why the Lovegren interest could not have been acquired much sooner. The rule is:

"If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made." Minneapolis, etc., Ry. Co. v. Columbus, etc., Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376.

The most favorable view that can be taken for the respondent is that the appellant consented that it should have a reasonable time in which to acquire the Lovegren interest.

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634; Miller v. Rice, 133 Ill. 315, 24 N. E. 543.

In the Miller Case it was said that, where time is not in express terms made of the essence of the contract, its materiality may be implied upon a variety of circumstances, such as where the subject-matter of the contract is from its nature subject to considerable and frequent variations of price, or "where the object of the contract is a commercial enterprise."

The judgment is reversed, with directions to grant the relief prayed for in the complaint.

MORRIS, C. J., and CROW and PARKER, JJ., concur.

(83 Wash. 628)

MEEKER v. WADDLE et ux. (No. 12487.) (Supreme Court of Washington. Jan. 25, 1915.)

1. APPEAL AND ERROR (§ 272\*)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO FINDINGS—CONCLUSIONS.

Under Rem. & Bal. Code, § 383, providing that exceptions to the findings of fact or conclusions of law in a decision of a court or judge upon a cause tried without a jury may be taken either by stating to the judge when the decision is signed that the party excepts thereto, or by filing written exceptions within five days after the filing of the decision, or where the decision is signed subsequently to the hearing and in the absence of the party excepting within five days after service of a copy of the decision or of written notice of the filing thereof, exceptions to the findings and conclusions not taken within the time specified are insufficient to secure a review of the evidence upon which they are based in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.\*]

2. TRIAL (§ 405\*)—EXCEPTIONS TO FINDINGS—CONCLUSIONS.

Under Rem. & Bal. Code, § 383, where notice of the filing of findings of fact and conclusions of law is not served, exceptions may be taken within five days after the party acquires notice in any way.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 963-965, 967; Dec. Dig. § 405.\*]

3. APPEAL AND ERROR (§ 655\*)—RECORD—ABSTRACT AND STATEMENT OF FACTS.

The failure to properly except to the court's findings of fact and conclusions of law did not require the striking of the entire statement of facts and abstract of the record, where the sufficiency of the complaint to support any decree in plaintiff's favor was raised by demurrers and the sufficiency of the evidence in support thereof was raised by a motion for a nonsuit to the adverse rulings upon each of which exceptions were duly noted, and so much of the statement of facts as showed the testimony up to the motion for nonsuit was properly in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DECREE OF DISTRIBUTION—COLLATERAL ATTACK.

A decree of distribution by the superior court in probate, made after due notice and hearing, is entitled to the same weight as a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment in any court or proceeding, is of equal solemnity, and cannot be attacked or annulled in any collateral proceeding except for fraud.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 315\*)—  
DECREE OF DISTRIBUTION—COLLATERAL AT-  
TACK.**

A decree distributing a deceased wife's entire estate, including land purchased during coverture with the proceeds of a sale of her separate property, to the surviving husband, could not be set aside merely because the husband falsely represented that the land was community property, as whether land acquired during marriage is separate or community property is often a very intricate and mixed question of law and fact, while treating his representation as one of fact the decree merely rested on perjured testimony, which, in the absence of some other extrinsic and collateral fact entering into and constituting fraud in the transaction, will not invalidate a judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.**

Action by Ezra M. Meeker, executor of the last will of Eliza J. Meeker, deceased, and as sole devisee thereunder, against Robert W. Waddle and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with instructions.

Forney & Ponder, of Chehalis, and B. H. Rhodes, of Centralia, for appellants. Dy-spart & Ellsbury and C. D. Cunningham, all of Centralia, and J. H. Templeton, of Seattle, for respondent.

**HOLCOMB, J.** Plaintiff brought this action to set aside a decree of distribution, and to recover an interest which he claims in certain property as successor in interest to and heir at law of Abbie Waddle, the deceased wife of Robert W. Waddle, basing his claim on the supposition that the assets of her estate were separate and not community, whereas distribution thereof was made by the superior court, sitting in probate, as community property.

The respondent first moves the court to strike the appellants' statement of facts and abstract of record based thereon, and to refuse to consider for any purpose on this appeal the evidence embodied in said statement of facts and abstract of record based thereon, for the reason and because no exceptions were taken or reserved or entered to the findings of fact embodied in the decree. It appears from the transcript that no formal findings of fact and conclusions of law were made by the trial court. A simple decree, reciting the facts, was entered by the court. No exceptions to the findings were either noted by the court or filed in writing within five days after the entry of said decree, as required by section 383, Rem. & Bal. Code. It appears that the decision or decree was signed subsequently to the hearing of

the case, the hearing being completed on or about April 23, 1914, and the judgment being signed on June 22, 1914. It does not appear whether counsel for appellants were present when the judgment was signed, and had notice thereof, or not. They evidently had some notice thereof, however, for they gave notice of appeal from the judgment on August 25, 1914.

[1] It has been held by this court that, where exceptions to the findings of fact and conclusions of law are not taken within five days after their filing, they are insufficient to secure a review of the evidence upon which they are based in the appellate court. *Nat. Bank of Com. v. Seattle, etc., Works*, 15 Wash. 126, 45 Pac. 731.

[2] Under this section written exceptions to findings must be filed within five days after the notice of the decision. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *Irwin v. Olympia Waterworks*, 12 Wash. 112, 40 Pac. 637; *Ballard v. First National Bank*, 13 Wash. 670, 43 Pac. 938.

But when notice of the filing of the findings is not served, exceptions may be taken within five days after acquiring notice in any way. *Irwin v. Olympia Water Works*, supra; *Fisher v. Kirschberg*, 17 Wash. 290, 49 Pac. 488; *Mann v. Provident Life, etc., Co.*, 42 Wash. 581, 85 Pac. 56; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 309.

[3] It does not follow, however, that respondent's motion to strike the entire statement of facts and abstract of the record should be granted. The sufficiency of the complaint to support any decree in respondent's favor was raised by demurrers by the appellants, and the sufficiency of the evidence in support of respondent's complaint was raised by appellants, by a motion for nonsuit at the conclusion of respondent's evidence, to the adverse rulings upon each of which appellants' exceptions were duly noted. So much of the statement of facts, therefore, as shows the testimony up to respondent's motion for nonsuit is properly in the record, and has been properly certified, together with all the other facts. The abstract contains the pleadings and the judgment and a synopsis of the facts above alluded to. It being proper and necessary, therefore, to consider said portions of the record, the same will not be stricken, and the motion of respondent will be denied. We will approach the case, therefore, with a view: First, of determining whether or not the complaint stated a cause of action against the appellants; and, second, whether or not the facts produced at the trial by respondent entitled him to any recovery.

The complaint alleged, among other things:

"That on the 2d day of December, 1913, the last will and testament of Eliza J. Meeker, deceased, was duly admitted to probate in the superior court for King county, Wash., and that on said date the plaintiff herein was duly appointed and qualified as the executor of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

last will and testament of said Eliza J. Meeker, and ever since said date has been and now is the duly appointed, qualified, and acting executor of the last will and testament of Eliza J. Meeker, deceased, and that he is sole devisee thereunder.

"That on or about the 15th day of May, 1909, one Abbie Waddle died in Lewis county, Wash., leaving a large amount of real property and leaving surviving her Eliza J. Meeker, now deceased, and Robert W. Waddle, her husband, as her heirs at law and the only persons who were entitled to any share in said Abbie Waddle's estate.

"That thereafter and on or about the 1st day of June, 1909, the said Robert W. Waddle, defendant herein, filed a petition in the superior court of Lewis county, Wash., in probate, setting forth the fact that said Abbie Waddle died in Lewis county, Wash., on or about the 15th day of May, 1909, and stated under oath in said petition that said Robert W. Waddle was the widower of said Abbie Waddle, and that all of the property of which said Abbie Waddle died seised was community property, and that the same upon the said Abbie Waddle's death became the property absolutely of said Robert W. Waddle.

"That the said Robert W. Waddle was, on or about June 14, 1909, appointed as the administrator of the estate of said Abbie Waddle, deceased, and that on or about the 23d day of September, 1910, the said defendant Robert W. Waddle, as such administrator, filed in the office of the clerk of said court a purported final account in said estate, and also made application for an order of distribution therein, distributing the entire estate left by the said Abbie Waddle to the defendant Robert W. Waddle as his sole and separate estate; that in said final report and application for distribution the said Robert W. Waddle falsely and fraudulently represented to the court that said Abbie Waddle had died without leaving any heirs other than the defendant Robert W. Waddle, her surviving husband, and also falsely and fraudulently represented to the court that all of the property of which the said Abbie Waddle was seised at the time of her death was the community property of the said Abbie Waddle and the defendant Robert W. Waddle; that said final report and application for order of distribution came on for hearing in said court on the 2d day of November, 1910, and that on the false and fraudulent showing and testimony produced by the said defendant Robert W. Waddle, the said court on said date entered an order approving said final account and distributed all of the assets of which the said Abbie Waddle died seised to the said defendant Robert W. Waddle, to the exclusion of all other persons or heirs of said Abbie Waddle, said proceeding being in the superior court of Lewis county, Wash., entitled 'In the Matter of the Estate of Abbie Waddle, Deceased,' numbered 1072 in probate.

"That the defendant Robert W. Waddle and Abbie Waddle were married some time prior to the year 1894, the exact date being unknown to the plaintiff; that at said time Abbie Waddle, whose maiden name was Abbie Sumner, owned a farm situated near Tenino, Thurston county, Wash., which was her own separate and individual property; that thereafter, to wit, after said marriage, said Abbie Waddle, formerly Abbie Sumner, sold said property for the sum of \$9,700, and immediately thereafter invested the same money derived from the sale of said farm in certain described property, to wit [describing the same], which said property, together with any other property of which said Abbie Waddle died seised, was her sole and separate property and estate and in no wise community property.

"That said property was distributed to the said defendant Robert W. Waddle by reason of

his false and fraudulent representations, made to the court, and that the same was illegally and fraudulently obtained; that in truth and in fact said property should have been distributed as the separate property of the said Abbie Waddle, and the same would have been so distributed had not the said Robert W. Waddle falsely and fraudulently withheld from the court the true facts in regard to the ownership of said property by the said Abbie Waddle in her separate rights; that the said Eliza J. Meeker was the only heir at law of the said Abbie Waddle, said Abbie Waddle leaving surviving her no father or mother, or sister or brother, or child or children, other than the said Eliza J. Meeker, who was her sister; that said Robert W. Waddle was only entitled to one-half of said property and that the other one-half interest in and to said property was and is the property of the estate of Eliza J. Meeker, deceased; that this plaintiff has only within the last year discovered that the said defendant Robert W. Waddle had, by the aforesaid false and fraudulent representations, obtained a decree of distribution, distributing the entire estate of said Abbie Waddle to himself, and that the estate of Eliza J. Meeker had an interest therein; that said decree of distribution would not have been made except for the false and fraudulent representations of the said Robert W. Waddle, and except for the fraud perpetrated by said Waddle upon said court in withholding from the court the truth as to the ownership of said property, he, the said defendant, Robert W. Waddle, at all times knowing well that said property was the separate property of said Abbie Waddle, deceased.

"That plaintiff has been informed and alleges the facts to be that the said defendants have sold and transferred the following portions of said property [describing the same] and received the sum of \$6,200 for said last above described portions of said property, one-half of which said property or the proceeds thereof was and is the property of the estate of Eliza J. Meeker, deceased.

"That the defendants Robert W. Waddle and Estella J. Waddle, now are husband and wife, and that the said Estella J. Waddle has and is asserting an interest therein adverse to plaintiff.

"Wherefore plaintiff prays that the decree of distribution, entered in said estate of Abbie Waddle on or about November 2, 1910, in this court, be set aside and held for naught, and that plaintiff have judgment for an undivided one-half interest in and to said property of said estate or the proceeds thereof," etc.

The appellants demurred separately as to any cause of action attempted to be set out by the respondent in any capacity, either as executor or as devisee under the will of Eliza J. Meeker, on the ground, among others, that the action was barred by the statute of limitations, and that the facts stated were insufficient to constitute a cause of action. The demurrers were overruled and exception noted.

Upon the assumption that, upon going to trial, any defects or omissions in the complaint which might be cured by amendment are deemed amended to conform to the proofs, we will next notice the evidence introduced in behalf of respondent in support of his complaint. The files in probate in the estate of Abbie Waddle, deceased, in the said superior court, were admitted in evidence, whereby it appears that Abbie Waddle died in May, 1909, and the appellant immediately administered upon her estate, being appoint-



ed administrator June 14, 1909. Both the petition and inventory exhibit the land in controversy as community property. On November 2, 1910, a decree of distribution was entered, after due notice and hearing, awarding all of the property to the appellant Robert W. Waddle as community property. No exceptions were taken by any relative or heir of deceased. Respondent knew of the death of deceased, Abbie Waddle, within a day or two thereafter, but took no steps to assert his interest in her estate, and paid no attention to the administration thereof. Respondent testified that he first heard of the administration in the latter part of 1912, or early in 1913. Respondent's own wife had died on October 9, 1909. This action was brought December 10, 1913. The relief demanded is to set aside the decree of distribution entered November 2, 1910, in the probate proceedings, based upon the allegations that the decree was procured to be made and entered by means of false and fraudulent representations of appellant Waddle. There is nothing in the testimony in support of respondent's complaint that shows whether or not the appellant Waddle testified at the hearing on the final account and petition for distribution of the estate of Abbie Waddle. There is some testimony to the effect that Mr. Waddle stated to a neighbor that he was going to have Mrs. Waddle's estate probated, that afterwards he said he had the same probated in order to shut out some heirs, and that later he said it was the Meeker heirs he was going to shut out. The muniments of title to various tracts of land as shown by various deeds, and of the sale of the land mentioned in the complaint as having been sold by the defendants after being distributed to them, were produced in evidence. Appellant also testified, in behalf of respondent, that Abbie Waddle was his wife; that she died May 29, 1909; that they were married on July 6, 1892; that they lived north of Centralia and before that near Bucoda in Thurston county; that they sold the property in Thurston county for \$9,700.

[4] It has been repeatedly held by this court that a decree of distribution by the superior court in probate, made after due notice and hearing, is entitled to the same weight as a judgment in any court or proceeding, is of equal solemnity, and cannot be attacked or annulled in any collateral proceeding, except for fraud. In *re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990; *Alaska, etc., Co. v. Noyes*, 64 Wash. 673, 117 Pac. 492; *Krohn v. Hirsch*, 142 Pac. 647; *Bayer v. Bayer*, 145 Pac. 433, decided January 8, 1915; In *re Bell's Estate*, 70 Wash. 498, 127 Pac. 100. Unless, therefore, the decree of distribution in the Waddle estate, by the superior court of Lewis county sitting in probate, can be set aside on the ground that it was fraudulently obtained, it is invulnerable to such an attack as this.

[5] The only ground of fraud alleged or attempted to be proven by the respondent was that the appellant Robert W. Waddle falsely represented that the land in controversy was the community property of himself and his deceased wife, whereas in truth and in fact it was separate property, and the attempted showing of a declaration against interest on the part of Waddle that he was having the same probated in order to shut out heirs. As to the first proposition, the question of whether land acquired during the marriage of spouses is separate or community property is one which has often puzzled the courts, and is often a very intricate and mixed question of law and fact. A great deal of respondent's evidence and argument in this case went to the point that the land in controversy was in fact and in law the separate property of the deceased, Abbie Waddle, and should have been so determined by the court. That may be. It does not follow, however, that the decree of distribution must be set aside for that reason only. It presupposes that the court at the time of the determination in the probate matter was ill-advised either as to the law or as to the facts. Which are we now to say was the case? If he were wrongly advised as to the facts, then the case presented is merely one where the testimony upon which the decree rests was perjured. That does not avail the respondent, for the reason that decrees in a court of justice cannot be set aside on collateral attack, as being fraudulently obtained upon the sole ground that they were obtained upon perjured evidence, without some other extrinsic and collateral fact entering into and constituting fraud in the transaction. To hold otherwise would be to lead ultimately to bewildering and endless uncertainty and confusion. In *McDougall v. Walling*, 21 Wash. 478, on page 486, 58 Pac. 669, on page 671, 75 Am. St. Rep. 849, this court, per Reavis, J., said:

"Perjury is not specified in our statute as a distinctive ground for vacating a judgment. There must, at any rate, be connected with it such circumstances as will relieve the opposite party from all implication of want of diligence, and deceive him completely in the nature of the testimony."

See *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Graves v. Graves*, 132 Iowa, 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216, 10 Ann. Cas. 1104, and note thereto; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, and the case just decided by this court; *Bayer v. Bayer*, 145 Pac. 433, filed January 8, 1915.

In the last case cited the facts as to misrepresentation of the beneficiary of the probate proceedings were very similar to the facts in the case at bar. If decrees were to be set aside upon the mere ground that they were based upon perjured testimony, decrees might never become final, for the decree which held that a former decree was founded upon perjured testimony might itself later be attacked upon the ground that it was pro-



cured by perjured testimony, and so on ad infinitum. We are convinced, therefore, that there were not sufficient facts, either stated in the complaint or proven at the trial by respondent, to entitle respondent to recover, and that the judgment of nonsuit moved for by appellant should have been granted.

The judgment is therefore reversed, and the cause remanded, with instructions to dismiss the action.

MORRIS, CHADWICK, MOUNT, and PARKER, JJ., concur.

(83 Wash. 615)

**KING et ux. v. KING et ux.** (No. 12020.)  
(Supreme Court of Washington. Jan. 19, 1915.)

**1. APPEAL AND ERROR (§ 766\*)—BRIEFS—DEFECTS—EFFECT.**

Where respondents moved to dismiss the appeal because all references in appellants' brief were to the statement of facts, and not to the abstract, etc., and respondents themselves guilty of the same fault, the court will not dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3101, 3126; Dec. Dig. § 766.\*]

**2. APPEAL AND ERROR (§ 582\*)—BRIEFS—ABSTRACT—DEFECTS—EFFECT.**

Where appellants' abstract states the evidence in a clear, narrative form, with reasonable fullness, it is enough, and it is not ground for dismissal of the appeal that it does not quote it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2582, 2583; Dec. Dig. § 582.\*]

**3. APPEAL AND ERROR (§ 635\*)—BRIEF—ABSTRACT—INSTRUCTIONS.**

Where appellants' abstract contains only those instructions on which claims of error have been predicated, but it appears by respondent's supplemental abstract that the instructions complained of are in no way modified or controlled by those not set out, appellants' action is not ground for dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

**4. LANDLORD AND TENANT (§ 180\*)—EVICTION—ACTION—SUFFICIENCY OF EVIDENCE.**

Evidence in a tenant's action for eviction and conversion of personalty *held* sufficient as to the facts of eviction and conversion to go to the jury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.\*]

**5. LANDLORD AND TENANT (§ 48\*)—TOTAL BREACH—MEASURE OF DAMAGES.**

The measure of a lessee's damages for total breach of his lease is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved for such time.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 114-116; Dec. Dig. § 48.\*]

**6. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

An instruction in a tenant's action for eviction that his measure of damages was the value of the use of the premises for the time, subsequent to the eviction, for which rent had been paid, while abstractly erroneous, in that the true measure of damages, of which there was no

evidence, was the difference between the market rental value for the entire unexpired term and the rent reserved therefor, was not prejudicial to the landlord.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**7. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.**

In a tenant's action for eviction, in which the landlord pleaded, both as a defense and a counterclaim, that the tenant had attempted to burn the property, an instruction that there was no evidence that a certain person set fire to the premises, or that he was plaintiff's agent, and that there could be no recovery on the counterclaim, was erroneous, as eliminating the affirmative defense, even if correct as to the counterclaim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 417; Dec. Dig. § 253.\*]

**8. TRIAL (§ 143\*)—INSTRUCTIONS—QUESTION FOR JURY.**

An instruction is erroneous which takes from the jury a question whereon there was competent evidence as to which reasonable men might differ.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 250-263; Dec. Dig. § 143.\*]

**9. LANDLORD AND TENANT (§ 180\*)—EVICTION—ACTION BY TENANT—EVIDENCE.**

Evidence in a tenant's action for eviction *held* sufficient to sustain a finding that fire had been set to the demised premises by plaintiffs or their agent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.\*]

Department 2. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by Charles D. King and Frances A. King against George F. King and Angie King for damages for wrongful eviction from leased premises and for conversion of personal property. From a judgment against them for \$750, defendants appeal. Reversed and remanded.

George B. Holden and Englehart & Rigg, all of North Yakima, for appellants. Snively & Bounds, of North Yakima, for respondents.

ELLIS, J. This is an action for damages for wrongful eviction from leased premises and for conversion of personal property.

On December 4, 1912, the defendants by written lease demised to the plaintiffs for a term of two years the second floor and the south room of the first floor of a two-story frame building in Toppenish, Wash., known as the "King Rooming House," at a rental of \$60 per month. At the same time the defendants leased and agreed to sell to plaintiffs the furniture and household goods contained in the upstairs for \$900, plaintiffs paying \$450 down, and agreeing to pay the balance in two equal installments, as evidenced by two promissory notes for \$225 each, due in 6 and 12 months, respectively. By the second lease and contract of sale the defendants agreed to execute and deliver to plaintiffs a bill of sale of the furniture upon final payment of the deferred installments and interest. Under these leases the plaintiffs occu-

pled the premises and were in possession of the furniture from December 5, 1912, to April 13, 1913. There was a conflict of evidence as to whether the rent had been paid to April 24 or to May 4, 1913.

Early in the morning of April 13, 1913, a fire was discovered in three inner and adjoining rooms on the second floor. It was of incendiary origin. Holes had been cut in the partition walls and skylights of the rooms. The furniture had been piled on the beds. Coal oil had been poured about each of the rooms, and the bed clothes were saturated with oil. Cans of oil were standing in each room. There were two roomers, Britt and Root, in the house at the time of the fire.

On April 13, 1913, defendant George King caused the arrest of plaintiff Charles King and the man Root, charging them with setting fire to the building. At the time of the fire the plaintiff, Charles King, was visiting with a friend about three miles out of the city, having left the house in Root's charge about 6:30 o'clock on the prior afternoon. His wife was in Walla Walla, where she had gone on a visit about ten days previously. There was evidence that previous to going she had stated to a friend that she expected trouble, and she seemed depressed. Before the fire her husband sent her fur coat to her. One of the defendants' witnesses testified to seeing valuable silverware and linens in a trunk in one of the rooms. These articles were not in the trunk at the time of the fire. The three rooms in which the fire occurred were securely locked, and the only persons permitted to enter them were the plaintiffs and the man Root. The other roomer, Britt, heard no sounds after retiring about midnight until the time of the fire. A hatchet was discovered in an old shed on the premises having particles of plaster adhering to it of the same tint as that of the walls of the rooms. An apron belonging to the plaintiff Frances A. King was discovered in the kitchen. In a pocket of this were similar particles of plaster. She explained that they must have fallen into her pocket when she was cleaning up after certain repairs to the plastering in the hallway. The plaintiffs carried insurance on the furniture in the amount of \$1,000. The defendants carried no insurance on either the building or its contents. Plaintiff and Root remained in custody until April 23, 1913, when, on preliminary examination, they were discharged, and have been at liberty ever since.

There is no direct evidence as to the damage done to the personal property in the building, but the building itself was damaged to the extent of about \$500. The sheriff had the keys to the premises from the time of the fire until May 10, 1913, when he turned them over to the defendants. On or about April 24, 1913, the defendant George King and a deputy sheriff nailed up the doors to the building. The plaintiffs made no demand

for possession nor any effort to re-enter the premises or take possession of the personal property subsequent to the fire. On April 24, 1913, the defendants served notice upon the plaintiffs that, by reason of the plaintiffs' breach of the terms and conditions of the two leases, and their attempt to destroy the property, they elected to terminate both leases and take possession of the real estate and personal property, and forfeit all payments made by the plaintiffs as liquidated damages. Nothing further was done with the property until in August, 1913, when defendants cleaned up the debris and personally occupied the premises as a rooming house.

On September 11, 1913, the plaintiffs commenced this action, alleging they were wrongfully evicted from the premises by defendants on April 24, 1913, and that the defendants converted the personal property included in the contract of lease and sale and certain other articles of personal property belonging to plaintiffs not so included, and claiming damages therefor. The defendants denied the allegations of the complaint, and set up, as an affirmative defense and counterclaim, that plaintiffs had attempted to destroy the property by fire, and had thereby forfeited their rights under the leases, and had abandoned the property, and prayed dismissal of the plaintiffs' action and judgment for \$500, because of damages to the building by fire. At the close of the evidence both parties moved for a directed verdict in their favor respectively. Both motions were overruled. The jury returned a verdict in favor of the plaintiffs for \$750. The court overruled defendants' motions for judgment non obstante and for a new trial. The defendants appeal.

The respondents have moved to dismiss this appeal on the grounds: (1) That all references in the appellants' brief are to the statement of facts and not to the abstract; (2) that the abstract does not refer to the pages of the statement of facts where the particular evidence is to be found; (3) that the abstract is a statement of conclusions, rather than a statement of what the evidence actually was; (4) that the abstract does not contain any of the instructions except those upon which claims of error are predicated.

[1] As to the first and second grounds the respondents are equally derelict with the appellants. Their brief contains no reference to either abstract. Their supplemental abstract contains no reference to the statement of fact. We would not be justified in punishing the appellants alone for a fault shared equally by the respondents.

[2] The third ground is not well taken. The appellants' abstract, it is true, does not quote the evidence, but states it in a clear narrative form with reasonable fullness.

[3] As to the fourth ground, it is true the abstract contains only those instructions upon which claims of error are predicated, but an examination of all the instructions as set

out in respondents' supplemental abstract convinces us that the instructions complained of are in no manner modified or controlled by other instructions. The motion to dismiss is denied.

On the merits the appellants have advanced many claims of error. They may be grouped for convenient discussion as follows: (1) That the evidence was insufficient to sustain the verdict; (2) that the court erred in instructing as to the measure of damages for the eviction; (3) that the court erred in withdrawing from the jury the appellants' affirmative defense.

[4] 1. It is claimed that the evidence was insufficient to sustain the verdict in that it showed no eviction from the leasehold nor any conversion of the personality by the appellants, but, on the contrary, showed an abandonment by the respondents. The argument in support of these claims is based mainly upon the fact that respondents made no demand for a restoration of possession. We think, however, that the fact that appellants' notice, claiming a forfeiture of the lease and rescinding the sale of the personality, was served upon the respondent Charles King very soon after his discharge from arrest, sufficiently explains respondents' failure to make demand. There was also much other evidence tending to show that any demand for possession of either the realty or the personality would have been futile. There was ample evidence to take the questions of eviction and conversion to the jury. *Hyman v. Jockey Club, etc., Co.*, 9 Colo. App. 299, 48 Pac. 671; *Skally v. Shute*, 132 Mass. 367; 2 *Tiffany, Landlord and Tenant*, p. 1335.

[5, 6] 2. The court's instruction on the measure of damages was to the effect that, if the jury found an eviction, and that the respondents had paid no rent for any time beyond the eviction, they could recover only nominal damages for the eviction, but that, if the jury found that the respondents had paid rent for any time beyond the eviction, they would be entitled to recover the value of the use of the premises for such period subsequent to the eviction for which they had paid rent. Abstractly, this instruction was erroneous. In the absence of pleading and proof of special damages, and there was neither in this case, the true measure of a lessee's damages for total breach of a lease is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved for such unexpired term. *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 263, 113 Pac. 630, 85 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 1050; *Cannon v. Wilbur*, 30 Neb. 777, 782, 47 N. W. 85; *Goldstein v. Asen*, 46 Misc. Rep. 251, 91 N. Y. Supp. 783, 785; *Rhodes v. Baird*, 16 Ohio St. 573, 581; *Favar v. Riverview Park*, 144 Ill. App. 86, 90; *Greene v. Williams*, 45 Ill. 206, 208; *Snodgrass v. Reynolds*, 79 Ala. 452, 460, 461, 58 Am. Rep. 601;

*Tyson v. Chestnut*, 118 Ala. 387, 24 South. 73, 80.

In this case there is no proof of the market rental value of the unexpired term. There is proof, however, tending to show that the tenant had paid rent to May 4, 1913; that is, for ten days beyond the time of eviction, if there was an eviction. The instruction, though abstractly erroneous, was therefore not prejudicial.

[7, 8] 3. Touching the affirmative defense and counterclaim, the court gave the following instruction:

"The defendants also, by way of counterclaim, allege that one James Root, as agent for the plaintiffs, fired the said building, whereby it was partly burned, to their damages in the sum of \$500. I instruct you that there is no evidence to warrant a finding by the jury either that Root fired the building or that he was by the plaintiffs appointed as their agent to fire it, and therefore I instruct you that you must not award defendants anything on their said counterclaim."

This instruction is erroneous in two vital particulars. In the first place, it confines the evidence touching the fire to the sole office of proving the counterclaim and inferentially eliminates it as a defense. It is clearly relevant as tending to prove an affirmative defense, even if insufficient to establish the damages set up as a counterclaim. In the second place, it takes from the jury a question of fact touching which there is competent evidence upon which the minds of reasonable men might well reach different conclusions.

[9] We have set out the salient facts developed by the evidence touching the character and origin of the fire and the whereabouts and actions of the respondents at the time of its occurrence. We shall not again review the evidence nor comment upon it further than to say that it was sufficient, if credited by the jury, to sustain a finding that the fire was of incendiary origin, and was deliberately arranged for by some one who lived in or had access, not only to the house, but to the three inner rooms where the fire originated, which, it appears, were always kept locked, and were securely locked on the night of the conflagration. It clearly appears that the respondents and the man Root were the only persons who had access to these rooms. This is not a criminal action. The quantum of proof required in such cases was not necessary. The appellants were not compelled to produce proof beyond a reasonable doubt that the respondents caused the fire, but only to prove that fact by a fair preponderance of the evidence. The credibility and weight of the evidence was for the jury to determine. In the nature of the case the appellants were compelled to rely upon circumstantial evidence to prove their affirmative defense and counterclaim. The circumstances here presented were, we think, amply sufficient to take this defense to the jury. They were certainly no less conclusive

than those found in *Bruff v. Northwestern Mutual Fire Ass'n*, 59 Wash. 125, 109 Pac. 280, Ann. Cas. 1912A, 1138, a case in which similar circumstances were held sufficient to take the case to the jury. In that case we said:

"The circumstances shown strongly indicate that the house had been deliberately and purposely prepared for a sudden, destructive, and well-timed conflagration. Respondent held separate insurance policies on the house and its contents, and was the only person in a position to recover for losses resulting from the fire. There was sufficient evidence, if accepted and credited by the jury, to sustain them in finding that the fire was of incendiary origin, and that same one who had access to, and was familiar with, the premises had deliberately arranged the house and its contents for destruction by fire. The respondent was the only person who lived in, or had constant access to, the house. He was there early in the evening, and left the building securely fastened. There was no evidence of any breaking prior to the arrival of the firemen. They found everything intact and well secured."

The parallel with the case here is too plain to require comment. We are clear that both the affirmative defense and counterclaim should have been submitted to the jury upon proper instructions.

Reversed and remanded for a new trial.

MAIN, MOUNT, CROW, and FULLERTON, JJ., concur.

(83 Wash. 690)

J. M. ARTHUR & CO. v. BURKE.  
(No. 12165.)

(Supreme Court of Washington, Feb. 1, 1915.)

1. LIMITATION OF ACTIONS (§ 2\*)—WHAT LAW GOVERNS.

Where the plaintiff elects to sue a resident of this state, in this state, on notes executed in another state, the statute of limitations of the forum governs.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.\*]

2. LIMITATION OF ACTIONS (§ 1\*)—STATUTE AS DEFENSE—CONSTRUCTION.

The defense of the statute of limitations, being the result of legislative views of public policy, is not inherently vicious, and will be viewed by the courts with the same consideration as any other defense.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

3. LIMITATION OF ACTIONS (§ 153\*)—STATUTE OF LIMITATIONS—PART PAYMENT—SUFFICIENCY.

Part payment, to toll the statute of limitations, must have been voluntarily made or authorized or ratified by the debtor.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 153.\*]

4. LIMITATION OF ACTIONS (§ 195\*)—STATUTE OF LIMITATIONS—PART PAYMENT—BURDEN OF PROOF.

Where part payment is pleaded by the creditor to toll the statute of limitations, and such payment is denied by the debtor, the burden of proving a payment within the statutory period rests upon the creditor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

5. LIMITATION OF ACTIONS (§ 159\*)—STATUTE OF LIMITATIONS—PART PAYMENT—ENTRY OF CREDIT.

The fact of part payment within the statutory period, not the formal entry crediting the amount to the debtor on the creditor's books, tolls the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 637; Dec. Dig. § 159.\*]

6. LIMITATION OF ACTIONS (§ 160\*)—STATUTE OF LIMITATIONS—PART PAYMENT—INDORSEMENT ON NOTE.

The indorsement upon a note by the holder of a payment thereon is not of itself such evidence of the date of payment as to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 638-641; Dec. Dig. § 160.\*]

7. LIMITATION OF ACTIONS (§ 157\*)—STATUTE OF LIMITATIONS—PART PAYMENT—SUFFICIENCY.

Part payment of a debt to toll the statute of limitations must be made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of payment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 631-634, 636; Dec. Dig. § 157.\*]

8. LIMITATION OF ACTIONS (§ 197\*)—STATUTE OF LIMITATIONS—PART PAYMENT—INDORSEMENT ON NOTE.

Where, on closing out his business, the defendant, who was indebted to plaintiff, reconsigned goods to it to reduce the indebtedness and gave it notes to the full amount of his indebtedness, while later the plaintiff sold part of the reconsigned goods and indorsed the amount received as a credit on the defendant's notes, in the absence of evidence that the actual sale of the reconsigned goods was made at the date when the credit was indorsed on the defendant's notes, there was no such part payment as would toll the statute of limitations on the notes.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722-726; Dec. Dig. § 197.\*]

9. LIMITATION OF ACTIONS (§ 160\*)—STATUTE OF LIMITATIONS—PART PAYMENT—INDORSEMENT ON NOTES.

Where defendant reconsigned goods to plaintiff to sell and apply the proceeds on his indebtedness, two years before he executed notes to discharge such indebtedness, a subsequent sale of the reconsigned goods and credit of the proceeds on the notes by the plaintiff was not such part payment of the notes as to toll the statute of limitations on them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 638-641; Dec. Dig. § 160.\*]

10. LIMITATION OF ACTIONS (§ 153\*)—STATUTE OF LIMITATIONS—PART PAYMENT—SUFFICIENCY.

To revive a debt barred by the statute of limitations, part payment must be made under circumstances showing a clear and unequivocal intention on the part of the debtor to revive the whole debt.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 153.\*]

11. LIMITATION OF ACTIONS (§ 160\*)—STATUTE OF LIMITATIONS—PART PAYMENT—INDORSEMENT ON NOTES.

Where defendant reconsigned goods to plaintiff to reduce an indebtedness 12 years before a sale of the last of them was made, the application of the proceeds of such sale on defendant's notes given to discharge the same debt

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and barred by the statute of limitations cannot operate as a waiver of the bar of the statute as by part payment.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 638-641; Dec. Dig. § 160.\*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by J. M. Arthur & Company, a corporation, against J. R. Burke. Judgment for plaintiff, and defendant appeals. Reversed and remanded for dismissal.

Frank A. Paul and Hastings & Stedman, all of Seattle, for appellant.

ELLIS, J. This action was commenced on March 21, 1912, upon three promissory notes executed and delivered by the defendant to the plaintiff, dated February 15, 1901, at Portland, Or., for \$200 each, and payable in two, four, and six months, respectively. The plaintiff alleged the payment on March 21, 1906, of \$27.21 on each note. The defendant in his answer alleged the execution and delivery of the notes at Spokane, Wash., denied the partial payments, and set up affirmatively the bar of the statute of limitations. The evidence was conflicting. It is undisputed, however, that for some time prior to 1899 the defendant was engaged in business at Spokane, Wash., and was selling goods purchased from and goods consigned on commission by the plaintiff. In May, 1899, the defendant terminated his business at Spokane, and having a small quantity of shelf goods on hand reconsigned them to the plaintiffs at Portland, Or., with instructions to credit the account of Northwest Machinery Company (defendant's trade-name) with their proceeds when sold. At that time the defendant owed the plaintiff a considerable balance on account, and in February, 1901, plaintiff sent him the three notes for execution.

Each party introduced but one witness. Plaintiff's president testified that at the time of execution of the notes the sum of \$600 represented the balance due on defendant's account, without regard to the reconsigned goods plaintiff still had on hand. Defendant testified that it was his understanding at that time that the notes represented the balance due the plaintiff after crediting the proceeds of all of the reconsigned goods. Plaintiff's witness testified that defendant came to Portland and executed the notes there. Defendant testified he was not in Portland at any time between 1899 and 1910, and that the notes were executed at Spokane and mailed by him from there to the plaintiff at Portland. Plaintiff's president testified credit memoranda were forwarded to defendant by mail at different times after the execution of the notes. Purported copies of such memoranda were introduced. He could only say, however, that he supposed they were mailed in the course of business.

One of these was dated March 21, 1906, and amounted to \$81.62. The plaintiff indorsed one-third of this credit as a payment on each note on March 21, 1906. This witness testified that the goods making up this credit were probably all sold some time prior to March 21, 1906. He also testified that there were other credits amounting to \$9.42 rendered defendant on account the remainder of the reconsigned goods, one in 1907 and the last in 1913, and stated that defendant had been advised of this by mail. Defendant denied ever having received any of the letters or credit memoranda, and denied having had any correspondence with plaintiff subsequent to the execution of the notes, or that he ever knew of or consented to the credit indorsements on the notes. The lower court found that the notes were executed and delivered at Portland, Or., and that a total credit of \$27.21 had been made by plaintiff on each note between February 15, 1901, and March 21, 1906, pursuant to the agreement between the parties at the time of the execution of the notes that the proceeds of the reconsigned goods should be credited on the notes as sales were made; and thereupon entered judgment in favor of plaintiff. The defendant appealed.

The sole question presented by this appeal is whether the application upon the notes by the respondent of the moneys realized on sales of the reconsigned goods tolled the running of the statute of limitations.

[1] We are convinced that by a preponderance of the evidence it was shown that the notes were executed by the appellant at Spokane, Wash. This, however, is immaterial, since the respondent elected to sue in this state where the appellant has resided ever since the inception of the debt. In such a case it is the statute of limitations of the forum which governs. *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107, 85 Am. St. Rep. 939; *Adams v. Henderson*, 2 Wash. T. 263, 5 Pac. 601; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473.

[2] It is the settled law of this state, in common with many others, that the defense of the statute of limitations is not inately unconscionable, but is entitled to the same consideration as any other defense. The statute is a legislative declaration of public policy which the courts can do no less than respect. *Thomas v. Price*, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Clementson v. Williams*, 8 Cranch (U. S.) 72, 3 L. Ed. 491; *United States v. Wilder*, 13 Wall. (U. S.) 254, 20 L. Ed. 681.

[3] It is also the settled law of this state, following the trend of authority in others, that in order to toll the statute of limitation the partial payment must have been a voluntary payment made or authorized or ratified by the party against whom the payment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is invoked as tolling the statute. *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637; *Bassett v. Thrall*, 21 Wash. 231, 57 Pac. 806; 1 Wood on Limitations (2d Ed.) § 97; *Good v. Ehrlich*, 67 Kan. 94, 72 Pac. 545, 546; *Sawyer v. Lufkin*, 58 Me. 429; *Arnold v. Downing*, 11 Barb. (N. Y.) 554; *Butler v. Price*, 110 Mass. 97; *Dundee Investment Co. v. Horner*, 80 Or. 558, 48 Pac. 175. A creditor cannot by any act of his own, such as the giving of an unauthorized or surreptitious credit, toll the running of the statute. *Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co.* (Kan.) 70 Pac. 983; *Pease v. Catlin*, 1 Ill. App. 88; *Samuel v. Samuel's Adm'r*, 151 Ky. 235, 151 S. W. 676, 42 L. R. A. (N. S.) 1155; *Chapman v. Hogg*, 135 Mo. App. 654, 116 S. W. 492; *Good v. Ehrlich*, supra.

[4] When reliance is placed upon a part payment to remove the bar of the statute and the payment is denied, the burden of proving the payment within the statutory period rests upon the party asserting it. *United States Trust Co. v. Stanton*, 76 Hun. 32, 27 N. Y. Supp. 614; *Gregory v. Filbeck's Estate*, 20 Colo. App. 131, 77 Pac. 369; *Harding v. Grim*, 25 Or. 506, 36 Pac. 634; *Scott v. Christenson*, 46 Or. 417, 80 Pac. 731.

[5] It is the fact of partial payment, and not the formal entry of credit, which tolls the statute. The creditor will not be permitted to defeat the statute by making belated credits. There must be affirmative proof of the time of actual payment. *Terrill v. Deavitt & Trustee*, 73 Vt. 188, 50 Atl. 801; *Fowles v. Joslyn*, 130 Mich. 272, 89 N. W. 946; *Briscoe v. Huff*, 75 Mo. App. 288; *Freeze v. Lockhard*, 87 Mo. App. 102; *Elsea v. Pryor*, 87 Mo. App. 157; *Davidson v. Delano*, 11 Allen (Mass.) 523; *Gibbs v. Gibbs*, 6 Colo. App. 368, 40 Pac. 781; *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268; *United States Trust Co. v. Stanton*, supra.

[6] The indorsement by the holder of a note of a payment thereon is not competent evidence of the true date of payment so as to take it out of the operation of the statute. *Smith v. Wells*, 70 N. H. 49, 46 Atl. 51; *Schlottfeldt v. Bull*, 18 Wash. 64, 68, 50 Pac. 590.

[7] The rationale of these principles is this: The payment must be made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of payment, from which arises a new implied promise, supported by the original consideration, to pay the residue. *Dundee Investment Co. v. Horner*, supra; *Becker v. Oliver*, 111 Fed. 672, 49 O. C. A. 533; *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; *Campbell v. Baldwin*, 130 Mass. 199; *Leach v. Asher*, 20 Mo. App. 656; *Pease v. Catlin*, supra; *United States v. Wilder*, supra.

[8] Applying these principles to the case in hand, we are convinced that the action was barred by the statute of limitations. In the first place, the respondent's own evidence wholly failed to show that any of the sales of the reconsigned goods represented by the credit of \$81.62, apportioned and indorsed, \$27.21 upon each of the notes, on March 21, 1906, were made on that day. On the contrary, the respondent's president admitted that they were probably all made prior to that time. He could not even say that any of these goods were paid for on that day or subsequently. The action having been commenced on the last day of the six-year period after the date of these credits and the actual sales having been made prior to that date, it is clear that these credits, representing antecedent sales, were wholly insufficient to show any actual payment within six years prior to the date of suit.

[9] But there is another reason which goes deeper than this. The reconsignment of the goods was never made with the intention that moneys realized from their sale should be applied upon these notes. The notes were not executed until almost two years later. The appellant's testimony that he understood when the notes were given that he had already received credit for all of the reconsigned goods is undisputed. It is negatively corroborated by the admission of the respondent's president that nothing was said about the goods at that time. Upon these facts we are clear that payments, no matter when made, from money realized from sales of the goods, were not payments made under such circumstances as to show an intentional acknowledgment by the debtor of his liability for the whole debt as of the date of the sales, from which a new promise could be implied to pay the residue.

Had the reconsignment of the shelf goods been made at the time the notes were given and as a part of the same transaction as collateral to the notes, a different case would be presented. Even in such a case, however, it has been usually held that, where part payment of a note is made from money realized by the sale of collateral, a new promise is not to be implied as of the date of the sale of the collateral nor as of any date later than the transfer of the collateral to the creditor. *Wolford v. Cook*, supra; *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568; *Jones v. Langhorne* (Rehearing) 19 Colo. 206, 34 Pac. 999; *Thomas v. Brewer*, 55 Iowa, 227, 7 N. W. 571; *Campbell v. Baldwin*, supra; *Leach v. Asher*, supra.

In *Wolford v. Cook*, 71 Minn. at page 79, 73 N. W. at page 706, 70 Am. St. Rep. 315, it is said:

"Wolford's right to receive the proceeds of the collateral mortgages, and apply them in part payment of defendant's note, was acquired under and by virtue of the contract made at the time the collaterals were transferred to him. His subsequent exercise of that right was not a voluntary payment made by the defendant from

which a promise to pay the residue can be inferred. The defendant had done nothing since he transferred the collaterals to Wolford in March, 1889. The fact that he made no objection when informed by Wolford that he had applied the proceeds of these collaterals on his note could not take the case out of the statute. He had no reason to object, and, if he had done so, it would have been futile. Wolford had merely exercised a contract right which he acquired in 1889. Defendant's passive acquiescence in the exercise of that right constituted neither a voluntary payment as of that date, nor a new promise in writing to pay the balance of the debt. *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Ryan*, 66 N. Y. 352 [23 Am. Rep. 60]; *Brown v. Latham*, 58 N. H. 30 [42 Am. Rep. 568].

In *Brown v. Latham*, 58 N. H. at pages 35 and 36 (42 Am. Rep. 568), it is said:

"The plaintiff's right, in this case, to receive the proceeds and to apply them in part payment, and his exercise of that right within six years of the date of the writ, were neither a promise made by the defendant within that time to pay the residue of the debt, nor an acknowledgment made by the defendant within that time of his liability and willingness to pay the residue, nor evidence from which it can be inferred that within that time the defendant made, or intended to make, or was understood to make, such promise or acknowledgment. What the defendant did in 1862 was an acknowledgment of a liability and a promise to pay at that time, but it has no tendency to prove that he afterwards made such promise and acknowledgment, or authorized them to be made. The placing of the security in the plaintiff's hands was of no greater force or effect than the giving of the note itself."

The same rule is strongly indorsed in 1 Wood, Limitations (2d Ed.) p. 282 et seq., as follows:

"Nor does a part payment derived from a collateral security, without the debtor's assent to it as a payment, operate to remove the statute bar; and although in some of the cases it is intimated that a sale of collaterals made within a reasonable time after they are deposited with the creditor, and the proceeds applied upon the debt, may operate as a part payment at the date of the receipt of such proceeds, yet this doctrine is believed to be fallacious, and rests upon the mistaken notion that the creditor is thereby made an agent of the debtor for the collection or sale of such collaterals, ignoring the circumstance that the creditor cannot be made the agent of the debtor to such an extent as to make an act done by him, operate as a new promise to himself, without which ingredient or element a payment cannot operate to remove the statute bar; and according to the later cases it seems that the question as to whether the creditor exercises diligence or not, in the sale or collection of the collaterals, has no influence upon the question of part payment, as the statute can, in any event, only be suspended by some act of the debtor, or some person authorized by him from which a new promise may be inferred, and in this view the suspension of the statute could only be claimed from the time when such collaterals were deposited with the creditor."

145 P.—62

The grounds of the foregoing authorities seem to us sound, but it is not necessary to adopt them here. We need not go so far. Here the reconsignment of the shelf goods for sale and application of the proceeds on the debtor's account was made nearly two years before the notes were ever thought of, and it would be doing violence to any possible intention of the parties to say that at the time of the transaction it was the intention that the sale of the goods should be applied on the notes so as to constitute an acknowledgment of the whole debt, or a promise to pay the balance of the notes by the debtor. Unless this can be implied from the original reconsignment, it cannot be implied at all, since there is no evidence that there was any agreement touching the goods at the time the notes were given or at any subsequent time.

[10] As to the \$9.42 payment resulting from the sales made after March 21, 1906, one of them, indeed, after the commencement of this action, there can be no question that, even had it been indorsed upon the notes, it could not operate as a renewal of the notes already barred. Even assuming that a barred debt may be revived by part payment, the payment must be made under circumstances showing a clear and unequivocal intention on the part of the obligor to revive the whole debt. The naked fact of payment or entry of credit is wholly insufficient. *Kaufman v. Broughton*, 31 Ohio St. 424.

[11] The appellant cannot be held to have assented to what he did not know. The burden was on the respondent to prove that he did assent. There was absolutely no evidence that the appellant had any knowledge that the tag ends of his old stock, represented by this \$9.42, had not been disposed of long before. He had turned the goods over to the respondent 12 years before the last sale testified to was made. It would be going farther than any authority which we have been able to find to hold that the appellant assented to a revival, by the sale of the goods, after the notes given 10 years before had long been barred.

The case of *Becker v. Oliver*, supra, is instructive as going to every phase of the case here. See, also, *Easter v. Easter*, 44 Kan 151, 24 Pac. 57.

The judgment is reversed, and the case is remanded for dismissal.

CROW, MAIN, MOUNT, and FULLERTON, JJ., concur.

(83 Wash. 666)

**BATTYANY et al. v. McNELEY et al.**  
(No. 11919.)

(Supreme Court of Washington. Jan. 29, 1915.)

**1. APPEAL AND ERROR (§ 141\*)—PERSONS ENTITLED TO APPEAL—GUARDIAN.**

In an action against M. and his minor children, of whom he was guardian, where it appeared that his interests were adverse to those of the children, his attempted appeal as their guardian from a judgment from which their guardian ad litem did not appeal would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 908-913; Dec. Dig. § 141.\*]

**2. HUSBAND AND WIFE (§ 264\*)—COMMUNITY PROPERTY—SUFFICIENCY OF EVIDENCE.**

Evidence that a contract to purchase land ran to a husband and wife as grantees, and that payments thereunder were made from the funds of the wife prior to her death, justified a finding that the land conveyed to the husband after the wife's death was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.\*]

Department 2. Appeal from Superior Court, Spokane County; W. H. Jackson, Judge.

Action by Alex. Battyany and others against Alfred C. McNeley and others. From the judgment, the defendants Alfred C. McNeley and wife appeal. Affirmed.

L. H. Prather and W. C. Jones, both of Spokane, for appellants. Smith & Mack, of Spokane, for respondents.

**CROW, J.** This is an action to quiet title, or, in the alternative, to rescind a sale of land and obtain other equitable relief. For some years prior to 1905 the defendant Alfred C. McNeley and one M. Jennie McNeley were husband and wife, and the record owners of 20 acres of land in Spokane county admitted to be their community property. They also held an unrecorded contract to purchase 40 acres of adjoining land from W. A. Wright and wife, on which partial payments of purchase money were made during the lifetime of M. Jennie McNeley. On August 10, 1905, M. Jennie McNeley died intestate, leaving three minor children as her heirs at law. Two of these minor children, Harold J. McNeley and William J. McNeley, are defendants herein. The third minor child died intestate on October 6, 1906. After the death of M. Jennie McNeley, the defendant Alfred C. McNeley was appointed and qualified as administrator of her estate. In the inventory which he filed he included the 20-acre tract to which they held title, but did not include the 40-acre tract upon which they held a contract of purchase. Later Alfred C. McNeley married the defendant Minnie McNeley, his present wife. The estate of M. Jennie McNeley, deceased, was closed, and the defendant Alfred C. McNeley was appointed and qualified as guardian of the person and estate of his surviving minor children. After the death of M. Jen-

nie McNeley, Alfred C. McNeley completed payments to Wright and wife on the 40-acre tract, and took a deed therefor in which he was named as grantee. Later he and his present wife contracted to sell the 40-acre tract and the 20-acre tract to the plaintiffs Alex. Battyany and Steve Battyany, for the total consideration of \$3,900. Judicial proceedings were instituted which authorized Alfred C. McNeley, as guardian of the minor heirs, to sell their interest in and to the 20-acre tract, and it was included in the sale to Alex. and Steve Battyany. Later deeds were delivered to plaintiffs, although there is some dispute as to whether they intended to accept them or approve the title conveyed. Plaintiffs paid \$2,000 on the purchase price, and executed two notes and mortgages for \$1,900, the remainder thereof, one note and mortgage to Alfred C. McNeley on the 40-acre tract and one undivided half of the 20-acre tract to secure \$1,575, and one note and mortgage to Alfred C. McNeley as guardian of Harold J. and William J. McNeley, minors, on the other undivided half of the 20-acre tract to secure \$325. At the time plaintiffs purchased the land they had neither knowledge nor notice of the unrecorded contract of sale running from W. A. Wright and wife to Alfred C. McNeley and M. Jennie McNeley, but had knowledge of the recorded deed which had been executed and delivered to Alfred C. McNeley, a widower. Later plaintiffs learned that the minors and relatives of their deceased mother were claiming the 40-acre tract had been the community property of Alfred C. McNeley and M. Jennie McNeley, and that the minors each claimed a one-sixth interest therein. When plaintiffs, who had made valuable improvements on the land, learned of these claims, they demanded of Alfred C. McNeley that he take the proper and necessary steps to perfect their title. This he refused to do. Thereupon they commenced this action against Alfred C. McNeley, Minnie McNeley, his wife, and Harold J. McNeley and William J. McNeley, minors, and Alfred J. McNeley, as their guardian, to quiet title or obtain alternative equitable relief. They pleaded substantially the facts above stated, and asked, in the event their title could not be quieted, that their contract of purchase be rescinded; that they be given judgment for the purchase money they had paid and for the value of the permanent improvements they had made; that these sums be made a lien on the land; and that their notes and mortgages be canceled and returned to them.

The record shows that, when plaintiffs learned of the cloud on their title, they declined to pay interest on their notes and mortgages until their title could be quieted. The defendant Alfred C. McNeley, individually and as guardian for the minors, filed an answer in which he alleged that the 40-acre tract was his individual property, and not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the community property of himself and his former wife; that the title which had been conveyed to plaintiffs was perfect; and that they had made default in payments of interest on their notes; and asked for decrees foreclosing the mortgages. It appearing to the trial court that the claims of the defendant Alfred C. McNeley were adverse to the interests of his minor children and wards, an order was entered appointing John M. Gleason as guardian ad litem for the minor defendants. The guardian ad litem answered, claiming that the 40-acre tract was community property, and asking the court to protect the interests of the minors therein. The principal issue tried was whether the 40-acre tract was the community property of Alfred C. McNeley and his deceased wife. During the trial the plaintiffs announced their willingness to retain the land if their title could be quieted. To this the guardian ad litem does not seem to have taken any exception, provided the interests of his wards could be so protected that they would receive their share of the purchase price for which the 40-acre tract had been sold. After hearing the evidence the trial judge found and decreed that the 40-acre tract was community property; that the sale to plaintiffs had been made for a fair and valuable consideration; that plaintiffs were willing to retain the land; that the interests of the minors in the purchase price which plaintiffs had agreed to pay was \$975; that to secure this sum that proportion of the unpaid purchase-money mortgages should be decreed and paid to them; that the plaintiffs were justified in failing to pay interest until their title was quieted; that the mortgages should not be foreclosed; that the guardian ad litem should be authorized to make an application to the superior court to increase the bond of Alfred C. McNeley as guardian of the minors; that a fee of \$100 should be paid to the guardian ad litem, the same to be a charge against the appellant Alfred C. McNeley and his interest in the mortgages; that the same should be paid directly to the guardian ad litem; that, in his discretion, the guardian ad litem might appeal on behalf of his wards from the final decree herein; that plaintiffs' title should be quieted; and that costs should be awarded against the defendant Alfred C. McNeley. From this decree the defendants Alfred C. McNeley and Minnie McNeley have appealed.

[1] Alfred C. McNeley has also attempted to appeal as guardian of his minor wards. The latter appeal will not be considered, as

the record clearly shows that the interests and contentions of Alfred C. McNeley are adverse to the interests of his wards. No cross-appeals have been taken.

[2] The controlling issue before us is whether the 40-acre tract was the community property of Alfred C. McNeley and M. Jennie McNeley, his former wife. The appellants have filed a brief in which no assignments of error are made. Their arguments, however, indicate their contention that the 40-acre tract was the separate property of the appellant Alfred C. McNeley; that he acquired title thereto after the death of his former wife; that the payments made prior to her death were made by him from his separate funds; that he conveyed good title to the respondents; and that the minors had no interest in the 40-acre tract. The respondents have filed no brief, nor have we had the benefit of any oral argument. There is an abstract which has not been helpful, and we have examined the statement of facts. This examination shows that a portion of the evidence has been omitted from the statement, and that certain exhibits which should be attached are not before us. However, there is sufficient before us to show beyond question that the evidence on the issue whether the 40-acre tract was community property was conflicting. The original Wright contract, which is in the record, ran to Alfred C. McNeley and M. Jennie McNeley, as grantees. While this fact may not be controlling, it indicates the intention and understanding of the vendees at the time that the land should become their community property. There was evidence tending to show that payments on the Wright contract were made from funds belonging to appellant's former wife, and that such payments were made prior to her death. The trial court found the land was community property, and we are unable to find otherwise. As to the decree, no complaint is made by any party except the appellants, Alfred C. McNeley and Minnie McNeley. The land being community property, and the rights of respondents and the minors having been protected to their complete satisfaction, we find nothing in the decree of which the appellants can successfully complain.

On the record before us we conclude the judgment should be affirmed.

It is so ordered.

MORRIS, MOUNT, FULLERTON, and PARKER, JJ., concur.

(83 Wash. 671)

**LEWIS v. LEWIS.** (No. 12061.)  
(Supreme Court of Washington. Jan. 29, 1915.)

**1. DIVORCE (§ 182\*)—ALIMONY AND COUNSEL FEES—ALLOWANCE PENDING APPEAL.**

Under Rem. & Bal. Code, § 988, providing that pending an action for divorce the court or judge may make such orders relative to the expense of such action as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof, and section 1731, providing that upon the taking of an appeal and the filing of a bond the Supreme Court shall acquire jurisdiction of the appeal for all necessary purposes but that the superior court shall retain jurisdiction for the purpose of all proceedings provided to be had in such court and for all purposes in so far as the cause is not affected by the appeal, the superior court had jurisdiction to order the payment of attorney's fees and suit money to the wife pending an appeal by the husband from a judgment dismissing a divorce suit, especially as the Supreme Court has no jurisdiction to make an allowance of suit money, attorney's fees, or alimony pending the appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. § 182.\*]

**2. DIVORCE (§ 184\*) — APPEAL FROM ORDERS GRANTING ALIMONY AND COUNSEL FEES—MATTERS REVIEWABLE.**

An appeal from an order in a divorce action allowing attorney's fees and suit money pending an appeal from the judgment did not bring up for review questions involved in the principal action in which the appeal had been dismissed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

Department 2. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Richard Lewis against Elizabeth Lewis for divorce. From an order allowing attorney's fees and suit money, plaintiff appeals. Affirmed.

H. W. Lueders, of Tacoma, for appellant.  
Anthony M. Arntson, of Tacoma, for respondent.

**MAIN, J.** This is an appeal from an order of the superior court allowing attorney's fees and suit money in a divorce action pending an appeal.

[1] The facts are as follows: On the 3d day of December, 1912, the plaintiff brought an action against the defendant for a divorce. On March 10, 1913, after a trial, the superior court entered a judgment dismissing the action. On March 27, 1913, the plaintiff's motion for a new trial was overruled. On June 6, 1913, the plaintiff served his notice of appeal; and thereafter filed and served his bond on appeal. On August 14, 1913, the plaintiff served his opening brief. Thereupon the defendant petitioned the trial court for an order for suit money, attorney's fees, and alimony, in order that she might defend the action in this court. On September 22, 1913, an order was made by the trial court requiring the plaintiff to pay a certain sum as attorney's fees and suit money on appeal. Thereafter counsel for the defendant prepar-

ed, served, and filed on her behalf a brief. Subsequent to the service and filing of this brief, and on October 6, 1913, the plaintiff appealed from the order of September 22d, which was the order allowing attorney's fees and suit money on appeal. On May 15, 1914, the plaintiff's appeal in the divorce action was by this court dismissed. Upon the present appeal the cause is here for review of the order requiring the plaintiff to pay attorney's fees and suit money on appeal.

The principal question in the case is whether in a divorce action, after an appeal has been taken from the judgment of the superior court, that court has the power or jurisdiction to allow the wife attorney's fees, suit money, and alimony pending the appeal.

Rem. & Bal. Code, § 988, provides that:

"Pending the action for divorce the court, or judge thereof, may make, \* \* \* such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof. \* \* \*

Section 1731, after providing that "the Supreme Court shall acquire jurisdiction of the appeal for all necessary purposes," provides that the superior court shall retain jurisdiction for certain purposes specified and "for all purposes in so far as the cause is not affected by the appeal."

The order complained of here was entered after the appeal had been perfected. The allowance or disallowance of suit money, attorney's fees, or alimony pending the appeal is not a part of the original judgment appealed from. Neither is it a matter embraced therein. The wife could not in fact make the application until after the appeal had been taken, because she could not have known that the husband intended to appeal from the judgment dismissing the action until the notice of appeal was served. We think, under the sections of the Code above referred to, that the superior court retained jurisdiction and power after the appeal for the purpose of determining the question of suit money, attorney's fees, or alimony, pending the appeal. In *Ex parte Bernhard Lohmuller*, 103 Tex. 474, 129 S. W. 834, 29 L. R. A. (N. S.) 303, the Supreme Court of Texas under a statute similar in terms to that of section 988, supra, held, that the trial court retained power and jurisdiction after an appeal had been perfected to make an allowance to the wife. In the course of the opinion it was said:

"The statute concerning divorces empowers 'the judge,' either in term time or vacation, to allow a wife who has not sufficient income for her maintenance, 'during the pendency of the suit for divorce,' a sum for her support 'until a final decree shall be made in the case.' Rev. St. art. 2086. This is a power incidental to the jurisdiction over the suit for divorce in the exercise of which it becomes the duty of the court to see to the proper support and maintenance of the wife until it can be determined in the course of the proceeding whether or not she is to remain a wife. The full accomplishment of the purpose for which the power is granted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

requires that it last as long as the occasion for its exercise shall last (that is, 'during the pendency of the suit'); and hence the 'final decree' (that is, to put an end to the power) is that 'made in the case' (not necessarily that made by the district judge or the district court). The decree of the trial court granting or denying the divorce may be the final decree of that court, but it is not the final decree 'made in the case' when an appeal is taken to another tribunal. So long as the appeal is pending the suit is pending, and the occasion specified in the statute for the allowance of alimony continues, and it does not end until that decree is pronounced which puts an end to the case. The nature of the power is such as to make it incompatible with the notion that it can no longer be exercised after the district court has rendered a judgment for divorce and has adjourned, although an appeal has been taken. The facts remain that the case is still pending, that no final decree has been made in it, and that the wife is still in need of the provision as fully as she was before the judgment; and these are all the facts which the statute requires to make it the duty of 'the judge' to exercise the power. We do not mean to hold that the statute giving the power would justify the disregard of anything adjudicated by the decree of divorce. Nothing of the sort was done here. The action of the district judge was based upon conditions that did not exist, and therefore were not and could not have been passed on when the judgment was rendered, but have arisen since. Hence, we conclude that the principle which forbids a court to change its judgment after the expiration of the term at which it was rendered has no application."

Other courts holding to the same effect under similar statutes are these: *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065; *Roby v. Roby*, 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50; *Reilly v. Reilly*, 60 Cal. 624.

In *Griffiths v. Griffiths*, 71 Wash. 59, 127 Pac. 585, upon a rehearing it was held that this court was without jurisdiction to hear original applications for alimony, suit money, and attorney's fees in a divorce action pending the appeal, and overruling the former holdings of the court upon that question. Our attention has not been called to the decision of any court holding that the trial court does not have jurisdiction after the appeal has been perfected in a divorce action to make an allowance for suit money, attorney's fees, or alimony pending the appeal, where the reviewing court is without jurisdiction, as in this state, to determine such matters. If there are such decisions, they have not been cited, nor has our investigation discovered any.

The plaintiff cites the cases of *Ætna Ins. Co. v. Thompson*, 34 Wash. 614, 76 Pac. 105, and *Gust v. Gust*, 71 Wash. 76, 127 Pac. 566, as sustaining his position. Neither of these cases is in point. In each of them the subsequent or collateral order entered by the court was a modification of the previous judgment. In the present case, as already indicated, the subsequent or collateral order embodied a matter not embraced in the original judgment and which could not have been included therein.

[2] Something is said in the plaintiff's

brief relative to the principal action. But obviously the appeal from the collateral order does not bring up for review questions involved in the principal action in which the appeal has been dismissed.

The judgment will be affirmed.

CROW, MOUNT, ELLIS, and FULLERTON, JJ., concur.

(84 Wash. 1)

SCHIRMER v. SCHIRMER. (No. 12032.)

(Supreme Court of Washington. Feb. 1, 1915.)

1. DIVORCE (§ 157\*)—GROUNDS—CRUELTY BY EACH PARTY.

Where a husband and wife had each mistreated the other, and violently accused the other of infidelity, and could not live together as husband and wife, a divorce was properly granted to each party, especially as a divorce in favor of either would necessarily divorce both.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 517, 528-531; Dec. Dig. § 157.\*]

2. DIVORCE (§ 252\*)—DIVISION OF PROPERTY—DISCRETION OF COURT.

Under Rem. & Bal. Code, § 989, providing that on a divorce the court shall make such disposition of the property as shall appear just, in view of the condition in which the parties will be left by the divorce, the discretion of the court in distributing community funds was not abused, where a divorce was granted to each party for the other's cruel and inhuman treatment, though the property given the husband was worth more than that given the wife, where that awarded to the wife was real estate, while that awarded to the husband was largely personal property and consisted in part of corporate stock, the value of which was speculative and uncertain, the husband was in debt and was required to pay \$30 a month for the care and support of the children, the custody of which was awarded to the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. § 252.\*]

3. DIVORCE (§ 308\*)—SUPPORT OF CHILDREN—SUFFICIENCY OF ALLOWANCE.

In a divorce suit, in which the custody of two boys 12 and 16 years old and a girl 6 years old was awarded to the wife until the further order of the court, where it appeared that the older boy was industrious and had saved out of his own earnings \$285, and that the other two children were apparently dependent upon their parents, an allowance of \$30 a month to be paid by the husband to the wife for the support of the children did not appear insufficient.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.\*]

4. DIVORCE (§ 288\*)—APPEAL—COSTS.

Where, in a divorce suit, all of the personal property was awarded to the husband, while the wife was given real estate, for which there was no ready sale, and apparently had no ready money, on affirmation on the wife's appeal, the husband would be required to pay the costs.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 772; Dec. Dig. § 288.\*]

Fullerton and Crow, JJ., dissenting.

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Katie Schirmer against W. E. Schirmer, for a divorce. From a decree

granting a divorce to each party, plaintiff appeals. Affirmed.

W. B. Mitchell, of Spokane, for appellant. McCarthy, Edge & Cleland, of Spokane, for respondent.

MOUNT, J. This action was brought by the plaintiff to obtain a divorce from her husband on the grounds of cruelty and infidelity. The plaintiff prayed for a division of the property and the custody of the three minor children. The defendant, in answer to the complaint, denied the allegations of cruelty and infidelity alleged in the complaint, and filed a cross-complaint seeking a divorce from his wife upon alleged grounds of cruelty. Upon these issues the case was tried to the court and resulted in findings to the effect that each of the parties had been guilty of cruel and inhuman treatment toward the other, such as to render it impossible for the parties to live longer together as husband and wife, and concluded that each was entitled to an absolute decree of divorce from the other. The custody of the children was awarded to the plaintiff until the further order of the court. The plaintiff was awarded all of the real estate belonging to the parties, with the exception of one piece which stood in the name of the defendant's brother. The defendant was awarded the remainder of the property, consisting of mortgages, cash on hand, and stocks. The defendant was required to pay to the plaintiff \$30 per month, until the further order of the court, for the support and care of the children. The defendant was also ordered to pay \$250 for attorney's fees. He was further ordered to pay to the plaintiff certain taxes, assessments, and water rent due upon the premises decreed to the plaintiff. The plaintiff has appealed from the decree so rendered, contending, first, that the evidence was insufficient upon which to base a finding that the defendant was entitled to a decree of divorce.

[1] It is apparently conceded that a divorce was properly granted to the appellant, because no question is made against the finding that the respondent had been guilty of cruelty toward his wife. If a decree of divorce is granted in favor of one of the spouses, both are thereby necessarily divorced. If we should conclude, therefore, that the court erroneously declared the respondent guilty of cruelty, the result would not for that reason necessarily be changed. The only result which would follow is that no blame would attach to the appellant. In short, the appellant's contention upon this question is based upon sentiment rather than substance. In view of this conclusion, the result will not be changed, even if we should conclude that the appellant was blameless. We shall not discuss the case further than to say that we have read the evidence with some care and find that the parties had not lived together

as man and wife for a period of six years prior to the date the action was brought; that during this time they had mistreated each other and accused each other violently of infidelity; that the respondent was the aggressor upon most occasions, and, if more blame is to be attached to one than to the other, it should be placed upon the respondent. It is apparent that the parties cannot live together as husband and wife, and that a divorce has been properly granted.

[2] It is next argued by the appellant that there was an unequal and unjust division of the property. The evidence upon the value of the property is not definite or certain. The appellant claims that the value of the property awarded to the defendant was largely in excess of that awarded to her. It may be true that the property awarded to the defendant was somewhat greater than that awarded to the plaintiff. The property awarded to the defendant, with the exception of one piece of land standing in the name of his brother, was all personal property, some of which consisted of stocks in corporations, the value of which was and is speculative and uncertain. There were two mortgages of about the value of \$8,000. There was some money in the bank, the amount of which is not clearly shown by the evidence. The defendant was in debt in about the sum of \$1,500. He was required to pay to the plaintiff \$30 per month for the care and support of the children. He was also required to pay the attorney's fees in the case, and the costs, and was required to make other small payments. A wide discretion is given to the trial court by section 989 of Rem. & Bal. Code in the distribution of the community funds. We are not convinced from the evidence, nor by the argument of counsel, that the court abused its discretion in the division of the property.

[3] The appellant also argues that the trial court erred in allowing but \$30 per month for the maintenance of the children. There are three minor children. The oldest, at the time of the trial, was a boy 16 years of age; the next was a boy of about the age of 12; and the youngest was a girl of about the age of 6. It was shown upon the trial that the older boy was industrious, and had saved out of his own earnings, at the time of the trial, \$285. The other two children, so far as the evidence shows, were entirely dependent upon their parents. It may be that in a short time \$30 per month will not be sufficient to properly care for these children. But at this time there is nothing in the record to indicate that \$30 per month awarded to the plaintiff will not be sufficient. We find nothing in the case which justifies a reversal, or even a modification of the decree at this time.

[4] In view of the fact that the appellant appears to have no ready money, and there is not a ready sale for the real estate, or any part thereof, at this time, and in view of the further fact that the defendant was

awarded all of the personal property and available money on hand, we think it is just that he should be required to pay the costs of this appeal, exclusive of attorney's or counsel fees.

We find no error in the record, and the decree is therefore affirmed.

MAIN, J., concurs. ELLIS, J., concurs in the result.

FULLERTON, J. I am compelled to dissent from the conclusion reached by my Associates. The trial court found, as matter of fact, that each of the spouses had been guilty of such a degree of marital infidelity towards the other as to constitute a cause for a divorce on the statutory ground of cruel treatment, and that the parties could no longer live together as husband and wife. It concluded, as matter of law, that each of the parties was entitled to a divorce, and entered a decree awarding a divorce to each of them. The majority of this court conclude that the facts justified the findings, and direct an affirmance of the decree. With the conclusion as to the facts I have no quarrel. I think it proven that each of the parties has been guilty of such a degree of cruel treatment towards the other as would warrant a decree of divorce in that other's favor, had he or she been without fault. My quarrel is with the conclusion of law drawn from the facts, as it seems to me the conclusion is not sustained by the principles of law governing in such cases.

The form of the decree is somewhat unusual, but this I shall not discuss, as I conclude that it is in effect nothing more than is required by the Code in such cases, namely, "a full and complete dissolution of the marriage as to both parties."

But it is a principle of law, as old as the law of divorce itself, that the party seeking relief from the marriage relation must come into court with a clear conscience and with clean hands, and be innocent of any substantial wrongdoing towards the other party of a like nature of which he or she complains; that divorce is a remedy for the innocent as against the guilty, and, if the party seeking the divorce has been guilty of a like violation of matrimonial duties as that of which complaint is made, the action must be dismissed and relief denied. This is the principle upon which the doctrine of recrimination rests, and all of the courts agree that it is a defense to an action of divorce, based upon a specific ground, to show that the complaining spouse has been guilty of a like offense, although they may not be unanimous upon the question whether a like result follows when the wrongs are dissimilar in nature. I need not cite authorities to prove these propositions. They can be found in any work treating upon the subject of marriage and divorce.

Our statute, also, it seems to me, can bear no other construction. The opening sentence of the chapter on divorce and alimony provides that divorces may be granted on application "of the party injured," for the causes therein defined, and clearly there can be no legal injury where the conduct of the one party has been no more gross than the conduct of the other. Such, moreover, has been heretofore our uniform construction of the statute. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598; *Ellis v. Ellis*, 77 Wash. 247, 137 Pac. 453.

The case is not aided by the finding to the effect that the court is satisfied that the parties can no longer live together. While it is true the Code, after enumerating certain specific causes for which a divorce may be granted, provides, "And a divorce may be granted upon application of either party for any cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," this clause has never been held by us to authorize a divorce merely because the court may be satisfied of the fact. On the contrary, we have held that, in addition thereto, some specific cause must be found giving rise to the conclusion, and that the party in favor of whom such cause is found has not been guilty of like misconduct towards the other party. Thus, in *McDougall v. McDougall*, the governing principle is stated in this language:

"The only theory upon which we can account for the action of the court below is that it came to the conclusion that, under all the circumstances of the case, the parties would not probably again live together as husband and wife, and from that fact assumed that it would be proper to decree a dissolution of the marriage bonds. There are some who would justify a divorce for this reason, but for the good name of our state we are glad to be able to say that principles of this kind have not yet taken the shape of legal enactment here. As our statute at present stands, it is not enough to authorize a decree of divorce that the court should find as a fact that the parties will no longer live together as husband and wife. It is necessary that there should be found to exist some of the causes mentioned in the statute in favor of the one as against the other party, and that the party in favor of whom such cause of divorce is found has not been guilty of like misconduct against the other party."

So in *Colvin v. Colvin* it was said:

"We do not think it was intended by the Legislature that a divorce should be granted in every case wherein it should be found 'that the parties can no longer live together'; and where, as here, their failure to live together is due to their own obstinacy and stubbornness, we think a divorce should be denied. It is not the policy of the law that divorce should be granted merely because parties 'from unruly temper' or mutual wranglings live unhappily together. In order to have relief, it is not required that the party

complaining should be wholly without fault, for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But where the parties to a divorce suit are in pari delicto, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party."

In the case of *Ellis v. Ellis* it was said:

"Whatever may be the opinion of the individual judge as to the desirability of parties continuing in the marriage relation when they have lost that mutual respect and affection which is the basis of the relation, that relation can only be legally severed when one of the parties to it is guilty of such conduct toward the other as in law constitutes a ground for divorce. It is not enough that neither party has any regard for the other. *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21. Nor can irascibility of temper, nor a disposition to quarrel over trifles, be regarded as cruelty, within the meaning of that expression in divorce statutes. *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812. Nor is it sufficient that the parties will no longer live together in peace and harmony. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1020; *Stanley v. Stanley*, 24 Wash. 490, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598. Unhappiness between husband and wife is to be deplored; but, when such a condition arises between them because of mutual neglect, the remedy is not the courts, but reformation of individual conduct. The case being triable here de novo, this record has been read in the light of the complaints, and we cannot find evidence supporting the claims of either party to justify us in holding that a divorce should be granted against the other. Neither can we say that one party or the other is the

cause of the situation in which we find them. The husband holds the wife blamable, and the wife accuses the husband. Neither produces any corroboration worth mentioning. We are therefore driven to hold, as the lower court, that neither has sustained a cause of divorce against the other. We differ with the lower court only in its announcement that, under such circumstances, the best interests of society and the state demand the annulment of this marriage."

So in the case at bar, since it has been found that the parties have been guilty of a like offense towards the other of that which complaint is made, it is no ground for a divorce that the court may believe that they can no longer live together. Nor is it any ground for granting the divorce in the first instance, or for affirming the decree in this court, that the parties themselves do not suggest the question I have discussed. Marriage is a status or institution as well as a contract, and in it the state, as well as the several parties thereto, has an interest. It is the duty of the court, therefore, as the representative of the state's interest, to deny the divorce when it is made to appear that the complaining party has been guilty of conduct towards the other party of a like nature of which he or she complains, whether pleaded or suggested by the other party or not.

In my opinion the only decree properly to be entered is one denying the divorce, and I think the court errs in its order of affirmance.

CROW, J., concurs in the dissent.

(83 Wash. 663)

PETTET v. JOHNSTON et al. (No. 11769.)  
(Supreme Court of Washington. Jan. 29, 1915.)

1. CONTRACTS (§ 349\*)—BREACH—EVIDENCE—PRICE.

In an action on a contract for work, where the testimony is conflicting as to the price agreed on, evidence of the value of the work at the time of the making of the contract is admissible to show the agreed price.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1808, 1811-1814, 1817, 1818; Dec. Dig. § 349.\*]

2. APPEAL AND ERROR (§ 882\*)—QUESTIONS REVIEWABLE—INVITED ERROR.

A party, who, by objections, succeeds in excluding evidence to establish a fact, may not complain of the subsequent exclusion of evidence offered by him for the same purpose, for the error, if any, was invited by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

Department 1. Appeal from Superior Court, Snohomish County; Guy O. Alston, Judge.

Action by R. C. Pettet against Elmer E. Johnston and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Coleman, Fogarty & Anderson, of Everett, for appellants. Stiger & Dally, of Everett, for respondent.

CROW, J. Action by R. C. Pettet against Elmer E. Johnston and Jessie M. Johnston, his wife, to recover the amount alleged to be due on a contract for clearing land and for extra work. From a verdict and judgment in plaintiff's favor, the defendants have appealed.

The respondent alleged that on or about October 1, 1910, he entered into an oral contract with appellants, whereby he agreed to clear about eight acres of land for \$125 per acre; that he performed his contract; that he also performed extra work of the value of \$100 at appellants' request; and that, after allowing appellants all credits to which they are entitled, they were indebted to him in the sum of \$571.17, for which he asked judgment, with interest. Appellants denied that the tract to be cleared contained more than 6½ acres; denied that they agreed to pay respondent \$125 per acre; denied that respondent had completed his contract; alleged that it would cost \$100 to complete it; and contended that respondent contracted to do all of the work for the agreed sum of \$500. From this statement of the issues it is apparent that the one question involved was whether the contract price was to be \$125 per acre, or \$500 in all. Appellants called one I. L. Todd, a competent and qualified witness, and asked him what it would be worth to clear such land as appellants'. To this question respondent's objection, on the ground that it was immaterial and irrelevant, was sustained. Thereupon appellants offered to prove by the witness that he had

examined similar land in the immediate neighborhood belonging to the appellants, and that the value of clearing such land would not exceed \$80 per acre. To this offer respondent's objection was also sustained.

[1] Appellants now contend that, as a dispute arose between the parties with reference to the contract actually made and the contract price, the evidence offered should have been admitted, not for the purpose of establishing a contract, but for the purpose of furnishing circumstantial evidence as to which contention of the parties was correct. In support of this position appellants cite *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101; *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760; *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884.

There is no question but that this class of evidence is ordinarily competent and admissible in cases of this character for the purpose which appellants urge. In *Wheeler v. Buck & Co.*, supra, we said:

"In an action on a contract for work, when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time the contract was made, as tending to show what the agreed price was."

[2] We are of the opinion, however, that appellants are not in a position to take advantage of this alleged error. The record shows that, when respondent was introducing his evidence for the purpose of showing the contract which he alleged was made, he produced one A. O. Clevisch, a competent witness, and asked the following questions:

"Q. Do you know what it is worth to clear such land as that, take it all together as a job? A. Why, I have done such work on a job. Q. What would it be worth to clear such land? Mr. Anderson (attorney for appellants): Objected to as immaterial. (Sustained. Question withdrawn.)"

It will thus be noticed that the first objection to this class of evidence was made by appellants and sustained by the trial court; that, after the objection was sustained, respondent submitted to the ruling of the court and withdrew the question. The first ruling of the court, that this evidence was inadmissible, was procured by appellants themselves. If the ruling was erroneous, the error was invited by them. This being true, it is apparent that appellants are now in no position to take advantage of the error which they invited and now urge.

Appellants urged the exclusion of this evidence as error, in presenting their motion for a new trial. In passing upon the motion, the trial judge well said:

"I do not think that the defendant is in a position, after having obtained a ruling from the court that such evidence is immaterial, to now predicate error on the court's sustaining an objection to similar testimony proposed by the plaintiff."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appellants in their brief seek to meet this suggestion by saying:

"The court appears to be of the opinion that errors can be set off against each other so long as they have occurred in the offer of testimony by the opposing parties to the suit."

If appellants had first offered to introduce this evidence, and respondent had objected, and thereafter respondent had sought to introduce it, the situation of the parties would be different. But, as above suggested, the ruling was first procured by the appellants themselves, and it is a well-settled rule of practice that no advantage can be taken of invited error by the party who invited it. 2 Rul. Case Law, § 198.

The judgment is affirmed.

CHADWICK, MAIN, and ELLIS, JJ., concur.

(83 Wash. 676)

STATE ex rel. DOW, Prom. Atty., v. NICHOLS et al. (No. 12098.)

(Supreme Court of Washington. Jan. 29, 1915.)

**1. NUISANCE (§ 81\*)—ABATEMENT—STATUTE—KNOWLEDGE OF OWNER.**

Where it appears that prostitution is being carried on in a hotel with the knowledge of the tenants, the nuisance may be abated under Laws 1913, p. 391, § 1, making the building and grounds upon which a house of prostitution exists a "nuisance," and section 2, authorizing an action in equity against such nuisance, though there is no evidence that the owner of the building had knowledge of the existence of the prostitution.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 193; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

**2. JURY (§ 14\*)—RIGHT TO JURY TRIAL—EQUITABLE ACTION—ABATEMENT OF NUISANCE.**

The action to abate the nuisance being one in equity, defendants have no right to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.\*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the State, on relation of Lorenzo Dow, Prosecuting Attorney, against W. R. Nichols and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

C. M. Riddell, A. R. Titlow, and A. O. Burmeister, all of Tacoma, for appellants. Lorenzo Dow and A. B. Comfort, both of Tacoma, for respondent.

MAIN, J. The purpose of this action was to abate a nuisance and enjoin the continuance thereof. In the complaint it is alleged that on and from some time prior to October 18, 1913, a certain building or hotel known as the Wilber, in the city of Tacoma, "was used for the purpose of lewdness, assignation, and prostitution, and said place was at said time, and is now, a nuisance under the statutes of the state of Washington." The own-

ers of the hotel as well as the lessees were made parties defendant. They answered separately denying the existence of the nuisance. After the issues had been thus framed the defendants demanded a jury trial. This by the trial court was refused. The cause was tried to the court and a finding made:

"That on and prior to the 18th day of October, 1913, said building together with the fixtures, furniture, and movable property therein, was used for the purpose of lewdness, assignation, and prostitution."

A judgment was entered abating the nuisance and closing the property for a period of six months. From this judgment the defendants appeal.

In the briefs two questions are argued: First, whether the finding that the building was used for the purpose of lewdness, assignation, and prostitution is sustained by the evidence; and, second, whether the trial court erred in denying a jury trial.

I. The action was brought under chapter 127, p. 391, Laws of 1913, generally known as the red light law. Section 1 of this act is dual in its provisions. It is there provided that whoever shall erect, establish, maintain, continue, use, own, or lease any building or place used for the purpose of lewdness, assignation, or prostitution is guilty of a nuisance; and also that the building or place or the ground itself in or upon which lewdness, assignation, or prostitution is conducted, permitted, or carried on, continues or exists, and the furniture, fixtures, musical instruments, and contents, are declared a nuisance. Section 2 of the act provides that the prosecuting attorney, or any citizen of the county may maintain an action in equity in the name of the state. The present action is one in equity, and is brought under the second provision of section 1 of the act, which makes the place or building a nuisance, and not under the first provision, which makes the person subject to be prosecuted by indictment or information.

[1] The appellants claim that the evidence does not show that lewdness or prostitution was conducted or carried on in the building mentioned. This presents a question of fact. The statement of facts covers approximately 225 pages. The appellants' abstract of the evidence covers less than 2 pages of typewritten matter. It does not set forth the evidence of the various witnesses in narrative form, nor contain references to the statement of facts, as required by the statute and the court rules. The abstract covers the evidence in general terms, and is denominated by the abstracter as a "synopsis" of the evidence. No motion was interposed to strike this abstract. The respondent filed a supplemental abstract setting forth the testimony of certain of its witnesses in narrative form. Considering the testimony as it is found in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



these two abstracts, there is no question but what the finding of the trial court is sustained by the evidence. From the evidence abstracted it plainly appears, not only that prostitution was carried on in the place mentioned, but that this was with the knowledge of one of the tenants. It is said, however, that the owners of the property had no knowledge of the existence of the nuisance. This is doubtless true. But the fact that the owners had no knowledge that prostitution was being carried on at the place mentioned, would furnish no reason why the court should not abate such nuisance if, in fact, it existed.

[2] II. The appellants argue their assignment of error based upon the refusal of the court to grant a jury trial, but cite no authority sustaining their position. As already stated, this action was brought on the equity side of the court. Under the statute the building or place where prostitution is carried on is made a nuisance, and an action in equity is authorized to abate and enjoin the existence of such a nuisance. It is common learning that in an equitable action a jury trial cannot be demanded as a matter of right. Independent of the statute, an equity court has power in proper cases to abate and enjoin a bawdyhouse as a nuisance.

In *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35, speaking upon the contention that there was a plain, speedy, and adequate remedy at law, and that therefore the right did not exist in equity, the court said:

"The second contention of the appellant, while not entirely free from difficulty, we think is also without merit. It will be remembered that courts of equity have, from the earliest times, exercised jurisdiction to prevent and abate public nuisances, notwithstanding there has concurrently existed the common-law remedies of indictment and action on the case. The jurisdiction was grounded on the inadequacy of the legal remedies; it being within the power of courts of equity, not only to abate an existing nuisance, but to do what the courts of law could not do—interpose and prevent threatened nuisances, and, by a perpetual injunction, make their remedies effectual throughout all future time. \* \* \* Precedents are abundant where equity has interfered by injunction to prevent and abate public nuisances against which there existed the same common-law remedies of indictment and action on the case that existed against the maintenance of a bawdyhouse"—citing authorities.

In *State v. Jordan*, 72 Iowa, 377, 34 N. W. 285, the Supreme Court of the state of Iowa, in an action brought under a statute which made the place where intoxicating liquors were sold unlawfully a nuisance, held that the defendant could not demand a jury trial as a matter of right. It was there said:

"It is insisted that the statute is in conflict with the Constitution of the United States, for the reason that it denies defendant the right of trial by jury, deprives her of her property without due process of law, and authorizes punishment without indictment by a grand jury. It is sufficient to say, in reply to these objections,

that the action is brought in chancery to restrain the maintenance of a nuisance—a subject of equitable cognizance before the statute was enacted—and that the right to trial by jury in chancery cases is not secured by any constitutional provision. \* \* \*

The trial court did not err in refusing a jury trial. Had the action been brought under the first provision of section 1 of the statute by information or indictment, and a jury trial been denied, a different question would be presented.

The judgment will be affirmed.

MOUNT, ELLIS, and CROW, JJ., concur.

(84 Wash. 13)

# INDEPENDENT ORDER OF FORESTERS v. BONNER et al. (No. 12070.)

(Supreme Court of Washington. Feb. 2, 1915.)

## 1. APPEAL AND ERROR (§ 999\*)—VERDICT—CONCLUSIVENESS.

That the jury accepted evidence of defendant does not show passion or prejudice requiring reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

## 2. DEPOSITIONS (§ 64\*)—EXAMINATION OF WITNESSES—RESPONSIVENESS OF ANSWERS.

Where a witness testifying by deposition was asked to state the condition in which he found the vital organs of decedent when performing the autopsy, the answer stating his conclusion that the condition of the organs was the same as would be caused by chronic alcoholism, and that the odor of alcohol was present when the autopsy was performed, was not responsive, and was properly excluded.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 133-141; Dec. Dig. § 64.\*]

## 3. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Keman, Judge.

Action by the Independent Order of Foresters against H. E. Bonner and another. From a judgment for plaintiff, defendant Mrs. H. S. Fender appeals. Affirmed.

Samuel R. Stern, of Spokane, for appellant. Charles P. Lund, of Spokane, for respondent.

MAIN, J. This is an action of interpleader brought by the plaintiff, a fraternal insurance order, for the purpose of having determined to whom should be paid the amount due on a beneficiary certificate issued to one V. R. Bonner, and for what amount the plaintiff should be held liable. The certificate called for the payment of \$1,000. Under the rules of the order, when any member thereof used intoxicants to such excess as to endanger his life, or to materially affect the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

risk upon his life, or directly or indirectly cause his death, his insurance or mortuary benefits were reduced.

The plaintiff claims that the death of V. R. Bonner was accelerated by the use of intoxicants, and that therefore the amount payable to the beneficiary was \$577.38. H. E. Bonner, the son, and Mrs. H. S. Fender, the former wife, both appeared in the action. Prior to the calling of the case for trial, the son filed a disclaimer. Mrs. Fender denied that the deceased's death was accelerated by the use of intoxicants, and claimed the full amount of the certificate. The cause was tried to the court and a jury. The trial judge, in submitting the case to the jury, stated that the question to be determined was whether "deceased died of alcoholism." To this instruction no exception was taken. The jury returned a verdict for the sum of \$1,000, the full amount of the certificate. Motion for a new trial and motion for judgment notwithstanding the verdict being made and overruled, a judgment was entered upon the verdict. The plaintiff appeals.

[1] It is first assigned as error that "the verdict was the result of passion and prejudice and against the evidence." The testimony for the plaintiff was given by depositions. The testimony for the defendant was given orally before the court and jury. The trial proceeded with the utmost decorum. We find nothing in the record to justify the claim that the verdict was the result of passion and prejudice. The fact that the jury accepted the evidence of the defendant rather than that of the plaintiff does not show passion or prejudice.

[2] The second error assigned is upon the ruling of the court sustaining an objection to the reading of an answer to one of the cross-interrogatories found in one of the depositions, and the refusal of the court to permit the reading of the answer to a question

in another deposition. By the cross-interrogatory the witness was asked to state the condition in which he found the vital organs of the deceased when he performed the autopsy. The answer did not state the condition in which he found such organs, but stated the conclusion of the witness that the condition of the organs was the same as would be caused by chronic alcoholism, and that the odor of alcohol was present when the autopsy was performed. The answer was not responsive to the question. The other question to which the court sustained an objection called for a matter which was not relevant or material to the inquiry. In these rulings the trial court committed no error.

[3] It is also claimed that the motion for judgment non obstante veredicto should have been granted. The evidence of the plaintiff and that of the defendant was not in harmony. The evidence offered by the defendant and the reasonable inferences that might be drawn therefrom were sufficient to sustain the verdict. On the other hand, the evidence of the plaintiff and the reasonable inferences that might be drawn therefrom would have sustained a verdict as contended for by it. The disputed question was one of fact, and consequently it was for the jury to determine. The appellant in its brief states:

"There is but one disputed question of fact in this case, and that is whether the decedent's death was caused in whole or in part from the use of alcoholic beverages."

The jury having spoken upon the disputed question of fact, and there being evidence to sustain the verdict, it will not be disturbed by this court.

There are other assignments of error, all of which have been considered, but in none of them do we find substantial merit.

The judgment will be affirmed.

CROW, MOUNT, ELLIS, and FULLERTON, JJ., concur.

(83 Wash. 684)

TAYLOR v. ANDRES et al. (No. 12189.)

(Supreme Court of Washington. Jan. 29, 1915.)

## APPEAL AND ERROR (§ 614\*)—RECORD—CERTIFICATION.

Under Rem. & Bal. Code, § 391, providing that, when such is the fact, the trial judge shall certify that the statement of facts contains all the material facts, matters, and proceedings occurring in the cause and not already a part of the record, on an appeal on the sole ground of misconduct of the jury, a certificate that the matters and proceedings embodied in the statement were matters and proceedings occurring in the cause, but not certifying that they were all the matters and proceedings or all of those material, was insufficient, and the statement would be stricken on motion, though it contained an affidavit by each of the 12 jurors, as, the certificate being insufficient, the court would not look into the proposed statement and attempt to determine from its contents whether it, in fact, contained all the material facts and proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. § 614.\*]

Department 2. Appeal from Superior Court, Skagit County; Wm. H. Pemberton, Judge.

Action by Eugene Taylor against Claus E. Andres and others. Judgment for plaintiff, and defendants appeal. Motion to strike the statement of facts granted, and judgment affirmed.

Shranger & Henderson, of Mt. Vernon, for appellants. Thomas Smith, of Mt. Vernon, for respondent.

MAIN, J. The purpose of this action was to recover damages for breach of a written contract. After the issues were framed the cause was tried to the court and a jury. A verdict was returned in the sum of \$800. The defendants thereupon interposed a motion for a new trial upon various grounds. Upon hearing this motion the court directed that a new trial would be granted unless the plaintiff should elect to remit from the verdict the sum of \$200. The plaintiff thereupon filed his election to accept a judgment for \$600. The motion in other respects was denied. A judgment was entered in favor of the plaintiff in the sum of \$600. The defendants appeal.

Upon this appeal but one question is urged, and that is the misconduct of the jury. The respondent opens his answering brief with a motion to strike the statement of facts; one of the grounds of the motion being that the statement of facts is not certified as required by law. Aside from the formal parts, the certificate is as follows:

"That the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in said cause."

The statute (Rem. & Bal. Code, § 391), among other things, provides that, when such is the fact, the trial judge shall certify that the statement of facts "contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein. \* \* \*" Comparing the certificate with the statute, the infirmity in the former readily appears. It nowhere appears in the certificate that the statement of facts contains all the material facts, matters, and proceedings occurring in the cause not already a part of the record therein. Where it does not appear in the certificate to the statement of facts that the statement contains all the material facts not already a part of the record necessary to the consideration of the case, the statement, upon motion, will be stricken. In the absence of such a certificate, it is presumed that the statement does not include all the material facts. Kirby v. Collins, 8 Wash. 297, 32 Pac. 1060; State ex rel. Miller v. Seattle, 45 Wash. 691, 89 Pac. 152.

In the case last cited it was said:

"It is neither certified that the statement before us contains all the material matters and proceedings occurring in the cause which are not already a part of the record, nor that it contains such thereof as the parties have agreed to be all that are material therein. The statute makes it the duty of the trial judge to so certify when such are the facts. Bal. Code, § 5060 (P. C. § 677). In the absence of such a certificate, it must therefore be presumed that the statement does not include all the material facts, and we are thus advised that all the material facts which were before the trial court and which controlled its action are not before us. \* \* \*"

But the appellant claims that since the only question is the misconduct of the jury, and the statement of facts contains an affidavit by each of the 12 jurors, that it shows on its face that it contains all the material facts necessary to determine the question presented. This conclusion, we think, does not necessarily follow. The certificate being insufficient, the court will not look into the proposed statement of facts and attempt to determine from its contents whether it does, in fact, contain all the material facts and proceedings necessary to a consideration of the point involved. Had the certificate contained a statement that there were embodied in the statement of facts all the material facts, matters, and proceedings not already a part of the record which were necessary to a determination of the question involved, a different question would be presented.

The motion to strike must be granted. The judgment will be affirmed.

CROW, MOUNT, FULLERTON, and EL-LIS, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(84 Wash. 16)

**MANHEIM v. STANDARD FIRE INS. CO.  
OF HARTFORD, CONN.**  
(No. 12171.)

(Supreme Court of Washington. Feb. 2, 1915.)

**1. INSURANCE (§ 565\*)—FIRE INSURANCE—  
"ADJUSTER"—"INSURANCE ADJUSTER."**

An "adjuster" or "insurance adjuster," defined by Laws 1911, p. 183, § 2, as one undertaking to ascertain and report the actual loss to the subject-matter of insurance due to the peril insured against, may only ascertain the amount of a fire loss and report his findings to insurer, and, in the absence of authority conferred on him, he may not waive any of insurer's rights or admit or deny its liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1412; Dec. Dig. § 565.\*]

For other definitions, see Words and Phrases, First and Second Series, Adjuster.]

**2. INSURANCE (§ 565\*)—FIRE INSURANCE—  
DUTIES OF ADJUSTER—PRESUMPTIONS.**

Where a statute defines the duties of an insurance adjuster, no presumption of authority to perform other duties, and thereby bind insurer, can arise from the mere fact that he acted as adjuster.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1412; Dec. Dig. § 565.\*]

**3. INSURANCE (§ 576\*)—FIRE INSURANCE—  
WAIVER.**

The purpose of a clause in a fire policy, stipulating that insurer shall not be held to waive any provision of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part, relating to the appraisal or to the examination provided for, is to permit insurer to cause a full investigation to be made as to the value of the property destroyed and the amount of loss, and may, without waiving any fraud of insured in furnishing proofs of loss, examine invoices or certified copies to ascertain the amount of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.\*]

**Department 2. Appeal from Superior Court, Yakima County.**

Actions by W. Manheim against the Standard Fire Insurance Company of Hartford, Conn. From a judgment for defendant, plaintiff appeals. Affirmed.

G. G. Lee, of Toppenish, for appellant. Granger & Clarke and Fred Parker, all of Seattle, for respondent.

**CROW, J.** Two causes of action, to recover for losses sustained by fire, based on separate policies of insurance, are pleaded herein. From a verdict and judgment entered on the first cause of action in favor of defendant, the plaintiff has appealed.

The complaint, in substance, alleged that on November 19, 1912, the respondent Standard Fire Insurance of Hartford, Conn., a corporation, executed and delivered to the appellant W. Manheim policy No. 900501, whereby, for the period of one year, it insured appellant's stock of furnishing goods, in a store in North Yakima, against loss by fire, in the sum of \$2,500; that other concurrent insurance was permitted; that appellant procured additional concurrent insurance in the sum of \$10,000; that the merchandise was

totally destroyed by fire on February 12, 1913; that its value was not less than \$14,000; that appellant immediately notified respondent of the loss and submitted proofs of loss within 60 days after the fire; that respondent's adjuster investigated the fire and the loss sustained; that appellant fully performed all conditions and stipulations of the policy on his part to be performed; and that, after receiving the proofs of loss, respondent refused to pay the loss which appellant had sustained.

Answering the complaint, respondent alleged: That the policy of insurance contained the following provision:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; \* \* \* or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

That subsequent to the fire appellant furnished and delivered proofs of loss to respondent, in which he stated that the insured property amounted to \$14,262.70. That the statement was false. That it was intentionally made for the purpose of deceiving and defrauding respondent, and that the value of the property at the time did not exceed \$2,500, as appellant well knew.

For affirmative reply appellant alleged that one A. W. Jones, an adjuster, acting for respondent, after receiving the proofs of loss, demanded of appellant that he furnish the adjuster with duplicate invoices of the goods, wares, and merchandise destroyed; that in so doing appellant was put to considerable trouble and expense; and that respondent was thereby estopped 'from defending on the ground of fraud and false swearing.

[1] The controlling contention which appellant makes by his various assignments of error is that the action of respondent's adjuster in making an investigation after the proofs of loss were made, and in demanding duplicate invoices from appellant constituted a waiver of objections on the part of respondent, and estopped respondent from defending this action on the ground of appellant's false swearing. It is not contended that the verdict of the jury on the issue of false swearing was not sustained by the evidence. We are unable to conclude that respondent waived the defense of fraud and false swearing, or that it was estopped from urging the same. There is no showing that Mr. Jones occupied any position other than that of an adjuster, or that he was authorized to bind the respondent corporation by waiving any of its rights. All he was authorized to do was to investigate the fire, ascertain as nearly as possible the loss which appellant had sustained, and report his findings to respondent. An adjuster and his duties are defined by section 2 of chap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ter 49, Session Laws 1911, at page 163, in the following language:

"Adjuster' or 'insurance adjuster' is a person, copartnership or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against."

No evidence was presented showing or tending to show that any additional authority was conferred on the adjuster by respondent, which would have the effect of empowering him to waive any of respondent's rights or to admit or deny its liability. In the absence of some such showing, his only authority would be to investigate the fire, the amount of property destroyed, and the actual loss sustained, and report his findings to respondent, so that it might determine the question of liability.

[2] The statute having defined the duties of an adjuster, no presumption that he had authority to perform other duties, and thereby bind the respondent, can arise from the mere fact that he was acting as an adjuster.

[3] The policy, which in its form and provisions complies with chapter 49 of the Session Laws of 1911, contained the following clause:

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to the examination herein provided for."

The manifest purpose of this clause is to permit the insurance company to cause a full and complete investigation to be made as to the value of the property destroyed and the amount of loss or damage sustained. The policy expressly provides that the company may examine invoices or certified copies if the originals be lost, and that by so doing it does not waive any provision or condition of the policy. No construction of insurance laws should be made, if avoidable, which would permit an assured to defraud the insurance company. No assured, who is exercising honesty in his dealings, will object to a thorough investigation or examination of his books and invoices by an adjuster, after his proofs of loss have been made and delivered to the company. It is not contended that the clause of the policy pleaded in the answer is invalid, nor is it contended that the jury was not justified in finding from the evidence that appellant had in fact made false proofs of loss whereby, for fraudulent purposes, he intentionally overestimated the amount of property destroyed. There is nothing in the record which would have justified the trial court in withdrawing the cause from the jury and directing a verdict for the appellant.

The judgment is affirmed.

FULLERTON, MOUNT, MAIN, and ELLIS, JJ., concur.

(84 Wash. 9)

MASON COUNTY v. McREAVY.  
(No. 12485.)

(Supreme Court of Washington. Feb. 1, 1915.)

1. HIGHWAYS (§ 8\*)—ESTABLISHMENT—PRESCRIPTION.

Where tideland, designated as a street on a plat made by one not owning the land, was used by the public as a street for more than 10 years after the acquisition by a third person of title to the land, the public acquired a public street by prescription, though the plat was invalid.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 11; Dec. Dig. § 8.\*]

2. HIGHWAYS (§ 153\*)—STREETS—OBSTRUCTIONS.

A structure across a highway and from 13 to 20 inches above the surface thereof, with inclined approaches on each side, constructed without authority, may be found to be an unauthorized obstruction and a nuisance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 299, 417, 419; Dec. Dig. § 153.\*]

3. APPEAL AND ERROR (§ 889\*)—REVIEW—AMENDMENT TO CONFORM TO EVIDENCE.

A complaint, not attacked by motion to make it more definite and certain, will be deemed amended to conform to evidence received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.\*]

Department 1. Appeal from Superior Court, Mason County; Chas. E. Claypool, Judge.

Action by Mason County against H. E. McReavy. From a judgment of dismissal, plaintiff appeals. Reversed and remanded for new trial.

Troy & Sturdevant, of Olympia, and A. J. Falknor, of Seattle, for appellant. T. P. Fisk, of Shelton, for respondent.

MOUNT, J. This action was brought by Mason county for the purpose of abating an alleged nuisance upon a public highway. The complaint alleged, in substance, that within said county, in the town of Union, there is a public highway known and designated as Canal street; that this street was dedicated to the public use by the owner of the fee more than 20 years ago, and for that length of time has been used continuously by all of the people of Mason county who desire to use the same; that the same is a public thoroughfare and highway, and has been such both by dedication and by user for a period of more than 20 years under claim of right; that in the nighttime of December 12, 1913, the defendant placed an obstruction in said thoroughfare and highway, and denies and refuses to recognize the right of the public therein; that the board of county commissioners ordered and directed the road supervisor of that district to remove said obstruction, but the defendant prevented him from so doing; that said obstruction is a nuisance and a menace to the rights of the people of Mason county. And the com-

plaint prays for the abatement of the nuisance.

The defendant filed a general denial to this complaint. The cause was tried to the court and a jury. At the close of all the evidence the court discharged the jury and dismissed the action because, in his opinion, the evidence failed to show that the street, at the point where the obstruction was placed, was a public highway, for the reason that the public authorities had not assumed control over the street, and there was no evidence that any public money had been expended upon it, or such use made of it as to constitute it a county road by prescription. The plaintiff has appealed from that judgment.

It is contended by the appellant: First, that the street is shown by the evidence to be a public highway by prescription; and, second, that the structure in the street is an obstruction to public travel, and is therefore a nuisance.

[1] The evidence very clearly shows that in the year 1889 John McReavy and wife filed a plat in the office of the county auditor of Mason county, platting certain lands into lots and blocks, and naming the same Union city. This plat covers land located, abutting upon Hood's Canal. The most northerly street running east and west is described on the plat as Canal street. This street had been used by the inhabitants of the county for more than 20 years. It was contended by the respondent in the court below that this street was below the line of ordinary high tide, and that therefore the plat that was made by John McReavy and wife, although designating Canal street as one of the streets thereon, did not constitute a street, because, being tideland, the title of the land was in the state of Washington. Subsequently in the year 1901 the tidelands of the town site were acquired by the defendant from the state. Since that time it is shown practically without dispute that a portion of this street called Canal street has been used by the public as a thoroughfare. Conceding, however, that the original plat of the street was invalid by reason of the fact that the platters did not own the fee to the land, it was afterwards used as such street more than 10 years, the same as it had been previously used. It is true that no public money had been expended upon the street by the county authorities. But this court has held that, in order to constitute a public highway, it is not necessary that public money should be used thereon, provided it has been used by the public as a road or street for a period of more than ten years. In *Stofforan v. Okanogan County*, 76 Wash. 265, at page 273, 136 Pac. 484, 487, we said:

"In this state, however, we have repeatedly held that roads may be established by prescription by the use by the public for a period of not less than seven years, where the same have been worked and kept up at the expense

of the public, as provided in Rem. & Bal. Code, § 5657 (P. C. 441, § 91) or, where not so kept up at the public expense, simply by continued use by the public for a period coextensive with the period of limitation for quieting title to land, which is, in this state, ten years. *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615; *Okanogan County v. Cheetham*, supra, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027; *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858."

This being the rule, we are satisfied that there was abundant evidence to show that this street had been used as a public thoroughfare for more than ten years, and was therefore a public highway.

[2] We also think there was sufficient evidence to go to the jury upon the question whether the obstruction was an obstruction to public travel, and therefore a nuisance. The evidence shows that the defendant constructed this structure in the street on the night stated in the complaint. It was a structure built of lumber, extending across the street from a store building on one side of the street to a warehouse or wharf on the other. The structure was from 13 to 20 inches above the surface of the street. Inclined approaches were made upon each side. There is abundant evidence in the record to show that this was an obstruction to the street, and this court, in the case of *Miller v. Pierce County*, 34 Wash. 592, 76 Pac. 103, held that a structure similar to this built in a public highway, without authority of the county commissioners, was an unauthorized obstruction, and a nuisance. "Any unauthorized obstruction of a public highway is a nuisance." 37 Cyc. 247. There was no claim on the part of the defendant that he obtained authority from the county commissioners, and the evidence is clear to the effect that no authority was given by the county commissioners to construct this structure upon the street. It was therefore subject to abatement at the suit of the county.

[3] The respondent in his brief argues that the complaint does not state facts sufficient to constitute a cause of action by reason of the fact that the structure itself is not described, except in general terms. No motion was directed against the complaint to make it more definite and certain or to particularly describe the structure. The evidence, however, very clearly shows the character of the structure. This court has held frequently that, after evidence is introduced without objection, the pleadings will be treated as amended to conform to the evidence. *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172. We are satisfied that the court erred in taking the case from the jury.

The judgment is reversed, and the cause remanded for a new trial.

MORRIS, C. J., and HOLCOMB, CHADWICK, and PARKER, JJ., concur.

(84 Wash. 29)

**BRISCOE v. WASHINGTON-OREGON CORPORATION.** (No. 12475.)

(Supreme Court of Washington. Feb. 2, 1915.)

**1. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS—APPELLANT NOT ENTITLED TO RECOVER.**

Error in instructions is not prejudicial to plaintiff, where the evidence showed that his injury was due to his own negligence, so that no verdict in his favor could have been sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**2. STREET RAILROADS (§ 114\*)—COLLISION WITH VEHICLE—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

In an action for injuries resulting from a collision between a street car and plaintiff's automobile, evidence held to show that the negligence of the plaintiff was the proximate cause of the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by B. P. Briscoe against the Washington-Oregon Corporation. Judgment for the defendant, and plaintiff appeals. Affirmed.

Walsh & Lee, of Centralia, for appellant. Forney & Ponder, of Chehalis, for respondent.

**MOUNT, J.** The plaintiff brought this action to recover damages by reason of the alleged negligence of the defendant in the operation of a street car so that it collided with an automobile driven by the plaintiff. The defendant, in answer to the complaint, denied the allegations of negligence, and alleged contributory negligence on the part of the plaintiff. Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the defendant. The plaintiff has appealed.

[1] Counsel for the appellant argue at length that the court erred in instructing the jury. The instructions complained of are not set out in the brief. Only a part of the instructions given by the court are set out in the appellant's abstract of the record. The argument in the brief is directed to certain words and certain sentences which the appellant asserts should have been included or omitted in certain instructions. It is difficult to understand from reading the brief alone the points attempted to be made by the appellant upon these instructions. We have carefully read the instructions given by the court, and are convinced that they contain a correct statement of the rules of law appli-

cable to the case. Clearly the appellant has no valid and reasonable complaint upon any of the instructions given. They were certainly as favorable as he was justly entitled to. We shall not enter into a discussion of the questions presented upon the instructions, because we are satisfied that, if there could be a case where it was the duty of the court to take the case from the jury or direct a verdict for the defendant, this is such a case.

[2] It appears that the respondent was operating a street car line in the city of Centralia. On June 28, 1913, the appellant stopped his automobile on the west side of Tower avenue, in the city. Thereafter he started his car south on this avenue, and went for a short distance, possibly 100 feet, where he attempted to make a square turn east on Locust street, which crossed Tower street at right angles. As he did so he turned in front of a street car moving north on Tower avenue. The automobile was damaged, and the appellant himself was injured. By the great preponderance of the evidence both for the appellant and for the respondent it was shown that the appellant, without any care for his safety, drove his automobile upon the street car track immediately in front of the moving street car. Not only by the great weight of the evidence of the witnesses, of whom there were several, was this fact shown, but all the circumstances tended to show that the appellant carelessly and negligently drove his automobile in front of the approaching car, and that there was no time for the street car to be stopped and the accident avoided. The negligence of the plaintiff was clearly established. The only negligence claimed against the street car company was that the car was traveling at an excessive rate of speed. But whether it was or not, there was nothing in front of the appellant to obstruct his view. The street was open; the street car was in plain sight upon the track; and there can be no doubt of the fact that the proximate cause of the accident was the plaintiff's own negligence. The jury, under proper instructions, so found. We deem it unnecessary for this reason to consider the technical objections made to the instructions, or to consider the motion for a new trial. It is plain from the whole record that no other verdict could have been sustained, even though the criticisms of the instructions complained of by the appellant are well taken.

The judgment is therefore affirmed.

**MORRIS, C. J., and CHADWICK, PARKER, and HOLCOMB, JJ., concur.**

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(83 Wash. 687)

**SLATER v. LICH et al. (No. 11951.)**

(Supreme Court of Washington. Feb. 1, 1915.)

**1. MECHANICS' LIENS (§ 272\*)—ACTIONS—ANSWER.**

Where a building contract required the contractor to present to the owner receipts for all amounts paid by the contractor for work and materials on the job, an answer, in an action to foreclose a lien upon the building, which alleged that the contractor had not made certain payments for materials furnished, but not that the receipts for all bills paid had not been furnished, or that the materialmen had given notice of lien as required by 3 Rem. & Bal. Code, § 1133, stated no defense.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 514-524; Dec. Dig. § 272.\*]

**2. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—RULINGS ON DEMURRER.**

In such action, where, though the demurrer to that defense was sustained, the action was fully tried upon its merits, and upon the other defenses pleaded, which raised the issues whether the contractor had performed his contract, and what sums were due him for extras, and the owner's claim of offset for negligence in performance of the contract, the owner was not prejudiced by the sustaining of the demurrer, whatever may have been the correct construction of the contract.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

Department 1. Appeal from Superior Court, Whitman County.

Action by G. W. Slater against J. P. Lich and another to foreclose a mechanic's lien. Decree for plaintiff, and defendants appeal. Affirmed.

Chas. L. Chamberlin, of Colfax, and Chas. P. Lund, of Spokane, for appellants. Nellie & Burgunder, of Colfax, for respondent.

**CROW, J.** The defendants, J. P. Lich and Myrtle Lich, his wife, are the owners of certain improved lots in the city of Colfax, in Whitman county. In March, 1913, the plaintiff G. W. Slater and the defendant J. P. Lich executed a written building contract, whereby the plaintiff, for the stipulated price of \$3,849.60, agreed to furnish the labor and material necessary to construct an addition to a building then on the lots. Plaintiff, claiming that he had completed his contract in accordance with the plans and specifications, that he had also done extra work and had furnished extra material to the total value of \$404.50, and that the defendants had paid him only \$1,994.70 on the contract price, filed a claim for lien against the building and lots, and commenced this action to foreclose such lien. After issue joined and after trial, the trial judge without making findings of fact entered a decree in plaintiff's favor for \$1,881.90, \$200 attorneys' fees, and costs, and for the foreclosure of the lien. From this decree, the defendants have appealed.

[1] Appellants' first assignment is that the trial judge erred in sustaining respondent's demurrer to their second affirmative defense. The allegations of their answer predicate

this defense upon clause 4 of the building contract, which reads as follows:

"When the building is finished as per all plans, specifications and contract, a turnkey, broom cleaned job, and upon the presentation of all receipts for all money paid out by said Slater for work done on the job, and for all material furnished by any and all parties, and every transaction closed up and accepted by and all parties in a satisfactory and business way, then said J. P. Lich is to pay G. W. Slater the remainder of the contract price to be paid for said job."

After pleading this clause, appellants alleged that the respondent had contracted debts for materials used in the construction of the building to the Potlatch Lumber Company in the sum of \$1,037, to one P. F. Chadwick in the sum of \$800, and to one J. O. Housekeeper in the sum of \$100; that respondent had not made payments thereof; that he had not presented receipts for any payments thereof; and that he was not entitled to maintain this action. Upon consideration of clause 4 of the contract above quoted, we must confess that we find it somewhat ambiguous. If it makes any provision at all, it is that the respondent should present to appellant receipts for all bills paid by him for labor performed and materials furnished in the progress of the work. There is no allegation that this was not done. The clause did not provide that respondent should pay all bills as a condition precedent to the recovery of any balance due him on the contract. There is no allegation that the materialmen named had complied with the requirements of section 1133, 3 Rem. & Bal. Code, by delivering or mailing notices and statements to appellant. In the absence of this allegation the answer did not show that the amounts due the materialmen were for lienable items. If they were not, neither appellants nor their property could be held for their payment. There is no suggestion that these materialmen were seeking to obtain or enforce liens against appellants' property.

[2] Although the demurrer was sustained to the second affirmative defense, the action was fully tried upon its merits and upon other defenses pleaded. The issues tried were whether respondent had performed his contract and what sums were due him on the contract price and for extras. Appellants by other affirmative defenses claimed damages for respondent's alleged failure to complete the contract and for his negligence in its performance. These issues were also tried. Considering this condition of the record, we fail to see how appellant has been prejudiced by the order sustaining the demurrer, whatever may have been the meaning or correct interpretation of clause 4 of the contract.

The remaining assignments of error involve a consideration of the evidence introduced by the respective parties for the purpose of sustaining their respective claims. This evidence was conflicting and volumi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nous, and no good purpose would be served by an attempt to state it in detail. The trial court found the amount due respondent to be less than he claimed, but awarded him a judgment in excess of the sum which appellants in effect conceded to be due. We are unable to say that this result is not supported by the evidence. After an examination of the record, we conclude that the final judgment should not be disturbed. It will therefore be affirmed.

MAIN, ELLIS, and PARKER, JJ., concur.

(83 Wash. 680)

**MIANUS MOTOR WORKS v. VOLLANS.**  
(No. 12140.)

(Supreme Court of Washington. Jan. 29, 1915.)

**1. SALES (§ 273\*)—IMPLIED WARRANTY—FITNESS FOR PURPOSE.**

Where machinery was constructed under definite specifications embodied in a written contract, there is no implied warranty that it is suitable for the buyer's purpose, but the contract is fully performed if the machinery conforms to the specifications.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.\*]

**2. SALES (§ 273\*)—IMPLIED WARRANTY—FITNESS FOR PURPOSE.**

Where a certain engine of the buyer is known to be intended for use with a hoist contracted to be built according to definite specifications, in an action for the price of such hoist, it is no defense that the engine could not develop the power necessary to work the hoist.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.\*]

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by the Mianus Motor Works against B. H. Vollans. From an order granting a new trial, defendant appeals. Affirmed.

Cooley & Horan and B. Mulvihill, all of Everett, for appellant. Louis A. Merrick, of Everett, for respondent.

MAIN, J. Plaintiff, as the assignee of the Automatic Machine Company, instituted this action for the purpose of recovering for certain machinery sold and delivered to the defendant. The defendant counterclaimed for damages alleged to be due to the breach of an implied warranty. The cause was tried to the court and a jury. The amount claimed to be due as alleged in the complaint was \$1,082.10. The jury returned a verdict in the plaintiff's favor for \$66.80. A motion for a new trial was interposed upon the ground that the court had committed error in submitting the cause to the jury. This motion was sustained, and an order entered granting a new trial, from which the defendant appeals.

The facts are substantially as follows: The Automatic Machine Company was a man-

ufacturer and seller of gasoline engines. B. H. Vollans, the defendant, was engaged in the logging business; that is, removing piles and poles from the woods. On September 5, 1911, by conditional sale contract, the Automatic Machine Company sold to the defendant one 25 horse power 2 cylinder gasoline engine, mounted on a double drum-gear hoist, together with the other appurtenances for such a machine. This machine was used by the defendant in its logging operations for a number of months. The hoist apparently not being satisfactory, owing to the size and make of the drums, negotiations were entered into with the machine company relative to the construction of a new hoist. It was agreed that the old hoist should be taken back, and a credit allowed for it in the sum of \$250, and that a new hoist should be constructed at a cost of \$1,750. From information and data given him by the foreman of the defendant and the representative of the machine company, one J. C. Biegert, owner of the Biegert Machine Works, prepared a blueprint for the proposed hoist. Thereafter specifications and a contract were drawn. The specifications and contract were embodied in the same instrument. The blueprint, specifications, and contract were submitted to the defendant, and the contract was signed by him. On February 8, 1912, the defendant returned the accepted copy of the specifications, together with his check for \$300 as applying on the purchase price.

The specifications, among other things, provided for a 25 horse power engine to be fitted on a cast-iron frame, and also that "we will use the same engine on this rig that you now have in the woods." This was the engine which had been sold under the contract of September 5, 1911, and subsequently used by the defendant until it was sent to the Biegert Machine Works to be mounted upon the new hoist which was to be constructed by that company. Thereafter the Biegert Machine Works constructed the hoist and mounted the engine thereon. When the machine was completed the foreman went to the machine works for the purpose of testing it. The machine was taken to a vacant block near the machine works, and there by the foreman tested. Being satisfactory, it was subsequently shipped to the point where the defendant was conducting his logging operations. At the time, or shortly after the test, an additional payment was made on the purchase price. During the time the Biegert Machine Works was constructing the hoist the defendant's foreman had certain changes or additions made not set out upon the blueprint or in the specifications. The authority of the foreman is not denied. After the machine was returned to the woods with the new hoist it proved unsatisfactory. It is claimed by the defendant that it was not suitable for the purpose for which it was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

constructed, in that it would not develop the power necessary to do the work intended.

The action, as already indicated, was for the balance of the purchase price. The trial court, in instructing the jury, in one or more instructions stated, in effect, that the rule of law that, where an article is sold or manufactured for a specific purpose, there is an implied warranty that it is suitable for such purpose, was applicable to the facts in this case. After a hearing upon the motion for a new trial the trial court became convinced that this instruction was erroneous, and granted a new trial.

[1] Under the undisputed facts in this case the rule of law stated in the instructions was inapplicable, and it was therefore error to give it. The motion for a new trial was rightfully granted. The rights of the parties in this case are fixed by their written contract. This contract called for a hoist in accordance with the blueprint and specifications. There is no claim that the hoist was not constructed as contracted for. The engine which was mounted upon the hoist was the one which the contract called for, and which had previously been used by the defendant. This case falls within the rule announced in *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075. In that case there was a contract for one 400-ton Howe type coal washer. In the first letter of proposal it was designated as "one 400-ton coal bunker and washer." In the second letter of proposal it was designated as "a locally built washer of the Howe type." In the order it was designated as "one 400-ton Howe type coal washer." In the letter of acceptance it was designated as "one 400-ton Howe coal washer." And in the specifications it was designated as "one standard vertical type Howe coal washer, capacity 400 tons per day." The specifications and blue-

prints were prepared and agreed upon by the parties before and at the time of entering into the contract. No contention was there made that the washer was not constructed in strict compliance therewith. It was there held that, the coal washer having been constructed in accordance with the specifications agreed upon by the parties, there was no warranty that it would wash 400 tons of coal per day. In the course of the opinion it was said:

"When the parties to a contract designate the article to be manufactured in the manner here involved, and then proceed to agree upon detailed specifications and drawings as to the size and manner of construction of such article, we think the contract itself shows that the manner of so designating the article was nothing more than the use of a trade-name or term for it, and the question of whether or not it is constructed in compliance with the terms of the contract is to be determined by the detailed specifications and drawings, and not by the mere name they may choose to call it, or the manner by which they may designate it, and that such designation does not amount to a warranty as to its capabilities"—citing authorities.

[2] But it is claimed in this case that the engine when mounted upon the hoist manufactured by the Biegert Machine Works would not develop the power necessary to do the work, and that the engine was not covered by the blueprint and specifications. The answer to this is that the engine and hoist became a completed rig. The engine used was the one specified in the contract and which had been used by the defendant for some months. The contract and specifications were submitted to the defendant as a "proposal for gasoline logging engine." When the engine and hoist were connected it was called by the foreman of the defendant "a gasoline donkey."

The judgment will be affirmed.

CROW, C. J., and MOUNT, FULLERTON, and ELLIS, JJ., concur.

(84 Wash. 20)

**STATE ex rel. UNION TRUST & SAVINGS  
BANK et al. v. SUPERIOR COURT  
FOR SPOKANE COUNTY et al.  
(No. 12421.)**

(Supreme Court of Washington. Feb. 2, 1915.)

**1. EMINENT DOMAIN (§ 47\*)—NECESSITY FOR  
TAKING—PROPERTY DEVOTED TO SAME USE.**

A corporation constructing a hydroelectric power plant for a public purpose cannot condemn a power site owned by another public utilities corporation which intends to construct thereon a similar power plant, since property owned by a corporation and devoted to a public use cannot be condemned by another corporation for use in the same manner and for the same purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.\*]

**2. EMINENT DOMAIN (§ 47\*)—PROPERTY DE-  
VOTED TO SAME USE—ANTICIPATION OF FUTURE NEEDS.**

Where property was acquired by a public utilities corporation in reasonable anticipation of its future needs, it is considered to be devoted to a public use, unless there has been an abandonment of intention to devote it to such use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.\*]

Department 1. Certiorari to Superior Court, Spokane County; E. H. Sullivan, Judge.

Certiorari by the State of Washington, on the relation of the Union Trust & Savings Bank and another, against the Superior Court for Spokane County and another, to review an order of public necessity in condemnation proceedings. Order reversed, with directions to dismiss the proceedings.

Graves, Kizer & Graves, of Spokane, for relators. H. M. Stephens, H. S. Stoolfire, and Burcham & Blair, all of Spokane, for respondents.

PARKER, J. Certiorari to review an order of public necessity entered in an eminent domain proceeding. The Spokane & Inland Empire Railroad Company will hereafter be called the "relator." The Spokane Valley Power Company will be called the "respondent." The relator was incorporated as a public service corporation in 1906, for the purpose of taking over the properties of the Spokane Traction Company, organized in 1903, which had built and was operating street railway lines in Spokane; the Cœur d'Alene & Spokane Railway Company, organized in 1902, which had built and was operating a railway line to Cœur d'Alene, Idaho, and beyond; the Spokane & Inland, organized in 1904, which was building and had partially in operation railway lines in the Palouse country; and the Spokane Terminal Company, organized in 1905, which owned the terminals in Spokane used by the other companies. Each of these properties was operated electrically. The relator has a

capital stock of \$10,000,000 and a property investment of approximately \$25,000,000. It acquired from its predecessor a power site on the Spokane river known as the "Nine Mile" site. In 1906 it acquired a power site between the city of Spokane and the Nine Mile site, known as the "Bowl and Pitcher" site. With the Bowl and Pitcher site it acquired a light and power franchise theretofore granted by the city of Spokane. It paid \$50,000 for the power site and franchise. Neither of the original companies owned the electric power for the operation of its property. Each thereof had a separate contract for electric power with the Washington Water Power Company, expiring in 1916. The relator took the properties subject to these contracts. In April, 1908, the relator entered into a contract with the Washington Water Power Company in lieu of the several separate contracts of its predecessors, whereby it agreed to take the amount of power covered by their contracts until the completion of its Nine Mile plant then in process of construction, and to take thereafter until October 12, 1916, 3,800 horse power. It was agreed that neither the relator nor the three original companies would, prior to October 12, 1916, engage in the sale of electrical power for light or power purposes within the city of Spokane or in the Cœur d'Alene mining district, Idaho; that thereafter, and some time in 1908, the relator completed its Nine Mile power plant, which furnishes a maximum of 15,000 horse power, at a cost of approximately \$1,500,000. It commenced the construction of this plant in 1906. The relator owns and operates a street railway system in Spokane, and interurban lines running into various points in Washington and Idaho. It has a total urban and interurban mileage of 290.94 miles, all of which it operates by electricity. It uses a maximum of 8,900 horse power in the operation of its railway system, and furnishes 2,600 horse power for irrigation enterprises, making a total of 11,500 horse power devoted to a public use. When its contract with the Washington Water Power Company expires in 1916, it will not have sufficient power for these uses. For some time prior to the commencement of the work on the Nine Mile plant in 1906, the relator was considering the relative feasibility of the two sites, and hesitating as to which site it should first develop.

The respondent was incorporated as a public service company in 1913, with a capital stock of \$200,000 fully subscribed. Between that date and September 30th, its stockholders conveyed to it certain overflow and water rights on the banks of the Spokane river for a consideration of \$200,000. They took stock to the extent of \$142,500 and placed the balance of \$57,500 in the treasury. The stock is assessable to the extent of 25 per cent. of its par value. Some of the respond-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ent's land is above and some below the Bowl and Pitcher site which it seeks to condemn. The respondent's proposed power plant would create a lake about  $7\frac{1}{2}$  miles in length with the relator's land near the center. It cannot develop its plant without acquiring the relator's land. In January, 1914, the respondent commenced work at its dam site. On March 20th its trustees directed that the construction work should be prosecuted with diligence. In April it began certain condemnation proceedings against other parties. In May it made a tentative arrangement with the Spokane & British Columbia Railway Company to furnish it electric power. It expended before the hearing of this cause several thousand dollars in the prosecution of its proposed enterprise. The respondent desires to construct a hydroelectric plant at its site on the Spokane river below the Bowl and Pitcher site. The plan which the respondent proposes to carry out would cost about \$1,500,000.

The relator acquired the Bowl and Pitcher site in anticipation of its future needs; that is, it foresaw that within a reasonable time it would require the power which the two sites would develop to meet its needs in the operation of its system in the progress of its anticipated expansion, and in furnishing power for public use as an auxiliary to the full development of its system. Its good faith in acquiring and holding the Bowl and Pitcher site is shown by its several resolutions between April, 1906, and October, 1906. That it intends to develop this site is shown by its resolution of April 15, 1914, wherein it was resolved:

"That for the purpose of developing electric power to be used for the operation of its own and other railway lines and to enable this company to utilize its franchise in the city of Spokane and in other cities and towns where it may now have or hereafter acquire franchises for the disposal of electric current for the public, that the company with all convenient dispatch proceed to construct a dam and power plant on the Spokane river"—upon the lands in controversy.

It was further resolved that:

The president of the company "be and he is hereby authorized and directed to cause the necessary surveys to be made and plans to be drawn for the construction of a dam and power plant, to acquire such additional lands and such flowage rights as may be necessary for the proper development of electrical power, \* \* \* to make such financial arrangements as may be necessary for the construction of the plant and the development and utilization of electrical power thereat, to enter into any and all necessary contracts for construction, machinery, and additional engineering, \* \* \* and to do any and everything necessary or desirable for the construction of a power plant at the point aforesaid, and the development and utilization of electrical power thereat."

It was further resolved that he should apply to the federal government for flowage rights upon such of the Ft. Wright grounds as the engineer's report should show to be necessary in the development of its plant, and apply for and obtain additional fran-

chises from counties, cities, and towns which may be necessary or convenient in the utilization of the electric power to be developed, make contracts with municipalities or railway companies for the disposal of any power not needed for the purposes of the company, for public purposes, and execute in the name of the relator all contracts proper for the complete execution of the powers granted.

Mr. Wickersham, the relator's electrical engineer, testified:

"To sum it up, however, I might say that the average increase for each year from 1909 to 1914 has been about 20 per cent. a year, and on that basis we assume that five years will double the capacity of the present load. That has been checked by checking each individual consumer and analyzing the possibilities of his plant and considering our own requirements, without considering any extensions or any natural reserve that a power company should carry, and also taking over the Washington Water Power load, and we are convinced after the analysis that by the year 1918 the Inland Company will have to supply a load of approximately 25,000 horse power. Should any additional extensions be made, or we have the opportunity to sell power in Spokane, as we will after the year 1916, or receive larger consumers than we know of now, we may have to supply 8,000 to 10,000 horse power more. That is a reserve that any power company for its own safety should provide sufficiently far ahead of the actual demand for the power, so that in the year 1920 the Inland Company will be required, or should have to serve its interests, at least 35,000 horse power, which is the combined output of both the Bowl and Pitcher and the Nine Mile plant."

Mr. Gilman became the relator's president in January, 1914. He testified that the board of directors had directed the development of power at the site in controversy, that it had the ability to do so, and that it intended to do so. He further said:

"That for an electric system like ours the power is the heart of the system, and if we are stripped of our ability to produce power we are limited in our operations to the power that we have at the present time, so that when the country grows, when the Palouse is cut up, for example, and it is necessary to double-track, or extend our lines as the city grows, and we are required to extend our street car lines, or to put more cars or more service on the present lines, we will not have the ability to do so, because we will not have the power."

It would take two years—that is, two seasons—of low water, to complete the plant at either site. The relator cannot complete the development of a plant at its site without acquiring flowage rights for the back water. In this respect the parties stand upon an equal footing.

[1] Our statute (section 925, Rem. & Bal. Code) provides that, before property can be taken for a public use, two facts must be made to appear: (1) That the contemplated use for which the property is sought to be appropriated is "really a public use"; and (2) "that the public interest requires the prosecution of such enterprise." All property is held subject to the power of the state in the exercise of its sovereignty to appropriate it to a public use. Public service corpo-

rations are only permitted to exercise the power of eminent domain, an attribute of sovereignty, when the public interest will be promoted. We have held that property owned by a corporation and devoted to a public use cannot be taken by condemnation except in special cases not here present, to be used for the same purpose and in the same manner. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. v. Superior Court*, 65 Wash. 129, 117 Pac. 755; *State ex rel. v. Superior Court*, 47 Wash. 166, 91 Pac. 637. We have also held that property owned by a corporation "and not actually devoted to a public use" may be acquired by condemnation. *Samish River Boom Co. v. Union Boom Co.*, supra. The right to condemn in a particular case depends upon all the attending facts and circumstances. *Samish River Boom Co. v. Union Boom Co.*, supra.

[2] It has become the settled law of the state that a public service corporation may acquire property by condemnation or otherwise in reasonable anticipation of its future needs. When property has been so acquired, it is deemed devoted to a public use, although not actually devoted to such use, until there has been an abandonment of the intention so to use. *Nicomem Boom Co. v. North Shore, etc., Co.*, 40 Wash. 315, 82 Pac. 412; *State ex rel. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Neitzel v. Spokane International R. Co.*, 80 Wash. 30, 141 Pac. 186; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358.

In the *Nicomem Boom Co.* Case this court, speaking through Judge Hadley, said:

"It is also held that the question of future needs of railroad companies, in fulfilling their charter purposes and performing their public duties as common carriers, is one which should be given full consideration by a court before it undertakes to deprive a company of any part of its right of way in favor of another corporation. Such companies may anticipate future necessities and may, for that purpose, hold territory not in actual use to the exclusion of other companies."

In the second case cited, it was said by Judge Dunbar, speaking for the court:

"It is true that the International Railroad is not yet in operation, but the testimony shows that a large portion of the grading has already been contracted for, and that the whole road will be in operation in the near future; that it has traffic relations with the Canadian Pacific, and expects to be in reality the western portion of a transcontinental road. Although it is not yet in operation, companies of this kind must procure grounds for terminal facilities before they commence their operations. The necessity of the business requires this, and, when once they make their calculations, to procure these facilities, which this company did at an expense of \$150,000 in purchasing this land, they will be protected in those terminal rights to the same degree as will a company which is already operating its roads."

In the *Neitzel* Case, we said:

"A public service corporation may anticipate future needs, and mere nonuser of a portion of its easements does not, of itself, constitute an

abandonment. Whether or not there has been an abandonment depends upon the intention of the owner of the easement. While such intention may be deduced from long nonuser, the nonuse itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights."

In the *Merriam* Case, we voiced the same principle, saying:

"It was not incumbent upon the city to show an immediate necessity for an immediate use. The showing of a reasonable necessity for use in a reasonable time is all that can be required. A municipal corporation has the same right to be provident and forehanded in the acquirement of property for a public use that a public service corporation has."

In *State ex rel. v. Superior Court*, 71 Wash. 84, 127 Pac. 591, we recognized the rule of comparative necessity, saying:

"Whether the use is a public use, and whether the public interest requires the prosecution of the enterprise, and what lands, etc., are necessary for the enterprise, are all matters referred to the court for determination. *Rem. & Bal. Code*, § 925. From this results the doctrine which, for lack of a better name, may be called comparative necessity. If by the plan proposed the present and future public use and interest, as now apparent from the evidence, are met, that is as far as the court need now inquire."

The respondent has cited *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, and *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811. In each of these cases the proceedings were conducted under a different statute, as will appear from a reading of the cases. In *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25, the city condemned a strip of land 30 feet in width along the boundary of the University ground, for street purposes. The statute authorized the proceeding and the uses were dissimilar. In *State ex rel. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, it was not shown that the defendant would need or use the property in controversy for public purposes within a reasonable time. In *North Coast Ry. v. Northern Pacific Ry. Co.*, 48 Wash. 529, 94 Pac. 112, it was held that a portion of a railroad right of way through a defile which could be spared without material detriment could be condemned where the public interest required it. In all condemnation cases the paramount consideration is the public interest, and to that interest all rights must bow and all rules must bend. The record shows that the relator acquired the property sought to be condemned with the intention of devoting it to a public use within a reasonable time, that it now intends to prosecute the development of the power site with diligence, and that it has the means so to do. The purposes to which the parties desire to devote the property are the same.

The judgment is reversed, with directions to dismiss.

MORRIS, C. J., and CROW and CHADWICK, JJ., concur.

(27 Colo. A. 30)

**NEW ENGLAND ELECTRIC CO. v.  
SHOOK et al. (No. 4080.)**

(Court of Appeals of Colorado. Jan. 11, 1915.)

**1. BILLS AND NOTES (§ 123\*)—MAKERS WHO ARE LIABLE AS SUCH.**

Where a note for a corporate obligation reciting that, "I, we (and each of us), promise to pay," etc., was first signed by the corporation and then by defendants, who appended to their names the titles, "President" and "Secretary," defendants were not personally liable, although there was no "By," "Per," or similar term showing their agency, for the titles "President" and "Secretary" cannot be rejected as surplusage or considered descriptive persons, as the debt was that of a corporation, and it is not the custom for persons to append titles to their signatures on commercial paper.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 260-267, 1393; Dec. Dig. § 123.\*]

**2. EVIDENCE (§ 459\*)—PAROL EVIDENCE—ADMISSIBILITY.**

Where a note did not on its face show in what capacity two of the signers appended their signatures, parol evidence is admissible in explanation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

**3. BILLS AND NOTES (§ 519\*)—ACTIONS—EVIDENCE—SUFFICIENCY.**

Evidence held to sustain a finding that defendants, who appended their signatures, as officers, to a corporate note, did not intend to become personally liable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1802; Dec. Dig. § 519.\*]

**4. CORPORATIONS (§ 465\*)—CORPORATE NOTE—EFFECT OF SEAL.**

That a note, signed by a corporation is impressed with the corporate seal is strong circumstantial evidence that persons placing their names immediately beneath that of the corporation and appending the title "President" and "Secretary" are not personally liable, but that the note is a corporate obligation exclusively.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1822-1826; Dec. Dig. § 465.\*]

**5. ESTOPPEL (§ 68\*)—EQUITABLE ESTOPPEL.**

Where plaintiff proved against a bankrupt corporation a debt evidenced by a note executed by its president, he is estopped from claiming that the president was without authority to execute the note, and so was personally liable.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

**6. PLEADING (§ 269\*)—AMENDMENTS—DENIAL.**

The refusal of the court to allow a trial amendment to the replication, by which plaintiff desired to change the ground of liability, is not error, where the evidence showed plaintiff to be estopped to rely on such ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 811-815; Dec. Dig. § 269.\*]

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by the New England Electric Company, a corporation, against E. A. Shook and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Zimmerhackel & Avery, of Denver, for plaintiff in error. Isaac Pelton, of Akron, for defendants in error.

**HURLBUT, J.** This action was originally commenced in the county court of the city and county of Denver, on July 8, 1912, by plaintiff in error, as plaintiff (hereinafter called plaintiff). Defendants recovered judgment in the county court, from which an appeal was taken to the district court. The pleadings were the same in both courts.

The action is based upon a promissory note in words and figures following:

"\$575.69. Denver, Colorado, January 15, 1912.

"One hundred and twenty days after date, for value received, I, we (and each of us), promise to pay to the order of the New England Electric Co., five hundred seventy-five dollars and 69/100 dollars at the office of the United States National Bank, Denver, Colorado, with interest at 8 per cent. per annum from date until paid.

"The makers and indorsers hereof, hereby severally waive presentment for payment, protest, notice of nonpayment and of protest, and agree to pay ten per cent. additional as an attorney's fee, if collected by an attorney with or without suit. The Akron Gas & Electric Co.,  
{ Corporate } "R. A. Shook, President.  
{ Seal } "H. C. Black, Secretary.

The Akron Gas & Electric Company is not made a defendant, but the action is against Shook and Black as individuals. The complaint is short, pleads the note according to its legal effect, alleges its nonpayment, and prays for judgment against defendants for the amount of the note and interest. The answer pleads four defenses: First, a general denial of every allegation of the complaint except those expressly admitted; second, that neither of the defendants ever signed the note as a personal obligation, but that the same is the note of the Akron Gas & Electric Company only, and was executed and delivered by that company for a debt due from it to the plaintiff corporation; third, that neither of the defendants ever received any consideration for the execution and delivery of the note, and that the same was executed and delivered by the Akron Company in its corporate capacity solely, and not executed, or intended or understood to be executed, by either of the defendants personally, and was given for a corporate debt due plaintiff, all of which plaintiff well knew at the time of its execution. The fourth defense is equitable in its nature, averring, in substance, that defendants executed the note as president and secretary of the Akron Company, and that, through a mutual mistake on the part of plaintiff and defendants, the latter failed to execute the same unequivocally as the note of said company, and that the note should be reformed so as to express the true intent and meaning of plaintiff and defendants—to wit, an obligation of the Akron Company alone. Replication was filed by plaintiff, in which, among other things, it was admitted that the said Akron Company was one of the makers of the note; that the note was given exclusively for a debt due plaintiff from that company; and further alleged that,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prior to the time the note was signed, defendants were in no way indebted to the plaintiff company.

The case was tried to the court without a jury, and at the close of the trial judgment was rendered in favor of defendants.

The record presents but one controlling question for determination, and that is: Was the note the obligation of the Akron Company solely, or were Shook and Black personally liable thereon?

[1] Plaintiff's position is that the note on its face conclusively shows both Shook and Black to be personally bound for its payment; and in support of such position it contends that the phrase found in the body of the note, "I, we (and each of us)," shows beyond a doubt a plurality of signers or makers, and to hold that the corporation only was liable would be to ignore the plain meaning of the phrase and contradict the clear intention of the parties to the note as expressed thereby; and, further, that the absence of the word "By," and "Per," or a similar term, just after the corporate name, and before the names of Shook and Black, clearly manifests an intention on their part to personally bind themselves as makers. It is useless to deny that this position of plaintiff is supported by reputable authority, and particularly by the earlier English cases, but it is also true that such a position is vigorously condemned by authority of equal repute, including well known text-writers. Our attention has not been called to any decision of our own appellate courts passing on the question under discussion, and, knowing of none, we feel free to follow that line of authority which impresses us as being the most equitable, fair, and reasonable. By adopting this course, we find no difficulty in following the authorities last referred to, which hold to the rule that, in interpreting a note such as the one before us, the words "President" and "Secretary," immediately following the individual names signed, should not be rejected as surplusage, or considered *descriptio personæ*, unless it be clearly manifested from a plain reading of the entire note, giving the words used their common and customary meaning, that such parties intended thereby to personally bind themselves as makers. If the note be so read, how can it be reasonably said that there is any ambiguity, uncertainty, or doubt, upon the face of the note, as to the intention of Shook and Black in signing the same? Immediately following the context of the note is the full name of the corporation, "The Akron Gas & Electric Company," directly under which is signed the names "R. A. Shook, President," and "H. C. Black, Secretary," with the corporate seal attached, opposite their names, to the left. A corporation, as such, cannot write a word or do any other physical act. When business necessity requires its name to be subscribed on paper, it can only be placed there by and

through its officers or representatives. It is a custom of universal practice in the present day for those who sign the name of a corporation to any business or other document, with the intent to bind the corporation only, to append to the corporate signature their own names, or initials, with their official titles, intending thereby to characterize such signing as an act of the corporation only. Such is the common understanding throughout the business and commercial world, and it would seem reasonable for a judicial tribunal, when called upon to interpret a note or other written document so signed, to recognize such custom and give it full force and effect. In the instant case we have no hesitancy in saying that the note, with the impression of the corporate seal, when considered as a whole, is free from ambiguity, and shows upon its face that it is the note of the corporation only, and that neither Shook nor Black had any intention, in subscribing their names thereto, other than to do so as officers of the company, with the sole purpose of binding it alone to the payment thereof. From what standard of reason or common sense can it be maintained that, because the word "By," "Per," or some similar term, is not written before the names of Shook and Black, or because of the existence of the phrase above quoted, the plain intention of the signers of the note, as appears from the whole context and form of the signatures, should be ignored and held for naught, when it is manifest that the obligation was solely that of the company? Nor do we see any force or reason in the suggestion that, because of the absence of the word "By," etc., or because of the existence of such phrase in the body of the note, the words "President" and "Secretary," following the names of Shook and Black, should be held as *descriptio personæ*. It is the common custom, and so understood, at least in this country, that if a person intends to execute a promissory note in his individual capacity, and thereby bind himself personally, he simply signs his name, and that is the end of it. We venture the statement that it would be a positive curiosity, in this day and age, to find a promissory note, signed by individuals as individuals only, with descriptive words, such as appear on the note before us, appended to the signatures. In the early practice of the common law in England there was a general custom in vogue for individuals signing written documents to add to their signatures some title or abbreviation which indicated their social or political standing; but no such custom appears to have ever prevailed in this country.

[2, 3] If it be said that our interpretation of the note in issue is not warranted from a fair construction of the context, then the question arises: Does it, on its face, fairly show ambiguity or uncertainty of intention, on the part of the signers, or does it not,

and, if it does, is evidence admissible to show the real intent of the parties at the time it was executed? We find the authorities in conflict on this point also. The general trend of authority, including Colorado, supports the affirmative. Rhone v. Powell, 20 Colo. 41, 36 Pac. 899; Lewis v. Mutual Life Ins. Co., 8 Colo. App. 368, 46 Pac. 621. In the case at bar plaintiff admits in the complaint, and its witness Lawrence testifies, that the Akron Company was one of the makers of the note. The proof shows that after the note was executed and delivered the Akron Company was adjudicated a bankrupt, and plaintiff presented the note to the referee in bankruptcy as a claim against that company. Plaintiff's conceded agent, J. L. Cain, who was expressly instructed to collect the indebtedness, testified in his deposition that he was instructed to collect the money due, if possible, or, failing in this, to secure a personal note from Shook and Black, or, if unsuccessful in this, to obtain the company's note for the claim, and that in pursuance of such instructions, having failed to get the money, he solicited a note from Shook and Black personally, but both flatly refused to execute it, offering, however, to execute the company's note for the indebtedness, whereupon he accepted their offer and obtained the note in issue, with the understanding that it was executed by them solely as a company note, and not in any way as a personal note on their part. This testimony is corroborated in every particular by the testimony of both defendants. The only evidence tending to disprove such testimony was the testimony of an attorney for plaintiff, who testified that Cain made a statement to him on the street to the effect that at the time he (Cain) obtained the note from Shook and Black nothing was said by them or him about their not being personally liable on the note. The court found on this issue in favor of defendants, which is binding upon us.

[4] There is another feature of the case which it might be well to mention, and that is the corporate seal of the Akron company was impressed on the note. There is a line of authorities holding that a corporate seal on a note similar in form and language to the one before us is a strong circumstance tending to show that the note is that of the corporation only, and not of the individuals whose signatures are followed by their official titles. In Guthrie v. Imbrie, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331, the court had under consideration a note reading as follows:

"For value received, we promise to pay to David Guthrie, or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest.

James Imbrie, Prest.  
"J. J. Imbrie, Sec. G. M. Co."

The note bore the impression of seal reading "Granger Market Co., Portland, Oregon, November 4, 1874." The court held the note to be that of the company only, and not the individual note of the signers. To the same

effect: Means et al. v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624; Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316. This last case is referred to in Thompson on Corporations, vol. 4, § 5144. The following cases involve the interpretation of notes similar in form and phraseology to those considered in the Missouri, Indiana, and Illinois cases cited, except that the corporate seal was absent:

In Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171, the court construed a note identical in form and import with the one in issue. It read as follows:

\$637.40. Milwaukee, January 1st, 1887.

"Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

"San Pedro Mining & Milling Company,  
"T. Kraus, President."

The court held the note to be that of the corporation alone. The action was against both the company and Kraus. The latter pleaded a like defense to that pleaded by defendants in the instant case. See, also, 7 Cyc. 553 et seq., and Latham, Adm'r, v. Houston Flour Mills et al., 68 Tex. 127, 3 S. W. 462.

In Scanlan v. Keith, supra, it was held, in considering a note quite similar to the one before us, that the corporation alone was bound, the court saying in part:

"Most generally there is that on the face of the instrument itself, and especially where the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they may sometimes be, that will make it appear past all doubt whose obligation it is. \* \* \* It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the individual note of the officers whose names are attached to it. It needs no extrinsic evidence to show such a note is the obligation of the corporation. Such is the common understanding from what appears on the face of the instrument itself. A most unreasonable conclusion it would be to hold that a secretary of a corporation who attests such an instrument by his signature and the corporate seal thereby becomes a joint maker. That is precisely the case here. \* \* \* The same reasoning applies with equal force to defendant, who made the note as president of the corporation, in connection with the secretary, using the seal of the corporation. \* \* \* Dealing with the corporation, and taking a note made by its officers, with its corporate seal attached, it is most improbable plaintiff supposed he was obtaining the individual note of the officers. \* \* \* It is still more unusual that persons making an individual note or other obligation would cause it to be attested by the seal of the corporation with which they are connected."

Also in point: Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L. R. A. 71; Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L.



Ed. 266; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen (Mass.) 338; *Lacy v. Dubuque Lumber Co.*, 43 Iowa, 510; *Cook on Corporations* (5th Ed.) vol. 2, § 724.

[5, 6] Plaintiff also contends that Shook, as president, had no authority to bind the Akron Company by giving the note; therefore both he and Black were personally liable for its payment, under a rule of law, as claimed, that, where individuals attempt to consummate a contract on behalf of their principal, and fail in that regard, they become personally liable upon the contract. If such be the law, plaintiff is not in any position, under the record showing here, to invoke the rule. After admitting in its pleading that the instrument was the corporate note of the Akron Company, and after submitting it to the bankruptcy court as a lawful claim against that company, and after adducing sworn testimony in its own behalf to prove that fact, plaintiff should not be heard now to say that the instrument is not, and never was, the note of the Akron Company. Plaintiff may say, however, that at the trial it moved the court for permission to amend its replication by withdrawing therefrom its allegation that the note was that of the company, and substituting therefor a denial of that fact on information and belief, which motion was denied by the court. With such a state of facts before the trial court, we see nothing that suggests error in its denial of the motion, and are unable to perceive wherein it abused its discretion in so ruling.

We discover no error in the record.

The judgment will therefore be affirmed.

Judgment affirmed.

(169 Cal. 100)

Ex parte GAMBETTA. (Cr. 1902.)

(Supreme Court of California. Jan. 4, 1915.)  
BASTARDS (§ 16\*) — NEGLECT TO SUPPORT — STATUTES.

Pen. Code, § 270, making punishable a parent who fails to furnish necessities for his child, did not, as originally adopted, apply to the father of illegitimate children, and was not made applicable to him by Civ. Code, § 196a, requiring the father of an illegitimate child to support it, and authorizing a civil suit by the child or its mother or guardian to enforce the obligation.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 21-23; Dec. Dig. § 16.\*]

In Bank. Application by one Gambetta for a writ of habeas corpus. Petitioner discharged from custody.

J. A. Gendotti and C. J. Houston, both of San Francisco, for petitioner. Geo. L. Bell, of San Francisco, for respondent.

THE CHIEF JUSTICE. The court is unanimously of the opinion that section 270 of the Penal Code, as originally adopted, has no application to the father of illegitimate children, and that section 196a of the Civil

Code, relied on, does not change the application of that section in any way. The prisoner will be discharged from custody.

(168 Cal. 766)

In re BAKER'S ESTATE. (L. A. 3798.)

(Supreme Court of California. Dec. 12, 1914.)

WILLS (§ 766\*) — LEGACIES — "ADEMPTION" — STATUTES.

Where testatrix, by will executed July, 1912, gave to two nieces of her deceased husband \$500 each, and in July, 1911, sent to them a certificate of deposit for \$400, renewable each six months with interest, the principal of which they were not to use, stating that though she had mentioned them in her will, it was done that they might be sure of a little of their uncle's money, and subsequently wrote them that she was thinking of letting them have a \$600 certificate upon the same agreement, which would make the \$1,000 she intended to be theirs after her death, which certificate was also issued and paid to them, the letters and the gifts of the certificates were an "ademption" of the legacies contained in her will, within Civ. Code, § 1351, providing that advancements or gifts are not to be taken as adoptions of general legacies, unless such intention is expressed by the testator in writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1881-1885; Dec. Dig. § 766.\*]

For other definitions, see Words and Phrases, First and Second Series, Ademption.]

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Marian Baker Sutton and another, legatees under the last will of Mary M. Baker, deceased, appeal from a decree of final distribution. Affirmed.

Gurney E. Newlin and Roy V. Reppy, both of Los Angeles, for appellants. E. E. Leighton, of Los Angeles, for respondent.

ANGELLOTTI, J. This is an appeal by Marian Baker Sutton and Belle A. Baker, legatees under the last will of deceased, from the decree of final distribution in the matter of her estate, the court below having refused to award them therein any portion of the estate of deceased. The ground of the court's action was that certain transactions had by deceased with said legatees operated as adoptions of their legacies.

By her will executed July 24, 1902, deceased gave to each of said appellants, who were nieces of her deceased husband, \$500. The will also provided for several other small legacies. Appellants resided in Boulder, Colo. In February, 1911, the First National Bank of Palo Alto issued a certificate of deposit payable to the order of deceased for \$408, with interest from February 8, 1911, at the rate of 4 per cent. per annum if left for six months—no interest after maturity. On February 17, 1911, deceased wrote to Mr. M. A. Buchan, president of said bank, as follows:

"Those nieces in Boulder have been ill and are all alone and nothing but their earnings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to go for their support so I must try to help them if possible."

On July 8, 1911, deceased wrote a letter to appellants in which she said:

"I have been thinking all the morning about you two dear girls and how hard you both have to struggle along if your expenses are anywhere as expensive as ours are and you have to work so hard. Well I wish I dare do for you as I have been thinking I would. I have a \$400 certificate on the First National Bank of Palo Alto which I would sign over to you both to put in your bank as your own to draw interest my lifetime or while I live, unless I go broke and have to have it back, and you never need tell any one about it or break it until after I pass away, then you would be sure of a little of your uncle's money. I would give you full instructions how you would do with the bank and tell Mr. Buchan, the president of the First National Bank, about it. Of course, I have mentioned you in my will. My money goes out so fast I often feel I may outlive it and if I do have to go to you and if it was not for Sister Adelia, I would any way and we would use what I have together."

On July 22, 1911, she wrote another letter to appellants, in which she made the following statement:

"So in view of what may happen I am going to send you a piece of pink paper by name a certificate of the First National Bank of Palo Alto, Mr. M. A. Buchan, president and first cashier. It is at four per cent interest and has to be sent to the bank to be renewed every six months from the time of date. I will send it over to you \* \* \* and rather than have you break or use any of it only the interest I would rather you would ask me for help some other way."

On July 24, 1911, deceased indorsed on the back of the certificate the following: "Mary M. Baker sign this certificate to Miss Belle Baker and Mrs. Marian Baker Sutton of Boulder, Colorado"—and on the said date, or within a few days thereafter delivered the certificate thus indorsed to the appellants.

Mr. Buchan testified that he received from deceased a letter dated July 28, 1911, written by her, which informed him of the assignment of the \$408 certificate, and in her letter she made the following condition:

"That she was placing the certificate with her late husband's nieces, Marian Baker Sutton and Belle A. Baker, during her lifetime, to be renewed every six months as long as she should live unless she should get broke and need it, and they must not break the principal. That she wished to make sure of the small amount to be given Belle A. Baker and Marian Baker Sutton, her Boulder nieces, in case they should ever need it, and that she had sent it to them, together with directions how to proceed, and that they should send it to M. A. Buchan for renewal."

At the expiration of the six months for which the \$408 certificate was made the same was sent to the bank by appellants for renewal, and a new certificate was issued by the bank in the place thereof for \$408, dated August 8, 1911, which certificate recited that Marian Baker had deposited in the bank \$408 payable to the order of Belle A. Baker and Marian B. Sutton at the death of Mrs. Mary M. Baker and to be renewed every six months after date and to bear interest at

the rate of four per cent. per annum. After the expiration of six months from August 8, 1911, a new certificate was issued in renewal, which last-named certificate was paid to appellant some four months after the death of deceased. Subsequently, the date not appearing, deceased wrote to Marian B. Sutton as follows:

"I am thinking I will let you have a \$800 certificate on the same agreement of the \$400, not to use any of it which will make the \$1000 I intend will be yours and Belle's after I am gone. No one will ever know anything about it only M. A. Buchan."

On April 11, 1912, deceased wrote to Buchan the following:

"I remember I had thought of sending this \$800.00 to my Boulder nieces the same as I did the \$400.00 and let them keep it my lifetime and draw the interest unless I live long enough to need it. They must not draw the principal while I live, making them sure of the \$1000.00 I intend they would have if they outlive me."

On June 11, 1912, deceased again wrote to M. A. Buchan, saying:

"I am writing to ask a favor in regard to sending another certificate to my Boulder nieces. \* \* \* I want to make them even \$1000 on the same terms as the \$400 certificates they already have as that amount is what I am intending they shall have if they outlive me, and if what I have of my own does not last me I am to have it back with the proviso: that if I do have that when I draw it they may draw an equal amount to use as they are a mind to."

In response to the requests in these letters, Buchan on June 14, 1912, issued a certificate of deposit of said bank for \$800, the certificate reciting that Mrs. Baker has deposited in this bank \$800, payable to the order of Belle A. Baker and Mrs. Marian B. Sutton at the death of Mrs. Baker, with interest from May 29, 1912, at the rate of 4 per cent. per annum. On July 27, 1911, deceased executed a codicil to her will, appointing her nephew, Robert B. Emery, executor thereof, and revoking the appointment of P. H. Atkinson as executor made by the original will. Deceased died July 11, 1912, being at that time of about the age of 85 years. The bank paid the amount of the \$800 certificate to the appellants in December, 1912.

The lower court found that by the letters of the testatrix she expressed her intention that the certificates of deposit should be in ademption and satisfaction of the legacies to appellants, and that appellants are not entitled to any further moneys or properties of the estate.

Section 1351 of the Civil Code provides:

"Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing."

The question in this case is whether such an intention is sufficiently expressed by the deceased in the writings to which we have referred. We are of the opinion that this question must be answered in the affirmative. Of course, the requirements of section 1351, Civil Code, are satisfied if the intention there referred to is fairly shown by the writings

of the deceased, taken in connection with the circumstances under which such writings were made. We have here a will by which appellants were given \$500 each, or \$1,000 in all, and various other small legacies were provided for. It is quite apparent from her letters that deceased was continually in fear that she might exhaust the greater part of her property, if not all of it, before she died, and that she was very desirous that appellants should be preferred to all the other legatees in the event that the estate left by her was not sufficient in amount to pay all. She desired them to have as much as possible of the amount bequeathed, from the property left her by their uncle, if she did not require it for her own use during her own life. So she put the certificate of deposit for \$408 in appellants' possession, indorsed to them, with the condition expressed and understood by all parties, including the bank, that the principal of the same should not be paid to them during her lifetime, but only the interest thereon, and that she was to have the certificate back if she needed it for her own expenses of living. The condition as to the payment of the principal was incorporated in each of the renewal certificates. Her idea, as expressed in her letter of July 8, 1911, to appellants, was that they would thus be "sure of a little of" their uncle's money, and, as expressed in her letter of July 28, 1911, to Mr. Buchan, that she wished "to make sure of the small amount to be given" to appellants. Taken alone, the evidence as to this transaction of the year 1911 relative to the \$408 certificate may not sufficiently show an intention that the amount to be received thereunder should be in satisfaction pro tanto of the legacies to appellants of \$500 each, but when considered in connection with the evidence as to the later transaction in the year 1912, the intention as to both transactions is beyond serious question sufficiently shown. We think

that under the circumstances it may properly be so considered. She wrote appellant Marian B. Sutton, "I am thinking I will let you have a \$600 certificate on the same agreement of the \$400, not to use any of it *which will make the \$1000 I intend will be yours and Belle's after I am gone,*" and she wrote Mr. Buchan:

"I remember I had thought of sending this \$600.00 to my Boulder nieces the same as I did the \$400. \* \* \* They must not draw the principal while I live, making them sure of the \$1000.00 I intend they would have if they outlive me."

And again to Mr. Buchan:

"I want to make them even \$1000 on the same terms as the \$400 certificates they already have as that amount is what I am intending they shall have if they outlive me."

The intention was manifest that appellants should have the amount that she intended to give them by her will so placed that they would get it at her death, whatever the condition of her estate might be, and appellants received the \$600 certificate with that intention as to both certificates clearly expressed to them. There is nothing in any of the writings of deceased or in the evidence that is necessarily inconsistent with our conclusion.

We do not consider it necessary to discuss here any other suggestion or claim made in the briefs. Whether or not the money evidenced by the certificates belonged at the death of deceased to the estate rather than to appellants appears to be immaterial here. The bank has in fact paid the money to appellants, and the executor has acquiesced in such payment as one in effect made from the estate; the ground of his opposition to any distribution of further money to appellants being that they have thus received the \$1,000 to which they were entitled under the will.

The decrees appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(169 Cal. 77)

**In re HELLIER'S ESTATE.****In re ROOKER et al. (S. F. 6342.)**(Supreme Court of California. Dec. 29, 1914.  
Rehearing Denied Jan. 28, 1915.)**1. JUDGMENT (§ 688\*)—CONCLUSIVENESS—EXECUTORS AND ADMINISTRATORS.**

Under Code Civ. Proc. § 1504, providing that a judgment against an executor on a claim shall only establish the claim as if allowed by the executor, and section 1636, providing that the allowance of a claim may be contested, a judgment against an executor on a claim did not estop the residuary legatee from contesting the claim on settlement of the executor's account; a judgment on a claim against an estate for money being an exception to the rule, under section 1582, that a judgment against an executor in enumerated actions, including actions founded on contract, concludes legatees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. § 688.\*]

**2. STATUTES (§ 225½\*)—CONSTRUCTION—GENERAL AND SPECIAL PROVISIONS.**

In construing a statute, a general provision will be controlled by one which is special.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. § 225½.\*]

**3. TRIAL (§ 330\*)—GENERAL VERDICT—INCONSISTENT ISSUES.**

A judgment on a general verdict within Code Civ. Proc. § 624, authorizing such verdicts, will not be reversed on the ground that the verdict is uncertain and inconsistent, though the prevailing party has presented inconsistent issues, where such verdict necessarily decides at least one of such issues for such party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777-781½; Dec. Dig. § 330.\*]

**4. TRIAL (§ 330\*)—GENERAL VERDICT—EVIDENCE.**

Where several issues are tried and submitted to the jury, a general verdict must stand if the evidence on one issue alone is sufficient to sustain it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777-781½; Dec. Dig. § 330.\*]

**5. PLEADING (§ 93\*)—INCONSISTENT DEFENSES—RIGHT TO PRESENT—CLAIM AGAINST ESTATE.**

A legatee, contesting a claim based on a note signed by testator, may present inconsistent defenses and offer evidence in support thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.\*]

**6. TRIAL (§ 345\*)—GENERAL VERDICT—OBJECTION—WAIVER.**

Where, on the trial of a claim against an estate, evidence in support of inconsistent defenses is introduced, and claimant fails to demand that special issues be submitted to the jury, he waives his right to object to the rendition of a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 816-820; Dec. Dig. § 345.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

A claim presented by A. F. Rooker against the estate of William Hellier, deceased, was contested by Catherine Hellier, and from a judgment declaring the claim invalid and denial of a new trial, claimant appeals. Affirmed.

Roger Johnson and R. P. Henshall, both of San Francisco, for appellant. Lewis F. Byington, of San Francisco, for respondent.

SULLIVAN, C. J. Appeal from judgment of the superior court of the city and county of San Francisco declaring invalid the claim of A. F. Rooker against the estate of William Hellier, deceased.

William Hellier died testate. His daughter, Catherine Hellier, was named in his will as residuary legatee. A. F. Rooker in due time presented to the executor of the will of deceased a claim against his estate for the sum of \$5,000, with interest. The claim was based on a promissory note for that amount payable to Rooker and purporting to bear the signatures of G. S. Switzer and William Hellier. The executor rejected the claim. Thereafter Rooker commenced an action in the superior court against the executor to establish the claim. Upon trial before a jury in that action Rooker was awarded a verdict for the full amount of the note, with interest. Judgment upon the verdict was accordingly entered. On appeal by the executor the judgment was affirmed. After issuance of the remittitur Rooker applied to the lower court for an order requiring the executor to pay the judgment. His application was contested by the residuary legatee, Catherine Hellier, who filed written objections to the claim. Her contest raised substantially the same issues as were raised and determined in the action brought by Rooker against the executor to establish his claim. These issues were as follows: (1) That the note in question was not signed by the testator or by any one with his authority; (2) that the note was a forgery; (3) that no consideration was received for the note; (4) that if the note had been executed the testator paid the same before his death. On the trial before a jury Rooker introduced in evidence the judgment roll in the case brought by him against the executor, the judgment rendered by the appellate court in his favor, the remittitur from that court, and an account of the executor approved and settled after the appellate court had affirmed the judgment. Accompanying the account introduced in evidence was a statement of the claims against the estate, in which the executor declared that he "rejected this claim [referring to the Rooker claim] and has contested the same and will contest the same until the final determination thereof, upon the ground that he does not believe it to be a charge against the estate." On behalf of the contestant evidence was presented to the jury tending to prove that the note was never executed by the testator or by his authority. The claimant introduced evidence in rebuttal. The jury returned a general verdict in favor of the contestant. Following the verdict judgment was entered in her favor adjudging the claim invalid, and that the claimant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have and recover nothing thereon or upon the prior judgment based on said claim. Thereafter the claimant moved for a new trial, which was denied. From the judgment and order denying the motion for a new trial he appealed.

[1] The appellant takes the position that the judgment recovered by him against the executor establishing the validity of his claim was final and conclusive and bound all parties interested in the estate, including the contestant. This position is untenable. A judgment establishing the validity of a claim has no other or greater effect than the allowance of a claim by an executor or administrator and judge of the superior court. Having the right to attack the validity of any claim approved by an executor or administrator and judge, a legatee under a will of a testator has the same right to attack a claim the validity of which has been established by final judgment.

"A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, *only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge,*" etc. Section 1504, Code Civ. Proc.

Until a claim has been passed upon on settlement of an account or rendition of an exhibit, or in making a decree of sale, whether the claim be one approved by the executor or administrator and the judge, or one established after rejection by a final judgment, it may be contested by the heirs or legatees.

"All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. \* \* \* Whenever an allowed claim is contested by any heir, or other person entitled to contest it, either the contestant or claimant is entitled to a trial by jury of the issues of fact presented by the contest," etc. Section 1636, Code Civ. Proc.

The claim of Rooker had not been passed upon on settlement of any account or on the rendition of any exhibit or in any decree of sale, and was therefore subject to attack as in the manner provided in section 1636, Code of Civil Procedure. The plain language of these sections, 1504 and 1636, has been repeatedly construed in accordance with the unmistakable intent therein expressed. In *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299, this court said:

"The sole object of an action upon a rejected claim for money is to place it among the allowed claims against the estate. A judgment rendered against an executor or administrator upon any claim for money against the deceased only establishes a claim in the same manner as if it had been allowed by the executor or administrator and the judge, \* \* \* and such a judgment is no more effectual as an estoppel than an allowance of the claim would be, for it can be contested by the heirs on settlement of an account in the same manner as a claim allowed by an executor or administrator and judge can be contested. Code Civ. Proc. § 1636."

To the same effect see *Estate of More*, 121 Cal. 635, 54 Pac. 148; *Haub v. Leggett*, 160

Cal. 491, 117 Pac. 556; *Estate of Schroeder*, 46 Cal. 315; *Estate of Wiley*, 138 Cal. 301-306, 71 Pac. 441; *Estate of Glenn*, 74 Cal. 567, 16 Pac. 396; *Shivley v. Harris*, 5 Cal. App. 513, 90 Pac. 971; *Shiels v. Nathan*, 12 Cal. App. 605-615, 108 Pac. 34. We must hold, in accordance with the plain letter of the law, and consistently with the decisions in the cases cited, *supra*, that the contestant, respondent herein, was not bound by the judgment recovered by Rooker against the executor, and that she had the same right to contest his claim as if the same had been allowed by the executor and judge and no judgment had been recovered thereon by the claimant.

[2] Appellant contends, with apparent earnestness, that under section 1582, Code of Civil Procedure, and decisions of this court construing that section, the judgment obtained by Rooker against the executor bound the legatee. That section reads as follows:

"Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

This section has been construed by this court in actions to foreclose mortgages, to quiet title, in ejectment, etc., and the decisions construing the section all hold that in the cases enumerated therein a judgment rendered against an executor or administrator concludes heirs, legatees, and devisees. The principal case upon which appellant relies is *McCaughy v. Lyall*, 152 Cal. 615, 93 Pac. 681. In that case this court held that in an action to foreclose a mortgage executed by an intestate the administrator was the only necessary party defendant; that the judgment against the administrator concluded the heirs of the intestate and that a foreclosure sale under the judgment divested them of their interest in his estate. While section 1582, Code of Civil Procedure, provides that "all actions founded upon contracts" may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, sections 1504 and 1636, Code of Civil Procedure, qualify the effect of a judgment recovered against an executor or administrator in an action to establish the validity of a claim for money. The three sections must be construed together. Sections 1504 and 1636, Code of Civil Procedure, deal with one particular subject only, i. e., "claims for money against an estate." Section 1582 is general in character and applies to a number of subjects, including "all actions founded upon contracts." It is a well-settled rule of statutory construction that a general provision of the law must be controlled by one that is special. Sections 1504 and 1636, Code

of Civil Procedure, applicable only to judgments based upon claims "for money against an estate," in so far as they qualify the effect of such judgments, must be held to control the provisions of section 1582 as construed by this court in the cases cited by appellants. In other words, we must hold that by reason of sections 1504 and 1636 of the Code of Civil Procedure a judgment on a claim against an estate for money is an exception to the rule resulting from the provisions of section 1582, Code of Civil Procedure, that a judgment against an executor or administrator in the actions enumerated in that section, including actions "founded upon contract," concludes the legatees, devisees, and heirs of testators and intestates.

[3, 4] It is urged by appellant that the verdict was uncertain and inconsistent, by reason of the inconsistency of the issues claimed by him to have been submitted to the jury, and for that reason he contends that the judgment should be reversed. Undoubtedly, the issue as to the genuineness of the note was inconsistent with the issue that no consideration was received therefor and the issue that if the note had been executed the testator paid the same before his death. But the verdict was general, one which is declared by section 624, Code of Civil Procedure, to be pronounced "generally upon all or any of the issues either in favor of the plaintiff or defendant." The jury by its verdict decided upon at least one of the issues in favor of the contestant. The bill of exceptions does not purport to contain all of the evidence introduced upon the trial. The only evidence in behalf of contestant that does appear in the record relates to the issue involving the genuineness of the note in question. Appellant does not contend that the evidence presented to the jury was insufficient to justify the verdict against him on

that issue. On his motion for a new trial he did not rely on the insufficiency of the evidence. The bill of exceptions contains no specifications of particulars wherein he claims that the evidence was insufficient, and in his opening brief he admits that "the sufficiency of the evidence is not before the court." We must therefore conclusively presume that the evidence was sufficient to justify the verdict upon the only issue in support of which the record shows the contestant offered proofs.

[5, 6] The contestant, defending against the note, had the right to set up inconsistent defenses and offer evidence in support thereof. Upon demand of the claimant the court might have submitted special issues to the jury, if evidence in support of inconsistent issues had been introduced. But he made no such demand. He was apparently satisfied to take his chances upon a general verdict. The verdict being against him, he cannot now be heard to complain. Where several issues are tried and submitted to the jury, the general verdict must stand, if the evidence upon one issue alone is sufficient to sustain the verdict. *Crosett v. Whelan*, 44 Cal. 200; *In re Sanderson*, 74 Cal. 199, 208, 15 Pac. 753; *Verdelli v. Gray's Harbor Commission Co.*, 115 Cal. 517, 525, 47 Pac. 364, 778.

A number of other points are urged by appellant in support of his appeal, but they do not warrant a reversal, and we do not consider them of sufficient importance to require discussion here.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(100 Cal. 83)

**BORGES v. DUNHAM. (S. F. 7132.)**

(Supreme Court of California. Dec. 29, 1914.)

**1. APPEAL AND ERROR (§ 544\*) — RECORD — BILL OF EXCEPTIONS.**

An appeal, taken under the old method from an order appointing a receiver to collect the rents of the property in controversy, in a suit to set aside a deed conveying the same, is ineffectual for purpose of review, where the record contains no bill of exceptions showing what papers were used or evidence introduced on motion for a receiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

**2. APPEAL AND ERROR (§ 634\*)—RECORD—BILL OF EXCEPTIONS.**

Though, on appeal from an order appointing a receiver, taken under Code Civ. Proc. §§ 953a-953c, providing for the preparation of papers on appeal, jurisdiction of the court on appeal is acquired by the filing of notice of appeal in the trial court, yet, where a mere inspection of the record shows that appellant is not entitled to any relief, the court, in response to the motion to dismiss, will affirm the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829; Dec. Dig. § 634.\*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Joseph F. Borges against Ida J. Dunham, sometimes known as Ida J. Borges. From an order appointing a receiver, defendant appeals. Affirmed.

Harold Ide Cruzan and E. L. Webber, both of San Francisco, for appellant. Clarence N. Riggins, of Napa, for respondent.

**SULLIVAN, C. J.** Motion to dismiss appeal from order appointing receiver.

Plaintiff brought an action in the superior court of Napa county to cancel a deed which he had executed and delivered to the defendant and for an accounting of the rents and profits derived from the land described in the deed. Defendant answered, denying specifically the material allegations of the complaint, and with her answer filed a cross-complaint, in which she sued to quiet her title to the land in controversy. After issue joined, plaintiff, pursuant to notice given to the defendant, moved the trial court for an order appointing a receiver to receive the rents, issues, and profits of the real property involved in the action. The motion was noticed for the day set for the trial, and, as stated in the notice of motion, was based "upon all the papers, files, records, and proceedings in said action, and upon all the evidence that may be received at said trial, and upon further evidence to be introduced in support of the motion." At the trial, and after some testimony had been taken, the court granted plaintiff's motion and appointed a receiver. From the order appointing the receiver, defendant appealed. Plaintiff

now moves to dismiss the appeal upon the ground that the appellant has failed to present a record upon which the order appealed from can be reviewed.

The transcript on appeal contains no bill of exceptions. It contains a copy of the following papers and records: The pleadings; notice of motion for appointment of receiver; minutes reciting that the trial of the action was commenced, that a witness was sworn and testified, and that plaintiff's motion for the appointment of a receiver was granted; the order appointing the receiver, his bond and oath; notice of appeal and undertaking thereon. Appended to the transcript is a stipulation signed by counsel for respondent (reserving all objections to the record), wherein he agrees that the transcript contains a full, true, and correct copy of all the papers therein set forth now on file in the office of the county clerk of Napa county, and that the minutes therein contained are full, true, and correct copies thereof. There is also included in the transcript a certificate signed by the clerk, in which he certifies the correctness of the copies of the papers and minutes contained in the transcript.

[1, 2] Not only is there no bill of exceptions, but there is nothing in the record indicating that any of the papers, copies of which are contained in the transcript, were used on the hearing of the motion, nor is there a statement of any testimony given in support of the motion or at the trial of the case. If we consider the appeal as taken under the old method, it is ineffectual for the purposes of review, because it contains no bill of exceptions showing what papers were used or what evidence was introduced on the motion. If we consider the appeal as taken under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appeal is abortive, because appellant, after filing notice of appeal, took no further steps under those Code sections to procure a record to be used on appeal. For the reasons stated, it is impossible, with the record before us, to review the order appointing the receiver. As the filing of the notice of appeal in the court below, treating the appeal as taken under the new method, conferred jurisdiction upon this court, and as a mere inspection of the record shows that appellant is entitled to no relief, the proper order for this court to make in response to the motion to dismiss is to affirm the order appointing a receiver. *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526.

It is therefore ordered that the order appealed from be affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(169 Cal. 101)

**STRAUSS v. CANTY.** (Sac. 2124.)

(Supreme Court of California. Jan. 5, 1915.)

**1. HUSBAND AND WIFE (§ 267\*)—COMMUNITY PROPERTY—CONVEYANCES.**

A husband has the right to convey community property for a valuable consideration.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.\*]

**2. QUIETING TITLE (§ 44\*)—TITLE OF PURCHASER—EXECUTION SALE.**

Plaintiff, in an action to quiet title, showing a judgment, the execution with the sheriff's return showing the sale, the affidavit showing due publication of notice of sale and the sheriff's deed in proper form, showed his acquisition of the judgment debtor's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

**3. TAXATION (§ 615\*)—TAX SALE—NOTICE—APPLICATION OF STATUTE.**

Pol. Code, § 3897, as amended, requiring that a copy of the notice of a sale of property for nonpayment of taxes should be mailed to the party to whom the land was last assessed at his last known post office address, applied to sales after the section went into effect, even though publication of notice had been commenced before such mailing was necessary.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. § 615.\*]

**4. TAXATION (§ 760\*)—TAX DEED—RECITAL—STATUTE.**

Under Pol. Code, § 3898, requiring the deed of a tax collector to recite the fact necessary to authorize a sale and conveyance, a deed, not reciting the mailing of notice prescribed by section 3897, was not a valid tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509; Dec. Dig. § 760.\*]

**5. TAXATION (§ 810\*)—TAX DEED—ACTION TO ESTABLISH TITLE—BURDEN OF PROOF.**

In an action to quiet title, the burden of showing compliance with the statutory requirement of mailing notice, not recited in the collector's deed, was on the defendant claiming thereunder.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.\*]

**6. ADVERSE POSSESSION (§ 114\*)—SUFFICIENCY OF EVIDENCE—STATUTE.**

In an action to quiet title, wherein defendant set up a title by prescription, and the statute of limitations, evidence held to justify a finding that the property had not been held and possessed adversely to plaintiff's legal title for five years before the commencement of the action, as required by Code Civ. Proc. § 321.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.\*]

**7. ADVERSE POSSESSION (§ 34\*)—EXCLUSIVE POSSESSION—PASTURAGE.**

While possession may be maintained by using land for pasturage during the grazing season, even though there be no inclosure, the possession must be of an exclusive character.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 136; Dec. Dig. § 34.\*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Max Strauss against D. J. Canty. Judgment for plaintiff, and from the judgment and an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed.

Royle A. Carter, of Fresno, for appellant. Samuel M. Samter, of San Francisco, and Frank Kauke, of Fresno, for respondent.

**SLOSS, J.** The defendant appeals from a judgment quieting plaintiff's title to a tract of land in Kings county. He also appeals from an order denying his motion for a new trial.

The plaintiff claims as successor in interest of Arney L. Weddle, to whom the land was granted by a United States patent on March 7, 1892. The defendant claims under a tax deed, and also relies upon a title by prescription and the statute of limitations.

[1, 2] The plaintiff showed a good deraignment of title from Weddle. The record contains reference to a deed from Lucinda E. Weddle (wife of Arney L.) to Arna L. Weddle. The deed was intended to convey any possible interest of the wife to the husband. Waiving the question of the effect of the mistake in the grantee's name, there is nothing to show that the wife had any interest, and, so far as the proof goes, Arney L. Weddle was the sole owner of the land. Even if it was community property, he had the right to convey it for a valuable consideration. He did convey it to Frederick in 1907 by a deed reciting such consideration. Thereafter the plaintiff obtained a money judgment against Frederick, had execution levied, and purchased the property at the execution sale. The sheriff's deed was executed to the plaintiff on December 12, 1909. The evidence offered by plaintiff in this behalf consisted of the judgment against Frederick, the execution, with the sheriff's return showing the sale, and the affidavit showing due publication of notice of sale, and the sheriff's deed in proper form. These papers were sufficient to show the acquisition by plaintiff of Frederick's title. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Hihn v. Peck*, 30 Cal. 280; *Peterson v. Weissbein*, 75 Cal. 174, 16 Pac. 769.

[3, 4] The land was sold to the state for nonpayment of taxes in 1895. The tax collector made his deed to the state in 1900. The property was offered for sale and sold to the defendant on May 5, 1905, and a deed was thereafter executed. At the time of the sale section 3897 of the Political Code had been amended by adding certain requirements regarding the notice of sale by the state of property which had been sold to it for nonpayment of taxes. One of these requirements was that a copy of the notice should be mailed to the party to whom the land was last assessed at his last known post office address. By the terms of section 3898 the deed of the tax collector was required to "recite the fact necessary to authorize such sale and conveyance." This requirement of mailing notice applied to sales had after the amended section went into effect, even

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



though, as here, the publication of notice had been commenced before such mailing was essential. *Buck v. Canty*, 162 Cal. 226, 121 Pac. 924. Such mailing was one of the facts necessary to authorize the tax collector to make the sale. *Smith v. Furlong*, 160 Cal. 522, 117 Pac. 527. The deed in this case did not recite the mailing of notice. It was not, therefore, the deed provided for by section 3898. *Canty v. Staley*, 162 Cal. 379, 123 Pac. 252.

[5] But, if compliance with the requirement of mailing could be shown, although not recited, the burden of proof is on the party claiming under the deed (*Buck v. Canty*, 162 Cal. 226, 121 Pac. 924; *Krotzer v. Douglas*, 163 Cal. 49, 124 Pac. 722; *Davis v. Peck*, 165 Cal. 353, 132 Pac. 438), and, as this burden was not sustained by the defendant, the court rightly ruled that he had not acquired title by virtue of the tax proceedings.

[6, 7] The questions arising on the pleas of the statute of limitations and of prescriptive title may be considered together. Plaintiff having shown title in himself, he was presumed to have been in possession within the time required by law, and the presumption could be overcome only by proof that the property had been held and possessed adversely to the legal title for five years, before the commencement of the action. Code Civ. Proc. § 321; *Nathan v. Dierssen*, 146 Cal. 62, 79 Pac. 739. The plea of the statute of limitations would therefore not be sustained unless the defendant showed adverse possession for the same period necessary to the acquisition of a prescriptive title. The court found against defendant's allegations in this regard. We think this finding is amply supported by the evidence. The defendant testified that in May, 1905, he went on the land, measured it off, and placed stakes at the corners. He was on the land at that time during parts of two days. In the fall of 1905 he rented it for the purpose of feeding sheep. He rented it similarly during the succeeding years up to 1912, receiving a total rental of about \$50 for five years. He saw sheep feeding on the land several times. His testimony was somewhat qualified by the later statement that he gave no written lease, but merely charged and collected money "for the feed of the sheep on the land." The first transaction of this kind was between September and November, 1905. The action was commenced in August, 1910.

The court was entirely justified in concluding that the defendant had not proven an exclusive and continuous possession sufficient to satisfy the statute. While possession may be maintained by using the land for pasture during the grazing season (*Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431), even though there be no inclosure (*Bullock v. Rouse*, 81 Cal. 595, 22 Pac. 919), the possession must be of an exclusive character. The proof here was silent on the question of occupancy by others

and was entirely consistent with the view that the possession of those holding under Canty was casual and intermittent. Besides, this possession, such as it was, began in the fall of 1905, less than five years before the commencement of the action. It was not unreasonable for the court to conclude that the formal act of marking corners in May, 1905, if it was a taking of possession, was not connected with the later renting of the feeding rights so as to make the possession continuous between May, 1905, and the autumn of the same year.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.;  
SHAW, J.

(169 Cal. 113)

COOK v. LOS ANGELES RY. CORPORATION.  
(L. A. 3431.)

(Supreme Court of California. Jan. 5, 1915.)

1. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTION ON DAMAGES.

In an action for personal injuries in a collision between plaintiff's automobile and a street car, where it was undisputed that plaintiff suffered some injury, so that the verdict for defendant could have been reached only upon a finding of plaintiff's own negligence or defendant's want of negligence, any error in an instruction that, under Code Civ. Proc. § 1881, the physicians attending plaintiff could not testify without his consent, and that from his failure to call them or the nurse as witnesses to the extent of his injury the law presumed that their testimony would have been against him, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

2. STREET RAILROADS (§ 81\*)—ACCIDENT AT CROSSING—SPEED OF STREET CAR.

There is no arbitrary or set limit of speed for street cars, but negligence as to speed depends upon whether the car was being run at a speed beyond that which would be employed by one exercising ordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.\*]

3. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

Where the complaint charged that defendant's street car was being negligently run at 30 miles an hour, and the court correctly charged as to defendant's negligence in that respect, an instruction that there was no allegation or proof as to any ordinance limiting the rate of speed at the place of collision, if outside the issues, was not prejudicial, where it was not claimed that there was any limit fixed by ordinance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by C. A. Cook against the Los Angeles Railway Corporation. Judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Gibson, Dunn & Crutcher and Norman Sterry, all of Los Angeles, for respondent.

SLOSS, J. The plaintiff appeals from an order denying his motion for a new trial. The action was brought to recover damages for personal injuries sustained by plaintiff as the result of a collision between an automobile driven by him and an electric street car of the defendant. There was a jury trial and a verdict and judgment in favor of the defendant.

The testimony on the issues of defendant's negligence and plaintiff's contributory negligence was sharply conflicting, and no question is made of the sufficiency of the evidence to support the verdict. While it was shown without contradiction that the plaintiff had suffered some physical injuries, there was a good deal of controversy over the extent of these injuries, the defendant claiming that plaintiff was greatly exaggerating their severity. After the accident, the plaintiff was taken to a hospital. There he was attended by two physicians. He also had the care of a nurse. None of these three persons was produced as a witness.

[1] The court gave an instruction in which, after stating that, by reason of the privilege defined in section 1881 of the Code of Civil Procedure, the physicians who had attended plaintiff could not testify without his consent, it charged that if plaintiff had failed to call them as witnesses, and showed no reason for such failure, the law presumed that their testimony would have been against him. A like presumption was declared to arise from the unexplained failure to call the nurse. These instructions are assigned as error. So far, at least, as the physicians are concerned, the instruction given is in conflict with the views expressed in *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315, where it is said, in effect, that the raising of a presumption against a party for the failure to introduce or to permit the introduction of testimony which he had the right to exclude as privileged, would go far toward destroying the value of the privilege. But of this instruction, as well as the one relating to the nurse, it is sufficient to say that, if they were erroneous, they were not prejudicial. They dealt with witnesses who could have testified on no subject other than that of the extent of the plaintiff's injuries. As has been said, the fact that he had suffered some injuries was undisputed. The verdict in favor of defendant could therefore have been reached only upon a finding that,

by reason of plaintiff's own negligence or the defendant's want of negligence, there was no liability for the injuries, whatever their extent. In this state of the record, errors in instructions bearing solely on the amount of damage could not have influenced the verdict, and present no ground for reversal. *Wilhelm v. Donegan*, 143 Cal. 50, 76 Pac. 713.

[2, 3] Only one other point is made. It is claimed that the court erred in instructing the jury that there was no allegation or evidence of any ordinance limiting the rate of speed at which defendant might propel its cars at the place where the collision occurred, "and defendant had a right to drive or propel its said car at any rate which it saw fit which was not inconsistent with the exercise of ordinary care." The complaint charged that the car was being negligently driven at a rate of speed of about 30 miles an hour. Whether the speed was in excess of a rate which, under all the circumstances, would be compatible with the exercise of due care, was therefore an issue in the case. The instruction informed the jury that there was no arbitrary or set limit of speed, but that they must determine whether the car was being run at a rate beyond that which would be employed by one exercising ordinary care. This was a correct statement of the obligation of the defendant so far as the speed of the car was concerned. The plaintiff was not prejudiced by the charge that there was no limit fixed by ordinance, since it is not pretended that there was any such limit. If this part of the instruction was outside of the issues, it could not have misled the jury in any way. See *George v. L. A. Ry. Co.*, 126 Cal. 357, 361, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184. The case relied on by appellant in this behalf (*Cooper v. L. A. Term. Ry. Co.*, 137 Cal. 229, 70 Pac. 11), does not support his contention. There a requested instruction had been refused, and the action of the trial court was sustained on the ground that the instruction was directed to facts not in issue. It does not follow, of course, that the same ground would have required a reversal, if the instruction had been given. Furthermore, the instruction in the *Cooper Case* was condemned on the additional ground, not applicable to the charge given here, that it would have taken from the consideration of the jury the question whether the rate of speed was in fact reckless.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

(169 Cal. 106)

**CARDOZA v. PILLSBURY et al.** (S. F. 7262.)

(Supreme Court of California. Jan. 5, 1915.)

**MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series) — COMPENSATION — JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—JUDICIAL REVIEW.**

An application for review of proceedings of the Industrial Accident Commission on the grounds that the findings of the Commission are not sustained by evidence, and that the applicant has new evidence, does not state grounds for review within Workmen's Compensation Act (St. 1913, p. 317) § 84, but states grounds on which the Commission, under section 82, may grant a rehearing, and the application will be denied.

In Bank. Application for a writ of review by Joseph Cardoza against A. J. Pillsbury and others, constituting the Industrial Accident Commission, for a review of proceedings of the Commission. Denied.

Joséph Rafael, of San Francisco, for petitioner.

**THE CHIEF JUSTICE.** The application for a review by this court of the proceedings of the Industrial Accident Commission of the state of California states no ground upon which this court is authorized to entertain the same. The grounds stated—namely, that the findings of the Commission are not sustained by the evidence, and that the applicant has discovered new evidence material to him—are grounds upon which the Commission itself may grant a rehearing (section 82, Workmen's Compensation Act), but the courts are restricted to the grounds stated in section 84 of said act.

The application for a writ is denied for these reasons.

(169 Cal. 116)

**In re SILVA'S ESTATE.** (S. F. 6772.)

(Supreme Court of California. Jan. 6, 1915.)

**1. WILLS (§ 449\*)—CONSTRUCTION—INTESTACY.**

Under Civ. Code, § 1326, a will is to be so construed as to prevent intestacy, if reasonably possible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**2. WILLS (§ 94\*) — CONSTRUCTION — WHAT CONSTITUTES.**

A document, duly signed by the testator, reciting that he left all his "business" to his wife "so that she got to pay" all "my debts" and obligations due, is a "will," notwithstanding the English was incorrect, it appearing that the document was executed by the testator at a time he was sick and despaired of recovery.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 226, 236; Dec. Dig. § 94.\*]

**3. WILLS (§§ 119, 120\*)—EXECUTION—SUFFICIENCY.**

A testator while ill, told one of the witnesses that he desired to make a will, and the witness drew it and presented it to the testator for his signature. The testator signed and thereafter the witnesses affixed their signatures, although they were not specially requested to do so. *Held*, that as it was the

obvious intention of the testator to execute his will, the execution was sufficient; it not being necessary that he should expressly declare the document to be his will, or expressly request the witnesses to sign it as such.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 305-317; Dec. Dig. §§ 119, 120.\*]

**4. WILLS (§ 303\*)—ESTABLISHMENT—EVIDENCE.**

A will may be established although the witnesses to its execution gave conflicting testimony.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.\*]

**5. WILLS (§ 177\*)—REVOCATION—WHAT CONSTITUTES.**

Under Civ. Code, § 1292, declaring that a will can be revoked only by a writing of the testator executed with the same formalities as the will declaring such revocation, or by being burnt, torn, canceled, obliterated or otherwise destroyed with the intention of revocation, the testator's direction to his wife to destroy his will, and her destruction of the envelope which he was informed contained the will, does not amount to a revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 443, 444; Dec. Dig. § 177.\*]

**6. WILLS (§ 177\*)—REVOCATION.**

Where the beneficiary under a will fraudulently informed the testator that she had destroyed it according to his directions, probate of the document which was not destroyed cannot be denied on the ground that it was revoked, but relief must be sought in a court of equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 443, 444; Dec. Dig. § 177.\*]

**7. WILLS (§ 123\*)—EXECUTION.**

Where as part of one transaction the testator signed his will and the subscribing witnesses signed, it was immaterial which signed first.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 321-331; Dec. Dig. § 123.\*]

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Application by Antonio Da Rosa Brazil and others for revocation of the probate of the will of Frank V. Silva, deceased. There was an order denying the application, and from the refusal of a new trial petitioners appeal. Affirmed.

Everts & Ewing, of Fresno (H. P. Brown, of Fresno, of counsel), for appellants. James Gallagher, M. B. Harris, and E. M. Harris, all of Fresno, for respondent.

**SHAW, J.** The decedent, Frank V. Silva, died on March 22, 1912. On April 22, 1912, an order was made admitting a certain document to probate as his last will. Thereafter, within the time here allowed by law, the appellants filed a petition for the revocation of the probate of the will. After trial the court denied the revocation, the appellants moved for a new trial, and the court thereupon denied the motion. From this order the petitioners appeal. The decedent left no issue. The appellants are his brothers and sisters.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] The first point made in support of the appeal is that the document admitted to probate is not testamentary in character. The following is a copy of the paper:

Fresno, July 2th, 1906.

I leave all the Business I got To my wife Luiza Rosa Silva so that she got to pai all my deads and wages of the working men and all the Bills that iroe to be in Count ect.

Frank V. Silva.

Antone J. Breves  
Joe M. Silva

The appellants claim that the instrument does not describe any property, nor in any way refer to property so as to constitute a disposition thereof. We think, however, that this contention cannot be sustained. A will is always to be interpreted so as to prevent intestacy if such interpretation is reasonably possible. Civ. Code, § 1326. The courts are very liberal in construing words in a will written by one unfamiliar with the English language or unused to technical terms. *Mitchell v. Donohue*, 100 Cal. 208, 34 Pac. 614, 38 Am. St. Rep. 279. At the time this document was executed the decedent was very sick, and evidently believed that he would not live long. He announced his desire to make a will and of those present only Antone J. Breves was able to write English. All of them were Portuguese, unfamiliar with English. The decedent explained his intention to Breves, who thereupon prepared the above document. The use of the word "leave" is sufficient evidence of testamentary intent. The argument of the appellants is that the word "business" cannot by any reasonable construction, be held to refer to property. The context shows that it was used to describe whatever property the decedent at that time possessed. Taking the document as a whole, it sufficiently indicates the purpose of the testator to devise and bequeath to his wife all the property that he possessed and to require her to pay all his debts. Antone J. Breves testified that the word "deads" was his mode of spelling the word "debts," that the word written "ivoe" was his method of writing the expression, "I owe" and that by the words "in Count" he meant "account." Whether these explanations were proper and competent or not we need not consider, for without them, in the light of the attending circumstances, the will should be given effect as if the words so used by him were properly written as he states they were intended to be.

[3, 4] The appellants next claim that there is no sufficient evidence of the execution of the document as a will. There was testimony to the effect that the decedent stated that he wished to make a will, and that he asked Antone J. Breves to write it, that Breves then wrote out the paper and handed it to the decedent, that decedent signed it and passed it back to Breves, who signed it as a witness, and that it was then handed to Joe M. Silva, who also signed as a witness. It does not appear that the testator in words

asked that these persons sign as witnesses, or declared to them that the document was his will, but from the whole transaction as shown by the testimony it is very clear that all of them understood that he was promulgating the document as his will, that he desired these persons to sign the same as witnesses, and that they were signing in compliance with his desire so manifested by his manner and actions.

It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect. The testimony leaves no doubt that the testator signed the document as his will, that he gave all persons present to understand that it was his will, and that he desired the subscribing witnesses to attest the same for the purpose of constituting it a will. Nothing more on this point is required by the statute. There is, it is true, much confusion and conflict in the testimony of the several witnesses with regard to the occurrences at the time of the execution of the will. This is not surprising, and indeed it was to be expected, since the persons present were called upon to testify in regard to the facts six years after they occurred. The law does not require that all the witnesses shall testify without conflict concerning the execution of the will, nor that at the time of the probate both of the subscribing witnesses shall testify to all the facts necessary to constitute a statutory execution thereof. There was sufficient evidence given to support the conclusion of the court that the facts occurred as above stated. There is therefore sufficient evidence to support the finding that the will was duly executed.

[5] The appellants further claim that the court erred in refusing to admit evidence that the will was subsequently revoked. The evidence was properly rejected. The allegations of the appellants in their petition for revocation of probate were insufficient to justify the admission of evidence tending to show revocation. The Code provides, that no written will can be revoked except, first, by a writing of the testator declaring such revocation, executed with the same formalities as a will, or, second, "by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction." Civ. Code, § 1292. The allegations of the petition for revocation were to the effect that the wife of the decedent, respondent herein, some time after the execution of this will, was requested by the decedent to destroy the same; that thereupon in his presence she did destroy an

envelope, declaring to the decedent at the time that the will was inclosed therein; that the decedent then believed that the said will was in the envelope and was then destroyed by burning the same; that from that time forward until his death he continued to believe that the said will had been destroyed; that in fact some other paper was inclosed in said envelope; that the will aforesaid was not destroyed or burned; and that all this was done by the said respondent for the purpose of deceiving the decedent and securing to herself the property left to her by said document. These acts did not, under the statutory provisions aforesaid, constitute a revocation of the will. In order to constitute such revocation, there must be an actual burning, tearing, canceling, obliteration, or destruction, with the intention to revoke the document as a will. The mere intent, unperformed, to destroy or burn the will is not sufficient. There must be a joint union of act and intent in order to accomplish the revocation. Estate of Olmsted, 122 Cal. 229, 54 Pac. 745; 1 Underhill on Wills, §§ 223-226; Boyd v. Cook, 3 Leigh (Va.) 32; Kent v. Mahaffey, 10 Ohio St. 204; Hise v. Fincher, 32 N. C. 139, 51 Am. Dec. 383; Clingan v. Mitchelltree, 31 Pa. 25; Mundy v. Mundy, 15 N. J. Eq. 290. The decisions in other states having no statute similar to section 1292 of our Civil Code are inapplicable here. In re Comassi, 107 Cal. 5, 40 Pac. 15, 28 L. R. A. 414. Inasmuch as there was no allegation to show revocation, it was not error to refuse evidence in support thereof.

[8] In a proceeding under the statute for the revocation of the probate of a will, the court cannot give relief for a fraudulent prevention of a revocation of the will. The statute does not provide for the presentation of such an issue as ground for revoking the admission to probate. If relief can be given at all for such a wrong, it must be sought by suit in equity to declare the wrongdoer a trustee for the heirs with respect to the property received by such wrongdoer in virtue of the will. 1 Underhill on Wills, § 153.

The last point urged by the appellants is that the court erred in giving the following instruction:

"The court instructs you that it is not necessary that a testator should in words say that an instrument is his will or request the subscribing witnesses thereto to witness the same as such. Such statement and request on the part of the testator may be indicated by his manner, conduct or demeanor."

We see no error in this instruction. It is in accord with the law on the subject as we understand and have stated it to be.

[7] It was not error for the court to instruct the jury that it was immaterial whether the testator signed his name before or after the witnesses signed their names to the document executed as a will, if it appeared that all the parties signed it at the same time and as a part of the same transaction.

The statute does not make the order of signing material. We find no other objections worthy of consideration.

The order denying new trial is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

(169 Cal. 71)

PEOPLE v. RONGO. (Cr. 1861.)

(Supreme Court of California, Dec. 28, 1914.)

**1. CRIMINAL LAW (§ 576\*)—TRIAL—TIME—CONTINUANCE—CONSENT—PRESUMPTION.**

Where, at the time accused was arraigned, he did not object to the setting of his case for trial at a date more than 60 days after the filing of the information, his consent thereto would be presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**2. CRIMINAL LAW (§ 581\*)—TRIAL—CONTINUANCE.**

Where a motion to dismiss because accused had not been brought to trial within 60 days after the filing of the information was denied because the case had been set for trial by his implied consent, a continuance, without further objection on his part, because of the illness of the district attorney and the state of the calendar, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1308; Dec. Dig. § 581.\*]

**3. HOMICIDE (§ 254\*)—EVIDENCE.**

Evidence held to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.\*]

**4. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.**

Where the people asserted the motive of a homicide to have been robbery, evidence that decedent, about 1½ or 2 weeks prior to the homicide, had on his person \$180, and that another witness cashed a check for decedent a few days prior to the homicide, at which time he had a purse containing probably \$200, was not objectionable for remoteness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**5. HOMICIDE (§ 233\*)—MOTIVE—EVIDENCE—KNOWLEDGE OF ACCUSED.**

To establish robbery as a motive for a homicide, it is not necessary to show knowledge on accused's part that decedent had money on his person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.\*]

**6. HOMICIDE (§ 166\*)—EVIDENCE—MOTIVE.**

Where robbery was claimed to have been the motive of a homicide, the fact that proof of decedent's possession of money on his person was of a date somewhat remote from the time of the killing affected the probative value, but not the admissibility of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**7. HOMICIDE (§ 233\*)—MOTIVE—ROBBERY—EVIDENCE.**

That decedent was in the habit of carrying money, and that he had about \$200 on his person a few days before the homicide and had none when his body was discovered, was strong evidence of motive for the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Yolo County; Eugene P. McDaniel, Judge.

John Rongo was convicted of second degree murder, and he appeals. Affirmed.

Julian & Gibbs, of Winters, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and A. G. Bailey, Dist. Atty., of Woodland, for the People.

**HENSHAW, J.** Defendant was convicted of murder in the second degree and was sentenced to imprisonment for the term of 25 years. His motion for a new trial was denied, and he took his appeal from the judgment and from the order denying his motion for a new trial to the Court of Appeals. Owing to a disagreement of the justices of that court, the case was certified to this court.

[1] Upon appeal the first proposition presented is that the court erred in refusing to grant defendant's motion to dismiss the criminal charge on the ground that he had not been brought to trial within 60 days after the filing of the information. The information was filed on October 12, 1912. He was arraigned October 14th, and the time to plead was continued to October 16, 1912, on which day he pleaded not guilty, and the case was set for trial December 17, 1912. So far as the record shows, there was no objection made by defendant, on October 16th, to setting the case for trial on December 17th, although that date was beyond the 60-day limit. Consent will therefore be presumed. *People v. Douglass*, 100 Cal. 1, 84 Pac. 490; *People v. Peter*, 20 Cal. App. 151, 128 Pac. 415.

[2] Defendant moved for a dismissal on the above grounds, on December 16th. It appeared, at the hearing of the motion, that the district attorney was sick and unable to appear in court. Evidence was taken as to his physical condition which showed this to be the fact and that some days would elapse before he could safely undertake the trial of the case. A further continuance became necessary because the district attorney had no deputy and no attorney was available to take up the prosecution who had any knowledge of the facts. The court called attention to the fact that other cases were set for trial that would occupy all of December and would run into January. From the condition of the calendar and engagements of the court the judge stated that January 20, 1913, was "the earliest date this case could be continued to." The case was finally set for January 21st. No motion was made to dismiss after December 16th, and defendant went to trial on January 21st without further objection. The order was not error.

[3] It is next contended that the evidence is insufficient to justify the verdict. The homicide occurred in the evening of May 20, 1910. Upon that day the defendant, an Italian, and two of his countrymen—the deceased and a third man—met in Sacramento. They spent the better part of the day together, vis-

iting saloons and drinking therein. The deceased paid for some of these drinks. In the afternoon they took the train to the town of Yolo, where they arrived at about half past 7 in the evening. Defendant carried a valise containing personal effects, which he left in the baggage room of the railway station. The three men then left town, walking out on a public highway. The next morning the body of the deceased was found lying in the grass alongside of the traveled part of the highway. The ground gave evidence of a severe struggle and bore the marks of three distinct sets of footprints. Bruises and abrasions and incised wounds—the latter as though made with a knife—were found upon the head and body of the deceased, and in addition there was a punctured wound in the front of the body below the short ribs, which ranged upward and backward, passing entirely through the body, through the right lobe of the liver and the lower edge of the left lung. The hemorrhage resulting from this wound was the immediate cause of death. It was inflicted, according to the admissions of defendant, by a three-eighths inch iron bar or rod sharpened to a point which the third member of the party drove through the body of the deceased. Some small articles, a comb, and pocket pencil, were found lying in the grass and "ten cents, fifty cents, something like that," in money. No other money was found on the person of the deceased. The two men who were in company with deceased disappeared; this defendant abandoning his valise at the Yolo railway station. Two years afterward he was discovered, arrested, and put on trial for the murder. After his arrest he made a statement in substance as follows: He first met the third man, who he declares committed the murder, in Sacramento about a month before the day of the homicide. He did not know his name. On the morning of the homicide, the two met the deceased, and again in the afternoon. They drank together. Defendant did not notice any money in the possession of the deceased, saving one dollar, which deceased put upon a saloon counter to pay for a drink. The three together went to Yolo county, seeking work upon a ranch. They left the town in the evening for this purpose. The deceased and the third man quarreled on the train and again on the road. He did not know the cause of the quarrel, other than it was "some lady quarrel." They called each other vile names. They began to fight, and he saw the third man jab the deceased with the iron bar. Fearful of being implicated in the crime, he fled. Being ignorant of the English language and of American laws, he was in terror of arrest, and so abandoned his personal effects at the railway station, and walked all night, eventually going to Oregon.

A murder had been committed. Admittedly the defendant was present at the scene of the homicide. The condition of the ground

bore evidence of a protracted struggle (the deceased was a powerful man). The wild oats and grasses were trampled down for a radius of 60 yards. Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict.

[4] The single proposition upon which the justices of the District Court of Appeal differed was over the admissibility of certain evidence offered and received by the court in an effort to establish a motive for the crime, which motive the prosecution asserted to be robbery. In its effort so to do, the prosecution offered, and the court received, the testimony of two witnesses, Nardini and Martinelli. Martinelli testified that he saw deceased about  $1\frac{1}{2}$  or 2 weeks before the homicide, and that he had about \$180 with him. Nardini testified that he cashed a check for the deceased a few days previous to the homicide, and at that time the deceased had a purse under his vest which contained probably \$200. Appellant's objection to the introduction of this evidence was overruled, and his motion to strike it out was denied. It is conceded, of course, that proof of motive, while never indispensable, is always permissible and often valuable. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Owens*, 132 Cal. 469, 64 Pac. 770. The objection to this evidence, it is said, consists in this: That the time when it was shown that the deceased had money upon his person was too remote to give it any probative value in the case, and that it is not shown that the defendant knew that the deceased had this money. So the question is asked:

"But how can the possession of money be evidence of a motive for robbery when the assailant has no knowledge of the fact?"

[5] But to this there is a twofold answer: First, the jury was not bound by the declaration of the defendant that he saw in the possession of the deceased only a silver dollar, and it would be a perfectly legitimate in-

ference for the jury to draw that if the deceased did have any considerable sum of money upon the day of the homicide he may have exhibited it in one or another of the saloons or the railway ticket office; and the second answer is that to establish robbery as a motive it is not at all necessary that knowledge that the deceased had money should be brought home to the assailant. It is not required that thugs and highwaymen shall know that their victims' purses are well lined or lined at all. They commit their crimes for what the victims may chance to have upon their persons.

[6] Again, it is said that the last date upon which the deceased is shown to have money in his possession was too remote to give the evidence probative value, and therefore to render it admissible; it being argued that he might have spent all of that money between the date when last it was seen upon his person, and the date of the homicide. This is quite true. But the argument goes to the probative weight of the evidence, and not to its admissibility. *Marable v. State*, 89 Ga. 425, 15 S. E. 453; *State v. Rice*, 7 Idaho, 762, 66 Pac. 89; *State v. Bailey*, 79 Conn. 589, 65 Atl. 954; *State v. Shelton* (Mo. Sup.) 122 S. W. 736; *Shumway v. State*, 82 Neb. 152, 117 N. W. 407; *Thurman v. Commonwealth*, 107 Va. 912, 60 S. E. 99; *Spates v. State*, 62 Tex. Cr. R. 532, 138 S. W. 394.

[7] The proof of the fact that the deceased was in the habit of carrying money upon his person; that he had about \$200 upon his person a few days before the homicide; that he had none when the body was discovered—affords strong evidence of motive, and there was no error in admitting the evidence.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.

SLOSS, J. I concur in the judgment.

(169 Cal. 86)

**REHFUSS v. REHFUSS.** (S. F. 6171.)

(Supreme Court of California. Jan. 2, 1915.)

**1. DIVORCE (§ 165\*)—INTERLOCUTORY JUDGMENT—"EXCUSABLE NEGLECT."**

Where a husband, who was seeking divorce, represented to his wife that if she contested his charges and made countercharges their minor child would be given into the custody of a public institution and she could never see it, and her attorney corroborated him, her failure to oppose the suit was "excusable neglect," within Code Civ. Proc. § 473, authorizing the vacation of judgments taken against a party through his excusable neglect.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

**2. DIVORCE (§ 165\*)—JUDGMENTS—VACATION.**

Where a wife, in consideration of an agreement with her husband as to the custody of a minor child and to the disposition of his property, agreed not to oppose his suit for divorce, an interlocutory judgment of divorce should be set aside, being based on collusive agreement.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

**3. DIVORCE (§ 151\*) — JUDGMENT — RELIEF FROM—"NEW TRIAL."**

Where the defendant in a divorce suit filed an answer admitting the allegations of the complaint, her remedy to set aside an interlocutory judgment for plaintiff is under Code Civ. Proc. § 473, authorizing relief from judgments obtained through excusable neglect, and not by a motion for new trial, for that motion is to obtain a review of issues already tried.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 509-513; Dec. Dig. § 151.\*]

For other definitions, see Words and Phrases, First and Second Series, New Trial.]

**4. DIVORCE (§ 160\*)—ACTIONS—JUDGMENT.**

Though the defendant in a divorce action defaults, judgment cannot be granted until the facts upon which the relief is sought are established.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 521; Dec. Dig. § 160.\*]

**5. DIVORCE (§ 161\*) — ACTIONS — JUDGMENT—SETTING ASIDE.**

A default judgment of divorce will be set aside on slight showing, for the state is also interested, being concerned with the preservation of the marriage relation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 522-526; Dec. Dig. § 161.\*]

**6. DIVORCE (§ 11\*)—PROCEEDINGS—PARTIES INTERESTED.**

The state is interested in divorce proceedings, being concerned with the preservation of the marriage relation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 13, 472; Dec. Dig. § 11.\*]

**7. DIVORCE (§ 165\*)—JUDGMENT—VACATION.**

Where the defendant wife, who filed an answer and cross-bill, withdrew her answer and filed another admitting the allegations of the complaint, the court, on motion to set aside an interlocutory judgment, may consider that the cross-bill was not denied, although the fact that the cause was not at issue is not usually ground for the vacation of a judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Herman E. Rehfuß against Elizabeth A. Rehfuß. From an order setting aside an interlocutory judgment of divorce, plaintiff appeals. Affirmed.

Austin Lewis, of San Francisco, and R. M. Royce, of Oakland, for appellant. Stafford & Stafford, of San Francisco, for respondent.

SULLIVAN, C. J. Plaintiff brought an action against defendant for divorce, on the ground of extreme cruelty. Defendant answered, denying specifically the acts of cruelty alleged against her. With her answer she filed a cross-complaint charging plaintiff with extreme cruelty and praying for a divorce from him. No answer to the cross-complaint was ever filed. After filing her original answer and cross-complaint, the defendant filed an amended answer in which she admitted all of the averments of the plaintiff's complaint. Thereafter the case was tried. At the trial the defendant appeared in person. Her attorney was not present, and she was not called upon to testify. Plaintiff's attorney testified to the fact of plaintiff's residence for the requisite length of time in California and in the county wherein the action was brought. Plaintiff, the only other witness, testified that on one occasion defendant fired a shot at him from a pistol, with intent to kill. He testified to no other act of cruelty. The testimony as to the shooting was not corroborated. In her original answer, referring to the shooting, the defendant alleged that on a certain occasion she "discharged a pistol near plaintiff, but not at him or with intent to kill or injure him, but merely to frighten him, shortly after he had cursed and sworn at defendant and called her vile and low names, and after plaintiff had badly beaten, hurt, and badly injured defendant." At the trial no reference was made to defendant's cross-complaint on file. On the testimony of plaintiff and his attorney the court granted an interlocutory judgment, adjudging that he was entitled to a divorce and awarding him the custody of the minor child of the parties, aged two years. After judgment the defendant employed other attorneys to represent her in place of her original attorney. Through her substituted attorneys she moved the court, within four months after the trial, to set aside the judgment taken against her, upon the following grounds: (1) That the judgment was taken against her by reason of her mistake, inadvertence, surprise, and excusable neglect; (2) that the cause was not at issue at the time of trial. In her affidavit used upon the motion, defendant alleged that the denials and averments contained in her answer and cross-complaint are true, and averred that "she reiterates the averments

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and statements contained in her answer and said cross-complaint." She further deposed that it was her intention to contest plaintiff's application for a divorce; that in pursuance of her intention she filed her answer and cross-complaint; that on June 19, 1911, her attorney then representing her advised her to sign an amended answer admitting the truth of all of the allegations of plaintiff's complaint, although the same were untrue; that she "was solely induced to sign said amended complaint (answer) on the advice of her said attorney, who told her that if she contested said action the court would award the custody of the only child of plaintiff and said defendant, namely, Herman E. Rehfuß, Jr., to some public institution, and that the care and custody of said child would be taken from both plaintiff and defendant; \* \* \* that she was deeply attached to said child and interested in its welfare, and moved solely by love for said child she consented to sign said so-called amended answer." In her affidavit she stated that her attorney advised her that if the child were awarded to the plaintiff she would be permitted to see the child and "have him more or less in her care," and if the child were placed in some public institution she would not have such right or privilege; that she appeared at the trial at the request of plaintiff, who told her that "the judge might want to see her and ask some questions." She also stated in her affidavit that "her husband had told her that if she contested said action her child would be taken from him and her and given to some public institution." One of plaintiff's attorneys in an affidavit used in opposition to the motion averred that notice of the time and place of trial had been given to the defendant; that her attorney, upon whom the notice had been served, "stated that he would not be present at said trial, as there were no issues, but that defendant should be present; \* \* \* that on the 31st of May defendant's attorney wrote to affiant a letter in which he stated: 'I will file a withdrawal of Mrs. Rehfuß's answer, so you can serve me with notice of trial and I will not appear.'" He further deposed in his affidavit that on the 19th day of June, 1911, he received from defendant's attorney another letter in which the latter stated:

"I have to-day had Mrs. Rehfuß verify the amended answer and filed it. You stated when I last saw you that you would have Mr. Rehfuß sign the agreement regarding the custody of the child and file it. Would you kindly let me know when you do file same. I hope you will now have the matter set for trial and would deem it a favor if you would notify me of the result of the court's decision."

In an affidavit by defendant's former attorney, filed in opposition to the motion, he denied that he had given the advice or made the statements alleged in defendant's affidavit to have been given and made. He alleged in his affidavit that pending the action the par-

ties arrived at an agreement concerning their property rights and the custody of their child; that this agreement was the result of a meeting of the parties and their attorneys in the office of the attorneys for the plaintiff; that pursuant to this agreement the plaintiff executed and delivered to his wife a quitclaim deed conveying to her certain real property in dispute between them; and that the defendant on her part in consideration of the deed, executed an agreement relinquishing to the husband her right to the custody of the child; that when the defendant received the deed she instructed her attorney to withdraw her answer and cross-complaint and said to him, "Let him (referring to her husband) go ahead now and get his divorce." He further deposed, using his own language, "that the defendant instructed me immediately after the said meeting of the said parties in Mr. Austin Lewis' office, that after all documents were executed carrying out the terms therein agreed upon that I was to then file a withdrawal of the answer and cross-complaint filed therein by the defendant, and the plaintiff was to proceed with the divorce as he thought fit"; that on June 13th he called upon plaintiff's attorneys "with a view to filing a withdrawal of the answer and cross-complaint"; that one of the plaintiff's attorneys in the interview "suggested that it would be better for the court records if the defendant were to file an amended answer admitting the charges in the complaint." He further stated in his affidavit:

"The next day I consulted with the defendant and she remarked that she was agreeable to signing this (amended answer), as she wanted him now to go ahead and get his divorce; that she was well satisfied with the matters as I had arranged them for her."

Plaintiff himself filed no affidavit in response to that of defendant, nor did he testify at the hearing of the motion, although oral testimony was then taken.

[1-4] The failure of plaintiff to deny the averments of defendant's affidavit that he "had told her that if she contested said action her child would be taken from him and her and given to some public institution" warranted the court in believing that the plaintiff had made such representations to her. The record before us shows beyond doubt that the interlocutory judgment was taken against defendant through her excusable neglect or through a collusive agreement entered into between the parties. In either event, the judgment was properly set aside. Upon the showing made by the defendant, if the court believed the declarations contained in her affidavit, the court was justified in holding that her failure to defend the action was due to her excusable neglect, induced by fear that, if she did defend, her infant child would be taken from her and its father and placed in some public institution. This fear was engendered in her, according to her sworn statement, by the representations made

to her by her husband and her own attorney. Her neglect, under the circumstances detailed in her affidavit, was excusable in law.

Section 473, Code of Civil Procedure, provides that:

"The court may, \* \* \* in its discretion, \* \* \* relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The defendant was entitled to relief under this section. Her remedy could not be by motion for a new trial. Her original answer was superseded by her amended answer, which admitted all of the allegations of the complaint and raised no issue of fact. No issue of fact having been raised or tried, defendant had no right to move for a new trial, as a new trial is a re-examination of issues already tried.

In a divorce action, "whether the defendant suffered default or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere ex parte showing, his remedy in seeking relief from the judgment is in section 473 of the Code of Civil Procedure, and not upon motion for a new trial." *Foley v. Foley*, 120 Cal. 33-37, 52 Pac. 122, 123 (65 Am. St. Rep. 147).

If the trial court disbelieved the statements made by defendant in her affidavit and her oral testimony given at the hearing of the motion, and accepted as true the allegations of the affiants contained in their affidavits used in opposition to the motion, the court was bound to vacate the interlocutory judgment on the ground of collusion between the parties. In *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621, an action for divorce, the defendant moved to set aside a default judgment. The motion was denied and the defendant appealed. In reversing the order denying the motion the court said:

"The facts stated in the affidavit of defendant show either collusion between the parties, or that the defendant was grossly misled and deceived by her husband. \* \* \* In either case the court should have been prompt to set aside the judgment and to allow the defendant to answer, so that the case might be heard and determined on its merits."

[5, 6] The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. And although in other actions a party seeking relief from default must support his motion by an affidavit of merits, no such affidavit is required on motion to set aside the judgment in an action for divorce. The law is at all times very solicitous to preserve the integrity of the marriage relation. That relation is the basis of the family, the

foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. An action for divorce concerns not only the parties immediately interested, but also the state. The attorneys in the case represent the respective parties—the court in a sense represents the state. It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together. As well said by the Supreme Court of Connecticut in *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. Rep. 135:

"When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair."

Where it becomes manifest to the court, before it loses jurisdiction of the case, that a judgment decreeing a divorce has been obtained by collusive agreement between the parties, or through fraud practiced upon the court, the court has the inherent power to set aside the judgment. This it may do on its own motion. *McIntyre v. McIntyre*, 9 Misc. Rep. 252, 30 N. Y. Supp. 200; *Welch v. Welch*, 16 Ark. 527; 2 *Nelson on Marr. & Div.* § 1050; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Earle v. Earle*, 91 Ind. 27; *Johnson v. Coleman et al.*, 23 Wis. 452, 99 Am. Dec. 193; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Boyd's Appeal*, 38 Pa. 241; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999; *Rush v. Rush*, 46 Iowa, 648, 26 Am. Rep. 179.

[7] One of the grounds of defendant's motion was that the cause was not at issue at the time the interlocutory judgment was rendered. Although ordinarily this ground would not be sufficient to warrant the court in setting aside a judgment, yet the court had a right to take into consideration, in passing upon the motion to vacate the judgment, the fact that there was an unanswered cross-complaint of defendant on file containing allegations which, if true, should prevent the plaintiff from obtaining a divorce.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(169 Cal. 107)

**MILLER et ux. v. PACIFIC ELECTRIC RY. CO.** (L. A. 3437.)

(Supreme Court of California. Jan. 5, 1915.  
Rehearing Denied Feb. 4, 1915.)

**1. CARRIERS (§ 318\*)—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE—INVITATION TO LEAVE CAR.**

In an action for the death of plaintiffs' son, evidence held to warrant a finding that he left the car and walked back over the track to the station upon the express or the implied invitation of defendant's conductor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**2. CARRIERS (§ 303\*)—DUTY TO PASSENGERS—SETTING DOWN PASSENGER.**

A carrier owes to a passenger the duty of safely delivering him at his destination, and, when the passenger is carried beyond his station and is directed by the conductor to alight, must provide him with a safe means of return to the station; and the relation of carrier and passenger does not terminate until the passenger has had a reasonable opportunity of leaving the carrier's premises.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 303.\*]

**3. CARRIERS (§ 347\*)—PERSONAL INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

On evidence in an action for the death of plaintiffs' son, who was carried by his station and then invited to leave the car and walk back over the track to the station, and who was killed by the backing train, his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.\*]

**4. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In such action, where a witness for defendant, whose testimony was of slight bearing on the cause of death, testified that deceased had taken three or four drinks, but refused to state that he was drunk, and where plaintiffs' cross-examination undertook to show that the witness had been influenced in favor of defendant by reason of his relations with defendant, the exclusion of an explanation offered to sustain the credit of the witness, if erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by George Miller and wife against the Pacific Electric Railway Company. Judgment for plaintiffs, and, from the judgment and an order denying a new trial, defendant appeals. Judgment and order affirmed.

J. W. McKinley, Frank Karr, A. W. Ashburn, Jr., and R. C. Gortner, all of Los Angeles, and Leonard & Surr, of San Bernardino, for appellant. Willis & Guthrie, John Brown, Jr., and Daley & Byrne, all of San Bernardino, for respondents.

SLOSS, J. The plaintiffs brought this action to recover damages for the death of

their son, George E. Miller, who, it was claimed, was killed through the negligent acts of the defendant's servants. There was a verdict and judgment for \$7,500 in favor of the plaintiffs. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The main contention of the appellant is that the evidence did not support the findings, implied in the verdict of the jury, that the defendant was guilty of negligence proximately causing George E. Miller's injuries and death, and that said George E. Miller was himself free from contributory negligence.

The defendant operated a line of electric railway from the city of San Bernardino to the town of Highland. One of the points on the line was Harlem Springs, where the defendant maintained a regular station for receiving and discharging passengers. Coming from San Bernardino, the track, as it approached Harlem Springs, ran in a north-easterly direction. At the station there was a platform and a covered shed or pavilion. Beginning about 40 feet beyond the end of the platform, a bridge or trestle, about 80 feet in length, carried the track over a depression some few feet in depth.

On the night of December 26, 1911, at about 10 o'clock, George E. Miller (whom we shall in this opinion call "Miller") took passage at San Bernardino upon a car of defendant bound for Highland and intermediate points. He had a ticket for Harlem Springs, and, during the progress of the journey, presented his ticket to the conductor. There were other passengers desiring to alight at Harlem Springs, but the conductor, through an oversight, omitted to signal for a stop at that point until the car was opposite the station. The motorman ran on until he had crossed the trestle and then brought the car to a standstill. As the car passed Harlem Springs station, Miller, who had been sitting in the open section at the rear of the car, arose and took a position on or near the steps. The conductor told him not to get off the car until it stopped. Miller left the car after it had crossed the trestle, and started to walk along the track toward the station. (The railroad ran upon its private right of way, and not on a public highway.) Meanwhile the conductor had notified other passengers that the car would return to the station, and he gave the signal to back. The motorman, remaining at his post at the front of the car, reversed the power and started the car backward toward the station. When the car had gone a part of the way over the trestle, it struck Miller and killed him. The conductor did not see Miller on the track until the car was almost upon him, and the signal to stop, which he then gave, was too late.

[1] The instructions presented the case to

the jury upon the theory, briefly stated, that the defendant was not liable unless Miller left the car and returned over the track toward the station upon the invitation, express or implied, of the conductor, and unless, further, he was struck while in the exercise of due care in consequence of the negligent act of the conductor in running the car back upon him without proper warning and in disregard of the action taken by Miller in reliance upon the said invitation. The defendant insists that the evidence did not warrant a finding of the invitation referred to in the instructions. But this position is not tenable on the record. There was evidence that the night was dark, cold, and stormy. The ground under the trestle was wet and swampy. The most direct and convenient way of returning to the station was along the track. Any other course would have involved a long detour through private property and across wire fences. The warning not to leave the car until it stopped might very reasonably have been understood by Miller and by the jury to carry with it an affirmative authorization to alight when the car should stop. And, under the circumstances above detailed, it was well within the province of the jury to infer that an invitation to leave the car on the further side of the bridge was an invitation to the passenger to return to the station by way of the railroad track. The appellant's arguments on this point are, to a great extent, based upon a view of the evidence which the jury, by its verdict, rejected. Thus, it is claimed that Miller left the car before it stopped, or after the conductor had announced, in his hearing, that the car would be backed to the station. But there was testimony, which the jury apparently accepted, to the effect that Miller got off the car just after it stopped, and that the conductor's announcement regarding the backing was not made until after Miller had alighted and disappeared into the night.

[2] The authorities are clear to the point that a carrier owes to a passenger the duty of safely delivering him at his destination, and that the relation of carrier and passenger does not terminate until the passenger has had a reasonable opportunity of leaving the carrier's premises. *Melton v. Birmingham Ry. Co.*, 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467; *Burke v. C. & N. Ry. Co.*, 108 Ill. App. 565; *Glenn v. Lake Erie, etc., R. R. Co.* (Ind. App.) 73 N. E. 861; *Texas, etc., Ry. Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. 895. When the passenger is carried beyond his station, and is directed by the conductor to alight, the carrier owes him the duty of providing him with a safe means of return to the station. *Nellis on Street Railways* (2d Ed.) § 326; *Kentucky Ry. Co. v. Buckler*, 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. Rep. 234; *N. Y. C. & St. L. Ry. v. Doane*, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451; *Adams v. Mo. P. Ry. Co.*, 100 Mo. 555,

12 S. W. 637, 13 S. W. 509. The cases cited by appellant are not in conflict with these views. In *C. H. & I. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, the injured person was on the wrong train, having boarded it by his own mistake. It was held that the conductor was not acting within the scope of his authority in directing the mode of return to the station. A similar situation was presented in *Finnegan v. Chic, etc., Ry. Co.*, 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399. In *State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258, as in *Buckley v. Old Colony R. Co.*, 161 Mass. 26, 36 N. E. 583, there was no invitation to alight; the passenger knowing that the train had not been stopped for that purpose. Our own decision in *Benson v. C. P. R. R. Co.*, 98 Cal. 45, 32 Pac. 809, 33 Pac. 206, does not aid the appellant. There the passenger had disembarked at the station next after the one for which she was bound, and had received injuries in walking back along the track. A verdict in favor of the carrier was sustained, the court basing its ruling upon the ground that the passenger had been left in a place of safety and was not called upon to return to her destination by way of the railroad track. The case of *N. Y. Ry. Co. v. Doane*, supra, is distinguished on this ground, the court citing with approval the declaration found in section 617 of *Hutchinson on Carriers*, that:

"Where the passenger is carried past the platform, or usual alighting place, and is required either expressly or impliedly to leave the car without assistance, and to find his way unaided to the station, during which time he receives injury, the carrier is liable."

[3] The appellant contends that, even if it be granted that Miller was upon the trestle by defendant's invitation, he was still, as matter of law, guilty of contributory negligence. We cannot agree with this claim. According to the finding of the jury, he was rightfully on the track, having started to walk to the station at the conductor's suggestion and without any knowledge that the car was to be backed. The conductor signaled the motorman to back by sounding three bells. But it is not clear that Miller was then in a position to have heard this signal, nor is there any evidence that he knew what it meant if he did hear it. He was on the trestle when the car came near him, and it was clearly for the jury to say whether he should have become aware of its approach sooner and whether he then acted as a reasonably prudent man would act under the circumstances.

[4] The appellant assigns as error the action of the court in sustaining objections to certain testimony offered by defendant with a view to sustaining the credit of one of its witnesses. This witness had given testimony, which was, in fact, of slight moment. He knew little or nothing of the material facts bearing directly upon the cause of Miller's death, but had testified that, in the course

of the evening, Miller had taken three or four drinks. He expressly refused to state, however, that Miller was drunk. The plaintiffs, in cross-examination, sought to show that the witness was biased in favor of the defendant. This was done by questioning him regarding a dance hall leased to him by the defendant. He was also asked whether he had not recently acquired an automobile. To meet this line of testimony, the defendant undertook to go into the particulars of the lease, and to show just how the automobile had been acquired. The court sustained objections to questions directed to this end. Without going into a technical consideration of the admissibility of the proposed evidence, we think the rulings, if erroneous, are not to be regarded as substantially prejudicial. Whether the witness might have been influenced in favor of defendant by his business dealings with it, or whether those dealings enabled him to acquire an automobile, had a very remote and indirect bearing on any issue in the case. The testimony given by the witness in chief was of such slight value that the verdict could hardly have been influenced by it one way or the other. Certainly a reversal would not be justified by the fact that an attempted impairment of the force of this testimony had not been overcome, even if defendant was entitled to overcome it.

Similar reasons preclude favorable consideration of the objections based on the attempt to impeach the same witness by proof of a conversation in which he referred to the receipt of a letter from the railroad company.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.;  
SHAW, J.

(169 Cal. 131)

WESTINGHOUSE ELECTRIC & MFG. CO.  
v. CHAMBERS, State Controller.  
(S. F. 7011.)

(Supreme Court of California. Jan. 3, 1915.)

1. STATES (§ 213\*)—CLAIMS AGAINST STATE—JUDGMENT—PAYMENT.

A judgment against a state, in cases where the state has permitted an action to be maintained against it, merely liquidates and establishes the claim, and, without an express statutory provision, cannot be collected by execution against the state or its property or by any of the ordinary processes of law.

[Ed. Note.—For other cases, see States, Cent. Dig. § 201; Dec. Dig. § 213.\*]

2. STATES (§ 130\*)—NECESSITY OF APPROPRIATION—REFUNDMENT OF TAXES PAID.

Pol. Code, § 3669, provides that corporation taxes shall be paid to the state treasurer "as other moneys are required to be paid into the treasury," and if the corporation is aggrieved it may bring an action against the treasurer, and the controller shall draw his warrant for the payment of any final judgment rendered in such action. Section 454 provides that payments to the state treasurer shall go into the general fund unless otherwise provided by law. *Held*, that section 3669 is violative of Const. art. 4, § 22, providing that no money shall be

drawn from the treasury except on appropriation by law, since the statute contemplated a payment of money from the general fund without an appropriation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. § 130.\*]

3. STATUTES (§ 107\*)—APPROPRIATION BILL—SEVERAL ITEMS.

Const. art. 4, § 29, provides that the general appropriation bill shall be confined to state salaries and expenses of the state government. Section 34 provides that appropriation bills other than the general appropriation bill shall not contain more than one item of appropriation for a single and certain purpose. *Held*, that Pol. Code, § 3669, is violative of Const. art. 4, § 34, since, if such section 3669 can be considered an appropriation bill, it is not limited to a single and certain item, as many and different judgments may be paid thereunder.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.\*]

4. STATES (§ 130\*)—PAYMENT OF INDEBTEDNESS—NECESSITY OF APPROPRIATION—CONSTITUTIONAL PROVISIONS.

Const. art. 13, § 14g, providing that injunction shall not lie to restrain the collection of taxes, but that an action may be maintained "to recover" taxes illegally collected, does not abrogate Const. art. 4, § 22, forbidding the payment of state money without an appropriation, and hence the provision of Pol. Code, § 3669, directing the state treasurer to pay warrants drawn by the controller for the payment of judgments for taxes illegally collected without an appropriation, is unconstitutional.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. § 130.\*]

5. STATUTES (§ 105\*)—TITLES OF ACTS—APPROPRIATION.

Const. art. 13, § 14g, does not abrogate Const. art. 4, § 34, providing that appropriation bills other than the general appropriation bill shall be confined to a single item for a single and certain purpose, and hence Pol. Code, § 3669, authorizing the payment of judgments against the state for taxes illegally collected without an appropriation, is not thereby taken out of the operation of such section 34 of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.\*]

6. STATES (§ 191\*)—LIABILITY TO SUIT—STATUTES IN DEROGATION OF SOVEREIGNTY.

Public rights will not be treated as relinquished or conveyed away by inference or construction, and statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.\*]

7. TAXATION (§ 543\*)—RECOVERY OF TAXES PAID—CONSTITUTIONAL AND STATUTORY PROVISIONS.

In view of their legislative history, Pol. Code, §§ 3664-3670, relating to assessment of property, and to the recovery of taxes illegally collected, apply exclusively to taxes therein provided for under the former system of railroad taxation, and Act April 1, 1911 (St. 1911, p. 530), enacted to carry into effect Const. art. 13, § 14, as amended November 8, 1910, allowing payment of taxes under protest and an action to recover taxes illegally collected in the manner then or thereafter provided, applies exclusively to taxes levied and collected under the constitutional amendment, and covers the entire legislation applicable to recovery of such taxes by action.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1006-1016; Dec. Dig. § 543.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
145 P.—65

In Bank. Application for writ of mandate by the Westinghouse Electric & Manufacturing Company against John S. Chambers, State Controller. Application denied.

J. C. Campbell and Weaver, Shelton & Levy, all of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Deputy Atty. Gen., for respondent. Edward F. Treadwell, of San Francisco, as amicus curiæ.

SHAW, J. Mandamus to compel the state controller to issue a warrant in favor of the plaintiff on the state treasury for the amount of a judgment recovered by the plaintiff against the state of California in an action to recover state taxes illegally collected.

The plaintiff was a foreign corporation doing business in this state. Subdivision "d" of section 14, art. 13, of the Constitution, provides that the franchises of all corporations, other than those engaged in certain public service, insurance, or banking, shall be valued, in a manner to be provided by statute, and taxed at the rate of one per centum each year on such value. This section was added to article 13 by an amendment adopted in November, 1910. Section 14 of the act of 1911, passed to carry out this provision (Stats. 1911, 530), prescribes the method of valuation. Under these laws, the plaintiff was regularly taxed in the sum of \$2,700 as one per centum of the value of its franchise to do business in this state. This business consisted entirely of interstate commerce. For this reason it claimed exemption from this tax, and upon that claim it paid the tax under protest and thereupon brought suit to recover the amount paid and obtained the judgment in question. This judgment has become final. With its merits we have nothing to do, our concern in this proceeding being wholly upon the question of the mode of obtaining payment from the state.

[1] The general rule is well established that a judgment against the state, in cases wherein the state has permitted actions to be maintained against it, merely liquidates and establishes the claim against the state, and that, in the absence of an express statute so providing, such judgment cannot be collected by execution against the state or its property, or by any of the ordinary processes of law provided for the enforcement of judgments; it remains for the state, after such judgment, to provide for the payment thereof in such manner as it sees fit, or to refuse to do so at its pleasure, and the judgment creditor can obtain payment in no other way than that provided. *Sharp v. Contra Costa County*, 34 Cal. 291; *Smith v. Broderick*, 107 Cal. 650, 40 Pac. 1033, 48 Am. St. Rep. 167; *Gilman v. Contra Costa County*, 8 Cal. 57, 68 Am. Dec. 290; *Emeric v. Gilman*, 10 Cal. 404, 410, 70 Am. Dec. 742;

68 Am. Dec. 297, note; *People v. San Joaquin, etc.*, Ass'n, 151 Cal. 806, 91 Pac. 740.

[2] The petitioner claims that a provision for the payment of this judgment and for the issuance of the warrant therefor is made by section 3669 of the Political Code as amended in 1905 (St. 1905, p. 823). The material parts of the section are as follows:

"Each corporation, person or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, \* \* \* and the filing of notice with the controller of an intention to begin an action, may, \* \* \* bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof. \* \* \* When any person, corporation or association has made payment of any of the taxes, \* \* \* herein referred to, which have been subsequently adjudged illegal, and still remain in the hands of the state treasurer, such person, corporation or association shall be entitled to a refund thereof, although the payment of such taxes \* \* \* may not have been under protest, nor a notice filed with the controller, \* \* \* as hereinbefore provided. And in case of failure or refusal by the state treasurer to pay the same to such person, corporation or association upon its demand, an action may be brought against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer or any part thereof. \* \* \* *If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected; and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated and the controller may demand and receive from the county, or city and county interested, the proportion of such costs.*"

We have italicized the particular clause which, it is claimed, authorizes the issuance of the warrant to the plaintiff. If this clause is valid, and is applicable to the taxes in question, the warrant should be issued as prayed for. We have reached the conclusion that the clause is both invalid and inapplicable. We proceed to state the reasons.

[3] This provision for the payment of money out of the state treasury is contrary to the specific mandates of the Constitution. Section 22 of article 4 provides that:

"No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller."

Section 34 of the same article is as follows:

"No bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed."

Section 3669 opens with the statement that the person assessed must pay the taxes each year levied upon the property assessed to it,

to the state treasurer, "as other moneys are required to be paid into the treasury." The suit to be brought for the recovery of taxes illegally collected cannot be begun until after the taxes in controversy have been thus paid into the treasury "as other moneys" are paid in. There is no provision of law appropriating such money to any special fund or requiring it to be kept in a separate account; hence it would go into and be a part of the general fund. Pol. Code, § 454. It would be out of this fund that the money must come to pay the warrant of the controller issued to satisfy the judgment in the action when it became final. Money thus paid into the treasury is not earmarked; it becomes a part of the mass and cannot be distinguished from any other money. It is all subject to payment out of the treasury whenever a warrant on the general fund is presented, under a valid appropriation. There can be no doubt therefore that the money to be paid out under the italicized clause of section 3669 above quoted is money in the state treasury, or that in order to get it out it must be taken from the state treasury. This brings it within the prohibition of section 22 of the Constitution aforesaid; it cannot be drawn out "but in consequence of appropriations made by law," and upon the warrant of the controller, duly drawn. Section 29 of the same article declares that the general appropriation bill shall contain no item or items of appropriation except for state salaries, and expenses of state government and state institutions; hence appropriations for these claims could not be embraced in the general appropriation bill. They must be paid out, if at all, by virtue of a specific appropriation. This means that the authority for such payment must be found in a bill containing only one item of appropriation, for one single and certain purpose therein expressed.

By no stretch of construction can this paragraph of section 3669 be transformed into a specific appropriation bill of the kind described in section 34 of article 4 of the Constitution. This section was first enacted in 1883. It was amended in 1891 and again in 1905. This particular paragraph has been included in it from the beginning. If it has any force at all, therefore, instead of being a bill containing but one item of appropriation and that for one single and certain purpose, it authorizes warrants for different items due to different persons for different years, embracing every final judgment that may have been rendered for such claims in any and every year since the last amendment of the section in 1905, or which may hereafter be rendered. The best that can be said of it in this regard is that it is a general appropriation bill to authorize the payment of all future judgments for such claims. It does not contain but one item of appropriation; it embraces as many items as there may be persons having such claims and ob-

taining final judgments therefor. These separate claims are not itemized at all. And no specific amount is stated. It has no resemblance to a specific appropriation. It is not payable out of revenues of a specified year; it is a continuing general appropriation of the revenues of each succeeding year, as such claims may arise and are converted into final judgments. It is a kind of legislation that is positively forbidden by the sections of the Constitution above quoted, and it is therefore void.

It is urged that the same objections will apply to the validity of sections 3804 and 3819 of the Political Code, so far as they provide for the refunding by the state of state taxes illegally collected. It is to be observed that these sections do not provide for payments of money out of the state treasury, but only allow deductions to be made from collections of taxes that would otherwise be paid into the state treasury. Whether this distinction will place these provisions without the scope of sections 22 and 34 of the Constitution, or not, is a question upon which we express no opinion. The enactment of these sections can have no proper bearing upon the meaning and effect of the prohibitions in the Constitution concerning payments from the state treasury.

[4, 5] It is claimed, however, that this provision of section 3669 is referred to and practically incorporated into the Constitution itself by subdivision "g" of the aforesaid section 14 of article 13. This subdivision, after declaring that no injunction shall ever issue against the collection of any tax levied under the section, proceeds as follows:

"But after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law."

The argument is that this authorizes an action "to recover" taxes illegally collected under color of the constitutional scheme, that to "recover" a sum of money due is to obtain payment thereof, and, consequently, that this is an express recognition, affirmation, and adoption of the provision of section 3669 and, in effect, a constitutional declaration that an action may be maintained for such taxes, and judgment recovered against the state therefor, and that such judgment when final, shall be paid out of the treasury on warrant drawn thereon by the controller. If this is the meaning of subdivision "g," it supersedes and overrides sections 22 and 34 of article 4 in so far as they involve appropriations of money to satisfy final judgments against the state for taxes illegally collected by the state treasurer and, to that extent, takes from the state its sovereign power to control payments of money from the state treasury.

[6] It is a rule of statutory construction that public rights will not be treated as relinquished or conveyed away by inference or legal construction. 2 Sutherland on Stat-

utory Construction, § 568; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646, 28 Am. St. Rep. 451; *Ruperich v. Baehr*, 142 Cal. 193, 75 Pac. 782, and cases first above cited. In pursuance of this rule it has been held that statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed. *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. These rules are applicable to the present case.

The word "recover," when used in connection with actions at law for money, does not necessarily, or even ordinarily, include the actual payment of the money sued for. The *Century Dictionary* defines its meaning as a law term as follows:

"To recover damages for a wrong, or for a breach of contract. It does not necessarily imply the actual gain of satisfaction or possession, but ordinarily only the obtaining of judgment therefor."

It is true that in some connections it has been given a broader significance. For example, in *Leslie v. York*, 112 Ky. 712, 66 S. W. 751, it was held that, in a contract by a litigant to pay his attorneys "one-half they may recover," it meant the actual receipt of the money sued for. But the opinion states that ordinarily the word did not include more than the recovery of judgment for the money. In ordinary usage the phrase "action may be maintained to recover any tax illegally collected," as used in subdivision "g," would not be understood to refer to or include a mode or means of obtaining satisfaction of the judgment to be rendered in such action, or the actual receipt of the money sued for. It was not so used in section 3669. The declaration of that section that "an action may be brought against the state treasurer for the recovery of the amount of taxes," if this were the meaning of the word "recover," would have included the actual payment of the money by the state treasurer and the additional provision for a warrant by the controller would have been unnecessary. The rule of strict construction therefore does not warrant the meaning which the plaintiff here desires to have attributed to the word "recover."

Furthermore, the subdivision itself does not declare that the taxes illegally collected shall be repaid to the taxpayer. Its declaration is that he may maintain an action to recover them. The maintenance of an action to recover money is not ordinarily understood to include the collection of the money after judgment. The presentation of the certified copy of the judgment to the controller, and the issuance of the warrant thereon by him, as provided for in section 3669, were not parts of the proceedings in the action authorized by that section. The action was complete when the judgment became final. Likewise, the action authorized by subdivision "g" would be complete when final judgment was obtained, and there is nothing in that subdivision that can be understood as a dec-

laration concerning the manner of satisfaction of the judgment when recovered. Our conclusion is that subdivision "g" does not continue in force or incorporate the provision of section 3669 for the payment of the money out of the state treasury after final judgment.

[7] Upon a consideration of the history of the legislation which culminated in the enactment of section 3669, we are of the opinion that the provision here invoked has no application to the payment of taxes collected under section 14 of article 13 of the Constitution. Prior to the adoption of the Constitution of 1879, railroad taxes were assessed and collected in each county by the county authorities. That Constitution made a radical change in the manner of collection with respect to railroads operated in more than one county. It provided that the operative property of such railroads should be assessed by the state board of equalization and apportioned to the respective counties in proportion to mileage. Article 13, § 10. In 1880 an act was passed adding sections 3664 and 3665 to the Political Code to carry out this provision of the Constitution. The scheme thus provided was not complete, and in 1883 another statute was passed amending sections 3664 and 3665 and adding new sections from 3666 to 3670, inclusive, embracing substantially the scheme in force at the time the constitutional amendment of 1910 was adopted. Some of these sections were subsequently amended, the last amendment of 3669 being in 1905. This entire statutory provision was enacted to provide for the assessment and collection of railroad taxes in pursuance of the constitutional provision requiring the same to be assessed by the state board of equalization. Section 3666 required the state board to prepare a record of the railway assessments and of the apportionment thereof to the counties and that the same should be transmitted to the state controller. The controller was required to enter the amount of the state and local taxes due upon the whole assessment from each railroad company assessed. Section 3668 specified the time when such taxes should be deemed delinquent and the penalties to be thereupon imposed, and provided further that the state's portion of the taxes collected by the state treasurer should be distributed by the treasurer to the funds entitled thereto and that the portion of each county should be reported to the officers thereof. It was this tax so to be assessed to which the provisions of section 3669 requiring it to be paid to the state treasurer applies. The opening sentence of that section does not in terms specify that it refers to the railroad taxes assessed under the immediately preceding provisions of the Code; but, when taken in connection with those provisions and the subject of the act as originally enacted and subsequently amended, it is clear that it can mean no other tax



than the railroad tax therein authorized to be assessed and collected. It is not therefore a general continuing provision made for the purpose of applying to any state tax which might thereafter by any subsequent scheme be imposed upon taxpayers. By the amendment to the Constitution in 1910 providing for a percentage tax upon corporation earnings or capital as a means of raising state revenues an entirely distinct and different scheme was enacted. The old provision for the valuation and assessment of all operative railroad property by the state board of equalization was entirely superseded. The provisions of the law relating to that scheme were by their terms necessarily inapplicable to the new scheme. These provisions of the Code related to the assessment of property and the imposition of a tax according to the valuation thereof. The new constitutional scheme provided for no valuation of property except franchises. It included all public service corporations as well as banking and insurance corporations. In order to supplement this constitutional provision a new act was necessary. To meet this exigency the Legislature passed the aforesaid act of April 1, 1911 (Stats. 1911, 530), entitled:

"An act to carry into effect the provisions of section fourteen of article thirteen of the Constitution of the state of California as said Constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation."

This act embraces an elaborate scheme covering every detail of the proceedings deemed necessary to carry out the constitutional provision referred to. Section 23 of the act covers the same subject-matter, with respect to the taxes levied under the constitutional plan of taxation, as that covered by section 3669 of the Political Code with respect to taxes collected under the old system of railroad taxation superseded by the Constitution. It provides for payment under protest and an action against the state treasurer for the recovery thereof if the taxes are illegally collected; but it omits any provision for warrants by the controller or payment of the judgment out of the state treasury. The only reasonable conclusion from this legislative history is that the provisions of sections 3664 to 3670, inclusive, of the Political Code were intended to apply and do apply exclusively to taxes therein provided for under the old system of railroad taxation, and that the provisions of the act of April 1, 1911, aforesaid, were intended to and do apply exclusively to taxes levied and collected under the constitutional amendment of 1910, and that the latter act covers the entire legislation applicable to the recovery of such taxes by action. The provisions of the Political Code are therefore inapplicable to taxes levied un-

der the Constitution as supplemented by the act of 1911.

For these reasons we are of the opinion that the plaintiff is not entitled to the warrant which he here seeks. The petition for a writ of mandamus is denied.

We concur: ANGELIOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(169 Cal. 83.)

Ex parte THROOP. (Cr. 181.)

(Supreme Court of California. Jan. 3, 1915.)

1. MUNICIPAL CORPORATIONS (§ 625\*)—REGULATIONS—FACTORIES.

A city ordinance, prohibiting the maintenance of certain factories, including stone crushers, within a large district of the city which was sparsely inhabited and which contained 500 acres which were unimproved and practically uninhabited, but permitted them within a much smaller district which was densely inhabited, though by the poorer classes, is unreasonable and void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.\*]

2. MUNICIPAL CORPORATIONS (§ 611\*)—REGULATIONS—FACTORIES.

The business of producing crushed stone for concrete work cannot be arbitrarily suppressed or interfered with by a city unless it is a nuisance or injurious to the health, comfort, safety, or welfare of the inhabitants.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.\*]

3. MUNICIPAL CORPORATIONS (§ 626\*)—POLICE POWER—FACTORY REGULATIONS.

The prohibition of the operation of stone crushers in certain districts within a city cannot be justified under the police power if such operation is permitted in another district where it interferes more with the health, welfare, or safety of the surrounding residents.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1380; Dec. Dig. § 626.\*]

In Bank. Application by R. A. Throop for a writ of habeas corpus. Petitioner discharged.

Guy Eddie, of Los Angeles, for petitioner. Wm. J. Carr, of Los Angeles, for respondent.

SULLIVAN, C. J. The petitioner was taken into custody by virtue of process issued out of the recorder's court of the city of South Pasadena for alleged violation of ordinance of that city No. 264, adopted in 1908, and certain ordinances amendatory thereof. He seeks discharge on the ground, among others, that the ordinances which he is charged with violating are unreasonable and void. The ordinance divides the city into three districts, numbered 1, 2, and 3. The entire area of South Pasadena comprises approximately 2,200 acres of land. District No. 1 contains 25.25 acres, district No. 2 contains 11.65 acres, and in district No. 3 there are 2,163 acres. District No. 1 embraces the re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tail business section; district No. 2, known as the "Industrial District," is situate in a populous part of the city. As stated in the petition for the writ, it is "densely surrounded by residences and other buildings on all sides for a distance of many blocks in every direction, and is itself very largely built up." District No. 3 is known as the "Residence District," and, as stipulated in this proceeding by the respective parties, "the greater part of the district is sparsely settled, one area containing 500 acres being unimproved, undeveloped and practically uninhabited."

Section 51B of the ordinance, as amended, reads as follows:

"It shall be unlawful and is hereby declared to be unlawful for any person, persons, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, occupy or cause to be occupied any factory, warehouse, storehouse, blacksmith shop or horse shoeing shop, livery stable, lumber yard, planing mill, coal yard, hay and feed yard, machine shop, bottling works, brick yard, canning works, carpet cleaning works, railroad shop, power house, feed or flour mill, feed or sales stables, foundry, packing house, ice factory, laundry, oil tank, piano or organ factory, pattern works, *stone crusher*, rolling mill, fireworks factory, gasworks, moving picture development works, moving picture photographic works or camp, or a place where persons congregate or assemble for the purpose of making and producing moving picture views and scenes, or any manufacturing establishment, or any storage or warehouse business of any kind or character in district No. 3 of said general fire limits."

The ordinance excludes from district No. 1 the buildings, occupations and businesses prohibited in district No. 3 but inferentially permits them in district No. 2. Presumably the stone crusher is included in the list mentioned in the section by reason of the noise and dust which usually result from its operation. The petitioner at the time of his arrest maintained and operated in district No. 3 a stone crusher, in plain violation of the provisions of section 51B. The plant of the petitioner is situate in the "Arroyo Seco," on the western boundary of the city. The petitioner owns 14 acres in this area. The Arroyo Seco is what is known as a "wash." In the vicinity of the crusher the "wash" is three-quarters of a mile wide. For a distance of approximately one-half a mile on the east side of the "wash" the area consists almost entirely of vacant and unimproved land. There are only four dwellings within a radius of 200 yards from the crusher. As stated in the petition for the writ, the environment in the neighborhood of the stone crusher is made up of a "large area contained in a rugged, rocky, and bushy wash, cut off from the rest of neighborhood by high bluffs." These bluffs range in height from 50 to 100 feet and upward. In the neighborhood and closer to the populous part of the city are several railroads in operation, the Salt Lake operating daily 10 trains, the Santa Fé 20 trains daily and the Pacific Electric (an interurban line) operating a train

every 10 minutes. In the dry season the floor of the Arroyo Seco presents the appearance of a desert waste, here and there dotted with cacti and brush. In the rainy season torrential freshets occasionally spread over and cover the entire area. It contains large deposits of sand, gravel and rock which are very valuable for building purposes, particularly so because of the proximity of the market for building materials in the nearby cities. The rock consists of boulders of various sizes which are put through the crusher to reduce them to marketable form. The freshets which occur in the rainy season cause material to take the place of that removed in the dry season, making the supply of rock, sand, and gravel practically inexhaustible. Plaintiff's land has scarcely any value other than that due to the building material found thereon.

Before he applied for a writ of habeas corpus, the petitioner commenced an action in the superior court of Los Angeles county against the city of South Pasadena to enjoin the enforcement against him of the Ordinance No. 264 and amendatory ordinances, on the ground of their alleged illegality. In that action the court adjudged the ordinances valid. By stipulation entered into between the petitioner and respondent the same evidence presented to the superior court upon the hearing of the application for the injunction is considered as evidence in this case. The findings of fact and conclusions of law in the injunction proceeding are also before us as evidence, but they are in no way binding upon this court and will be disregarded in view of the conclusion which we have reached concerning the invalidity of the ordinances. The Chief Justice of the court, in company with counsel for the respective parties, viewed the premises where the stone crusher is located, observed its operation at close range and at different points more or less remote from it. He also visited districts 1 and 2 and observed conditions in and about the same.

After a careful consideration of the evidence in the case we must hold that the ordinances under which the petitioner is being prosecuted, in so far as they relate to the right to maintain and operate a stone crusher in district No. 3, are unreasonable and therefore void. In the injunction suit brought by the petitioner against South Pasadena, the petitioner introduced in evidence affidavits of 19 witnesses, who testified to the conditions surrounding the stone crusher and resulting from its operation. Several of these witnesses testified that the noise and dust produced by the operation of the crusher were not observable at their places of residences. Among the witnesses so testifying for the petitioner were four dairy proprietors who conducted their dairies in the vicinity of the crusher, three at a distance of 300 yards therefrom, and one at a

distance of 450 yards. They all deposed that if the amount of dust claimed by the witnesses for the defendant to come from the crusher, emanated therefrom, they would notice it "as the dairy business would be especially sensitive to such an annoyance." The other witnesses for the plaintiff, living at distances varying from 100 to 300 yards from the crusher, deposed that at their respective places of residence they noticed very little, if any, dust or noise.

As is usual in cases of this character there is a decided conflict in the testimony produced by the respective parties. The affidavits of eight witnesses were presented as evidence in favor of the defendant in the injunction suit. Six of these witnesses testified to the offensive character of the dust and noise emanating from the crusher, while in operation; several of them joining in the statement that:

"The stone crusher maintained on plaintiff's property is injurious to the health of the residents along the bank of the Arroyo Seco by reason of the noise and large amount of dust caused thereby and for like reasons is offensive to the senses of the residents and interferes with the use of property in the vicinity thereof and interferes with the comfortable enjoyment of life and property and is a nuisance."

J. W. Moore, building inspector of South Pasadena, in his affidavit denied that industrial district No. 2 is not suitable for or adapted to the existence or maintenance of businesses prohibited in district No. 3 as claimed by plaintiff. He declared:

"On the contrary said district (No. 2) is located in the vicinity of railroad tracks and it is *immediately surrounded by a poorer class of residences*. There are vacant lots in said industrial district on which manufacturing and industrial enterprises may be located."

He further deposed that the crusher by its operation "creates noise and dust so as to seriously impair and destroy the value of lots in the city of South Pasadena along the bank of the Arroyo Seco and in the vicinity of said stone crusher."

[1] Notwithstanding the evidence produced by respondent we deem the ordinances unreasonable and void. As already stated, the only district (No. 2) in which a stone crusher may be maintained contains 11.65 acres situated in the heart of the city and surrounded by residences and other buildings on all sides. While the ordinances permit the maintenance of a stone crusher in this restricted territory surrounded by residences, the same ordinances make it a crime to erect or maintain one in a remote corner of the district No. 3, containing 2,163 acres, a greater part of which is sparsely settled, or to maintain or erect one in the center of an area containing 500 acres in district No. 3 which is admittedly unimproved, undeveloped, and practically uninhabited. Although, as Inspector Moore, in his affidavit says, district No. 2 where the business prohibited in No. 3 may be maintained is "immediately surrounded by a poorer class of residences," the occu-

pants of these residences are entitled in law to as much consideration as those occupying the magnificent residences on the banks of the Arroyo Seco several hundred yards away from the objectionable crusher. The unreasonable restrictions as to the place where a stone crusher may or may not be erected or maintained render the ordinances void.

[2] Concrete has become a very important factor in the construction of improvements in our cities and towns and in the construction of roads and highways. Rock, sand, and gravel and cement are necessary ingredients in concrete construction and must be obtained. The business of producing these materials, if maintainable within the confines of a city or county without becoming a public nuisance or injurious to the health, comfort, safety, or welfare of the inhabitants, cannot, by legislative bodies, be arbitrarily suppressed or interfered with.

[3] The city of South Pasadena, in the exercise of the police power vested in it by our state Constitution, has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety, or welfare. As stated by the Supreme Court of the United States in *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169:

"It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In the case now under consideration, it is plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police power exists, namely to protect the public health, comfort, safety, or welfare. An ordinance which prevents the operation of a stone crusher in a sparsely settled territory of 2,163 acres, 500 of which are undeveloped and practically uninhabited, and allows its operation in a small area of 11.65 acres in the center of a city surrounded by "poorer classes of residences," does not subserve the ends for which the police power exists.

The ordinances which the petitioner is charged with having violated being void and

his arrest being illegal, it is ordered that he be discharged.

We concur: LORIGAN, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

(169 Cal. 122)

**C. M. STAUB SHOE CO. v. BYRNE.**  
(L. A. 3419.)

(Supreme Court of California. Jan. 7, 1915.  
Rehearing Denied Feb. 4, 1915.)

**1. LANDLORD AND TENANT (§ 101\*)—PROVISIONS FOR TERMINATION—CONSTRUCTION—"WHOLLY UNFIT FOR OCCUPANCY"—"UNFIT FOR OCCUPANCY."**

A lease provided that if the building was destroyed by fire, or partially destroyed so as to render the premises wholly unfit for occupancy, or so badly injured that they could not be repaired within sixty days, the lease should terminate and the lessee should surrender and pay rent only to the time of surrender, and that in case of such destruction or partial destruction the lessor might repossess the premises discharged of the lease, but that, if they could be repaired within 60 days, rent should not run after injury and during repairs, and that the lessor should repair with reasonable speed; that, if the premises were so slightly injured as not to be unfit for occupancy, the lessor should repair with reasonable speed; and that rent should not cease. The premises were damaged by fire and rendered wholly unfit for occupancy, and the tenant, after being excluded from possession, brought action for the value of the term. Civ. Code, § 1641, requires that the whole of a contract be taken together so as to give effect to every part, if reasonably practicable. *Held*, that "wholly unfit for occupancy" and "unfit for occupancy" were not equivalent, and that if the premises were so damaged as to prevent or greatly interfere with the conduct of the lessee's business, though not requiring him to vacate during repairs, they were "unfit for occupancy," relieving the lessee from rent during repairs, but not terminating the lease; but that, where the premises were so damaged as to be "wholly unfit for occupancy," the lease was terminated, so that the lessee could not recover.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.\*]

**2. LANDLORD AND TENANT (§ 101\*)—TERMINATION OF LEASE—FORFEITURE.**

Such provision did not declare a forfeiture, because fixing events having no relation to any act or default of the parties upon which the lease should terminate, and hence there was no basis for applying the rule of strict construction prescribed by Civ. Code, § 1442, against conditions involving forfeiture.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.\*]

**3. LANDLORD AND TENANT (§ 101\*)—LEASE—CONSTRUCTION.**

A provision in a lease for termination upon damage or destruction by fire, etc., was to be interpreted in the light of the conditions existing when it was made, and not against the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.\*]

**4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a lessee's action to recover the value of the use and occupation for the term of a lease found to have been terminated under a

provision thereof by damage from fire, error, if any, in admission of evidence as to the time within which the premises could be repaired, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**5. LANDLORD AND TENANT (§ 213\*)—TERMINATION OF LEASE—RIGHT TO RECOVER RENT.**

Under a lease providing that upon damage or destruction of the premises the lease should terminate and the lessee should immediately surrender the premises and pay rent only to the time of such surrender, the lessee, who had paid rent in advance for February, during which month the lease terminated by damage or destruction of the premises, could not recover the proportionate rent for the remainder of the month, as the provision was not a covenant to repay rent due and paid.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 846-848, 850, 852, 854, 856, 857-860; Dec. Dig. § 213.\*]

**6. LANDLORD AND TENANT (§ 231\*)—RECOVERY OF RENT—BURDEN OF PROOF.**

If such provision entitled the lessee to recover the proportionate part of advance monthly rental, after termination and surrender, the burden of alleging and proving a surrender was on him.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 926-934; Dec. Dig. § 231.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the C. M. Staub Shoe Company against James W. Byrne. Judgment for defendant, and, from the judgment and an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. Denis & Loewenthal and O'Melveny, Stevens & Millikin, all of Los Angeles, for respondent.

SLOSS, J. On March 9, 1910, Mrs. Margaret Irvine was the owner of a store and office building situated at the northwest corner of Broadway and Third streets in the city of Los Angeles. On that day she executed a lease of the corner store and basement in said building to the plaintiff for the term of five years commencing on the 1st day of January, 1911, at a monthly rental of \$1,250, payable in advance on the 1st day of each month. On February 16, 1911, the building and the premises occupied by the plaintiff were damaged and injured by fire. Prior to the last-mentioned date the defendant James W. Byrne had succeeded to the interest of the lessor in the lease. This action is the outgrowth of a controversy arising over certain provisions of the lease relative to the effect of destruction of or injury to the premises by fire or other cause. The plaintiff contended that it was entitled to remain in possession of the store and basement under its lease. The defendant's position was and is that the lease was terminated at the date of the fire, and he has excluded the plaintiff

from the possession and leased the premises to another tenant. The action was brought to recover the sum of \$45,000 alleged to be the value, at the date of the fire, of the lease and the value of the use and occupation of the premises during the remainder of the term. The complaint also seeks to recover the sum of \$580.40, being the proportion of the monthly rent representing the part of the month of February elapsing after the fire. The case was tried without a jury, and judgment went in favor of the defendant. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The case turns largely upon the construction of the fourth clause of the lease. This clause reads as follows:

"If, during the term of this lease, the building or premises are destroyed by fire, or other action of the elements, or partially destroyed so as to render the premises demised wholly unfit for occupancy, or if they shall be so badly injured that they cannot be repaired within sixty days after the happening of the injury, then this lease shall cease and become null and void from the date of such damage or destruction, and the lessee shall immediately surrender said premises, and all interests therein, to said lessor, and said lessee shall pay rent within this term only to the time of such surrender; and in case of destruction or partial destruction as above mentioned, the said lessor may re-enter and repossess said premises discharged of this lease, and may remove all parties therefrom; and if said premises shall be repairable within sixty days from happening of said injury, then said rent shall not run or accrue after such injury and while the process of repairs is going on, and the lessor shall repair the same with all reasonable speed, and the rent shall recommence immediately after said repairs shall be completed; but if said premises shall be so slightly injured by fire or the elements as not to be rendered unfit for occupancy, then the said lessor agrees that the same shall be repaired with reasonable promptitude; and in that case the rent accrued and accruing shall not cease or determine. In no case shall the lessee be entitled to compensation or damages on account of any inconvenience or annoyance, or destruction by fire or earthquake or by other actions of the elements or by reconstruction or repair of any portion of said building; nor for any damage to or loss of property in said premises from any cause."

The complaint alleges that the leased premises were repairable and could have been repaired within the period of 60 days after the said 16th day of February, 1911; that the defendant did not repair said premises within said period of 60 days and did not use reasonable or any diligence in that behalf. The answer denies these allegations, and further alleges that the demised premises occupied by plaintiff were destroyed and were rendered by said fire wholly unfit for occupancy. Upon all these issues the findings were in favor of the defendant.

One of the conclusions of law was that, by reason of the fact that the building and premises were partially destroyed by fire so as to render the demised premises wholly unfit for occupancy, said lease became and was terminated. A like conclusion was drawn

from the fact that the premises were so badly injured that they were not repairable and could not be repaired within 60 days after the happening of the said injury by fire. The court further concluded that the defendant was entitled under the terms of the lease to retain the sum of \$1,250 paid in advance for the month of February, 1911.

With respect to the main cause of action, i. e., that based upon the defendant's refusal to permit the plaintiff to occupy the premises during the remainder of the term, the appellant contends that under a proper construction of the lease the tenancy did not terminate by a mere partial destruction rendering the premises wholly unfit for occupancy, but that such result followed only if the premises were so badly injured that they could not be repaired within 60 days. Unless this position be well taken, the appellant's claim that it was wrongfully ousted from the premises must fail, since it cannot be doubted that the evidence amply warranted the finding that the fire rendered the premises wholly unfit for occupancy. If, on the other hand, the fact so found did not terminate the tenancy, the plaintiff must still overcome the conclusion that the lease ceased by reason of the fact that the premises were not repairable within sixty days. In this regard the appellant contends with great vigor and earnestness that the evidence does not support the finding that the premises could not have been repaired within the time specified.

[1] The first subject of inquiry, then, is the proper interpretation of the clause defining the conditions which may terminate the lease. By the clear and express language of the opening part of this clause, it is provided that the lease shall cease and become null and void upon the occurrence of any one of three contingencies: (1) If "the building or premises are destroyed by fire or other action of the elements"; (2) "if the building or premises are partially destroyed so as to render the premises demised wholly unfit for occupancy"; or (3) "if they shall be so badly injured that they cannot be repaired within sixty days after the happening of the injury." Up to this point the clause is expressed in plain and simple words, and there is no room for the play of rules of interpretation. The appellant contends, however, that the later provisions of the clause so modify and limit the effect of the portion just referred to as to destroy the second contingency outlined and to terminate the lease in the case of partial destruction or injury only in the event that the premises are not repairable within 60 days after the happening of the injury. This claim is based upon the following provision:

"That if said premises shall be repairable within sixty days from the happening of said injury, then said rent shall not run or accrue after such injury and while the process of repairs is going on and the lessor shall repair the same with all reasonable speed and

the rent shall recommence immediately after said repairs shall be completed; but if said premises shall be so slightly injured by fire or the elements as not to be rendered unfit for occupancy, then the said lessor agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or terminate."

The argument is that the provision last quoted obviously contemplates the liability of the lessor to repair and the right of the tenant to continue under his lease in either of two events: (1) If the injury or the necessary repair work be so extensive as to prevent occupancy by the tenant, in which case rent shall be remitted during the time of repair; or (2) if the injury be so slight as not to render the premises unfit for occupancy, in which case the obligation to pay rent shall continue during the period of repair. It being provided therefore that the right of the tenant shall continue even though there be an injury rendering the premises unfit for occupancy, there is presented, it is urged, a conflict between the later and the earlier parts of the clause, and the conflict should be resolved in favor of the tenant by holding that no partial injury shall terminate the lease unless the premises be injured to such an extent that they cannot be repaired within 60 days. The necessary effect of this contention is to deny all meaning to the provision for a termination in the event of a partial destruction rendering the premises demised wholly unfit for occupancy, for, under the construction thus suggested, the only event (short of a total destruction of the building or premises) which would terminate the lease would be an injury not repairable within 60 days—an event which is provided for in separate and distinct terms. It is, of course, unnecessary to cite decisions in support of the fundamental rule of interpretation requiring effect to be given to every part of a contract if reasonably practicable. Civ. Code, § 1641. Unless the later provisions relied on by the appellant are fairly susceptible of no interpretation other than one which will totally destroy an independent provision of the contract, they should not be interpreted in the manner suggested. We are satisfied that it is "reasonably practicable" to give effect to every part of the fourth clause, without doing violence to the intent of the parties as manifested by the language used by them. The opening part of the clause contemplates three different kinds or degrees of destruction or damage: (1) A total destruction (which is not in question here); (2) a partial destruction or damage rendering the premises wholly unfit for occupancy; and (3) an injury which cannot be repaired within 60 days. Since these three situations are stated in terms connected by the disjunctive article "or," the three contingencies specified are to be understood as representing alternatives, each of which operates independently of the other two. An injury which

cannot be repaired within 60 days may or may not render the premises wholly unfit for occupancy. But since the lease specifies the two conditions alternatively as events terminating the lease, the natural meaning of the clause is that a damage rendering the premises wholly unfit for occupancy will terminate the lease, regardless of the time necessary for repair, and that an injury that cannot be repaired within 60 days will have the same effect, whether the injury be one that renders the premises wholly unfit for occupancy or not.

There remains a fourth contingency, upon the occurrence of which the lease is not determined, although there has been an injury to the premises, i. e., if the premises are not rendered wholly unfit for occupancy, and if they can be repaired within 60 days. The later clause dealing with the abatement of rent during the period of repair deals with this contingency. The lessor is required to repair with all reasonable speed, and no rent is to be paid during the period of repair unless the injury is so slight that the premises are not rendered unfit for occupancy. This provision does, no doubt, contemplate the possibility of a continuance of the lease even though the premises have been rendered unfit for occupancy. Is there a necessary conflict with the earlier provision for a termination in the event of partial destruction rendering the premises "wholly unfit for occupancy"? We think not. The word "wholly" is not found in the later provision, and we must assume that, in the minds of the parties, this word had some meaning and purpose. "Wholly unfit for occupancy" is not the same thing as "unfit for occupancy." The rational conclusion is that the parties foresaw the possibility of injuries affecting the availability of the premises for occupancy in three different degrees: (1) An injury which would make them totally unfit for occupancy; (2) an injury which would seriously interfere with their enjoyment and occupancy; and (3) one which was so slight as to create virtually no impediment to their occupancy. The premises were to be used, and were used, as a retail shoe store. The parties were contracting with reference to occupancy for such use. The premises might be damaged to such an extent as to prevent or greatly hamper the conduct of business, while not requiring the tenant to vacate while repairs were being made. This would render the premises "unfit for occupancy" within the meaning of the clause relieving the tenant from the payment of rent during the period devoted to repairs, but would not terminate the lease by rendering them "wholly unfit for occupancy."

[2] This construction, as we have already suggested, gives effect to every provision of the contract and does not distort any word or phrase from its fair meaning. So interpreted, the fourth clause makes entirely rea-

sonable provision for the various contingencies that might result in case of fire or other injury to the building or premises. There is here no basis for applying the rule of strict interpretation against conditions involving forfeiture. Civ. Code, § 1442. The clause terminating the lease in certain contingencies does not declare a forfeiture. It fixes events, having no relation to any act or default of the parties, upon which it is agreed that the lease shall end.

[3] The further argument of appellant that the clause should be interpreted against the lessor is equally inapplicable. The meaning of the lease is, of course, to be ascertained in the light of conditions existing when it was made. Whatever it meant then it means now. There is no ground for saying that the provision terminating the lease in the event of damage rendering the premises wholly unfit for occupancy was for the benefit of the lessor rather than the lessee. So far as could be known in advance, it might be highly advantageous to the tenant to be released if the premises should be rendered wholly unfit for occupancy.

The interpretation put by us upon the lease dispenses with the necessity of any inquiry into the sufficiency of the evidence to sustain the finding that the premises were not repairable within sixty days. Nor is it important to examine the finding, also assailed by appellant, that the lessor used reasonable diligence in repairing the premises. Whether the premises could be repaired within a given time, or whether they were repaired diligently or at all, does not concern the appellant if his lease ended on the day of the fire by reason of the fact that the premises had been rendered wholly unfit for occupancy.

[4] It is claimed that the court erred in certain rulings on the admission of evidence, but the evidence involved all bore on the issue of the time within which the premises could have been repaired. If error was committed in any of these rulings, it was not prejudicial.

[5, 6] The only other point raised by appellant is that it should have been given judgment for a portion of the February rent paid by it in advance. The fire occurred on the

16th day of the month. The fire clause, which we have already quoted in full, provided that, upon the occurrence of any of three events, the "lease shall cease and become null and void from the date of such damage or destruction, and the lessee shall immediately surrender said premises, and all interests therein, to the lessor, and said lessee shall pay rent within this term only to the time of such surrender." It is settled in this state that a tenant who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, cannot, in the absence of any covenant in the lease, recover the rent so paid in case of the destruction of the premises by fire without any fault of either party to the lease. *Harvey v. Weisbaum*, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115. And this is true even though, by the terms of the lease, or under a statute, the destruction of the premises terminates the lease. The appellant was not therefore entitled to repayment of a proportion of the February rent unless the lease contained a covenant for such repayment. The appellant relies on the provision that the lessee shall, in certain events, "surrender said premises \* \* \* and said lessee shall pay rent within this term only to the time of such surrender." This is not a covenant to repay, in whole or in part, any installment of rent which had become due and been paid prior to the fire. It merely declares that the tenant shall not be called upon to pay any further rent after surrendering the premises. But, if the language relied on could be given the effect claimed for it, the right to repayment would arise only upon the tenant's surrender of the premises. There is neither allegation, proof, nor finding that the plaintiff surrendered the premises at any time which would entitle it to a refund of any part of the February rent. In any view, the burden was on the plaintiff to allege and prove such surrender.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.;  
SHAW, J.

(45 Utah, 820)

**JENSEN v. LICHTENSTEIN et al.**  
(No. 2690.)

(Supreme Court of Utah. Jan. 9, 1915.)

**1. MORTGAGES (§ 559\*)—FORECLOSURE—ACTIONS.**

Under Comp. Laws 1907, § 3498, declaring there can be but one action for the recovery of any debt secured by a mortgage, no personal judgment is authorized in such an action until after the mortgaged property has been sold and the proceeds derived from the sale applied to the payment of the debt and then only for the deficiency.<sup>1</sup>

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

**2. MORTGAGES (§ 581\*)—FORECLOSURE—ASSESSMENT OF ATTORNEYS' FEES.**

In a suit to foreclose a mortgage, the court, in determining what is a reasonable attorney's fee may, whether he has or has not sufficient data, call to his assistance attorneys engaged in the practice and take their judgment under oath respecting what would be a reasonable amount.<sup>2</sup>

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.\*]

**3. MORTGAGES (§ 581\*)—FORECLOSURE—ATTORNEYS' FEES—“REASONABLE ATTORNEY'S FEE.”**

Comp. Laws 1907, §§ 3504, 3505, declare that in all cases of foreclosure when an attorney's fee is claimed no amount shall be allowed greater than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney, and that the attorney's fee shall be fixed by the court in which the proceedings are had, any stipulation in the mortgage to the contrary notwithstanding. A note secured by a mortgage provided for a 10 per cent. attorney's fee, while the mortgage provided for a reasonable attorney's fee. *Held*, that under the statutes only a “reasonable attorney's fee” should be allowed, by which is meant one reasonable under all the facts and circumstances, and it is error for the court to fix a 10 per cent. attorney's fee without determining whether it is a reasonable one.<sup>3</sup>

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Reasonable Attorney's Fee*.]

**4. MORTGAGES (§ 581\*)—CONSTRUCTION—LIEN.**

Where a mortgage provided that in case of foreclosure the mortgagor should be liable for a reasonable attorney's fee, the attorney's fee allowed, becomes a lien on the property secured by the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.\*]

**5. EXCEPTIONS, BILL OF (§ 41\*)—TIME OF FILING.**

Comp. Laws 1907, § 3286, provides that a party desiring to have exceptions settled in a bill may within 30 days after service of notice of the entry of judgment serve the bill upon the adverse party. Plaintiff who recovered served notice of entry of judgment, and defendant thereupon served a copy of the proposed bill of exceptions. As defendants incorporated in their

bill only so much of the proceedings material to their appeal, plaintiff who objected to a portion of the judgment attempted to perfect a second bill of exceptions. *Held*, that plaintiff was not entitled to notice of entry of judgment in order to start limitations against the filing of his bill.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 65-71; Dec. Dig. § 41.\*]

**6. BILLS AND NOTES (§ 125\*)—CONSTRUCTION.**

Where a note provided that if interest should remain unpaid for 30 days then the principal sum and accrued interest shall at once be due and payable at the option of the holder of the note and shall draw interest at the rate of 12 per cent., the holder of the note is not, upon the maker's default in the payment of interest, entitled, where he did not declare the entire sum due, to recover 12 per cent. interest.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 274-281; Dec. Dig. § 125.\*]

**7. BILLS AND NOTES (§ 125\*)—INTEREST.**

Where a note provided for payment of interest in regular installments and the maker defaulted, the maker became liable for interest on the sums in default at the rate of 8 per cent., as fixed by Comp. Laws 1907, § 1241.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 274-281; Dec. Dig. § 125.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by F. C. Jensen against M. B. Lichtenstein and another. From the judgment, defendants appeal, and plaintiff cross-appeals. Reversed and remanded, with directions.

Lewis Larson, of Mantl, for plaintiff. Frank B. Stephens, Benner K. Smith, Robert B. Porter, and Harold M. Stephens, all of Salt Lake City, for defendants.

FRICK, J. The plaintiff commenced this action against the defendants in the district court of Salt Lake county to foreclose a mortgage given to secure the payment of the following note:

“Salt Lake City, Utah, June 25, 1909. \$10,000. Two (2) years after date, for value received, we jointly and severally promise to pay to Utah Savings & Trust Company, or order, ten thousand dollars, with interest thereon at the rate of seven per cent. per annum from date until paid, both before and after judgment. Interest payable quarter-yearly to the Utah Savings & Trust Co., whose receipt for same shall be accepted without the presence of this note. If any interest remains due and unpaid for the period of thirty days then the principal sum and all accrued and unpaid interest shall at once be due and payable at the option of the holder of this note and the principal sum and all unpaid interest shall then draw interest at the rate of twelve per cent. per annum until paid. The principal sum and interest payable in United States gold coin at the banking house of Utah Savings & Trust Company, in Salt Lake City, Utah. In case this note is collected by an attorney either with or without suit we agree to pay in addition thereto ten per cent. of the principal amount of said note as attorney's fees.”

The action was brought in April, 1913, and the only provision in the mortgage which is material upon this appeal is the following:

<sup>1</sup> Boucofski v. Jacobsen, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898.

<sup>2</sup> Kurtz v. Sanitarium Co., 37 Utah, 313, 108 Pac. 14.

<sup>3</sup> McCornick v. Swem, 36 Utah, 7, 102 Pac. 626, 20 Ann. Cas. 1368; Bank v. Nelson, 38 Utah, 189-198, 111 Pac. 907.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



"If the indebtedness secured hereby should become due and payable and this mortgage is placed in the hands of an attorney for collection, the mortgagors agree to pay five per cent. of such indebtedness in addition thereto as costs of collection; in case foreclosure proceedings herein be instituted, the mortgagors agree to pay as attorney's fees, a reasonable amount in addition to the indebtedness secured thereby."

The complaint is in the usual form in foreclosure actions. Plaintiff, however, alleged that the defendants had made default in the payment of interest, and had paid no interest after the 10th day of December, 1910, and that for that reason in 30 days from that date, to wit, from January 8, 1911, according to the tenor of the note secured by the mortgage in question, he was entitled to 12 per cent. interest upon the principal and upon the interest remaining unpaid. It was also alleged that by the terms of said note the defendant had agreed to pay 10 per cent. of the principal sum as attorney's fees in the event the note should be collected by an attorney; and also pleaded the clause contained in the mortgage concerning the payment of attorney's fees, and alleged that \$1,000 was a reasonable attorney's fee. It was further averred that the plaintiff was compelled to pay \$512.43 taxes on the mortgaged premises, upon which sum he was entitled to 12 per cent. interest, which is the amount fixed by our statute.

The defendants appeared and filed an answer to the complaint. The only issues presented by the answer related to the rate of interest and the attorney's fee claimed by plaintiff; the defendants contending that plaintiff was entitled to only 7 per cent. interest and to a sum not exceeding \$500 as attorneys' fees.

[1-3] On the hearing plaintiff produced the note and mortgage in evidence, proved the payment of taxes as alleged in the complaint, and also made the following proof respecting the payment of attorney's fees (plaintiff testifying):

"Q. Now, Mr. Jensen, relative to the attorney's fees in this case, have you any agreement as to what amount of attorneys' fees you are to pay for the services? A. A thousand dollars. Q. And with whom is that agreement? A. My attorney, Lewis Larson. Q. Is that contingent upon the result of this case in any way? A. There is nothing said about the result of the case in our agreement. Q. Your understanding is that you are to pay \$1,000 for my services in this case? A. Yes, sir. Q. And you have agreed to do so? A. Yes, sir. \* \* \* After I purchased the note and mortgage, they were left with the Utah Savings & Trust Company for collection. I wrote a notice to the trust company authorizing Mr. Larson to receive all of the papers pertaining to this mortgage."

The foregoing is substantially all the evidence produced by the plaintiff, and the defendants offered none.

The court found the amount due upon the note and mortgage, including interest to January 14, 1914, to be \$12,173.87, upon which sum it allowed plaintiff 7 per cent. interest after judgment. The court also found that

the plaintiff was entitled to the sum of \$558.84 for taxes paid, which includes 12 per cent. interest. The court further found "that a reasonable attorney's fee herein is \$1,000," and that the plaintiff had agreed to pay said sum to his attorney as an attorney's fee in this case, and the attorney's fee, as well as the other sums found due, were declared to be secured by the mortgage aforesaid. A decree of foreclosure was accordingly entered on the 28th day of January, 1914, and the mortgaged premises were ordered sold to satisfy the several sums of money, with interest as aforesaid. Both parties appeal from the judgment.

The defendants, upon their appeal, in substance, insist that the court erred: (1) In allowing \$1,000 attorney's fee, and in allowing any sum in excess of \$500; (2) in declaring said attorney's fee a lien upon the mortgaged premises; (3) in adding the accrued and unpaid installments of interest to the principal up to January 14, 1914, the date the court announced its oral decision, and in allowing interest on the interest so added after judgment; and (4) in settling and allowing plaintiff's bill of exceptions.

It is insisted that the court erred in finding that \$1,000 is a reasonable attorney's fee for the reason that there is no evidence sustaining such a finding. We have a statute (Comp. Laws 1907, §§ 3504 and 3505) which reads as follows:

"Sec. 3504. In all cases of foreclosure, when an attorney or counsel fee is claimed by the plaintiff, no other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney for the plaintiff; and if it shall appear that there is an agreement or understanding to divide such fees between the plaintiff and his attorney, or between the attorney and any other person except an attorney associated with him in the cause, only the amount to be retained by the attorney or attorneys shall be decreed as against the defendant."

"Sec. 3505. In all cases of foreclosure by proceeding in court, the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding."

From the evidence we have set forth it is apparent that the plaintiff attempted to comply, and, as we think, has substantially complied, with the provisions of section 3504, supra. Defendant's counsel, however, insist that the provisions of section 3505 were not complied with either by the court or counsel. As we have seen, the court found \$1,000 to be a reasonable attorney's fee. The note provided for that amount, while the mortgage only provided, in case of foreclosure, for a reasonable attorney's fee. Under our statute (Comp. Laws 1907, § 3498) "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage," and, under the decisions of this court (*Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. [N. S.] 898, and cases there cited) no personal judgment is author-

ized in such an action until after the mortgaged property has been sold and the proceeds derived from such sale are applied to the payment of the debt, and then only for the deficiency. Such an action is therefore not personal, but is strictly one in rem, at least until after the mortgaged property is sold and the proceeds thereof have been applied in discharge of the debt. Sections 3504 and 3505, no doubt, were adopted for the purpose of protecting debtors against being required to pay excessive attorney's fees in foreclosure suits. It was, however, not intended that personal actions upon notes should be affected by these sections. Anything therefore that was said in *McCornick v. Swem*, 36 Utah, 7, 102 Pac. 626, 20 Ann. Cas. 1368, or in *Bank v. Nelson*, 38 Utah, 169-198, 111 Pac. 907, upon the subject of attorney's fees, has no application here. By the very terms of section 3505 it is limited to "foreclosure suits."

In such proceedings, however, the trial court cannot escape the responsibility of determining and declaring what amount shall be allowed as an attorney's fee, regardless of any stipulation of the parties upon that subject that may be contained in either the note or mortgage. By a "reasonable fee," no doubt, is meant one which is reasonable under all the facts and circumstances of each case. What is reasonable, therefore, in a large measure at least, must depend upon the amount in controversy, the labor, and responsibility imposed upon the attorney in obtaining judgment, as these things may have arisen from the issues presented and tried. If an attorney is required to do no more than to prepare the formal pleadings and decree in a default case, a smaller sum, no doubt, would be reasonable, than in a contested case, and especially in one where the issues were numerous and where intricate questions of both fact and law arose and had to be determined. It should not be assumed by the court that, simply because the parties have named 10 per cent., or any other amount, in either the note or mortgage, that that is the amount that should be allowed. The trial courts, in each case, become familiar with all the issues, know just what the facts and circumstances developed at the hearing are, and thus are in a position to arrive at an intelligent and just conclusion respecting the amount that should be allowed as the reasonable fee contemplated by our statute. In case, however, the court has insufficient data upon which to base a finding, or even though he has such data, he may nevertheless, as pointed out in *Kurtz v. Sanitarium Co.*, 37 Utah, 313, 108 Pac. 14, call to his assistance attorneys engaged in the practice and take their judgment under oath respecting the amount that would be reasonable in any given case. While the court, in the case at bar, had before it what little evidence that was submitted, yet, in view that it allowed

the precise amount named in the note, the conclusion is forced upon us that the court was controlled by the amount there named, rather than by any facts and circumstances that were developed in the case. This is just what the statute prohibited the court from doing. If the course apparently pursued in this case is permitted, then section 3505, *supra*, is practically nullified. Without expressing any opinion (and in view of our conclusions, to do so would perhaps be improper at this time) respecting what would constitute a reasonable fee in this case, and without intimating that the amount allowed is either reasonable or otherwise, we are forced to the conclusion that the amount allowed by the court, for the reasons stated, cannot be sustained upon this record. Defendants' assignment in that regard therefore must prevail.

[4] We cannot agree with counsel, however, that a reasonable fee was not intended to be secured by the mortgage, and therefore should not be declared a lien upon the mortgaged premises. We are clearly of the opinion that it was the manifest purpose and intention of the parties to the mortgage that a reasonable attorney's fee should be secured thereby, precisely the same as the principal, interest, and taxes mentioned therein were to be secured. It seems almost like a work of supererogation to attempt to demonstrate that the foregoing construction is the only proper one that can be placed upon the mortgage in question. If therefore it were not for some decisions from the California Supreme Court, for whose decisions we entertain the highest respect, we should not pause here to give this question further attention. In view, however, that counsel vigorously insist that we should follow those decisions, we shall briefly refer to at least some of them. The cases especially relied on by the defendants hold that, unless the attorney's fees mentioned in the mortgage are, in apt terms, made a lien on the mortgaged premises, or are declared to be secured by the mortgage, they are not a lien upon the mortgaged premises, but are only a personal obligation of the mortgagor. The following cases so hold: *Clemens v. Luce*, 101 Cal. 482, 35 Pac. 1032; *Sainsevain v. Luce*, 4 Cal. Unrep. 496, 35 Pac. 1033; *Lee v. McCarthy*, 4 Cal. Unrep. 498, 35 Pac. 1034; *Cooper v. McCarthy*, 36 Pac. 2; <sup>1</sup> *Barnett v. Mulkins*, 40 Pac. 115; <sup>2</sup> *Klokke v. Escallier*, 124 Cal. 297, 56 Pac. 1113; *Cortelyou v. Jones*, 132 Cal. 131, 64 Pac. 119; *Orange Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469. Upon the other hand, in the following cases decided by the same court it was held that under the terms of the mortgages there in question the at-

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 101 Cal. xvii.

<sup>2</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 107 Cal. xvii.

torneys' fees were a lien, namely: *O'Neal v. Hart*, 116 Cal. 69, 47 Pac. 926; *County Bank v. Goldtree*, 129 Cal. 160, 61 Pac. 785; *Peachy v. Witter*, 131 Cal. 316, 63 Pac. 468; *Haensel v. Pacific States S. & L. & B. Co.*, 135 Cal. 41, 67 Pac. 38; *Worth v. Worth*, 155 Cal. 599, 102 Pac. 663.

We shall not review all of those cases, nor attempt to reconcile them. We shall pause long enough, however, to compare two of those decisions. In *Klokke v. Escallier*, supra, which falls within the first group of cases cited, the mortgage contained the following provision:

Upon default "the mortgagee may foreclose this mortgage, and may include in said foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for insurance upon the buildings on said premises, and for any adverse claims to the mortgaged property, for searching title to the mortgaged premises, to the execution hereof, and for taxes on said premises, other than the taxes on this mortgage, or the money hereby secured, all of which payments the mortgagee is hereby authorized to make and the same, with interest thereon at the same rate as provided in said promissory note, shall be deemed to be secured by this mortgage and payable to the mortgagee or assigns in and out of the proceeds of the sale under said foreclosure."

It was held that all the things enumerated above were secured by the mortgage except the attorney's fees. We cannot understand how the court arrived at any such conclusion. As we read the stipulation contained in the mortgage, which we have set forth above, the attorneys' fees, under any reasonable construction, were secured thereby, precisely the same as were the insurance money, the taxes, and other items of expense.

In the case of *Worth v. Worth*, supra, which is found in the second group of cases cited above, it was said:

"The language of the mortgage as to counsel fees is practically the same as that contained in the mortgage in *Klokke v. Escallier*, 124 Cal. 297 [56 Pac. 1113], where it was held that the counsel fees were not secured by the mortgage. But this case differs from that in that the note here contains a provision for 'seven per cent. on principal, as attorneys' fees in such suit,' in the event suit is commenced to enforce payment of the note. The mortgage was given to secure 'said note,' which included the contract to pay the attorney fee provided for therein. The attorney fee was therefore secured by the mortgage."

As we read the California cases cited in the first group, many of them contained much stronger language from which it was apparent that the parties to the mortgages there in question intended to secure the attorneys' fees as well as the principal and interest, than is the language quoted from *Worth v. Worth*, and yet the conclusions of the same court in the two groups of cases are diametrically opposed to each other. We are unable to reconcile the California cases upon this question.

The Supreme Court of New Mexico, in the case of *Armijo v. Henry*, 14 N. M. 181, 89 Pac. 805, 25 L. R. A. (N. S.) 275, discusses

the rule which prevails upon this question in California, and it is there said, "The weight of authority is against the rule laid down by the California courts." Hence that court refused to follow the California cases. We agree with the Supreme Court of New Mexico in the statement just quoted. Moreover, in this jurisdiction the trial courts have always construed provisions to pay attorneys' fees like the one in question as being a lien upon the mortgaged premises. While such a construction has never been passed on or approved by this court, yet, in view that in our judgment it was clearly the intention of both the mortgagors as well as the mortgagee to secure a reasonable attorney's fee by entering into the stipulation in the mortgage, we do now approve such a construction. We further hold that under our statute the question respecting the payment of an attorney's fee is a matter of contract, but what is a reasonable fee in each case must be determined by the court.

The contention that the court erred in adding the accrued and unpaid interest to the principal and in allowing interest at 7 per cent. on the whole amount of principal and interest is untenable. As we shall endeavor to show hereafter, the plaintiff's, and not the defendants', legal rights were invaded by the court's ruling in that regard.

[8] The contention that the court erred in settling and allowing the plaintiff's bill of exceptions is well taken. The court's ruling is in the teeth of all the former decisions of this court upon that question. The record shows that the judgment or decree was filed and entered January 28, 1914, and that on May 25, 1914, plaintiff's counsel served notice of the decision upon defendants' counsel. That notice set in motion the time from which defendants were required to prepare and serve a bill of exceptions under the provisions of Comp. Laws 1907, § 3286. From the service of that notice defendants had 30 days within which to prepare and serve their proposed bill of exceptions, unless they, within said 30 days, obtained an order from the court or judge for additional time. This is not disputed. There is no claim that the defendants did not comply with the provisions of the statute or the rulings of this court in preparing, serving, having allowed, and in filing their bill of exceptions. When defendants therefore signified their intention to appeal, and having incorporated into their bill of exceptions only so much of the proceedings as they deemed material to their appeal, the plaintiff also attempted to have settled and allowed his bill of exceptions in which he proposed to include all of the proceedings which had been omitted from defendants' bill. The plaintiff had, however, obtained an order from the district court in which he was given to and including April 10, 1914, within which to prepare and serve a proposed bill of exceptions, and also obtained a fur-

ther order extending his time to do so to May 20, 1914. The plaintiff, however, did not prepare his bill within the time aforesaid; nor did he obtain any further order extending his time, but, notwithstanding his failure to do so, he, on June 16, 1914, served his proposed bill of exceptions, and the court, over the objections of the defendants, on June 25th following, settled and allowed the same. Counsel for defendants contend that, because the proposed bill was not served within the time fixed by the court under the repeated ruling of this court, the district court was without power to settle and allow the proposed bill. The only answer plaintiff makes to this contention is that under the provisions of section 3286, supra, he was entitled to notice of the decision from defendants' counsel, and, in view that no such notice was served upon him, therefore his time within which to prepare and serve a proposed bill of exceptions had not commenced to run when his proposed bill was in fact served. To hold that the Legislature intended that both parties must serve and are entitled to notice of the entry of a decision in a particular case is to hold that it intended something unreasonable, if not absurd. The whole purpose of the statute is to give the aggrieved party, who may intend to appeal, sufficient time within which to prepare and serve his proposed bill of exceptions, in which either all or so much of the proceedings of the trial court may be set forth as may be deemed necessary to such appeal. The notice provided for in the section is intended to set the time in motion within which the proposed bill of exceptions must be prepared and served. Now, is it reasonable to suppose that the party who prepares and serves the notice, which must contain a statement of the time that the decision was filed, is entitled to a further notice of what he must be conclusively presumed to know? Is not the notice which he prepares and serves upon his adversary also notice to him of what it contains? Why should it be held to impart notice to the person upon whom served but not upon him who is required to prepare and serve it? As already intimated, to so hold would, in our judgment, lead to an absurdity. Under all of our holdings, therefore, the court was without power to settle and allow plaintiff's proposed bill of exceptions and therefore we cannot consider it for any purpose.

[6] This brings us to plaintiff's appeal. While, as we have seen, we cannot consider his bill of exceptions or the evidence therein preserved for any purpose, yet there is at least one, perhaps two, of the assignments of error which plaintiff is entitled to have reviewed upon the judgment roll and upon defendants' bill of exceptions when considered with the judgment roll. The first assignment of error of that character is that the court erred in the construction of the note in ques-

tion respecting the rate of interest the plaintiff is entitled to thereunder. As we pointed out, plaintiff, in his complaint, prayed for 12 per cent. interest from and after January 6, 1911, which was 30 days after defendants made default in the payment of interest. Plaintiff does not claim that he exercised the option of declaring the principal due and payable, as he, in case of default in payment of interest, was authorized to do by the terms of the note. He, however, contends that in order to entitle him to the increased rate of interest it was not necessary that he should declare the note due and payable, but that he was entitled to the 12 per cent. after a default had continued for 30 days. While it is true that unless defendants made default in the payment of interest the increased rate could not be enforced, yet it is also true that the default alone did not give the right to demand 12 per cent. interest instead of the 7 per cent. stipulated in the first sentence of the note. The note must be construed and considered as a whole. The principal promise or obligation in the note respecting the payment of interest is that it bears interest at the rate of "seven per cent. per annum from date until paid both before and after judgment." Then comes the subsidiary promise, namely, that the interest is payable "quarter-yearly." This is followed by the condition:

"If any interest remains due and unpaid for a period of thirty days, then the principal sum and all accrued and unpaid interest shall at once be due and payable at the option of the holder of this note, and the principal sum and all unpaid interest shall then draw interest at the rate of twelve per cent. per annum until paid." (Italics ours.)

To our minds, this means simply this: That the note bears 7 per cent. interest, payable quarterly. If, however, the payee makes default in the payment of interest and remains in default for a period of 30 days or more, then the holder of the note may declare the principal sum due and payable forthwith, and, in case he does so, as expressed in the note, it "shall then draw interest at the rate of twelve per cent. per annum until paid." The word "then" is used in the note as denoting consequences, or pointing to a result, and has the same meaning and effect as though the phrase "in that case" or "in such case" had been used. That is, if the interest is not paid and the holder of the note exercises the option given him, then—that is, in that case, or in such event—the rate of interest shall be increased to 12 per cent. In order to have that effect, however, the defendants' default in the payment of interest and the exercise of the option to accelerate the maturity of the note must concur. If therefore at any time after 30 days' default in payment of interest, and before the note, according to its terms, had matured, the plaintiff had exercised the option, he would have been entitled to demand and receive 12 per cent. interest; but, not having

done so, he is limited to the 7 per cent. named in the note, so far, at least as the principal is concerned. The following cases, in our judgment, clearly pass upon and sustain our views upon this subject: *Mortgage Trust Co. v. Bach*, 69 Kan. 749, 77 Pac. 545; *Keys v. Lardner*, 55 Kan. 331, 40 Pac. 644; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044.

[7] Although the plaintiff is not entitled to 12 per cent. interest, as we have just held, yet we think the court erred in computing the interest to which he, under our statute (Comp. Laws 1907, § 1241), is actually entitled. In view that plaintiff failed to exercise the option to demand 12 per cent. interest, there is no express contract between the parties concerning the rate of interest on accrued and unpaid interest after it became due and payable at the end of each quarter. In such case our statute (section 1241, *supra*), fixes the rate. That section provides:

"The legal rate of interest upon the loan or forbearance of any money, \* \* \* shall be eight per cent. per annum."

Defendants had promised to pay the interest quarterly. There thus fell due at the end of each quarter the sum of \$175 as interest. This amount was owing from defendants to the plaintiff at the end of each quarter after the 6th day of December, 1910, when the last interest was paid as found by the court. If defendants had paid plaintiff the interest when due, he could have reloaned it to them, or could have loaned it to any one else, and could have contracted for any rate of interest not exceeding 12 per cent. per annum. In case, however, the loan had been made and no rate of interest was agreed upon, the statute would have supplied the omission by fixing 8 per cent. as the legal rate. The plaintiff therefore was as much entitled to interest upon the unpaid interest as though it had been paid to him when due and he had reloaned it, and, in view that no rate was agreed upon, the legal rate of 8 per cent. applied. The court therefore should have awarded plaintiff 8 per cent. interest per annum upon each quarterly installment of interest amounting to \$175 from the time it

became due until the principal and interest were merged into judgment, to wit, to the 28th day of January, 1914. When therefore the several sums of \$175, with interest thereon at the rate of 8 per cent. per annum from the date they severally became due until the judgment was entered as aforesaid, are all added to the principal, the total amount is the amount for which judgment should be entered. When that amount is ascertained, then the agreement in the note again controls which provides for interest at the rate of 7 per cent. per annum after judgment.

In view that the plaintiff has no bill of exceptions, we cannot consider the other assignments of error on his appeal.

For the reasons stated, therefore, the findings and judgment must be modified. The case is therefore remanded to the district court of Salt Lake county, with directions: (1) To set aside its findings in which the attorney's fees are fixed at the sum of \$1,000, and to hear any competent evidence the parties, or either of them, may offer upon the question of what amount should be fixed in this case as a reasonable fee, and, after hearing such evidence, or any other competent evidence upon that subject that the court may call for on its own motion, to fix a reasonable sum as an attorney's fee as contemplated by section 3505, independently of the provision contained in the note; (2) to determine the amount of interest at the rate of 8 per cent. per annum that plaintiff is entitled to upon the accrued and unpaid installments of interest from the respective dates the several installments became due until the 28th day of January, 1914, and after adding all of the accrued interest to the principal modify the judgment accordingly; (3) to enter judgment as modified as of the date of January 28, 1914, which judgment shall, from that date, bear interest at the rate of 7 per cent. per annum. In all other respects the findings and judgment are affirmed. Neither party to recover costs on this appeal.

STRAUP, O. J., and McCARTY, J., concur.

(45 Utah, 335)

**DUGGINS v. COLBY.**

(Supreme Court of Utah. Jan. 9, 1915.)

**1. DAMAGES (§ 222\*)—BREACH OF CONTRACT—FINDINGS.**

Defendant sold to plaintiff, in exchange for a tract of land at an agreed price, a flock of sheep, which he agreed to have registered before a fixed date. Before that date plaintiff sold the sheep to others, with an agreement to have them registered. Some of the sheep were not registered by defendant, and plaintiff compromised the claims of his buyers against him for failure to register the sheep, and then brought action for the breach of the contract by defendant. The court found that the registering of sheep adds to their market value, and that, by the failure of defendant to have the sheep registered, plaintiff's actual damages were a sum equal to the amount for which he compromised with his buyers, but there was no finding as to the number of sheep which were not registered or the market value of unregistered sheep of the kind and quality sold. *Held*, that the finding was insufficient for not stating facts from which it appeared that plaintiff suffered the amount of damages therein stated or any damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 563-566; Dec. Dig. § 222.\*]

**2. SALES (§ 418\*) — BREACH OF CONTRACT — MEASURE OF DAMAGES.**

The legal measure of plaintiff's damages in that action was the difference between the agreed value of the land given in exchange for the sheep, and the reasonable market value of the sheep unregistered, though plaintiff may have paid his buyers more than that in his voluntary settlement with them; but, if the amount of his settlement was less than the legal measure of damages, he could recover only that amount.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

**3. APPEAL AND ERROR (§ 846\*)—REVIEW — FINDINGS BY SUPREME COURT.**

In an action at law the Supreme Court cannot examine the evidence to determine what the findings should have been on a particular question upon which no findings were made by the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3347-3362, 3366; Dec. Dig. § 846.\*]

Appeal from District Court, Sevier County; Joseph H. Erickson, Judge.

Action by S. M. Duggins against Joseph Colby. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John F. Chidester, of Richfield, and Thurman, Wedgwood & Irvine, of Salt Lake City, for appellant. E. E. Hoffmann, of Richfield, for respondent.

**FRICK, J.** The plaintiff commenced this action in the district court of Sevier county to recover damages for a breach of contract. It is not necessary to refer to the pleadings. The court found that on October 25, 1911, the plaintiff and defendant entered into a contract in writing as follows:

"Know all men by these presents: That I, Joseph Colby, of Salina, sell to S. M. Duggins, of Gunnison, for his relinquishment right of 480 acres of land in Millard county, Joseph Colby to assume all money due on same, for the following property: Land to be valued at six thousand seven hundred and twenty-eight dol-

lars. Sheep, jack and mules at the following: Prince Jack, \$2,500; sheep, 165 head, \$6,200; mules, two head at \$200 each, \$400. Pick of balance of herd if we need any for to make up on sheep, at 150 not over 200 head to be taken unless short on sheep only one. All sheep to be registered sheep only three old sheep to be taken. Value of all sheep to be \$20 per head. Eleven bucks to be average of herd 65 lambs. Herd 50 ewes. Herd 39 yearlings Aug. 2. I, Joseph Colby, to have all sheep registered that are not now registered by the 1st of March, 1912, or forfeit \$20 per head."

The court further found that the sheep in question were delivered to the plaintiff, and that thereafter, and before March 1, 1912, he sold and delivered a number of the sheep to one Bench, another number to one Crane, and the remainder to one Stillman, and as part consideration of said sales agreed with said purchasers that the defendant had agreed to register said sheep, and therefore the plaintiff agreed that he would have them registered on or before March 1, 1912; that the defendant failed to comply with the conditions of the contract entered into between him and the plaintiff, in that defendant failed to have seven head of the sheep that were sold to said Crane registered, and hence the plaintiff was compelled "to violate his contract with the said Crane, and the plaintiff and said Crane agreed to compromise and settle the plaintiff's violation of said contract by not having seven head of sheep registered for the sum of \$50, which the plaintiff paid to said Crane." The court further found that the defendant failed to have registered a large number of the sheep which plaintiff sold to said Stillman, and that by reason of such failure said Stillman refused to pay the plaintiff therefor, and therefore the plaintiff "was compelled by said Stillman to deduct from the agreed price between plaintiff and said Stillman the sum of \$497, and plaintiff and said Stillman settled for said unregistered sheep by deducting from the purchase price which said Stillman had agreed to pay plaintiff for said sheep to be registered on or before the 1st day of March, 1912." The court further found:

"(11) That the registering of sheep adds to their market value, and that by the failure of the defendant in having the said sheep registered as agreed in the said contract the plaintiff's actual damages were \$547 and interest from May 1, 1912, amounting to \$64.10, or a total damage of \$611.10."

The conclusions of law and judgment are based upon the foregoing findings.

[1] Defendant's counsel assail the so-called finding last above set forth. Stating their assignment in their own language, they contend that the finding is vulnerable "for the reason that no fact is stated in said finding from which it can be concluded that said amount of damages, or any damage, was sustained by the plaintiff, except such as he incurred by his own voluntary act in making an unauthorized and unnecessary compromise settlement with Stillman." It is also as-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

signed as error that the court failed to find the difference in the market value between unregistered sheep and sheep that were entitled to be registered of the grade, quality, and kind of sheep in question, but which were neglected to be registered, as shown by the evidence, and that the court committed error in not finding the number of sheep that the defendant had failed and neglected to have registered. It is also insisted that the court erred in its conclusions of law and in entering judgment for the aggregate of the two amounts for which the plaintiff settled with Stillman and Crane as appears from said findings.

[2] We are of the opinion that counsel's contentions are well taken. It will be observed that the so-called finding No. 11 is more in the nature of a conclusion than a finding of fact. But let us assume that it is sufficient as a finding of fact. Yet the court, either inadvertently or otherwise, omitted to find the market value of the sheep in question as unregistered sheep. The parties, as the record discloses, had bought and sold the sheep and fixed the price thereof on the assumption that they were registered sheep for the reason that they were entitled to be registered. In view therefore that the breach relied on by the plaintiff consisted in defendant's failure to have the sheep registered as agreed upon, the legal damages which he could be required to pay, under the pleadings in this case, would be the difference between the contract price, if any (in this case the market value of the land given in exchange for the sheep), and the market value of unregistered sheep of the grade, kind, and quality of the sheep in question which were entitled to be registered. The court merely found "that the registering of sheep adds to their market value." Upon this finding the court then proceeds to base its conclusion that inasmuch as the plaintiff and Stillman had adjusted and settled the latter's claim for \$497, and that plaintiff and Crane had adjusted and settled Crane's claim for \$50, and because the plaintiff was required to deduct the aggregate of the two claims from the price for which he had sold the sheep to Stillman and Crane, therefore plaintiff, as matter of law, was entitled to recover said sum from the defendant as damages. In arriving at this result the court, apparently at least, had not the slightest regard for the number of sheep the defendant had failed to have registered, nor for the value of unregistered sheep of the grade, kind, and quality of the sheep in question

which were entitled to be registered. The record discloses that some of the sheep sold were registered, as agreed by plaintiff, and hence it was necessary to find the number he failed to register. While it may be that, as matter of fact, the court arrived at the correct amount of damages, yet, if he did, it is a matter of mere conjecture so far as the record and findings disclose. The defendant is entitled to have the correct legal measure of damages enforced, whether it be for or against him. Of course, the plaintiff could recover only the amount of actual damages sustained by him, although that amount was less than the legal measure of damages. In settling with the purchasers of the sheep, he may, however, have allowed them more than the legal measure, and, if he did so, the loss is his own and he cannot compel repayment from the defendant. While this may not be so, yet, from the findings the court made, it appears that the court allowed as damages the full amount which the plaintiff allowed to the purchasers. We have no legal means of determining whether the amount thus allowed was more or less than the legal measure of damages, and since it may be more, and in no event constitutes the legal measure of damages, the amount as found is contrary to law and cannot be justified.

[3] This is a law case, and we have no power to look into the evidence for the purpose of determining what the findings upon any particular question or phase of the case should be. That, in such cases, is the exclusive province of the court or jury, and all we have the power to do is to determine whether there is any substantial evidence to support the verdict of the jury or the findings, or of any particular finding of the court. If there is competent evidence in this regard therefore (which we very seriously doubt) upon which the court could have based a finding respecting the measure of damages which we have suggested, yet it is unavailing to us, because, as pointed out, we have no power to make findings in law cases, nor, in the first instance, suggest what, under the evidence, they should be.

For the reasons indicated, the judgment is reversed; and the cause is remanded to the district court of Sevier county, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. Defendant to recover costs.

• STRAUP, C. J., and McCARTY, J., concur.

(45 Utah, 340)

**STATE v. POULIS. (No. 2666.)**

(Supreme Court of Utah. Jan. 9, 1915.)

**1. GAMING (§ 75\*)—OFFENSES—WHAT CONSTITUTES.**

Under Comp. Laws 1907, § 4261, as amended by Laws 1911, c. 134, providing that every person who deals, carries on, or conducts any game of faro or any game played with cards for money or thing of value shall be guilty of a felony, it is not necessary to a conviction to prove that accused was conducting or had conducted a regular gambling house or was habitually engaged in gambling; the offense being complete if accused conducts or carries on the game in any place.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 189, 199-201; Dec. Dig. § 75.\*]

**2. CRIMINAL LAW (§ 1186\*)—APPEAL—HARMLESS ERROR.**

In a prosecution for violating Comp. Laws 1907, § 4261, denouncing the offense of conducting games of chance, accused cannot complain that the court and the prosecuting attorney treated the prosecution as one for conducting a regular gambling house and required proof to that effect; the error being harmless under section 4975, requiring the disregarding of errors not affecting the substantial rights, because imposing on the state a greater burden than imposed by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

**3. CRIMINAL LAW (§ 1036\*)—APPEAL—PRESENTATION OF ERRORS BELOW.**

Accused cannot on appeal complain of the admission of testimony received without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.\*]

**4. GAMING (§ 101\*)—PROSECUTION—EVIDENCE—SUFFICIENCY.**

Whether accused was the owner and was carrying on a game of chance *held* a question for the jury.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 300; Dec. Dig. § 101.\*]

Straup, C. J., dissenting.

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Tom Poullis was convicted of crime, and he appeals. Affirmed.

Jos. W. Rozzelle, of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

FRICK, J. [1, 2] The defendant was convicted of the offense defined in Comp. Laws 1907, § 4261, as amended by chapter 134, Laws 1911, p. 265. That section, so far as material here, provides:

"Every person who deals, or carries on, opens or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of faro, monte, roulette, \* \* \* or any game played with cards, \* \* \* for money, checks, credit, or any other representative of value shall be deemed guilty of a felony," etc.

The charging part of the information is in the following words:

"That the said Tom Poullis, at the county of Salt Lake, in the state of Utah, on the 14th

day of December, A. D. 1913, did willfully, unlawfully, and feloniously carry on, open, conduct, and cause to be opened and conducted, as owner, at those certain premises described and known as No. 533 West Second South Street, in Salt Lake City, Salt Lake county, state of Utah, a certain card game; said game being then and there played with cards for money."

In the introductory part of the information the offense was designated as "conducting a gambling house." A trial to a jury resulted in a verdict of guilty. Judgment was entered on the verdict, and the defendant appeals.

A number of errors are assigned. We shall consider those only which are deemed worthy of consideration and are alleged by the defendant to be prejudicial to his rights.

The court, in its charge to the jury, copied in full that portion of the statute we have quoted, and also set forth at large in its charge the information upon which the defendant was tried. The court also charged the jury as follows:

"As to whether or not proof of a single game being conducted is sufficient to warrant a conviction, it may or may not, according to what you may deem to be the weight of the evidence in the case bearing upon the question at issue. The charge is that he was conducting a gambling house. Under some circumstances proof of carrying on a single game might not be sufficient to show such a line of conduct as would amount to proof of that charge; but under other circumstances (that is, the circumstances shown in the evidence, I mean) it may be sufficient proof, if, taken in connection with all the facts in evidence, it convinces you that proof of a single game being conducted, if you find one game was conducted, under the circumstances; and, in view of all the testimony with reference to the previous conduct of the defendant, it may be sufficient, if you are satisfied the entire evidence does support the charge."

The giving of this instruction is assigned as error, and counsel insists that the defendant was prejudiced thereby.

The principal evidence adduced by the state was that of an eyewitness, who looked through the glass door leading into the room where the card game was being played in what is termed a Greek coffee house, which was owned, or at least conducted, by the defendant. In looking into the room the witness saw a number of men sitting around a table playing cards for money. He also saw a large number of others in the room, some standing around the table at which the card game in question was being played, while others sat at other tables playing cards; but no money was observed at the other tables. He watched the men playing cards for 20 or 30 minutes; saw them handling money. Finally one of those in charge of the room opened the door, at which the witness was standing, which apparently was locked or bolted from the inside. As soon as the man opened the door the witness, who was a police officer, forced his way into the room, and, as soon as he entered it and was seen, those directly engaged in the card game which was being played for money fled and left the mon-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



y and a deck of ordinary playing cards on the table. The witness gathered up the money, amounting to \$38.15 in silver, gold, and paper, and also took the deck of cards, and sealed the money and cards in an envelope and took the same with him to the police station. He also then and there arrested the defendant and took him to the police station. The evidence was ample to justify a finding that the game referred to in the information was played with cards; that it was played for money; and that the game was owned and conducted by the defendant.

The trial court, it seems, took the view, and counsel for the state maintain the same view in their brief, that the defendant was charged with "conducting a gambling house." We cannot yield assent to this view. The charge in the information was in the language of the statute; and, if it were necessary to give the offense a name, the only name that we can conceive to be proper, when stated in the most general terms, would be "gambling." All that is necessary for the state to prove, aside from the jurisdictional and technical matters, under an information like the one set forth above, is that the accused, either as owner or as the employé of another, whether for hire or not, has carried on or conducted any game played with cards, which game was played for money, credit, or for some other representative or thing of value. It is not necessary, therefore, to prove that the accused is conducting or has conducted a gambling house, or that he is habitually engaged in gambling; but it is enough

the things we have before enumerated are proved beyond a reasonable doubt. Moreover, the offense is complete if the game is played, carried on, or conducted in any house, street, or alley, or other place, public or private; and it is sufficient that it be played only once or for any indefinite length of time,

played for money, credit or other representative or thing of value. The court, in the charge complained of, therefore, required the state to prove more than was necessary under the statute and under the charge contained in the information. The court in that connection, however, also charged the jury respecting the elements of the crime charged in the information, and that it was necessary to establish all of them, beyond a reasonable doubt. Indeed, under the instructions of the court, and in view that the defendant was apprehended while in the very act of conducting a game played with cards for money, the jury, in order to find him guilty of conducting a gambling house, must necessarily also have found him guilty of conducting a game played with cards for money, as charged in the information.

The whole matter, therefore, amounts to this: That the court required the state to prove more than was necessary to convict under the information. This could not have prejudiced him. Nor could the fact that both

court and counsel for the state designated the offense as conducting a gambling house have prejudiced him. It was not essential to give the offense any specific name. If, in the introductory part of the information, the offense had been designated as a "felony," or as "gambling," either would have been sufficient; and the mere fact that it was designated as "conducting a gambling house" could not have prejudiced the defendant. He was charged as the statute requires, and that was sufficient. To reverse the judgment on the foregoing grounds, as we are urged to do by the defendant, would require us to fly in the very teeth of our Criminal Code (Comp. Laws 1907, § 4975), which reads as follows:

"After hearing an appeal, the court must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties."

[3] At the trial the state offered in evidence a stipulation which was signed by the defendant's attorney, in which he, in the absence of the defendant, admitted that the statements made by the witness, which we have in part set forth, were true, and that said sum of \$38.15, taken by said witness from the table, as herein stated, "belongs to the defendant." The stipulation was admitted in evidence without objection, but it is nevertheless claimed that error was committed in receiving it. This contention is not tenable. We cannot review an alleged error in the admission of evidence, unless the party complaining has timely objected to its admission and has saved an exception to the ruling of the court. The question argued by counsel is therefore not before us for review. Neither did the court err in its charge to the jury in which said stipulation was referred to. What the court said in that regard was, if anything, more favorable to the defendant than he was entitled to under the law.

[4] Nor can the contention prevail that the state did not prove that the defendant was the owner of the card game referred to in the information. As already pointed out, at and for some time before the time that the officer forced his way into the room where the game was being played, there were a large number of men in the room, some of whom were standing around and near the table at which the game was being played for money. They apparently were the friends, or at least the customers, of the defendant. The jury may have assumed that it was comparatively an easy matter for the defendant to have proved, by disinterested witnesses, his relation to the card game; and, not having done so, they, under the circumstances, no doubt inferred, as they had a right to do, that he owned and conducted the game. The fact that he personally undertook to deny his connection with the game, when apparently he could have called a number of disinterested witnesses, in no way affected the right of the jury to make the inferences we have suggest-

ed. While it is true that there is no direct evidence connecting the defendant with the game as owner, yet there are some facts and circumstances which, in our judgment, are sufficient to authorize a finding by the jury that he was the owner. The question is not whether we consider the evidence sufficient to justify a finding, but it is whether there is any substantial evidence, either direct or inferential, which justifies reasonable men to so find. In crimes that may be committed in secret, and usually are so committed, like the one in question, this court, in our judgment, should be slow in substituting its judgment for that of the jury.

A careful examination of the record discloses no reversible error. The judgment is therefore affirmed.

MCCARTY, J., concurs.

STRAUP, C. J. I dissent on the ground of insufficiency of the evidence to support a conviction under section 4261. Under that section, to deal, carry on, open, or cause to be opened, or to conduct, either as owner or employé, any game with cards for money or other thing of value, is a felony. Under section 4262:

"Who knowingly permits any of the games mentioned in the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, and any person who plays at or against any of said prohibited games is guilty of a misdemeanor."

Thus to conduct or carry on "as owner or employé" any of the games mentioned in the first section is a felony; to knowingly permit any "to be played, conducted, or dealt in any house owned or rented by such person," permitting it, is, under the second section, a misdemeanor. The defendant was informed against under the first section.

The state produced but one witness—the police officer who made the arrest. His testimony in brief is that the defendant, a Greek, was the owner or had charge of a coffee house in Salt Lake City. The witness at midnight, looking through a glass door at the rear of the premises for 20 or 30 minutes, saw, as he estimated, about 100 Greeks in the defendant's place of business. He saw five of them seated at a table playing cards for money, some standing around the table, watching the game, and others seated at other tables, but did not testify that they were playing cards or doing anything out of the way, and testified that "they were not gambling at any other table," except the table where the five were seated. He saw those play six or seven hands; first one then another playing, dealing the cards. When asked if he saw the defendant and what he did, he testified that he saw him about the building with an apron on, with two others, apparently employées, serving coffee and refreshments. He did not testify that he saw the defendant or any of his employées or servants

at or about the table where the cards were played, or that he or any of them had anything to do with the game or was in any manner connected with it, or that it was conducted or carried on by him or by any one, except the five Greeks seated around the table playing. The rear door was unbolted by some one coming out. The witness then entered the room and rushed to the table and seized the money and cards on the table. The five men playing at the table, seeing the witness was an officer, became "frightened" and "stampeded," as testified to by him, and that "every one of them got away. . . They left the cards and the money on the table, and every one of them made good his escape through the front door," as did others standing around watching the game. He testified that when he got to the table the five men playing were seated at the table, and, when asked if he made any effort to arrest them, answered, "I didn't have any time." When asked if he gave orders of any kind to them, he but answered, "They were gone so quick I didn't have time to give any orders." Then he arrested the defendant, and took him, the money, and the cards to the police station.

Now, I think it sufficiently shown that a game of cards for money was played in the defendant's place of business. And I think it also sufficiently shown to justify the inference that it was played with his knowledge and consent; that he "knowingly permitted" it "to be played, conducted, or dealt." But that rendered him guilty of only a misdemeanor under section 4262, and not of the felony charged under section 4261. To properly convict him of the charged offense, I think there must be some evidence to show that he, "as owner or employé," carried on or conducted the game, not necessarily direct and positive evidence, still some facts from which that may fairly be inferred. I find no such proof. To prove that he "knowingly permitted" the game "to be played, conducted, or dealt," in his house by others in no sense his employées, servants, or agents, and without attempting to show that he or any of his employées, servants, or agents was in any manner connected with the game or conducted or carried it on, except that he "knowingly permitted" it "to be played" in his house, does not suffice. For that, under the statute, renders him guilty of only a misdemeanor. And of course from proof which but shows the lesser the greater offense, the felony may not be inferred.

I see nothing in the defendant's testimony to help the state, for he, by his testimony, denied everything, except that he was in and about the room taking and serving orders for coffee and refreshments. He, by his testimony, denied that he gambled that night, that he saw others gambling; that he saw money on the table; that it was his money; that he was interested in any game; or that any was played for him.

I think the defendant is entitled to have the case remanded, with directions to either grant him a new trial, or, on the theory that the lesser is included within the greater offense, to sentence him for the former—a misdemeanor—under section 4262.

45 Utah, 349)

SALT LAKE CITY v. YOUNG. (No. 2532.) (Supreme Court of Utah. Jan. 11, 1915.)

WATERS AND WATER COURSES (§ 36\*)—PUBLIC WATER SUPPLY—PROTECTION FROM POLLUTION—POWER OF MUNICIPALITY.

The Legislature had power to enact Comp. Laws 1907, § 206, subd. 15, which gives to a city, to protect from pollution the streams from which its public water supply is taken, jurisdiction over the stream for ten miles above the point from which the water is taken.†

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 36.\*]

WATERS AND WATER COURSES (§ 196\*)—PUBLIC WATER SUPPLY—POLLUTION—COMPLAINT.

A complaint by Salt Lake City, which charged that defendant unlawfully and willfully and continuously for 10 days and more permitted 27 head of horses to be at all times accessible to the stream from which the city secured its water supply, to pasture along its banks, to wade in the stream, and to run at large upon defendant's tract of land comprising about 15 acres along the stream, contrary to a city ordinance, charged defendant with acts which the city could by its ordinance prohibit and was not emurrable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 36.\*]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Complaint by Salt Lake City against Seymour B. Young, Jr., for the violation of a city ordinance prohibiting the pollution of a stream. Complaint dismissed on defendant's demurrer, and plaintiff appeals. Reversed.

H. J. Dininny, Aaron Meyers, W. H. Foland, and W. W. Little, all of Salt Lake City, for appellant. Thurman, Wedgwood & Irine and Young & Moyle, all of Salt Lake City, for respondent.

FRICK, J. Salt Lake City, a municipal corporation, the appellant here, filed a complaint against the defendant, respondent here, charging him with having violated the provisions of the following municipal ordinance, to wit:

"Sec. 821. It shall be unlawful for any person to construct or maintain any corral, sheep pen, pig pen, chicken coop, stable or other offensive yard or outhouse along any stream of water used by the inhabitants of Salt Lake City, anywhere within ten miles above the point where said stream is taken by said city, where the waste or drainage therefrom will naturally find its way into said stream of water; or to deposit, pile, unload or leave any manure, or other offensive rubbish, or the carcass of any dead animal along any stream of water used by the inhabitants of Salt Lake City, anywhere within ten miles above the point where said stream is taken, where the waste or drainage therefrom will naturally find its way into said stream of water; or to drive, or to permit, or cause any other persons to drive any loose cattle, horses,

sheep or hogs through any canyon from the stream of which water is or shall be taken for the use of the inhabitants of said city, or to permit any cattle, horses, sheep or hogs to remain in or near, or to pollute any stream of water used by the inhabitants of said city anywhere within ten miles above a point where said water is first taken by said city."

Said ordinance was passed pursuant to Comp. Laws 1907, subd. 15, § 206, which confers certain powers upon the city, and which, so far as material here, is as follows:

"To construct or authorize the construction of waterworks, without their limits; and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works; and over all reservoirs, streams, canals, ditches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for ten miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect."

There is a proviso to this statute requiring the city to provide a "highway" extending through the limits of its jurisdiction, as stated in the statute, on which cattle, horses, sheep, and hogs may be driven.

The complaint, omitting the formal parts, charges the offense in the following terms, to wit:

"That the said defendant, Seymour B. Young, Jr., being then and there the owner and in possession of that certain tract of land of approximately fifteen acres through which runs that certain stream of water in Parley's canyon known as Parley's creek, at a point within 10 miles above the point where said stream of water is taken by the city of Salt Lake for the use of the inhabitants of said city, to wit, 6 miles above said intake of said city, unlawfully and willfully did then and there and continuously for 10 days and more prior thereto, permit 27 horses to pollute said stream of water by permitting said horses to be at all times accessible to said stream and to pasture upon and along the banks of the same, and to wade in and to drink from the same, and to drop their dung into said creek, and to run at large upon said tract of land where the waste and drainage therefrom naturally finds a way into said stream, contrary to the provisions of section 821 of chapter 29 of the Revised Ordinances of said Salt Lake City, in such cases made and provided."

The respondent demurred to the complaint, setting forth seven distinct grounds why the complaint should be held insufficient. About all of the grounds may, however, be considered under the head that the complaint is defective in substance in that the facts therein alleged do not "constitute a public offense." The district court sustained the demurrer and entered judgment dismissing the complaint and discharged the respondent. The city appeals and seeks a reversal of the judgment on the ground that the court erred in sustaining the demurrer and in entering judgment dismissing the complaint.

The questions presented for decision may be more easily understood by giving respondent's reasons why the demurrer was properly

sustained, and hence I shall follow that course. Those reasons, as I understand respondent's counsel, in substance are: (1) That the ordinance in question is "not authorized by any law or statute of the state of Utah"; (2) that said ordinance violates article 1, § 7, of the Constitution of this state, which provides, "No person shall be deprived of life, liberty, or property without due process of law"; (3) that it also violates section 22 of article 1 aforesaid, which provides, "Private property shall not be taken or damaged for public use without just compensation"; (4) that said ordinance also violates section 1 of the fourteenth amendment to the federal Constitution; and (5) that subdivision 15 of section 206 (which I have set forth above) is void because it is in conflict with the several constitutional provisions referred to above. It is only fair to state that counsel concede that both the ordinance and statute admit of a construction which, if adopted, might not invade the constitutional provisions referred to.

[1] It has heretofore been determined by the territorial Supreme Court of Utah that whenever the pollution of a stream by any person amounts to a public nuisance under Comp. Laws 1907, § 3506, the offender may be criminally prosecuted. *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87. Under that section any person who is injuriously affected by the nuisance may sustain an action to enjoin or to abate the nuisance. Since *People v. Burtleson* was decided, and after the territory of Utah had become a state, the Legislature passed a further act (Comp. Laws 1907, § 1113x), in which a "nuisance" is defined as follows:

"Whatever is dangerous to human life or health, and whatever renders soil, air, water, or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent, or occupant, having aided in creating or contributing to the same, or who may support, continue, or retain any of them, shall be deemed guilty of a misdemeanor."

See Laws Utah 1899, p. 66.

The violation of the foregoing section constitutes a misdemeanor, and, in addition to the right of an action by an individual, the board of health is also authorized to abate such a nuisance. Again, by Comp. Laws 1907, § 4274, the befouling of the "waters of any stream, well, or spring of water used for domestic purposes," in the manner in that section defined, is declared a nuisance. It is apparent therefore that the Legislature of this state has exerted the police power of the state in different ways for the purpose of protecting and maintaining the natural purity and wholesomeness of the waters flowing in the streams of this state. The reason why such great care is manifested by the Legislature to maintain the purity of our streams may perhaps be attributed to the fact that this state lies wholly within the arid belt, and for that reason the common law may have been deemed insufficient to afford ade-

quate protection. Moreover, the common-law rule that waters may not be appropriated and diverted from a stream has been entirely abrogated in this state, and every person may appropriate and divert any quantity or all of the waters flowing in any stream, provided he uses such water for a beneficial purpose. I advert to these matters primarily for the purpose merely of directing attention to the ever present fact that riparian rights in the streams of this state, if not entirely abrogated, have nevertheless been modified to a large extent. But, in addition to the several state regulations to which reference has been made, the Legislature has also conferred certain powers and imposed certain duties upon the municipal corporations of this state for the purpose of protecting and maintaining the wholesomeness and potability of the water used by the inhabitants of such municipalities. The statute conferring such powers and the ordinance by which it is sought to be exerted in this case I have heretofore set forth at large. In view that the statute expressly confers the power, respondent's contention that the ordinance in question is not authorized by any statute or law of this state is therefore clearly untenable.

Nor do I think that the contention can be sustained that the statute and ordinance both are, or that either of them is, void because they or either is violative of the constitutional provisions upon which counsel rely and to which reference has been made. It is universally conceded by both courts and text-writers that, in enacting statutes and ordinances such as those in question here, the legislative bodies, whether state or local, are exerting the police power which inheres in every sovereign state. In exerting the police power to protect the general health or welfare of the inhabitants, or in directing its exercise by the municipality for such purpose, the state is exerting one of the greatest prerogatives of sovereignty. Indeed, this power is considered of such vast importance that the sovereign is not permitted to surrender it or to be estopped from exerting it at any and all times when the public interests require its enforcement. And this is so although its exercise may interfere with property or property rights, or, under certain circumstances, may even cause the destruction of the same. The attempt to define this power has so often been made by the most able jurists that it would smack of pedantry for me to attempt it here. Perhaps as good and as comprehensive a definition as can be given is the one by Mr. Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. (Mass.) 53. See, also, *Cooley's Constitutional Limitations* (7th Ed.) pp. 830, 831, for reliable definitions. It has likewise become well settled that the discretion with respect to when and how this power shall be exercised is primarily vested in the legislative, and not in the judicial, branch of constitutional government; and in

case of its exercise that the courts will not interfere unless a statute, when properly passed, is palpably in contravention of some constitutional provision. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *People v. Hupp*, 53 Colo. 80, 123 Pac. 651, 41 L. R. A. (N. S.) 792, Ann. Cas. 1914A, 1177; *Durango v. Chapman*, 29 Colo. 160, 60 Pac. 635; *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177, 76 Am. St. Rep. 139; *State v. Wheeler*, 44 N. J. Law, 88; *State Board, etc., v. Diamond Mills P. Co.*, 63 N. J. Eq. 111, 51 Atl. 1019; *Durham v. Cotton Mills*, 141 N. C. 627, 54 S. E. 453, 7 L. R. A. (N. S.) 321. The prevailing doctrine is stated in *Mugler v. Kansas*, supra, by Justice Harlan in his usual terse style thus:

"It belongs to the legislative department to exert the police power of a state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety."

Again, in *Bland v. People*, 32 Colo. 319, 76 Pac. 359, 65 L. R. A. 424, 105 Am. St. Rep. 80, in referring to this subject, the court says:

"It is said that the police power of the state is founded largely upon the maxim: 'Use your property in such manner as not to injure that of another.'"

It is further said:

"The welfare of the people is the supreme law,' is a maxim of the law; and it is upon these two maxims that the police power of the state is largely based. In the exercise of the police power, the Legislature has a large discretion, and it is our duty to sustain such legislation unless it is clearly and palpably and beyond all question in violation of the Constitution."

The foregoing cases, without exception, are thoroughly considered, well reasoned, and all except the first one are based on some statute or ordinance prohibiting the befouling of water, and in a number of them the statutes or ordinances were assailed upon the same constitutional grounds on which the statute and ordinance in question are assailed. In those cases it is directly held that, although in enforcing the police power the use of property may be interfered with to the extent that the owner thereof may have to modify or change the manner of its use from one which is more to one which is less convenient to him, yet, if such interference is merely incidental to a proper enforcement of the power and does not deprive the owner of the reasonable use of his property, he cannot successfully maintain that his property is being taken or damaged for public use. While respondent's counsel do not seriously question the soundness of the principle laid down in the foregoing cases, yet they somewhat strenuously insist that the provisions of the ordinance in question transcend the rule just stated. In this connection they contend that the ordinance, in prohibiting every person from permitting "any cattle, horses, sheep or hogs to remain in or near, or to pollute any stream of water used by the inhabitants of said city

anywhere within ten miles above a point where said water is first taken by said city," practically amounts to the confiscation of property when used for the purposes for which respondent uses his property as such use is made to appear from the complaint in question. This contention is not based so much upon the acts with which respondent is charged in the complaint, as it is upon that portion of the ordinance which prohibits any cattle, etc., to "remain in or near" any stream from which the water is used as stated in the ordinance. The rule is invoked that the validity of a law or ordinance must be tested by what may be, and not by what in a particular case is sought to be, done under it. The rule, that in case two constructions of a statute or ordinance are possible one of which, if adopted, will defeat the law, while the other will uphold it, it is our duty to adopt that construction which will uphold the law, is too well settled to require argument at this time. Moreover, the rule that, for the purpose of ascertaining the intention of a statute or ordinance, it is not only our duty to consider it as a whole, but we must also keep in mind the object or purpose of the enactment and the evil consequences the lawmaker intended to guard against by its adoption, is elementary.

By applying these rules of construction to the ordinance in question, I think the objections that are inveighed against it by respondent's counsel largely disappear. For instance, it is contended that to prohibit cattle to be near a stream is too vague and uncertain to admit of reasonable enforcement. It is true that by segregating the phrase referred to from all other matter contained in the ordinance it appears to be somewhat obscure. But the manifest purpose of the whole ordinance is to prevent the pollution of water which is used for domestic purposes. With that thought in view, therefore, all acts which directly tend to affect or destroy the potability of the water flowing in our streams are prohibited. A careful reading of the ordinance makes clear that it was not intended to prohibit the mere casual straying of one or a few head of cattle, horses, sheep, or hogs along or near a stream. What the ordinance prohibits is "to permit any cattle," etc., "to remain in or near" the stream. It requires no argument to show that the prohibition is not against one, but it is against a number of cattle, and it is not directed against a mere incidental or casual straying into or near the stream, but what is prohibited is to permit a number of cattle, etc., to remain in or near the stream. To permit a number of cattle to remain in a stream must necessarily result in polluting the water for domestic use, and to permit them to remain at one place for any considerable length of time near the stream, where the accumulating filth naturally produced by them can drain into it, must unavoidably have the same effect. The filth

and excrementitious matter coming from a number of animals, or even from one, if permitted to accumulate and get into the stream, must result in its pollution.

Again, the ordinance must receive a reasonable construction and application. Such a construction simply prohibits the owner of any cattle, etc., from permitting them to be so near a stream, whether it be 10 or 100 feet, or more or less, which will result in appreciably befouling the stream. I think no one would insist that an owner of cattle should be punished for keeping his cattle at such a place, where their presence could have no effect on the purity of the water in the stream, although they were kept what may be termed to be "near" a stream. If therefore we keep in mind the purpose of the ordinance as an entirety, there is no difficulty in determining what is meant by the phrase "near the stream." The mere fact that the word "near" is coupled with the word "in"—that is, in or near the stream—clearly indicates that the intention was to prevent cattle, etc., from being and remaining in or so near to the stream as will result in polluting the water flowing therein. Nor does the ordinance apply to every stream, but it applies to such only from which the water is used by the inhabitants of a city. It is manifest therefore that to drive or keep any cattle, etc., at any place where they do not and cannot sensibly or appreciably pollute or befoul the water in the stream, does not come within either the purpose or the spirit of the ordinance. Suppose a stream were flumed or cemented, or otherwise protected, by either natural or artificial means so that it was impossible for animals to get into the water, and that their filth could not pollute it, would any one contend that the ordinance was violated by merely permitting horses, cattle, or other animals to be near it? I think not.

This brings me to the crucial question in the case. Respondent's counsel contend that the complaint discloses that he is to be punished for doing or permitting a lawful thing upon his own land in the usual and customary manner, namely, the pasturing of his horses thereon. It is alleged in the complaint that the stream in question "runs through" respondent's land. He insists therefore that he is a riparian owner with all the rights and privileges incident to such ownership. Upon these premises his counsel insist that he at least has the legal right to make a reasonable use of his land and the acts charged do not show that he has abused that right. Indeed, they contend that the very acts charged merely show a reasonable and not an unreasonable use. Counsel have cited one case, namely, *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. 72, 13 L. R. A. 117, 28 Am. St. Rep. 245, which seems to sustain their contention. That case, in my judgment, is, however, not so well considered as are the cases to which I have be-

fore referred. While the Maryland case may be applicable to the conditions prevailing in that state, yet it cannot be said that it can be applied to the conditions present in this state where pure water means life. By examining the notes to that case in 28 Am. St. Rep., it will be seen that the annotator also expresses some doubt respecting the soundness of the doctrine there announced. But assuming without deciding that reasonable use is the test, yet whether a use is reasonable, even as between riparian owners, depends largely upon conditions and circumstances. As has been well said:

"Whether the use to which he (the owner) wishes to devote it (the property) is reasonable must be determined by the circumstances." *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 42 N. W. 448, 14 Am. St. Rep. 319.

To arrive at a just result, therefore, not only the local conditions and circumstances surrounding the locus in quo must be kept in mind, but, in my judgment, conditions generally prevailing throughout the state, or, at least, throughout the locality where the stream is located, and the uses to which the water flowing therein is applied, must also be considered.

Again, the doctrine laid down by Judge Cooley, in his excellent work on *Constitutional Limitations* ([7th Ed.] 880), may also be important. It is there stated in the following words:

"So a particular use (or disposition) of property may sometimes be forbidden, where, by a change of circumstances, and without the fault of the owner, that which was once lawful, proper, and unobjectionable has now become a public nuisance, endangering the public health or the public safety."

The question is discussed by Mr. Justice Peckham, of the New York Court of Appeals, in the case of *Health Department v. Rector*, etc., 145 N. Y. 32, 42, 43, 39 N. E. 833, 836, 837 (27 L. R. A. 710, 45 Am. St. Rep. 579). It is there said:

"Within this reasonable restriction the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors or to the public generally. \* \* \* Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. (Citing cases.) The state, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner; but, so long as the amount exacted is limited as stated, the property of the citizen has not been taken in any constitutional sense without due process of law."

Therefore, whenever in this opinion I refer to a "reasonable use," I refer to one which is

not of itself a nuisance or which does not unnecessarily and appreciably pollute the waters of a stream. Further, that if in using property a stream is necessarily polluted and such pollution can be avoided without destroying the owner's ability to use the property, he must take reasonable steps and precautions to avoid such pollution, and, if he willfully or negligently fails to do so, he may be punished for his acts. Any use which results in an appreciable pollution which is preventable by incurring reasonable expense or making reasonable effort cannot be deemed a reasonable use for the purpose of withholding the enforcement of a police regulation which is intended to protect the public health.

But in answer to all this respondent insists that he is not charged with maintaining a public nuisance. Whether he is or not, as I shall endeavor to point out hereafter, is not controlling here. The real question is whether the use made by respondent of his land is a reasonable one under all the circumstances and within the purview of the rule heretofore laid down. What use is it that respondent makes of his land, and under what circumstances is it applied? The amount of land owned by him and on which it is alleged he keeps 27 head of horses is so situated that the stream in question runs through it. The amount of land is alleged to be 15 acres but in what shape or form these 15 acres lie and through what part the stream runs is not disclosed. For the purpose of this decision I shall assume that the land in question is a square piece of ground and is so situated that the stream runs through the whole of it from end to end or side to side, as the case may be. I do this for the purpose of giving respondent all possible advantage. If the stream in fact only runs through a small part of the land, then the rule that I shall apply is more favorable to him than it would be if the stream runs as I have assumed. If therefore the 15 acres constitute a square piece of ground, the length of one side or one end thereof, as the case may be, must be within a few feet of 49 rods.

In view therefore that the stream divides the piece of ground, the horses at times must necessarily go from one side of the stream to the other to feed. In order to prevent the horses from polluting the stream by depositing their filthy excrement therein as charged in the complaint, they must be kept out of the water, and this I shall assume can be only done by erecting two fences, one on each side of the stream, with a fenced passageway which will permit the horses to pass from one side of the field to the other at will, or, by putting up bars through which they may be led or driven by some one from one side of the stream to the other as aforesaid. Assuming therefore that fences will have to be erected for the full length of the land the combined length of such fences will be about

100 rods. In connection with this, some passageway must be devised for the horses to cross over the stream if they are to be kept entirely out of it. And in addition to the foregoing, some method by which water is provided for the horses to drink must also be devised. These things are so simple and in such general use that I may take judicial knowledge of the fact that their cost is, to say the least, not prohibitive, and, in view of the end to be attained, clearly not unreasonable. Will any one seriously contend that in this day and age it is necessary or even reasonable to permit 27 head of horses, or any other number, more or less, to go into a stream and to deposit their filthy excretions therein from day to day, the water of which stream is continually being used by a community of approximately 100,000 persons for culinary purposes? Would not all with one accord exclaim that, in order to keep this water reasonably free from pollution, it were better that the owner of the horses be required to provide water for them in some other way than by permitting them to go into the stream? It would seem that, under such circumstances, to require the owner to have recourse to even the primitive method of carrying water with a bucket for some distance into an ordinary trough for the horses would be much more reasonable than the present method of going into and polluting the stream. But, it is a matter of general knowledge that a much more convenient method without great expense, and one that acts automatically, can be devised to provide fresh water for the horses. Further, can it successfully be maintained that, if the owner of the land is required to fence his horses away from the stream as suggested, he is unreasonably inconvenienced, or that his property is taken for public use?

I have devoted an unusual length of time and an unusual amount of labor to find some case in the books wherein it has been held that merely to inconvenience a landowner to the extent herein suggested, for the purpose and under the circumstances here present, constitutes a taking or confiscation of property; but I have found none. Moreover, the cases I have cited all squarely hold that a landowner cannot complain because he is inconvenienced in the use of his property, where such inconvenience arises out of the proper enforcement of the police power to protect the public health, and where such enforcement does not amount to the taking or destruction of his property. If such were not the law, communal life in this arid country would be well-nigh impossible. All the streams would be polluted and the use of the water made unwholesome, if not absolutely dangerous to health, by what is termed to be a reasonable use. Further, if the purity of the streams could only be maintained by compelling the cities and towns of this state to condemn the land along such streams, it

would be necessary to condemn practically the whole watershed of the streams. This would be as impossible as it is impracticable. Neither is such a course imperative, since the water in every stream may be kept reasonably pure and fit for even culinary use without entirely depriving a reasonable number of cattle, horses, and other animals from eating the grass which grows along the watershed of our streams. The whole matter can be regulated by giving a reasonable construction to our statutes and ordinances and by applying reason and common sense in their enforcement. If there is one subject which should be governed by reason and common sense more than any other, it certainly is the subject of police regulation.

The respondent insists that under the ordinance in question he cannot permit any of his horses to remain on any part of the land for the purpose of eating the grass growing thereon, since in doing so they still will void their excrement on the land, which, in case of rains and floods, will be washed into the stream. It no doubt is true that where there are filthy substances deposited along the sides of the canyons—and most of our streams flow through canyons—such substances, in case of rains, will, to some extent at least, be washed into the stream; but this is unavoidable. To permit cattle, however, or horses to deposit their excrement on the land while they are grazing all over it from day to day is one thing, while to permit them to go into the stream and to deposit it into the water, or to permit them to deposit it in any quantity near the stream where it will be directly washed into it, is quite a different thing. The cattle wander over the land during the summer season, and that is the only season in which they can be pastured, eating grass, and in doing so never deposit a very large mass of excrementitious matter in one place, but in the natural order of things will scatter it over an entire field or pasture. With regard to such deposits, the magic influence of sunlight and air which bring about chemical decomposition must not be overlooked. Most of the offensive gases escape under such conditions, and, as pointed out by Vice Chancellor Stevens in the case of *Doremus v. Paterson*, 73 N. J. Eq. 483, 69 Atl. 225, where the question now under consideration is exhaustively treated, only the solids or the mineral portions of the excrementitious matter eventually find their way into the stream and these ordinarily are either harmless or settle down so as to become so. From these sources, therefore, the stream, provided it carries any considerable quantity of water, is not sensibly or appreciably polluted, and thus not made unfit for use.

Recurring now to the claim made by counsel that respondent is not charged with committing a nuisance: It is true that such is not the direct charge, but can it be said

that to permit 27 horses to go into a stream each day during the summer season, and to permit them to deposit their filthy excrement into the water flowing therein which is being used for culinary purposes by the inhabitants of a large city, if not a nuisance per se is, nevertheless, near the border line of constituting a very offensive one? If respondent, however, were either actually committing or maintaining a nuisance, he would not have any standing in court whatever. His counsel frankly concede that if he were guilty of maintaining a public nuisance it could be abated, and this, too, without considering whether the abatement would 'injuriously affect him in his property rights or not. But they strenuously insist that what is charged does not amount to a nuisance. Let me say here, once for all, that statutes and ordinances such as are in question here do not depend for their enforcement upon the question of whether the acts that are prohibited thereby constitute a nuisance or not. If such acts constituted a nuisance, the parties charged, if the acts came within the statute or ordinance, would be guilty as a matter of course, but they may also be found guilty although the acts do not, as yet, amount to a nuisance. If respondent were guilty either of committing or maintaining a nuisance, the city, under the common law, as a mere riparian owner, could require him to abate the same, or the board of health might do so. In either case it would be wholly unnecessary to have recourse to an ordinance like the one in question. Such ordinances are not enacted to prohibit the maintenance of existing nuisances; but their enforcement is intended to prevent the creation of nuisances which may become dangerous to the public health. If no one could be prevented from polluting water until his acts amounted to the committing or maintaining of a public nuisance, then police regulations to prevent the pollution of our streams would be almost entirely shorn of their beneficial effect, and much harm to the public health would be possible, which, by the enforcement of such ordinances, is or may be prevented. To this effect are all the cases to which I have referred herein.

Whether respondent has violated the provisions of the ordinance in question or not is a question of fact. He cannot be found guilty under the charge preferred against him unless it is found beyond a reasonable doubt that he has permitted the acts complained of and that such acts sensibly or appreciably pollute or have polluted the stream. The pollution must be one which constitutes an appreciable befouling of the water, because in the very nature of things it was not intended to punish for a mere technical contamination or pollution of water. Such a pollution is not preventable. Impure, noxious, or offensive matter cast into a stream, however small in quantity, to some extent



pollutes the water therein. That, however, is not the pollution which ordinances like the one in question seek to prohibit or punish. On the other hand, such ordinances are intended to prevent the deposit of filthy substances in or near our streams, which, if continued, might seriously endanger the public health. These ordinances are also intended to prevent individuals, by independent action, from polluting streams, although their acts cannot be construed as amounting to a nuisance. If the courts should refuse to enforce such ordinances, then each one of a number of individuals acting independently who own lands along a stream might pollute it, but not to such an extent as to constitute a nuisance, while the combined acts of all would so pollute the water of a stream as to make its use dangerous to health, and yet none could be punished, because the individual and independent acts taken singly would not so pollute the stream as to constitute a nuisance or make the use of the water necessarily dangerous to health.

I desire to add here that in the nature of things it is not possible for me to say, upon this demurrer, whether respondent is so affected in the use of his land as to amount to a taking as he contends. From the face of the complaint, no such result is discernible. The acts that are sought to be prohibited clearly come within police regulations, and, unless the prohibition of the use of his property in the manner it is used is tantamount to a taking of it or which deprives him of the use thereof, he cannot complain. Although he were found guilty and then were prohibited from using his property in the manner complained of, yet he would not, by reason of that fact, be prevented from seeking or from obtaining redress in the proper courts in this state, provided the prevention aforesaid would result in preventing him from making a reasonable use of his property as such reasonable use is herein defined.

I am constrained to hold therefore that, for the reasons stated, the ordinance in question is not invalid; that the statute on which it is based is a valid statute; and that the complaint states sufficient facts to constitute a public offense.

The judgment of the district court is therefore reversed.

**STRAUP, C. J. (concurring).** It undoubtedly was within the province of the Legislature to confer power upon municipalities by ordinance to protect waters of streams used by the inhabitants thereof for domestic and culinary purposes, and to prevent pollutions of such waters. Whether the ordinance in question, in all its parts, is within such conferred power, need not, as I view the matter, be now considered or determined. It is sufficient to ascertain, and the inquiry need be no broader, as to whether the acts or

wrongs alleged in the complaint are such as the municipality under its conferred power could and did by ordinance forbid and penalize. Certain it is that a municipality, by ordinance, under the conferred power, may forbid and prevent pollutions, and punish those committing them, which result from an unlawful, wrongful, negligent, unreasonable, or unnecessary use of, or interference with, such waters, or of premises through which they course or are adjacent to them. Whether the municipality under such conferred power may also forbid and prevent pollutions—a very flexible and comprehensive term, for any feces or refuse getting in the water of a stream may, in a degree, constitute a pollution—and punish those committing them, which result wholly from a lawful, careful, reasonable, and proper use of such premises by the owner or an occupant thereof, is a question concerning which I entertain serious doubt. The ordinance, however, seemingly forbids the one as well as the other. The location and physical conditions of premises of an owner, and of the stream coursing through or near them, may be such that to pasture or keep any animals, such as horses or cattle, on the premises, would necessarily result in pollutions of the waters to some extent, for it must be conceded that any appreciable quantity of feces washing or getting into the stream would in some degree injuriously affect the purity and potability of its waters. Hence it may well be questioned whether a municipality, under the conferred power, by preventing and penalizing such an act, under such circumstance, would not deprive the owner of a rightful use and enjoyment of his property, and thus, in effect, amount to a taking or damaging of property without compensation.

[2] But the complaint, in effect, charges a wrongful, negligent, unreasonable, and unnecessary use of the waters of the stream and of the premises through or along which it courses; the complaint in such particular being that the defendant, "unlawfully and willfully, \* \* \* and continuously, for 10 days or more," permitted, "at all times," 27 horses to pasture upon and along the banks of the stream, to wade in and drink therefrom, and to "drop their dung into said creek." That pretty nearly charges that the defendant willfully, unlawfully, and continuously, for a period of 10 days or more, used the stream as a depository for horse feces. I think the acts charged in the complaint are such as the municipality, under its conferred power, could by ordinance prohibit, and are such as are forbidden by the ordinance; and therefore that the demurrer to the complaint ought to have been overruled.

**McCARTY, J.** I concur. I am of the opinion that the complaint is not vulnerable to the objections urged against it. That the

Legislature may confer upon municipalities the power generally to protect from pollution streams of water used by the inhabitants for culinary and domestic purposes is no longer an open question. A municipality may not, however, in the exercise of its police power in that regard, destroy or appreciably impair the value or utility of vested rights of others in and to such streams. It is common knowledge that municipalities throughout this state, with but few exceptions, obtain the culinary water used by the inhabitants thereof from streams of water that have their sources in the mountains and which flow through canyons to the valleys and lowland where it is diverted for the uses mentioned. It is equally well and generally known that, in many of the canyons through which these streams of water flow, there are, at different points, small tracts of meadow, pasture, and arable land ranging in quantity from a fraction of an acre to a quarter section or more which usually extends back from either side of the stream to or near the base of the walls of the canyons. Much of these lands, because of their altitude and close proximity to the mountain ranges and public grazing lands, are specially valuable for raising hay, and for grazing, pasturing, and feeding cattle, horses, and other domestic animals, and, in a limited way for raising grain, potatoes, and a few other cereals that grow and thrive in high altitudes and that are indispensable in the maintenance of a cattle and horse ranch.

There may be, and no doubt are, instances where parties, at an early date in the settlement of this arid mountain region, homesteaded tracts of these lands and have fenced and otherwise improved the same, and have occupied and used the lands for raising hay, pasturing, grazing, and corralling cattle, horses, and other domestic animals, and have used the waters rising thereon and that flow through the premises for irrigation, culinary, and domestic purposes, before parties lower down on the stream acquired any interest in or title to the water. In such case, the homesteader and his successor in interest may, after a municipality acquires a right to the water, after it leaves the premises, for the use of its inhabitants, continue to make a reasonable use of the land for the purposes mentioned. He may farm the land, pasture, graze, and corral horses, cattle, and other domestic animals thereon, to the same extent as he did before the municipality acquired an interest in the water. And if in making such reasonable use of the land the drainage therefrom finds its way into the stream, which under the circumstances and conditions mentioned is generally unavoidable, he is not amenable to either the criminal or civil law. In such case the municipality has a remedy, and may, under the eminent domain law, acquire an easement or title to the land, or a sufficient

amount thereof, bordering on the stream, to enable it to protect the water from pollution. Section 22 of article 1 of the Constitution of this state provides that "private property shall not be taken or damaged for public use without just compensation." A municipality, under the conditions such as I have suggested, cannot evade this prohibitory provision of the Constitution and directly or indirectly deprive a party of his property or materially impair the value thereof by restricting its use without compensating him for the property taken or the damage sustained.

It is suggested that in the case at bar respondent might at a nominal expense construct a fence along either side of the creek where it passes through his land, and thereby protect the stream from the pollution mentioned in the complaint. As I have stated, it is common knowledge that the meadow, pasture, and arable lands in the canyons through which these streams of water flow is limited to small tracts situated along the beds of the canyons. In many instances this land consists of narrow strips on either side of the creek. There may be, and no doubt are, instances in which the homesteader, in order to include in his entry as much of this tillable land as possible, has "taken up"—filed on—two, three, or more contiguous "forties" along the bed of the canyon. In such case the homestead may consist of a tract of land 80 rods in width and 320 rods (1 mile) in length. Under these conditions, it would require 2 miles of fence to prevent the loose animals kept on the ranch from going into the stream at will. To construct and maintain such a fence would not only be expensive to the homesteader, but in many cases the fence would very materially impair the usefulness of the ranch and thereby decrease its value. This is an expense—a burden—that the municipality cannot, either under the Constitution, statute, or its police power, compel the owner to assume. If, under such circumstances, the municipality may prevent the homesteader, or his successors in interest, from pasturing animals on the portion of the ranch through which the stream of water flows (which may be the only part of the premises fit for pasturage), it necessarily follows that the municipality may also prevent the irrigation of the land because the waste water therefrom unavoidably flows into the creek, washing therein the offal of animals and other refuse, such as manure, debris, etc., hauled from the corrals and yards, and scattered over the arable portion of the ranch to fertilize the soil. The fact that the municipality may, in some cases, be compelled, as suggested, to purchase or acquire by condemnation proceedings entire watersheds in order to protect the stream from pollution, does not relieve it from doing what the provision

of the Constitution referred to requires, namely, compensate the owner for his property or so much thereof as may be necessary for the municipality to acquire in order to enable it to protect the stream from the impurities mentioned.

What I here state is in no sense in conflict with the case of *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87. In that case the defendant was convicted of having committed a public nuisance by unlawfully and willfully driving, herding, and keeping about 2,000 sheep upon a small stream of water which was used by the inhabitants of a small town or village. The record in that case, what there is on file in this court, shows that the defendant was herding and grazing his sheep on the public domain at the time he committed the nuisance for which he was convicted.

I do not wish to be understood as holding that a party may go upon the public domain and acquire title to land through which a stream of water flows that is being used by the inhabitants of a municipality for culinary and domestic purposes and make any use of the land that will result in befouling the water. Nor do I wish to be understood as holding that in cases where a party, or his predecessor in interest, was the first to locate on a stream of water and acquire title to land through which it flows, and later other parties lower down on the stream appropriate and make use of the water for culinary and domestic purposes, the first appropriator, or his successor in interest, may, in the use he makes of his property, willfully or wantonly pollute and befoul the water of the stream. He may not maintain thereon corrals, stables, privies, outhouses, pigsties, or a slaughterhouse where the drainage therefrom will naturally find its way into the stream. What I do say is that where a

party files on public land through which a stream of water flows, fences, tills, and otherwise improves the land, and makes the same use of it as is usually made of land of that character, such as farming, raising hay, pasturing and feeding cattle, horses, and other domestic animals, and a municipality or its predecessor in interest later on acquires a right to use the water after it leaves the premises for culinary and domestic purposes, the municipality may not compel the owner of the land to dispense with one or more uses to which the land is peculiarly and specially adapted, and to which it has been devoted, because such use unavoidably befouls the water. To arbitrarily prohibit the owner of a ranch from pasturing his animals thereon and making the same use of it as ranch property situated in the mountains is generally devoted, or to impose conditions that would make such use impracticable, would in effect be, at least, a partial confiscation of the property. This, neither the state nor any political subdivision thereof can do without disregarding and overriding the provision of the Constitution herein set forth.

Whether the respondent is within his rights in pasturing horses in the inclosure through which the stream of water in question flows depends on the circumstances and conditions under which he is using the land for that purpose. Of course, if he willfully and wantonly permits 27 or any number of horses in his pasture to wade into the stream at will and befoul the water under conditions that would enable him at a nominal expense and with but little inconvenience to protect the stream from pollution, he is amenable to the ordinance under which he is being prosecuted, regardless of whether his right to pasture his land antedates the right of the municipality to the use of the water.

(78 Or. 318)

STATE ex rel. MITCHELL v. RIDER.  
(Supreme Court of Oregon. Jan. 26, 1915.)

1. CONTEMPT (§ 66\*)—APPEAL—BILL OF EXCEPTIONS.

Whether a sentence for contempt exceeds the limits fixed by statute, being determinable from an examination of the judgment as exemplified in the record, may be submitted on appeal without a bill of exceptions, even though other questions discussed in the brief could not be considered without the evidence and a bill of exceptions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

2. CONTEMPT (§ 66\*)—APPEAL—RECORD—ADDITIONAL ABSTRACT.

Where respondent deems the abstract imperfect or unfair, he should file an additional abstract, as prescribed by Supreme Court rule 7 (56 Or. 616, 117 Pac. x).

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

3. CONTEMPT (§ 66\*)—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

That assignments of error in the abstract on appeal fall short of technical accuracy does not require a dismissal of the appeal, not essential to a transfer of the cause.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

4. CONTEMPT (§ 66\*)—APPEAL—TRANSCRIPT—AUTHENTICATION.

Where defendant has attempted in good faith to comply with Laws 1913, p. 656, declaring that when an appeal is perfected the original pleadings and the original bill of exceptions shall be sent up by the clerk of the trial court and made a part of the transcript, he will be allowed to supply a certificate to meet the objection that the pleadings and papers sent up were not properly authenticated.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Contempt proceedings, on relation of T. E. Mitchell against U. S. Rider. Judgment finding defendant guilty, and he appeals. On motion to dismiss appeal. Motion denied.

This is a motion to dismiss an appeal from the judgment of the circuit court of Marion county finding the defendant guilty of contempt. The reasons assigned in the motion are that: (1) No bill of exceptions was allowed or filed; (2) the evidence has not been brought before this court; (3) the abstract filed herein is insufficient because the affidavit for contempt on which the judgment was based is not set forth in full, the findings of fact are only partially recited, and the conclusions of law are omitted; (4) there are no assignments of error which could be determined on appeal; and (5) the notice of appeal was not served on the district attorney or other officer of the state of Oregon. The transcript filed includes copies of the

judgment, notice of appeal showing acceptance of service by both the district attorney and the attorney for the relator, and the undertaking on appeal. There are, in the hands of the clerk of this court, what purport to be papers filed in the justice court, where the contempt proceeding originated, and also what appear to be papers filed in the circuit court. There is no bill of exceptions. The objections will be considered in the order already stated.

Ivan G. Martin and Carey F. Martin, both of Salem, for appellant. E. R. Ringo, Dist. Atty., and McNary, Smith & Shields, all of Salem, for respondent.

HARRIS, J. (after stating the facts as above). [1] One of the questions sought to be determined by this appeal is whether the sentence imposed by the court exceeds the limits fixed by statute. An examination of the judgment, as we find it exemplified in the record, will reveal a recital of sufficient facts to enable a decision of the point raised. At least one phase of the case can be submitted on appeal without the presence of a bill of exceptions, and even though other questions discussed in the brief could not be considered without the evidence and a bill of exceptions.

[2] If plaintiff deemed the abstract imperfect or unfair, an additional abstract could have been filed as provided by rule 7, 56 Or. 616, 117 Pac. x. Francis v. Bohart, 143 Pac. 920.

[3] The assignments of error as set forth in the abstract are sufficient; and, even if they fell short of technical accuracy, the rule in Proctor v. Jeffery, 144 Pac. 1192, would apply.

The objection that the district attorney was not served with the notice of appeal is answered by the fact that the record shows that he admitted service.

[4] The defendant has attempted in good faith to comply with the provisions of chapter 335 of the Laws of 1913, and has caused to be sent to the clerk of this court, not only all the pleadings, but also all the original papers filed in the case. Objection has been made to these pleadings and papers because not properly authenticated, and defendant, therefore, has requested permission to supply a certificate that will meet the objection made. The request of defendant is granted.

"While vexatious appeals should be discouraged, yet the opportunity for litigants to have their issues tried in the higher courts should not be hindered by technical constructions, which too frequently lead to the subversion of justice. Smith v. Algona Lumber Co., 136 Pac. 7.

The motion to dismiss the appeal is denied.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(74 Or. 481)

## STATE v. ROBINSON.

(Supreme Court of Oregon. Feb. 2, 1915.)

1. INDICTMENT AND INFORMATION (§ 196\*)—  
WAIVER OF DEFECTS—FAILURE TO DEMUR.

The failure of an indictment for receiving stolen property to allege the name of the owner of the property was, not waived by failing to demur.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.\*]

## 2. RECEIVING STOLEN GOODS (§ 7\*)—INDICTMENT—NAME OF OWNER.

Under L. O. L. § 1959, providing that if any person shall buy, receive, etc., any stolen money or property, knowing or having good reason to believe it to be stolen, he shall be punished as therein provided, an indictment must allege the name of the owner of the stolen property, if known, and an indictment neither alleging the name of the owner nor an excuse for not alleging the ownership was fatally defective, since, while, under the statute, the offense is a substantive rather than an accessorial offense, the prosecution of the receiver of the stolen goods is not dependent upon the conviction of the thief, and it is not necessary technically to allege the larceny, the name of the thief or of the person from whom the goods were received, or the time and place of the original larceny; the name of the owner is essential in identification of the offense, as the transaction is identified, not only by a description of the property, but by the ownership.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.\*]

Department 2. Appeal from Circuit Court, Clatsop County; T. J. Cleeton, Judge.

C. A. Robinson was convicted of receiving stolen property, and he appeals. Reversed and remanded.

A. W. Norblad, of Astoria (J. T. Jeffries, of Astoria, on the brief), for appellant. C. W. Mullins, Dist. Atty., of Astoria, for the State.

HARRIS, J. The defendant, C. A. Robinson, was convicted of receiving stolen property. The charging part of the indictment is as follows:

"The said C. A. Robinson on the 5th day of February, A. D. 1914, in the said county of Clatsop and state of Oregon, then and there being, did then and there willfully, unlawfully, and feloniously buy, receive, conceal, and attempt to conceal, 1 joinder plane, of the value of \$3.50, 1 rip saw, of the value of \$2.00, 1 hand saw, of the value of \$0.75, and 1 saw clamp, of the value of \$1.25, and of the aggregate value of \$7.50, and which joinder plane, rip saw, hand saw, and saw clamp had been then, lately before, feloniously stolen, taken, and carried away, by certain persons within said county and state; and the said C. A. Robinson then and there well knowing and having good reasons to believe the same to be stolen, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

The defendant appealed from the judgment, contending that certain errors occurred during the trial. At the argument on appeal, and for the first time, the defendant questioned the sufficiency of the indictment

and urged that it was fatally defective because of the absence of an allegation of ownership.

[1, 2] If the allegation of ownership is indispensable, then a failure to demur does not operate as a waiver of the objection now made by defendant. *State v. Mack*, 20 Or. 236, 25 Pac. 639; *State v. Martin*, 54 Or. 405, 100 Pac. 1106, 103 Pac. 512. A person who buys, receives, or conceals stolen property, knowing the same to be stolen, is guilty of a substantive crime (section 1959, L. O. L.); and in most jurisdictions the act is made a substantive rather than an accessorial offense. Under statutes like ours, making the crime a substantive one, the prosecution of the receiver of stolen goods is not dependent upon the conviction of the thief who was the original taker, although it is necessary to allege and prove that the property was in fact stolen. It is not essential in this state technically to allege the larceny, nor is it requisite to allege the name of the thief, or the name of the person from whom the goods were received, or when and where the original larceny was committed (*State v. Hanna*, 35 Or. 197, 57 Pac. 629), for the reason that none of these features are essential for a description of the transaction. If, however, the name of the owner of the stolen property is known, the indictment must contain an allegation of ownership; and this rule is sustained by an overwhelming weight of authority whether the act of receiving stolen property be a substantive or an accessorial crime. An indictment is fatally defective when it does not allege the name of the owner, if known. *Rapalje on Larceny*, § 318; *Miller v. People*, 18 Colo. 166, 21 Pac. 1025; *State v. McAloon*, 40 Me. 133; *Commonwealth v. Finn*, 103 Mass. 469; *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *O'Connell v. State*, 55 Ga. 296; *State v. Pollock*, 105 Mo. App. 273, 79 S. W. 980; *State v. Perkins*, 45 Tex. 10; *Kirby v. United States*, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 809; 2 Bis. New Cr. Pro. (4th Ed.) § 983; 1 McClain, Cr. L. § 718; 34 Cyc. 521. The owner's name is essential in identification of the offense. The transaction is identified, not only by a description of the stolen property, but also by the ownership. Identity of the property embraces the element of ownership as a necessary part of the description, and therefore the name of the owner, if known, must be alleged; and if the indictment does not disclose the name of the owner or offer an excuse for not averring the ownership, it is fatally defective. In the note to section 1959, L. O. L., the statement is made that it is not necessary to allege the name of the person from whom the property was stolen, and *State v. Hanna*, supra, is cited as authority; but that portion of the note is erroneous if intended to mean that the name

of the owner need not be averred, because no announcement made in the case mentioned affords any warrant for the conclusion that the name of the owner, if known, may be omitted. The failure to allege the name of the owner, who was known, renders this indictment insufficient. It is not necessary to discuss any other phases of the case presented on appeal.

The judgment is therefore reversed, the cause is remanded for such further proceedings as may be proper, not inconsistent with this opinion, and, subject to the qualifications expressed in *State v. Eddy*, 46 Or. 630, 81 Pac. 941, 82 Pac. 707, a new trial is directed.

MOORE, C. J., and BEAN and BURNETT, JJ., concur.

(74 Or. 434)

**NORTHWEST TOWNSITE CO. v. CONN  
et al.**

(Supreme Court of Oregon. Feb. 2, 1915.)

**1. APPEAL AND ERROR (§ 383\*)—UNDERTAKING—SUFFICIENCY.**

L. O. L. § 551, declares that the undertaking of the appellant, if the judgment or decree be for the foreclosure of the lien on real property, shall be that he will not commit or suffer waste to be committed, and will pay the value of the use of the property from the time of the appeal until delivery, and that when the decree appealed from is for the foreclosure of a lien and is also against the person for the amount of the debt, the undertaking shall be that the appellant will pay any portion of the decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed. A mortgage was foreclosed and the mortgagor, against whom personal judgment was rendered, appealed. *Held*, that the undertaking should be to pay any sum remaining unsatisfied after the sale of the mortgaged property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2042-2048; Dec. Dig. § 383.\*]

**2. JUDGMENT (§ 479\*)—COLLATERAL ATTACK.**

A judgment foreclosing a mortgage, rendered by a court having jurisdiction of the parties and subject-matter, cannot be questioned collaterally by a suit to enjoin enforcement, but must be attacked directly, as by an appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 913-915; Dec. Dig. § 479.\*]

In Banc. Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Action by the Northwest Townsite Company, a corporation, against George Conn and others. From a judgment for defendants, plaintiff appeals. Dismissed.

C. E. S. Wood, of Portland (Wood, Montague & Hunt, of Portland, on the brief), for appellant. W. Lair Thompson, of Lakeview, and Jay Bowerman, of Portland (Fulton & Bowerman, of Portland, on the brief), for respondents.

BURNETT, J. In this suit the plaintiff invokes the original jurisdiction of this court

to stay the execution sale of certain real property under a decree of foreclosure of a mortgage given to secure the payment of certain promissory notes made by the plaintiff, in which foreclosure the defendants Conn here were plaintiffs and this plaintiff and others were defendants. The complaint narates the history and procedure in the foreclosure suit, including efforts of the defendant, plaintiff here, to procure a postponement of trial, the court's denial thereof, and the decree of foreclosure. Substantially the complaint here would serve approximately as a bill of exceptions in the suit to foreclose the mortgage. Having given notice of appeal, the plaintiff here filed in the foreclosure suit an undertaking on appeal in the sum of \$15,000, to the effect that until possession of the premises described in the decree shall be determined by the decree of the Supreme Court the defendant and appellant during the possession of the property will not commit or suffer any waste thereon, and, if such judgment or decree or any part thereof be affirmed, the appellant will pay the value of the use and occupation of the property so far as affirmed, from the time of the appeal until the delivery of the possession thereof. The money decree against the defendant, plaintiff here, in the foreclosure suit, was in favor of the plaintiff George Conn, in the sum of \$42,130.53, with interest from the date of the decree at 6 per cent. per annum, and in favor of Margaret E. Conn for \$12,733.94, with like interest.

[1] In the case at bar the answer does not materially controvert the averments of the complaint. Indeed, there is but little dispute as to the facts. The question between the parties is principally one of law as to the sufficiency of the undertaking given to stay the execution in the foreclosure suit. The rule affecting the question at issue is thus declared in section 551, L. O. L.:

"The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs, and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following: (1) If the judgment or decree appealed from be for the recovery of money, or of personal property, or the value thereof, that if the same or any part thereof be affirmed, the appellant will satisfy it so far as affirmed; (2) if the judgment or decree appealed from be for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof be affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding a sum therein specified, to be ascertained and fixed by the court or judge thereof; \* \* \* (4) when the decree appealed from is for the foreclosure of a lien, and also against the person for the amount of the debt secured

thereby, the undertaking shall also be to the effect that the appellant will pay any portion of such decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed. \* \* \*

The statutory method thus prescribed for the arrest of proceedings to enforce a decree is binding upon this court. The undertaking appears to have been given under the second clause of the section quoted; whereas, the portion of the excerpt applicable to the foreclosure proceeding is found in subdivision 4, because the original suit was for the foreclosure of a lien and also against the plaintiff here for the amount of the debt secured by that lien. Subdivision 2, in referring to the foreclosure of a lien upon real property, evidently contemplates a lien existing independent of any personal obligation to pay the debt. Mechanics' and materialmen's liens for the construction, alteration, or repair of a building upon real property would furnish illustrations of such liens. These, however, are widely different from the lien created by a mortgage given to secure a note evidencing an actual personal indebtedness from a mortgagor to a mortgagee. In these latter instances, the statute requires an undertaking that the debtor will pay any portion of the decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed. We cannot grant to the plaintiff any more favorable terms for stay of proceedings than the statute allows.

[2] In this proceeding we cannot review the merits of the decree of foreclosure. That was the determination of a court confessedly having jurisdiction of the parties and of the subject-matter. We cannot in this suit treat the action of the court as void, or suspend the execution of its decree. Whether the court abused its discretion in refusing a postponement of the trial, and whether it was right or wrong in rendering a personal decree against the mortgagor for the recovery of the debt secured by the mortgage, we cannot here decide. Those questions must be worked out in that suit when it shall come regularly before us upon appeal, and upon them we here express no opinion.

The present suit in this court is dismissed.

McBRIDE, EAKIN, and BENSON, JJ., not sitting.

(75 Or. 219)

### LOUGHARY v. SIMPSON.

(Supreme Court of Oregon. Feb. 2, 1915.)

#### 1. DESCENT AND DISTRIBUTION (§ 82\*)—FAMILY SETTLEMENTS.

Family agreements for the settlement and distribution of estates are looked upon with peculiar favor, and will be upheld in the absence of gross injustice or fraud.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318-321; Dec. Dig. § 82.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 425\*)—NECESSITY OF ADMINISTRATION—FAMILY SETTLEMENTS.

Where all of the children and heirs of an intestate who left no debts executed instruments acknowledging the receipt of all property due them from the estate as the final step in a settlement and distribution of the estate the administrator could not sue one of the children for an accounting as to funds claimed to have been received by him as attorney in fact for the intestate, as, the parties having reached a final settlement, there was nothing upon which to base an accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1663, 1665-1672; Dec. Dig. § 425.\*]

Department 1. Appeal from Circuit Court, Polk County; Webster Holmes, Judge.

Action by U. S. Loughary, administrator of Martha Simpson, deceased, against Isaac Simpson. From a decree for plaintiff, defendant appeals. Reversed, and suit dismissed.

This is a suit for an accounting. Plaintiff, as administrator of the estate of Martha Simpson, deceased, alleges, among other things, that defendant, as attorney in fact of Martha Simpson, during the last years of her life, obtained possession of certain funds belonging to her, which he has failed to account for, or turn over to plaintiff as administrator of the estate.

Decedent, who at the time of her death was a widow, was survived by three adult children, whose names are Marshall W. Simpson, Eliza Loughary, and Isaac Simpson, the defendant. Martha Simpson's husband, I. M. Simpson, died on the 11th day of July, 1887, leaving an estate and a will, by the terms of which the widow and Marshall W. Simpson were appointed executrix and executor, respectively. At the time of Martha Simpson's death the estate of I. M. Simpson, deceased, had not been finally settled, and thereafter on November 25, 1912, the three heirs of Martha Simpson, above named, being her only heirs, met in Dallas for the avowed purpose of settling their several interests in the estate of their father, I. M. Simpson, deceased, and for a final distribution of the assets thereof. At the same time there was some discussion of the estate of their mother, who had died intestate, and at that time they each executed a separate copy of the following instrument:

In the County Court of the State of Oregon for Polk County.

In the Matter of the Estate of Isaac M. Simpson (Senior), Deceased. No. 562.

I, the undersigned, do hereby certify, declare and acknowledge that I have received from the estate of my father, said Isaac M. Simpson, Senior, deceased, and from Martha Simpson, executrix, and Marshall W. Simpson, executor, of said estate, all property real and personal, due me from the said estate on the final settlement and distribution thereof, and I do hereby consent and agree that said Marshall W. Simpson, the surviving executor of said estate, may be released and discharged from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his trust as said executor, and his bondsman exonerated from any and all further liability herein.

I further acknowledge that I have received all property, real and personal, due me from the estate of said Martha Simpson (my mother), who died intestate in Polk county, Oregon, on the 22d day of November, 1912.

Witness my hand and seal, this 25th day of November, 1912.

Eliza Loughary. [Seal.]

Executed in the presence of us as witnesses.

Pearl Owings.

Oscar Hayter.

State of Oregon, County of Polk—ss.:

On this 26th day of November, 1912, before me appeared the above named Eliza Loughary, to me personally known to be the identical individual who executed the foregoing instrument and acknowledged to me that she freely and voluntarily executed the same.

Witness my hand and seal this 25th day of November, 1912.

[Seal.]

Oscar Hayter,

Notary Public for Oregon.

The other copies being exact duplicates of the foregoing, except that they were executed by Marshall W. Simpson and Isaac M. Simpson, defendant herein.

It is conceded that the estate was without creditors, and that the three children named were the only heirs at law of Martha Simpson. The court below entered a decree requiring the defendant to pay to plaintiff the sum of \$3,962.46, with interest, as the assets of the estate of Martha Simpson, deceased. From this decree defendant appeals.

George G. Bingham, of Salem, for appellant. John H. McNary, of Salem (McNary, Smith & Shields, of Salem, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1, 2] There is some conflict, but a clear preponderance of the evidence establishes the fact that the instrument above set out was executed by the parties as the final step in a settlement and distribution of the estates of both the father and the mother of the parties thereto, and was so understood at that time. Family agreements of this sort are looked upon with peculiar favor by the courts, and will be upheld unless there appears to be some gross injustice or fraud in connection therewith. 8 Cyc. 504; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Adams v. Adams, 70 Iowa, 253, 30 N. W. 795; Taylor v. Taylor (Tex. Civ. App.) 54 S. W. 1039; Cruger v. Douglas, 4 Edw. Ch. (N. Y.) 433.

This settlement appears to be within the limitations suggested, and should be upheld, in which event, the parties having reached a final settlement, there is nothing upon which to base an accounting, and the decree of the lower court must be reversed and the suit dismissed.

MOORE, C. J., and BURNETT and McBRIDE, JJ., concur.



(74 Or. 462)

## GILLIHAN et al. v. CIELOHA.

(Supreme Court of Oregon. Jan. 26, 1915.)

**1. NAVIGABLE WATERS (§ 44\*)—SHORE RIGHTS—ACCRETION—DREDGING.**

In the absence of assertion of title or possession by the state or the general government, extension of the land of an island along a slough by the government, in dredging another channel, pumping sand into the slough, increasing the height of accretions at certain points, and with the aid of high waters widening it at other points, accrues to the shore owner, and will not be treated as an avulsion.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. § 44.\*]

**2. EQUITY (§ 42\*)—ISSUES IN LOWER COURT—JURISDICTION.**

Both parties having submitted themselves to the equitable jurisdiction of the court and asked for affirmative relief, and so chosen to litigate their rights in such forum, the court will not seek specious reasons for declining jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. § 42.\*]

**3. APPEAL AND ERROR (§ 1033\*)—AFFIRMANCE—PARTY NOT APPEALING.**

The decree giving a too favorable division line to defendant will be affirmed; plaintiffs not appealing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Presley Gillihan and others against George W. Cieloha. From the decree, plaintiffs appeal. Modified and affirmed.

This was a suit to quiet title to certain land claimed by plaintiffs to be an accretion to the Martin Gillihan donation land claim situated on Sauvies Island, in Multnomah county, and practically embracing all the land between the Gillihan donation land claim and Coon Island, which is situated at the mouth of the Willamette river and near its junction with the Columbia. The complaint is in the usual form and alleges that the land is not in the actual possession of any one other than plaintiffs. The answer denies plaintiffs' title and that the land is not in the actual possession of any one else than plaintiffs, alleges that defendant is the owner thereof, that the land is not in possession of any one else than defendant, and that plaintiffs are making some unfounded claim thereto, and asks affirmative relief. The cause being put at issue by a reply, it was referred for the taking of testimony, which was done and reported to the court. The court without hearing argument, and without the consent of the defendant, directed John McQuinn, a surveyor of repute, to go upon the land and make an equitable division of the accretions and a report of his action to the court, which he did, disregarding slightly the testimony and surveys introduced in evidence. The court adopted this re-

port as its findings, and from a decree rendered thereon the defendant appeals.

H. M. Esterly, of Portland, for appellants. Omar C. Spencer, of Portland (Carey & Kerr, of Portland, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). The appointment of McQuinn under the circumstances was irregular, and his report does not pretend to be based upon the testimony, but upon the facts observed by him upon the ground. While in the main it is fair and generally accords with the testimony, we shall treat the case as coming here for trial upon the evidence taken before the referee, and only refer to the report and division made by McQuinn and adopted by the court for convenience in description. The Gillihan claim is an old donation claim located upon the east end of Sauvies Island, which is an island 3 or 4 miles in width and probably from 15 to 18 miles in length. The Willamette river originally debouched into the Columbia through two channels, one about a mile above the most northeasterly corner of Sauvies Island, and the other flowing along the easterly end of the island and separated from the channel first mentioned by Coon Island, which was a long narrow island originally containing about 20 acres, and separated from Sauvies Island by what was known as Coon Island Slough. This slough or channel was originally about 600 feet wide and of equal depth with the more easterly channel, and was navigated by the larger class of vessels. It afforded a means of access to navigation and abundant water frontage for the Gillihan place, and naturally doubled the water frontage of Coon Island, which also had the advantage of frontage on the easterly channel. About 1880 the government built a dyke or bulkhead across the head of Coon Island slough, extending diagonally in a northeasterly direction from a point on the Gillihan place to the southerly end of Coon Island. The dyke had the effect at low water of diverting a large portion of the current of the slough into the easterly channel and of rendering the slough unnavigable at low water, although at higher stages vessels were able to pass through the slough and over the dyke, which was raised to a height of about four feet above low water. The sand immediately began to accumulate below the dyke, and small sand islands or bars began to show themselves above the surface and accretions from both sides of the slough to extend out toward those islands, until they substantially connected Coon Island with Sauvies Island, and the slough was filled up practically to the Columbia river with these accretions. The testimony renders it difficult to ascertain upon which side of the center of the slough the accretions formed soonest. In fact, it seems

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

probable that they formed about as rapidly on one side as on the other. In 1902 a dredger, in deepening the easterly channel, used what had been Coon Island slough as a dumping ground for the sand pumped or dredged by it from the channel. This sand, by reason of the current in the slough having been impeded by the breakwater, was not carried off into the Columbia, but remained in the slough, and so accelerated or hastened the former natural process of filling that it was wholly closed at the upper end to a height of several feet, and was practically filled in to its full length, with the exception of two trifling depressions, where stagnant water probably caused by seepage stood, one near the Sauvies Island side and the other near the Coon Island side of the extinct slough. The testimony as to the division line of the accretions is not clear, and with one exception the witnesses on that subject are parties in interest. Morgan, Gillihan, and Reeder have lived practically all their lives in that vicinity; the two former being riparian owners on the slough. Taking their testimony as a whole, and it seems fair, we are of the opinion that the line surveyed by Bonser, and approximated in the partition recommended by McQuinn, comes as near being the true line of division as can be made under the testimony, except that the testimony does not justify the award to plaintiffs of any accretions north of the claim line dividing the donation land claims of Morgan and Gillihan, prolonged east to the dividing line between Gillihan and Morgan, as indicated by McQuinn's map; and the decree is modified in this respect.

[1] It is also urged that the sands lying in front of the Gillihan place and above the south end of Coon Island, as it now exists, are not accretions, but are an artificial deposit caused by pumping sand from the dredger, and therefore constitute an avulsion. That the operation of the dredger increased the height of the sands already forming, and that these sands working down stream in high water also contributed to fill up Coon Island slough more or less along its entire length, is undoubtedly true. They were pumped or carried from one channel to the other, not with the intent that they should serve as a filler for the westerly channel, but in order to get rid of them in the east channel. Being left subject to the action of the enormous seasonal high waters prevailing at this point during the freshet season of the Columbia and Willamette rivers, a portion was worked down and deposited along the slough, attaching itself either to Sauvies or Coon Island and swelling the accretions

there, while still another portion—and the largest—remained at or near the place deposited and increased the height of the accretions at that point. The result of defendant's theory of the case is that, whereas in 1879 plaintiffs had a navigable river flowing in front of their premises, giving them a mile of navigable water front, equity will give practically all the land that now occupies that water front to their neighbor, who still has a mile of water front and more land than he originally purchased. As against every one but the state, concerning the rights of which we express no opinion, plaintiffs are the owners of any artificial extension of the land caused by dumping or pumping sands against the bank. The law zealously guards the right of a riparian owner to have access to the stream upon which his land is situated; and while the right of the government of the state to artificially extend the banks, as was done in this instance in the interest of commerce, is paramount, we are disposed to hold that, in the absence of any assertion of title or possession by the state or the general government, such extension accrues to the shore owner.

[2] It is also objected that the defendant has been shown to be in possession of the disputed strip; that therefore the court is without jurisdiction; and that plaintiffs must be relegated to their action at law. The evidence shows that several years ago defendant raised a few hills of potatoes on some portion of the alleged accretions, and that at times he has sown some grass seed on other portions and planted some willows to hold the ground from washing away. These improvements were very slight and mostly upon ground which is given to him by the decree. The land was unfenced and depastured by both the stock of plaintiffs and defendant. There was, in fact, no actual possession by any one. In any case, both parties have submitted themselves to the equitable jurisdiction of the court and asked for affirmative relief; and, having chosen to litigate their rights in this forum, we will not seek specious reasons for declining jurisdiction.

[3] As before remarked, the division decreed by the circuit court does not follow exactly the Bonser line; but as it gives the defendant rather more land than a strict adherence to such line would give him, and as plaintiffs have not appealed, we have concluded to affirm it, with the modification herein indicated. Neither party shall recover costs in this court.

MOORE, C. J., and EAKIN and BEAN, JJ., concur.

(74 Or. 468)

**MORGAN v. CIELOHA.**

(Supreme Court of Oregon. Jan. 26, 1915.)

**QUIETING TITLE (§ 54\*)—COSTS—SURVEYS.**

The fees of a surveyor called in by the court, in a suit to quiet title to accretions, to assist in designating on the ground the points imperfectly indicated in the evidence, a survey being necessary to make any division intelligible, will be allowed as costs.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 105; Dec. Dig. § 54.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by W. H. H. Morgan against George W. Cieloah. From the decree, defendant appeals. Modified and affirmed.

H. M. Esterly, of Portland, for appellant. Omar C. Spencer, of Portland (Carey & Kerr, of Portland, on the brief), for respondent.

McBRIDE, J. This is a companion case to Gillihan et al. v. Cieloah, 145 Pac. 1061, just decided. The cases were tried together, and the testimony in the former case was stipulated into this case and is identical. We do not have the advantage of an actual survey upon the ground such as was made by Bonser in the former case; but, taking the whole testimony into consideration, we believe a division responsive to the testimony will be reached by prolonging the line fixed by McQuinn's map as the dividing line between the holdings of the Gillihans and defendant in a direction north 3 degrees east, until it reaches low water on the Columbia river.

An objection in this case and in the case of Gillihan et al. v. Cieloah is made to the allowance of the fee of \$150 to McQuinn as part of the costs of the case; but a survey was absolutely necessary in order to make any division intelligible, and his survey makes any extended survey unnecessary. It is only equitable that he should be paid for his work. While the court had no authority to make him a referee to decide the controversy, we concede that it did have authority to call in mathematical assistance to designate on the ground the points indicated so imperfectly in the evidence, and the item is allowed. Neither party shall recover costs in this court.

The decree as above modified is affirmed.

MOORE, C. J., and EAKIN and BEAN, JJ., concur.

(74 Or. 489)

**In re WEBSTER'S ESTATE.****LUSE et al. v. WEBSTER et al.**

(Supreme Court of Oregon. Feb. 2, 1915.)

**1. EXECUTORS AND ADMINISTRATORS (§ 213\*)—CLAIMS—LIMITATIONS.**

Under L. O. L. § 16, providing that the time of the absence from the state of a debtor shall not be taken as any part of the time limited for the commencement of an action accruing before the departure from the state, and

section 18, declaring that no action for collection of any claim against a decedent's estate may be maintained when no letters of administration issued within six years after the death of decedent, claims are barred where more than six years elapse between the death of a debtor and the issuance of letters of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 749-753; Dec. Dig. § 213.\*]

**2. COURTS (§ 202\*)—PROBATE COURTS—EQUITY PROCEDURE.**

L. O. L. § 1135, providing that the mode of proceeding in the county court sitting in probate is in the nature of that in a suit in equity, makes proceedings in probate a suit in equity.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; Dec. Dig. § 202.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 213\*)—SETTLEMENT OF ESTATES—ESTABLISHMENT OF CLAIMS—LACHES.**

A debtor having property within the state departed therefrom in 1896 or 1897, and resided elsewhere until his death in 1904. In 1912 letters of administration were issued in the state. His creditors had taken no steps to enforce payment of their claims until after the issuance of the letters. *Held*, that the county court sitting in probate properly adjudged that the claims of the creditors were stale, though the statute of limitations was not binding.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 749-753; Dec. Dig. § 213.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 323\*)—SETTLEMENT OF ESTATES—TAXES—ENFORCEMENT.**

Taxes accruing after the death of the owner are enforceable by appropriate proceedings, and will not justify an order for the sale of real estate by an administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1334-1336; Dec. Dig. § 323.\*]

In Banc. Appeal from Circuit Court, Coos County; Robert G. Morrow, Judge.

Proceedings by Lillian Luse, administratrix of W. G. Webster, deceased, and another, against Alma Webster and others, for the sale of real estate to pay debts and expenses of administration. From a decree conditionally dismissing the petition, the administratrix appeals. Affirmed.

On February 20, 1892, W. G. Webster, then a resident of Coos county, Or., gave his note to George S. Blood for \$100, due one day after date, with interest at 10 per cent. per annum. This was unsecured, and the interest was afterwards paid to February 2, 1895; no other payments having been made. On April 8, 1892, Webster gave his note and mortgage securing the same to W. A. Luse for \$1,000 due in four months, with interest at 8 per cent. per annum. It is stated in the pleadings that on this note and mortgage only the sum of \$216 has been paid, and that prior to February, 1895. It appears that Webster left Oregon in 1896 or 1897, and went to reside in Arizona, where he died October 7, 1904. On April 23, 1912, letters of administration were issued upon his estate in Coos county to Lillian Luse. On June 18,

1913, she petitioned the court appointing her for leave to sell certain realty of the deceased in that county for the satisfaction of claims, reciting those already mentioned, together with expenses of administration estimated at \$1,000, unpaid taxes due Coos county, Or., reckoned at \$329.49, and unpaid street assessments calculated at \$400.

It appears that W. G. Webster left a widow, Annie Webster, and, as heirs, his two sons, W. J. Webster, since deceased, and Walter H. Webster. The widow and Walter Webster conveyed away their interest in the land in question, to which by mesne conveyances the defendant Henry Sengstacken Company succeeded. W. J. Webster, the other son, died, leaving the defendant Alma Webster as his sole heir. The Sengstacken Company and Alma Webster, objecting to the petition for an order to sell the land, allege that the decedent died on October 7, 1904; that no petition for the administration of the estate was made or filed, and that no letters of administration were issued until April 23, 1912, as stated, that being more than six years subsequent to the date of the decedent's death. They urge that the only claims presented to the administrator were the Luse note and mortgage and the Blood note, and that they are barred by the statute of limitations. They further offer to pay to the administratrix such sum of money as the court shall adjudge necessary to pay the costs of administration. The replies challenge the answers in material particulars, and state, in substance, that the Luse note and mortgage were given in part payment of the purchase price of the premises in dispute; that afterwards Webster departed from the state, and at all times remained absent therefrom; and that no payments have been made on the note beyond the aggregate of \$216.22, the last payment being made April 13, 1895. The county court heard the matter on the issues involved, entered a decree disallowing the claims of Blood and Luse against the estate, and dismissed the petition on condition that the costs of the administration should be paid by the parties interested therein on or before October 6, 1913. The circuit court on appeal by the administratrix reached substantially the same conclusion fixing the expense of administration at the sum of \$450, which the defendant Alma Webster paid into court for that purpose. The administratrix appealed.

J. W. Bennett, Bennett Swanton, and Tom T. Bennett, all of Marshfield, for appellant. W. U. Douglas, of Marshfield, for respondents.

BURNETT, J. (after stating the facts as above). [1] There is no substantial dispute about the facts involved in this litigation. The principal question to be determined is whether the circuit and county courts were right in disregarding the claims of Luse and Blood. Section 18, L. O. L., reads thus:

"If, when the cause of action shall accrue against any person who shall be out of the

state or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the state, or the time of his concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

Section 18, L. O. L., provides as follows:

"If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his personal representatives after the expiration of the time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent, unless begun before the expiration of six months after the taking effect of this act."

It is plain that if Webster had not died and had never returned to the state of Oregon the statute of limitations would not yet have run against the notes in question; but, his death having been admitted, and it having been shown that it occurred on October 7, 1904, the situation is controlled by the last clause of section 18, L. O. L., saying:

"But no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent, unless begun before the expiration of six months after the taking effect of this act."

That excerpt was ingrafted upon section 18 as an amendment by the legislative assembly in 1907. More than six years having elapsed between the death of the decedent on October 7, 1904, and April 23, 1912, when the letters of administration were issued, the debts to Luse and Blood were barred under the conditions of section 18 just quoted. It is stated in emphatic terms in section 1241, L. O. L., that:

"No claim shall be allowed by the executor or administrator or the county court which is barred by the statute of limitations."

As a matter of law, this disposes of the Luse and Blood claims adversely to them.

[2] The administratrix apparently concedes that this would be the case if she had been sued in an action at law to recover the money due on the claims, or if a suit had been instituted against her to foreclose the Luse mortgage. She seeks, however, to avoid this conclusion by saying, in effect, that her operations in the county court were neither an action at law nor a suit in equity, but a mere proceeding which is not controlled by the statute of limitations. We read, however, in section 1135, L. O. L.:

"There are no particular pleadings or forms thereof in the county court, when exercising the

jurisdiction of probate matters \* \* \* other than as provided in this title. The mode of proceeding is in the nature of that in a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party or the order of the court. The court exercises its powers by means of—(1) A citation to the party; (2) an affidavit or the verified petition or statement of a party; (3) the subpoena to a witness; (4) orders and decrees; (5) an execution or warrant to enforce them."

The statute thus makes the proceedings in the county court sitting in probate substantially a suit in equity, and while, as a court of chancery, it is not strictly bound by the statute of limitations, except, on the question here involved, as stated in section 1241, L. O. L., still it proceeds in analogy to the same, and will withhold its aid to enforce a stale claim.

[3] The utmost that could be accomplished in any event in this litigation, or, for that matter, in any other against a nonresident, would be to subject to the payment of these debts the property belonging to the debtor within this state. That could have been effected, and was all that could have been done, at any time after the departure of Webster from the state in 1896 or 1897. Whether proceedings were instituted before or after his death, the end to be attained is the same. Independent of the statute, therefore, the county court was right in its action disregarding the Blood and Luse claims on the ground that they were stale under all the circumstances, for at the least calculation the holders of those demands allowed 15 years to pass from the departure of Webster to

the date of issuing the letters of administration without taking any steps whatever to enforce payment. Leaving the state law of limitations out of consideration, the county court, exercising its equity powers, was clearly within the bounds of its authority when it ignored these notes as stale. The principle is laid down by Mr. Justice Moore in *Loomis v. Rosenthal*, 34 Or. 585, 57 Pac. 55, the syllabus on this point reading thus:

"While the statute of limitations is not a defense in equity, still the claimant must have exercised reasonable diligence in asserting his claim after ascertaining the fraud complained of, or after learning of facts which would put a person of ordinary intelligence on inquiry."

Other authorities in this state are *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452, and *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158. Similar doctrine is enunciated in *Graham v. Brock*, 212 Ill. 579, 72 N. E. 825, 103 Am. St. Rep. 248; *Goodrum v. Mitchell*, 236 Ill. 183, 86 N. E. 217; *Cohen v. Tuff*, (Del.) 86 Atl. 833; *Matthews v. Peterson*, 150 N. C. 132, 63 S. E. 722.

[4] So far as the taxes and street improvements are concerned, they appear to have accrued long after the death of Webster, and are enforceable by appropriate proceedings other than administration. They do not necessarily concern the administratrix, and no one can be injured by the treatment these claims received in this proceeding. Otherwise an estate might be kept open indefinitely, for it is morally certain that taxes will always accrue.

The decrees complained of were just and equitable, and are therefore affirmed.

(74 Or. 496)

## VASQUEZ v. PETTIT.

(Supreme Court of Oregon. Feb. 2, 1915.)

## 1. RELEASE (§ 17\*)—FRAUD—REPRESENTATIONS OF MATERIAL FACTS.

A representation by an employer, inducing an employé to release his claim for a personal injury, that medical and hospital bills would be paid by an insurance company, was not a representation of a material fact, and the employé could not complain so long as the bills were in fact paid.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.\*]

## 2. TRIAL (§§ 108½, 110\*)—MISCONDUCT OF COUNSEL.

The action of the attorney for plaintiff suing for a personal injury in stating on the examination of jurors on their voir dire that the damages recoverable would be paid by an insurance company, and in compelling defendant on cross-examination to state that sums paid by him to plaintiff for a release had been repaid by an insurance company, was reversible error as rendering the jury careless as to the amount of the verdict on the theory that defendant was protected from liability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. §§ 108½, 110.\*]

## 3. PLEADING (§ 183\*)—ISSUES—DENIAL.

Where an employer, in an action by an employé for personal injuries, relied on a release, allegations of the reply that the employer disregarded his promise to employ the employé, forming a part of the consideration of the release, and discharged the employé, were allegations of new matter, and under L. O. L. § 95, controverted as on direct denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 389-396; Dec. Dig. § 183.\*]

## 4. RELEASE (§ 13\*)—FAILURE OF CONSIDERATION—EFFECT.

Where an employer, in an action for injury by an employé, relied on a release from liability, the employé alleging and proving that the promise by the employer to employ the employé, forming a part of the consideration for the release, had been breached, was not confined to an action for the breach, but could sue for the injury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 21-27, 29; Dec. Dig. § 13.\*]

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by L. Vasquez against J. Pettit, doing business under the firm name and style of Pettit Feather & Bedding Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action by L. Vasquez against J. Pettit, doing business as the Pettit Feather & Bedding Company, to recover damages for a personal injury. The complaint charges in effect that on May 1, 1911, the plaintiff was engaged in operating for the defendant a carding machine, used in picking hair with which to fill mattresses, and while thus employed his right hand was caught between cylinders of the machinery and so injured as to necessitate amputation. The negligence alleged is a failure properly to guard the machine, or to provide it with a belt shifter, or to inspect the instrumentality, or to instruct the plaintiff, or to have prompt commu-

nication between the operator of the machine and the engineer in charge of the motive power. The answer denied the negligence alleged, and for further defenses averred: (1) That the plaintiff knew the danger incident to operating the machine and assumed the risk; (2) that aside from his carelessness the injury resulted from the negligence of fellow servants; (3) that the hurt was caused by the plaintiff's carelessness whereby the accident was unavoidable; and (4) that the defendant on July 22, 1911, settled and compromised with the plaintiff, giving him the sum of \$535 and also assuming the payment of the surgeon's charges and the hospital expenses incurred in caring for the plaintiff, who upon the receipt of the money executed to the defendant a release discharging him from all liability by reason of the accident and injury. The averments of new matter in the answer were put in issue by the reply, which further alleged, in substance, that at the time stated the plaintiff received \$400 from the defendant, who then informed him that an insurance company would pay such charges of the doctor and bills at the hospital; that the defendant thereupon requested the plaintiff to sign an instrument in order to show the receipt of the money, so as to prove that the sum paid had been disbursed, saying that the amount was intended to cover wages for the past, and for a reasonable future time; that the defendant then promised and agreed with the plaintiff that he could work for the company as long as it continued in business; that if such writing is a release the plaintiff was induced to sign it by the defendant's fraudulent representations to him that it was only a receipt; that such statements were false, and so known by the defendant when he uttered them, and they were made for the purpose of inducing the plaintiff to sign the writing; that he is a Spaniard and unable, to any extent, to speak, read, or write the English, in which language the instrument was written, and no copy thereof was delivered to him; that desiring to continue in the work in which he was engaged when hurt, and realizing the difficulty which he would encounter in securing other employment by reason of the loss of his hand, and relying upon the defendant's representations and agreement, he signed the writing, supposing it was a receipt; that he did not intend to sign a release and did not believe he had done so; that he never received any money in compensation for his injuries and suffering; and that since he was hurt he has endeavored to render valuable services for the defendant, who, disregarding his promise and agreement, discharged the plaintiff and refused longer to employ him. Based upon these issues, a trial was had resulting in a judgment for the plaintiff in the sum of \$4,000, and the defendant appeals.

F. S. Senn, of Portland (Senn, Ekwall & Recken and Moser & McCue, all of Portland, on the brief), for appellant. W. E. Farrell, of Portland (Davis & Farrell and Wilber Henderson, all of Portland, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). [1] No motion appears to have been made to strike from the reply the averment as to the defendant's alleged representations with respect to the payment of the medical and hospital bills by an insurance company. It will be remembered that the answer states the defendant assumed the payment of these obligations. Whether or not he informed the plaintiff that an insurance company would advance or pay the money for that purpose is unimportant, for the source from which such debts were to have been paid was not the statement of any material fact, and it was unnecessary to move to strike the averment from the reply.

[2] The plaintiff's counsel in examining prospective jurors on their voir dire was permitted, over objection and exception, to state that the damages which their client had suffered were to be paid by money furnished by an insurance company and each person, when he entered the jury box, was asked if he was acquainted with the agents in Portland, Or., of such company. The defendant, as a witness in his own behalf, testified that he had paid the plaintiff, as wages, from May 1, 1911, the time he was hurt, to July 22d of that year, when he resumed work, \$135; that as a compromise and settlement of the damages which had been suffered he had given him \$400; and for his surgical operation, medical attention, hospital dues, etc., he had paid \$268.85, making \$803.85. On cross-examination the defendant was compelled, over objection and exception, to state that such sum had been repaid him by an insurance company under a policy which protected his business against liability for accidents to employes. It is contended that errors were committed in these particulars.

In the trial of this cause there appears to have been an intent at every convenient opportunity to establish the fact that the defendant was protected from liability to respond in damages for injuries to his employes by a policy of indemnity insurance. As such proof, in personal injury cases, might have a tendency to render the jurors careless as to the amount of their verdict, the rule is universal that a willful attempt to establish such fact constitutes reversible error. *Tuohy v. Columbia Steel Co.*, 61 Or. 527, 122 Pac. 36; *Putnam v. Pacific Monthly*

*Co.*, 68 Or. 36, 130 Pac. 986, 136 Pac. 835, 45 L. R. A. (N. S.) 338; *Cameron v. Pacific Lime & Gypsum Co.*, 144 Pac. 446.

The purpose in introducing the testimony complained of comes within the specification named, and, an error having been committed as alleged, it follows that the judgment must be reversed.

[3,4] In view of the conclusion thus reached, it is deemed important to consider another feature of the case. The testimony of the plaintiff, as given by an interpreter, is to the effect that he had been employed by the defendant several years and placed implicit confidence in all declarations that he made; that after the injury the defendant promised to give him employment in the factory as long as he continued to operate it; and that, relying upon such promises, he signed the writing supposing it was a receipt for the money and to show the insurance company what sum he had received. Julius Gonzales, the plaintiff's brother-in-law, interpreting his answer to the question, "There was something said about a job, too, when he signed it, wasn't there?" replied:

"He said that after he signed that paper, why, he told Mr. Pettit he wanted a recommendation for a life job, and Mr. Pettit said, 'No, I will give him a job that will last him for fifteen years for all he knows, or as long as he remained in the business.'"

This action was commenced May 1, 1913, just two years after the injury, and during most of the interim the plaintiff continued in the defendant's employ. It will be kept in mind that the reply avers that the defendant, disregarding his promise, discharged the plaintiff and refused longer to employ him. This allegation is deemed to be controverted by the defendant as upon a direct denial. L. O. L. § 95. At the trial herein the defendant's counsel did not concede that the alleged promise to employ the plaintiff was ever made, or that the service which he rendered after the injury formed any part of the consideration for the execution of the release. In this state of the case it would be improper summarily to dismiss this action and to hold that for a failure of a part of the consideration the plaintiff's proper remedy was an action to recover damages for a breach of the agreement, and to turn him out of court because the money which he received had not been returned or offered to be repaid before this action was commenced.

The cause will therefore be remanded in order to form new issues or for a trial upon the pleadings already filed as the parties and the court may determine.

McBRIDE and BENSON, JJ., concur. BURNETT, J., concurring in the result.

(74 Or. 502)

**LONG v. PACIFIC RY. & NAV. CO.**

(Supreme Court of Oregon. Feb. 2, 1915.)

**1. RAILROADS (§ 358\*)—LIABILITY FOR INJURIES TO LICENSEE.**

Where the use of a railroad right of way as a walkway for foot travel had not continued long enough for the public to acquire a right by prescription to use the right of way for that purpose, a person so using it was a bare licensee, to whom the company owed no duty beyond that of abstaining from willful injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.\*]

**2. RAILROADS (§ 390\*)—LIABILITY FOR INJURIES—LAST CLEAR CHANCE.**

The last clear chance doctrine applies only to a perceived peril, and could not be invoked on behalf of a licensee, where it was sought to base a right to recover on the failure to keep a proper lookout, and not on the failure to warn him or to stop the train after those in charge of the train saw him, especially where it did not appear that it was possible to stop the train within the short intervening distance, had his presence been observed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.\*]

On petition for rehearing. Former opinion adhered to.

For former opinion, see 144 Pac. 462.

**McBRIDE, J.** On re-examination of this case upon the petition for rehearing, we are still of the opinion that the facts are as stated by Mr. Justice MOORE, and that his conclusions therefrom are fully justified. Plaintiff's evidence tended to show that the gravel train which caused the injury was backing down the track at the probable rate of from 15 to 20 miles an hour, and it may be assumed, for the purposes of this case, that this speed was greater than prudence allowed in passing the mill and other buildings constituting the little community where the deceased resided. It may also be conceded that plaintiff's contention that no sufficient lookout was maintained to discover persons walking upon the track is true, but the fact remains that deceased stepped suddenly in front of the moving train when it was approximately only 49 feet distant, and had taken three or four steps along the track with his back toward the train when he was struck and killed. It is idle to say that he had no warning of the danger of his situation. A railroad track is always a place of danger. Every rail and every tie is shouting danger, and it is the duty of a person to look if he is in a situation to look, and to listen if he is in a situation to listen. A single glance down the track would have warned deceased of the impending danger, even if the winds prevailing might have prevented his hearing the approach of the train. Unfortunately he was heedless and failed to exercise any precaution for his own safety. It is fully demonstrated in the original opinion that deceased was not excused from the duty of taking these precautions by the fact that another train had just passed going in the

same direction as the one which struck him, and further discussion of that subject is unnecessary.

[1, 2] The contributory negligence of deceased is so clearly established by plaintiff's own evidence as to be beyond question; and, unless the doctrine of the "last clear chance" can be invoked here, there was nothing to submit to the jury, and it was the duty of the court to have granted a nonsuit. The evidence for plaintiff in the case at bar shows that the right of way of the defendant was used by residents of that vicinity as a walkway for foot travel. How long this use had prevailed does not appear. Certainly it had not been continued long enough for the public to acquire a right by prescription to use the right of way for that purpose. It is a matter of common knowledge that such rights of way and the tracks are commonly used by foot passengers wherever they are more convenient than the ways constructed by public authorities. It goes without saying that such use is not desired or encouraged by the railway authorities, but merely suffered because of the difficulties of preventing it. Such use is never of any advantage to the transportation companies, but is a disadvantage and frequently a source of danger and annoyance; and at best, under the testimony, the deceased was a bare licensee to whom the company owed no duty beyond that of abstaining from any willful injury. *Watson v. Manitou & Pike's Peak Ry. Co.*, 41 Colo. 138, 92 Pac. 17, 17 L. R. A. (N. S.) 916; *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063; *Beehler v. Daniels*, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; *Schreiner v. Great N. Ry. Co.*, 86 Minn. 245, 90 N. W. 400, 58 L. R. A. 75. The doctrine of the "last clear chance" cannot be invoked on behalf of plaintiff. This doctrine applies only to a perceived peril. It is remarked by Mr. Justice Bean in the case of *Smith v. Southern Pac. Co.*, 58 Or. 22, 113 Pac. 41, Ann. Cas. 1913A, 434:

"Where plaintiff negligently assumed a position of danger in such a degree, and so contributed to his hurt as to leave him without right of recovery for any primary negligence of the other party, he may nevertheless recover, if the person charged with the wrong or injury became aware of the peril in time to avoid, by the proper use of all the means at his command, injuring him, and listlessly and inadvertently or negligently failed to resort to such means." *Stewart v. P. R. L. & P. Co.*, 58 Or. 377, 114 Pac. 936; *Scholl v. Belcher*, 63 Or. 310, 127 Pac. 968; *Rowe v. So. Cal. Ry.*, 4 Cal. App. 1, 87 Pac. 220; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Black v. N. Y. Ry. Co.*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148, 9 Ann. Cas. 435.

The case at bar is based upon the assumption, not that defendant saw deceased and negligently failed to warn him or stop the train, but rather that the persons in charge of the train negligently failed to keep a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



proper lookout and ran over deceased without discovering him; and there is no evidence indicating that it was possible for defendant to have stopped its train within the 49 feet that intervened between it and deceased, when he suddenly appeared on the track, even if his presence there had been observed. While the accident was deplorable in its consequences, we cannot avoid the conclusion that the negligence of deceased contributed to it to such an extent as to bar a recovery.

We adhere to the original opinion.

(74 Or. 517)

### GERLINGER v. FRANK.

(Supreme Court of Oregon. Feb. 2, 1915.)

#### 1. WITNESSES (§ 21\*)—CONDUCT OF JUDGE—PUNISHING WITNESS DURING TRIAL.

The court may, during the trial, punish a witness who refuses to testify, stating that he does not remember, when it is obvious that his lack of memory is a mere pretense.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

#### 2. APPEAL AND ERROR (§ 671\*)—QUESTIONS REVIEWABLE—EXCEPTIONS—ABSTRACT OF RECORD.

An exception omitted from the abstract of record will not be discussed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

#### 3. WITNESSES (§ 219\*)—PRIVILEGED COMMUNICATIONS—WAIVER.

Under L. O. L. § 734, providing that, where a party offers himself as a witness, he thereby consents to the examination of his attorney on the same subject, a party who testifies as a witness in his own behalf as to a particular subject thereby removes the ban of privilege of his attorney from testifying on the same subject.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.\*]

#### 4. APPEAL AND ERROR (§ 971\*)—DISCRETION OF TRIAL COURT—RECEPTION OF EVIDENCE.

Under L. O. L. § 862, providing that, after the examination of a witness is concluded, the witness shall not be recalled without leave of court, and that leave may be granted or withheld in the exercise of discretion, the action of the court in permitting defendant, while introducing his case, to recall plaintiff for further cross-examination, will not be disturbed, unless the court abused its discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\*]

#### 5. WITNESSES (§ 349\*)—CROSS-EXAMINATION—CHARACTER OF WITNESS.

A party may, subject to the discretion of the court, cross-examine plaintiff to show her character and standing to affect her credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.\*]

#### 6. BREACH OF MARRIAGE PROMISE (§ 18\*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

A defendant in an action for breach of marriage promise may, under the general issue, show the bad character of plaintiff for chastity, as bearing on the damages, though the bad character of the woman, if known, is not a defense to her action for a breach of marriage promise.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 21-25, 48; Dec. Dig. § 18.\*]

#### 7. BREACH OF MARRIAGE PROMISE (§ 31\*)—DAMAGES—AMOUNT AWARDED—DISCRETION OF JURY.

The amount of damages for breach of marriage promise is within the sound discretion of the jury within the limits of the testimony, and an award of nominal damages will not be disturbed merely on the ground that defendant was a rich man.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. § 47; Dec. Dig. § 31.\*]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Gertrude Gerlinger against Lloyd Frank. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

In substance, the plaintiff alleges that during the month of January, 1913, the plaintiff and the defendant mutually promised to marry each other; that afterwards, about the month of March, the defendant absolutely refused to carry out the contract or to marry the plaintiff, and that by reason of the breach by defendant of such contract the plaintiff has been greatly humiliated, has suffered great mental pain and anguish, and her affections have been deeply injured to her damage in the sum of \$50,000. She says also, in substance, that the defendant is wealthy, and had he carried out the agreement to marry the plaintiff, her station in life would have been greatly improved, and she would have profited largely by such marriage. The answer merely traversed the allegations of the complaint. A jury trial resulted in a verdict and judgment in favor of the plaintiff for \$1. She appeals.

A. I. Moulton and G. E. Hamaker, both of Portland, for appellant. B. E. Haney and Chas. H. Carey, both of Portland (Joseph & Haney, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). At the trial the plaintiff herself was a witness, and gave testimony in support of her cause of action as narrated in her complaint. The defendant cross-examined her regarding her life and some of her transactions in Alabama about the year 1905 in matters affecting her chastity and purity at that time, including a suit instituted by her against a man for her seduction. Her counsel objected to this, on the ground that it was not proper cross-examination, irrelevant, and immaterial, and proper only as a matter of defense. A second exception is founded upon the fact that after the plaintiff had rested her case, and part of the testimony for the defendant had been put in, the court allowed the defendant to recall the plaintiff for further cross-examination. The record discloses that at the close of her examination by the defendant, while she was on the stand in support of her case, counsel for defendant reserved the right to further cross-examine

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

her. On this renewed interrogation by the defense she was questioned at length regarding sundry meretricious relations she sustained with different men both before and after the commencement of this action, all over the objection of the plaintiff that it was not proper cross-examination, irrelevant, incompetent, and immaterial.

[1] In passing, we note exception No. 4, as it appears in the abstract of record, to the effect that, while a certain witness was on the stand on behalf of the defendant, the court committed him to jail because with apparent contumacy, he refused to testify concerning occurrences which happened between him and the plaintiff only a few days before, by persistently and continuously saying that he did not recollect. No exception to this action of the court appears either in the abstract of record or bill of exceptions. Besides this, the court had undoubted authority to punish the witness promptly for refusing to testify when it was apparent that his forgetfulness was purely sham. The court was not required to wait until the conclusion of the trial before calling the offending witness to account.

[2, 3] The fifth exception noted in the abstract is founded upon the action of the court in allowing a detective to testify to the conduct of the plaintiff in her home, since the commencement of the action, with the witness who was punished for contempt. Exception No. 6 relates to the evidence of one Alfred Eubank, who was allowed to testify as to his relations and acquaintance with the plaintiff some ten years before the filing of the complaint, and likewise to state that her general reputation for truth was bad. Similar objections under exceptions Nos. 8, 9, and 11 were taken to the testimony of witnesses concerning her reputation, all to the effect that the matter sought to be elicited was too remote. Exception No. 7 is omitted from the abstract of record and on that account is not discussed. Exception No. 10 relates to the deposition of J. H. Ward, an attorney, who was allowed to narrate the effort of the plaintiff to induce him to commence an action in Alabama on her behalf against one Eubank for her seduction, and to state that he declined to take her case. The objection to this testimony was on the ground that it called for privileged communications made by the plaintiff to her attorney, and because it was too remote. So far as the privileged communications are concerned, the objection may be dismissed with the observation that the plaintiff herself was a witness, and was interrogated about the very subject mentioned and testified about it. This fact removes the ban of privilege, for it is said in section 734, L. O. L.:

"If a party to the action, suit, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject. \* \* \*

[4] The controlling questions to be determined are two: (1) Whether the court erred in allowing the plaintiff to be recalled for cross-examination; and (2) whether it was permissible to show either by cross-examination or by other testimony under the general issue that the plaintiff had sustained illicit relations with other men as long ago as ten years before the trial, or since the action was commenced. As to the right to recall a witness for further cross-examination it is stated in section 862, L. O. L.:

"A witness once examined shall not be re-examined as to the same matter without leave of the court; but he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examinations on both sides are concluded, the witness shall not be recalled without leave of the court. Leave is granted or withheld in the exercise of a sound discretion."

It is not apparent that the court abused its discretion in allowing the witness to be recalled, especially since counsel for the defendant gave notice at the time of his reservation of the right to recall her. As to the range of examination it is clearly within the sound discretion of the court. In an exhaustive opinion in *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8, Mr. Justice Lord laid down the rule to this effect:

"Subject to the sound discretion of the court, a witness may be compelled to answer any question which tends to test his credibility, or to shake his credit by injuring his character, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself; except only that he may claim his privilege and refuse to answer a question which tends to expose him to a criminal charge."

See, also, *Redsecker v. Wade*, 69 Or. 153, 138 Pac. 485.

[5] Considered as a witness only, subject to the discretion of the court, the jury had a right to know the character and standing of the person testifying. A most corrupt and unworthy person may make a fair appearance in direct examination upon a witness stand, and it would be a harsh rule that would exclude the opposing party from revealing by cross-examination the actual value of the declarations of such a witness.

[6] Besides all this, the plaintiff was claiming damages on account of being greatly humiliated, suffering great mental pain and anguish, and having her affections deeply injured. It is a matter of common sense that a pure-minded, virtuous woman will suffer greater damage over the disappointment of her affections than a common bawd would experience in the refusal of her paramour to marry her. The testimony was applicable to the general issue on this subject. The plaintiff claimed \$50,000 damages. This averment was directly traversed, and the question was: What was the amount to be adjudged as recompense for the injury alleged? Any testimony, therefore, throwing light upon the person supposed to be damaged was pertinent to this general issue. That cannot be injured which

is already corrupt; that cannot be spoiled which has been destroyed; and that cannot be damaged which is already dilapidated beyond repair. The antithesis between a pure, good, and virtuous woman and a blasé demirep is as marked as the difference between the songs of the ransomed and the wall of the damned. Hence, in order to enable the jury to translate in sordid dollars and cents the damage to be allowed in a case like the present, a very wide range should be given to the examination under the general issue as to the actual personage claiming damage. How the plaintiff should be classified in the wide range between the extremes of virtue and vice was a question exclusively for the jury when enlightened by testimony affecting her character favorably or unfavorably.

It may be well said, based upon the citations presented by the plaintiff, that if a man, knowing the character of the woman to whom he proposes marriage, violates the contract, her unchastity will furnish no defense, because under the circumstances of his knowledge of her shortcomings he cannot plead it as a bar to the action. The precedents cited would be applicable if an attempt had been made by affirmative matter to interpose a plea in bar to the plaintiff's cause of action. That is not the question here. The issue involved on that point is the amount of damages required to recompense the injury which the plaintiff has received,

and on the general issue it is admissible to show whether the plaintiff is a person who would likely have experienced such an injury as would justify more than nominal damages.

[7] Complaint was made at the argument that, considering the wealth of the defendant, more than nominal damages should have been awarded, on the ground that a marriage with a man as rich as he would have been of greater pecuniary advantage to the plaintiff. In the wide range of estimation allowed to a jury within similar limits of testimony, the amount of damage is one of sound discretion with the jurors. They may have considered that a marriage with such a man as the plaintiff describes the defendant to be would have been a veritable hell, instead of an advantage to the plaintiff, even under the circumstances mentioned, and that she lost but little by being rid of such an untoward alliance. The following citations are applicable to the point in issue: *Van Storch v. Griffin*, 71 Pa. 240; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Burnett v. Simpkins*, 24 Ill. 264; *Tompkins v. Wadley*, 3 *Thomp. & C. (N. Y.)* 424; *Denslow v. Van Horn*, 16 Iowa, 476; *Willard v. Stone*, 7 *Cow. (N. Y.)* 22, 17 *Am. Dec.* 496; *Johnson v. Caulkins*, 1 *Johns. Cas. (N. Y.)* 116, 1 *Am. Dec.* 102.

Finding no error, the judgment is affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(74 Or. 535)

**HAYDEN et al. v. CITY OF ASTORIA.**

(Supreme Court of Oregon. Feb. 2, 1915.)

**1. CONTRACTS (§ 246\*)—CONSTRUCTION—IMPLIED CONTRACT.**

Where the original contract has been deviated from in so many matters that it cannot be regarded as controlling, it must be considered as abrogated, and the parties relegated to their implied rights, for a subsequent departure from the terms of a written contract by the parties, mutually acquiesced in abrogates it to that extent.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1181-1138; Dec. Dig. § 246.\*]

**2. CONTRACTS (§ 284\*)—CONSTRUCTION—POWER OF ENGINEER.**

Where a contract for the construction of a water reservoir, etc., provided that the engineer should have full power to supervise and manage the contract, and that the estimates were only approximate and might be changed, the engineer cannot exercise his power so as to retard the work without rendering the municipality liable, nor can he increase the estimates from 150 per cent. to 500 per cent. without changing the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.\*]

**3. PLEADING (§ 367\*)—ITEMIZED STATEMENT—ACQUIESCENCE.**

Where on defendant's motion plaintiff filed an itemized statement in an action on account, defendant, if deeming the statement insufficient, should move to make it more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

**4. PLEADING (§ 367\*)—MOTION FOR ITEMIZED STATEMENT—ACQUIESCENCE.**

In an action on an implied contract, where defendant did not object to the itemized statement filed by plaintiff in response to its motion, defendant's motion to make the complaint more definite and certain by changing the nature of the action should be denied; being inconsistent with its tacit approval of the statement.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

**5. APPEAL AND ERROR (§ 1177\*)—DETERMINATION.**

While Const. art. 7, § 3, as amended by Laws 1911, p. 7, contemplates the settlement of a cause on one appeal, the case must be remanded where the record is too incomplete to permit the appellate court to render final judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.\*]

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Wilbur Hayden, Hoyt Hayden, T. B. Bidwell, and J. F. Meager, partners as Bidwell-Hayden & Co., against the City of Astoria, a municipal corporation. From a judgment dismissing the action, plaintiffs appeal. Reversed and remanded, with directions.

This is an appeal by the plaintiffs from an order of the circuit court striking their complaint from the record and dismissing the action. On August 22, 1911, a contract was entered into between Bidwell-Hayden & Co. and the city of Astoria, Or., whereby

the plaintiffs agreed to construct a storage reservoir dam, and clear a reservoir site on Bear creek by October 1, 1912, in accordance with the specifications attached and plans explanatory thereof which had been made or might thereafter be made from time to time by the engineer, and according to the written and verbal directions of the engineer in charge of the work as the same progressed. The contract was upon the unit basis: For clearing 25 acres for reservoir site, \$10,000; 1,900 cubic yards earth excavation at 50 cents, \$950; 550 cubic yards rock excavation at \$2, \$1,100; 6,600 cubic yards concrete, furnishing and placing, at \$8.88, \$58,608; and sluice gates, specials, pipes, steps, handrails, etc., for the total sum of \$64,889.90.

The plaintiffs set out at great length in their complaint that the construction of the dam and work, with the exception of clearing the reservoir site, was so changed that the original contract was modified and abandoned, and bring action for the reasonable value of the construction of the dam, etc. They aver that the plans purported to show the character of the dam to be constructed; that defendant required them to proceed with the exploration of the ground in a slow and costly manner in order that it might determine the nature of the ground and where a suitable foundation might be found, refusing to give the plaintiffs plans, directions, or information as to the extent of the excavation required, thus forcing them to obtain the same and determine the nature and quality of the ground at their own expense, causing delay and expense, and preventing the doing of the work on time or in the manner set forth in the original contract; that 4,325 cubic yards of rock were removed from the excavation instead of 550; that the excavation for the dam was thereby increased about 155 per cent.; that the defendant changed the type of the dam and the contemplated location; that during the placing of the concrete the engineers arbitrarily changed the proportions of cement, sand, and stone used in making the concrete so as to require a more costly mixture than specified; that the specifications called for 6,600 yards of concrete, whereas the amount was finally placed at 8,703; that the concrete cost \$15 per yard, instead of \$8.88, making a total of \$130,575, whereas under the contract it would have cost about \$77,000; that, owing to the work having to be done in the winter season, there were washouts and slides which retarded the operation, causing heavy expense. It was further contended that the original plan furnished by the defendant shows one cut-off wall four feet wide and four feet deep, filled with concrete, running parallel to the storage dam and serving as a part of the foundation for the same; that this was excavated accord-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing to the original plans and the advice of the engineer; that after a wait of several days during the month of August, and after consulting with another engineer, those in charge changed the plans of the cut-off wall by requiring it to be made four feet wide and ten feet deep, and added two additional cut-off walls parallel to the dam, each being four feet wide and ten feet deep, neither of which was shown on the original plans; that this increased the work of excavating for and concreting the cut-off walls approximately 500 per cent. over the amount indicated in the original specifications, which added greatly to the cost, hindered and interfered with the works of plaintiffs, prevented them from completing the work in the time specified, and made it necessary to do a part thereof in the winter season. Various other changes and additions were made, of which the above are samples.

According to the plaintiffs' complaint, the dam was completed June 22, 1913. All the work was done by that date and thereafter accepted by the defendant municipality, and was a first-class job. The plaintiffs assert that the changes and the departures from the original plans and specifications, the incompetency of the engineers, and the delays which added to the expense of the work, together with all the other matters herein contained, constituted a material modification, departure, and abandonment of the original contract; that the prices mentioned therein cannot be traced to or applied to the work, labor, and materials furnished, except that set forth for clearing the reservoir site, which is admitted as proper compensation for that part of the work; that all other work, labor, and services rendered and materials furnished on the dam and excavation, the placing of the concrete, etc., are of the reasonable value of \$143,105.58, of which \$82,473.11 has been paid, leaving a balance due for this part of the work of \$60,632.47, which with the sum of \$1,034, balance for clearing reservoir site, makes the total sum due \$61,666.47.

The defendant's counsel served notice upon the plaintiffs demanding an itemized statement of the account sued upon, and in compliance therewith the plaintiffs filed an itemized statement of the cost of the work set forth in the complaint "Showing Expenditures, Building Dam." Counsel for defendant then filed a motion to make the complaint more definite and certain, of the following purport:

"That the plaintiffs be required to make the allegations set forth in paragraph 13 of said complaint more definite and certain in the following particulars, namely: That plaintiffs be required to set forth in said complaint the actual number of days and hours, in other words, the actual time, in which plaintiffs were delayed in their work therein described, because of the fact as therein alleged that Lars Bergavik came upon said work therein described only about once a week; \* \* \* that said plaintiffs be required to set forth and allege the actual amount of dam-

ages that the plaintiffs claim they sustained by reason of the alleged differences of opinion between Bergavik and Forsythe (the engineers)."

In about 20 specific paragraphs the plaintiffs were required to set forth specifically the amount of damages they claimed they suffered by reason of the matters alleged in the several paragraphs of the complaint. Pursuant to the order of the court, the plaintiffs filed an amended complaint, in which they alleged, in substance, that the several causes of the delay, such as the disagreement of the engineers and the delay in furnishing the plans or directions for the work, were so intermingled that it was impossible to state separately what delay each caused; that all the defects and breaches of the contract on the part of the defendant, including the failure of Bergavik to appear upon the work except at intervals of a week, conjunctively delayed the completion of the excavation from the 10th of May, 1912, until August 29, 1912.

With respect to damages, the plaintiffs herein claim none, except to recover upon a quantum meruit basis as set forth in the concluding paragraphs of this complaint.

Upon motion of counsel for defendant the circuit court struck the amended complaint from the files and dismissed the action, for the reason that it did not comply with the order of the court setting forth the actual time that plaintiffs were delayed in their work and wholly failed to state the amount of damages claimed.

Thomas Mannix, of Portland (Mannix & Sullivan, of Portland, on the brief), for appellants. G. C. Fulton, of Astoria (A. W. Norblad, of Astoria, on the brief), for respondent.

BEAN, J. (after stating the facts as above).

[1] The proposition involved is plainly stated by counsel for defendant in their brief as follows:

"The only theory upon which the appellants can successfully maintain this appeal is that their complaint states facts showing that the respondent abandoned the original contract, or by its acts prohibited the appellants from performing the contract according to the terms thereof, and that an entirely new contract was by law impliedly entered into, and further that the unit agreement of compensation would not govern."

It would seem that the first position taken by counsel in regard to the itemized statement of account sued upon indicates that the complaint was understood. No objection was taken to the statement filed. The further motion to make the complaint more definite and certain which was allowed by the court in effect required the plaintiffs to change their form of action to one strictly for damages for a breach of the contract. We think the facts alleged in the complaint show that the contract between the parties was deviated from in material particulars, so that all its terms would not apply to the construction of the work as completed. An

extended discussion of the facts alleged would not be of assistance in the trial of the cause, as they might appear different from the evidence introduced.

The main question is: Can plaintiffs, under the facts shown in the complaint, maintain an action for the reasonable value of the work performed? It is stated in 4 Elliott on Contracts, § 3697, as follows:

"Sometimes it happens that the original contract has been deviated from in so many matters that it can hardly be regarded as controlling the parties at all, and in such cases the original contract is often treated as abandoned, and a new contract is implied to pay the fair or reasonable value of the work or materials. \* \* \* So, again, in Vermont, where the parties under a special contract deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract; and may be recovered for as such. \* \* \*"

A subsequent departure from the terms of a written contract by the parties and mutually acquiesced in abrogates the original contract to that extent. *Zanello v. Iron Works*, 62 Or. 213, 124 Pac. 660; *Pippy v. Winslow*, 62 Or. 219, 224, 125 Pac. 298; *City Messenger & Del. Co. v. Postal Tel. Co.*, 145 Pac. 657, filed January 26, 1915. We think these rules apply to the case in hand, taking the allegations of the complaint as true.

[2] Paragraph 42 of the specifications specially provides that the estimate of quantities included in the contract and in the contemplation of the parties must be understood to be only approximate; that such estimates were assumed on the basis solely for the purpose of comparison of bids; and that no claim could be made by the successful bidder against the water commission which represented the city of Astoria, on account of any excess or deficiency in the same. The specifications also required the bidders to visit the location of the works and satisfy themselves as to the nature of the materials and as to all local conditions. They also provided that the contractor should not be entitled to any compensation for delays or hindrances to his work for any cause whatever, but allowed for extensions of time for such unavoidable delays as might result from causes that in the opinion of the water commission were beyond the control of the contractor, but the latter was required to give notice for all requests for extension.

It is contended by counsel for defendant that the plaintiffs, while setting out the contract, utterly abandoned it and are now attempting to recover the reasonable value of the services performed; that according to the terms of the contract the plaintiffs are not entitled to any extra compensation. With this contention we are unable to agree. We think the following rule applicable: Even though the engineer is given full power to supervise and manage the work, he cannot

so conduct the same as to retard its progress or prevent the performance of the contract, no matter how seemingly broad his powers may be. *Dubois v. Del. & Hud. Canal Co.*, 4 Wend. (N. Y.) 285; *Del. Genovese v. Third Ave. R. Co.*, 13 App. Div. 412, 43 N. Y. Supp. 8; *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637. The power of an engineer under a contract allowing him to increase or diminish the quantity of the work to be done in his discretion is limited to such changes as are contemplated by the parties at the time the contract was made, and he cannot increase or diminish the quantities beyond this limit without paying the reasonable value for such changes. *Cook v. Harms*, 108 Ill. 151; *Salt Lake City v. Smith*, supra; *Dubois v. Del. & Hud. Canal Co.*, supra; *National Contracting Co. v. Hud. River Water Power Co.*, 192 N. Y. 209, 84 N. E. 965; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934. The changes alleged to have been made, in one case where the work was increased 155 per cent., and in another as high as 500 per cent., must be considered as not being within the contemplation of the parties at the time of the execution of the contract for the construction of the work. Therefore, in regard to the dam as constructed by the direction of the engineers and accepted by the city, there was no meeting of the minds of the parties as to the amount of compensation. It is the rule that in carrying out a contract, whether time is of the essence or not, the owner cannot delay or retard the contractor in the progress of the work or prevent performance thereof without liability; and, where the owner under the contract is bound to furnish materials or do any other thing required to be done by him pursuant to the contract, he must do that thing in such a way as not to retard the contractor; and, if through the act or omission of the owner under such circumstances the work is delayed in such a way as to make performance impossible, the contractor can recover upon the quantum meruit. *Cross v. Beard*, 26 N. Y. 85, 88; *Ind. Traction Co. v. Brennan*, 174 Ind. 1, 87 N. E. 215, 223, 90 N. E. 65, 68, 91 N. E. 503; *Standard Gaslight Co. v. Wood*, 61 Fed. 74, 9 C. C. A. 362.

[3, 4] If the defendant deemed the itemized statement of account filed by the plaintiffs to be insufficient, a motion should have been made to make the same more definite and certain. *Catlin v. Knott*, 2 Or. 321. By its motion defendant wholly ignored this statement. No objection having been made to the same, it must be assumed to have been satisfactory to the defendant. This statement furnished upon defendant's demand was for the purpose of making the pleading of which it was a part more definite and certain. The second motion is inconsistent with the first. It was error for the court to ignore this statement and to

tain a motion which, in effect, required the plaintiffs to change the form and substance of their complaint to one purely for damages and dismiss the action.

[5] While section 3, art. 7, of the Constitution, as amended by Laws 1911, p. 7, seems to contemplate that a cause should be set upon one appeal, the record is somewhat incomplete for this court to render final judgment. If issue is joined, the action could be tried upon the merits.

The judgment of the lower court will therefore be reversed, and the cause remanded for such further proceedings as may be deemed proper not inconsistent herewith.

MOORE, C. J., and EAKIN and HARRIS, J., concur.

9 N. M. 13)

**TAYLOR v. TAYLOR. (No. 1666.)**

Supreme Court of New Mexico. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**DIVORCE (§ 31\*)—GROUNDS—FAILURE TO SUPPORT.**

Under the provisions of section 22, c. 62, Laws 1901, making neglect on the part of the husband to support the wife according to his means, station in life, and ability, a ground for divorce, it appearing that the husband had the mental and physical ability to provide for such support, and failing so to do by reason of his neglect or indifference, which facts appear from the record in the case, the wife is entitled to a decree of divorce upon this ground, as set out in the statute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.\*]

Appeal from District Court, Luna County; John Neblett, Judge.

Action by Ella Taylor against Oscar C. Taylor. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 142 Pac. 1129.

This is an action for divorce. By her complaint plaintiff charged that defendant, in violation of section 22, c. 62, S. L. 1901, had neglected to support his wife, the plaintiff, according to his means, station in life, and ability, although he is a strong, healthy, and able-bodied man and well able to work and earn good wages, and well able, if he were so disposed, to furnish the plaintiff and the two children of the marriage a good home and with the ordinary and usual necessities and comforts of life, notwithstanding which, the defendant had failed and neglected so to do for a period of years, and that, by reason of his lazy and shiftless disposition and habits, he had worked but a small portion of the time and had earned very little; the said plaintiff being compelled to assume in a large part the support of herself and her two children, while the defendant, though able to work, and when work could be had, was voluntarily and persistently idle. Defendant, appellant here, appeared and answered the said complaint. Issue being joined

in the said cause, and upon the hearing, the district court made findings of fact and conclusions of law, and on the 10th day of December, 1913, entered a final decree in said cause, wherein it was adjudged that a divorce from the bonds of matrimony be granted, in accordance with the prayer of plaintiff, and that charge, custody, and control of the minor children be granted to said plaintiff, and that defendant and appellant be required to pay to plaintiff for the support and maintenance of the said minor children the sum of \$15 per month, and an additional sum of \$75 as an attorney's fee, together with the costs of the suit. From which final decree the appellant prayed for and was granted an appeal.

Jas. S. Fielder, of Deming, for appellant. Ely & Watson, of Deming, for appellee.

HANNA, J. (after stating the facts as above). Appellant contends that the questions before us for determination are: First, did appellant neglect to support appellee, his wife, according to his means, ability, and station in life? Second, if appellant did neglect to support his wife according to his means, ability, and station in life, was that neglect intentional on the part of appellant? Third, does unintentional neglect to support a wife entitle her under the laws of New Mexico to divorce?

We believe the first question is fully disposed of by the findings of the court, numbered 7 and 8, there being, in our opinion after a very careful consideration of the record, very substantial evidence to support the findings. In these findings the court said:

"(7) While some testimony was offered in behalf of the defendant tending to show that he is not strong physically, and unable to perform hard labor, the testimony offered by the plaintiff showed numerous occasions when the defendant refused to work when he was able to work; that he refused work when it was offered to him; that he left work that he might have continued; and that he did not make earnest or consistent efforts to find work when he was out of employment.

"(8) I find that the privations which this family has suffered are due, in large degree, to the indolent and shiftless disposition and habits of the defendant, and to his averseness to work, and that, had the defendant been so disposed, he might have provided for his family the necessities of life."

It might be said that these findings further support the view that the neglect of the defendant was intentional, in that it appears that the privations suffered by his family were due in a large degree to his shiftless disposition and his averseness to work, and had he been so disposed he might have provided his family with the necessities of life. This being true, there would be no reason to inquire as to whether unintentional neglect to support a wife entitled her, under our laws, to a divorce; that element of the case not being present.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We are not unaware of the fact that it has been quite generally held by the authorities in this country that a mere failure to support is not of itself a substantive ground for divorce. Some jurisdictions have held that failure to support may, in connection with other circumstances, constitute cruelty, while other states, including New Mexico, have made the husband's failure to support the wife an independent ground for divorce, unless perhaps she has forfeited her right to maintenance by her own misconduct.

The sixth ground for divorce, under section 22, c. 62, Laws of 1901, reads as follows:

"(6) Neglect on the part of the husband to support the wife, according to his means, station in life, and ability."

It is contended by appellant, and is not disputed by appellee, that such means as appellant had, during the years in question, or such sums as he earned, he devoted to the support of his family. There is no controversy as to whether or not the support provided, such as it was, was in accordance with the station in life of the defendant. But there is serious controversy as to whether or not the failure to support was the result of a lack of ability, or in violation of his ability so to do. Appellant claims that, so far as he has failed to support the appellee and the minor children born of the marriage, this has been due to his lack of physical ability, in that he has not been a strong man, and that he has worked hard and to the extent of his physical capacity, which has been curtailed at times by reason of his ill health and physical weakness; that his failures have not been due to intentional neglect on his part; and that he has worked to the full extent of his physical capacity. As pointed out, however, this contention is contrary to the findings of the trial court, and is, in our opinion, contrary to the evidence as disclosed by the record. We do not desire to discuss the evidence at large, but will refer to some portions of the evidence tending to contradict this contention of the appellant.

A Mr. Whitehill offered him work fixing fences and plowing, but he declined for the reason that he was going to cut hay, and for two or three weeks he worked an hour a day, getting rake and mowing machine ready, during which time he might have been earning wages. He left his work with a Mr. Young on account of sickness, but after recovery, in a few days, made no effort to resume work. While he was idle several persons offered him work. One man offered two weeks' work at \$1.50 a day and board, but he would not work for less than \$1.75. Another offered him carpenter work, but he refused, saying that he was looking for something better. A Mr. Gorman offered him work at \$1.50 a day and board, telling him, however, that if he took the job he would have to work. Appellant said he wanted to rest and

get ready for haying. He refused a well-drilling job at \$2 a day and board, saying that the work was too hard for \$2 a day. When urged by his wife to look for work, he replied that the town owed him a living, and if people wanted him they knew where to find him.

These instances, we believe, conclusively support the findings of the trial court, which we would therefore not feel disposed to disturb.

We agree with appellant, were it shown that he was unable by reason of physical incapacity to perform his duty of providing for the support of his wife and children, he could not be held responsible for his failure so to do. This was held in the case of *Baker v. Baker*, 82 Ind. 146. But we are clearly of the opinion that, under the provisions of section 22, c. 62, Laws 1901, making neglect on the part of the husband to support the wife according to his means, station in life, and ability, a ground for divorce, and it appearing that the husband had the mental and physical ability to provide for such support, and failing so to do by reason of his neglect or indifference, which facts appear from the record in the case, the wife is entitled to a decree of divorce upon this ground, as set out in the statute.

Our attention has not been directed to any cases similar to the one under consideration; but we find the following authorities supporting our view of the law, as thus stated, to a very large degree: *Whitacre v. Whitacre*, 64 Mich. 232, 31 N. W. 327; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Thompson v. Thompson*, 79 Me. 286, 9 Atl. 888.

This leaves perhaps but one element of controversy remaining in the case, at least from the standpoint of appellant, namely, that the failure to support was not intentional. Our answer to this contention is that the evidence and the findings of the court support the conclusion that the appellant had the ability to support his family, by which is meant that he was physically able so to do, and mentally qualified so to do. And it likewise appears from the evidence and findings that he had the opportunity so to do, and neglected to avail himself of his opportunities. For which reasons we do not believe it can be contended that his failure to support was unintentional, although we would be justified in assuming that the state of facts here presented would justify the conclusion that the failure was, as a matter of fact, an intentional one on the part of the appellant.

For the reasons stated, the judgment of the trial court is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.



(20 N. M. 33)

**NEW MEXICO WOOL GROWERS' ASS'N v. ATCHISON, T. & S. F. RY. CO.**

(No. 1706.)

(Supreme Court of New Mexico. Jan. 9, 1915.)

*(Syllabus by the Court.)*

**CARRIERS (§ 10\*)—CORPORATION COMMISSION—POWERS—FACILITIES—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.**

The State Corporation Commission is authorized by the provisions of section 7, art. 11, of the state Constitution to require railway companies to provide and maintain adequate depots, stock pens, station buildings, agents, and facilities for the accommodation of passengers and for receiving and delivering freight and express. Upon a petition presented to the Commission asking that a railway company be required to install and maintain hoof stock scales at designation stations, the burden of proof rested upon the petitioner to establish the fact that such scales were a necessary facility for receiving and delivering shipments of live stock. Where the evidence shows that the rates for the shipment of live stock are based upon the minimum capacity of cars, in stated pounds, and that the weights are determined upon track scales in transit or at points of destination, and that hoof stock scales are never used for determining the weight upon which the tariff is based, and that in loading stock into the cars the shipper loads the same, not according to weight, but places in a given car only so much stock as will ride safely to the point of destination, without overcrowding and consequent suffocation, and that the only useful purpose such scales would serve would be to enable the shipper to settle with those from whom he has purchased live stock, at the point of shipment, such hoof stock scales cannot reasonably be held to be a necessary facility for receiving and delivering freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. § 10.\*]

Appeal from State Corporation Commission; M. S. Groves, O. L. Owen, and H. H. Williams, Commissioners.

Proceeding instituted before the State Corporation Commission by the New Mexico Wool Growers' Association, by Horace C. Abbott, its president, and Charles Chadwick, its secretary, against the Atchison, Topeka & Santa Fé Railway Company, a corporation. From an order denying the relief sought, petitioner appeals. Affirmed.

John W. Wilson, of Albuquerque, for appellant. R. E. Twitchell, of Santa Fé, for appellee.

**ROBERTS, C. J.** This is a proceeding instituted by the New Mexico Wool Growers' Association, before the State Corporation Commission, for the purpose of compelling the Atchison, Topeka & Santa Fé Railway Company to install and maintain hoof stock scales at its stations of Albuquerque, Magdalena, Springer, Encino, and Grants, N. M. The petition, among other things, alleged that such scales were necessary facilities for receiving and delivering freight. Briefly stated, the petitioner alleged that it was an organization representing the sheep growers of the state of New Mexico; that the freight rates for the shipment of sheep and other

live stock were based on minimum weights of car load lots; and that such scales were necessary facilities in order to enable the shipper to load such cars to their full minimum capacity.

The railroad company appeared, and in its answer alleged, among other things, the following:

"Defendant further states that shipments of sheep and other live stock from and to the points mentioned in the complaint herein and the freightage charges therefor are made and computed upon bases in no way requiring the use of hoof scales at points of origin or points of destination. Defendant further states that the sole use of said class of scales desired by complainants is for the purpose of facilitating the consummation of business transactions between buyers and sellers of sheep and other live stock on bases of weight in lieu of fixed prices per head, and, in so far as questions of transportation are concerned, are no part thereof whatever."

At the hearing of the cause before the Commission, R. H. Crews, secretary of the sheep sanitary board, testified as to the number of sheep shipped from each of the stations above named. The only other witness introduced by the complainant was Charles Chadwick, secretary of the complaining association. He testified that such hoof stock scales should be installed so that shippers would be able to ascertain when they were loading cars to their minimum capacity, but he admitted that a shipper always loaded into the car the number of sheep which, in the shipper's judgment, would ride safely to market, without overcrowding and consequent suffocation. He also admitted on cross-examination that sheep buyers, in purchasing sheep, usually contracted for the purchase of the same according to average weight, which was to be ascertained at the point of shipment; that when the sheep are delivered the weight is ascertained, and that the ascertaining of the weight is a part of the business between the buyer and seller, and that hoof stock scales were used as an incident to the buying and selling of sheep. It is only fair to the witness, however, to state that he insisted that such scales were a necessary facility for the accommodation of the shipper, so that he could ascertain the minimum weight to be loaded into a car for shipment.

On behalf of the railroad company several witnesses testified. The evidence of the defendant was to the effect that its tariffs were based on car capacity, and the charge made on minimum weight, which was ascertained by weighing the car on track scales, usually at the point of destination, but not necessarily so; that no reasonable necessity existed for the installation of hoof stock scales, as such installation and operation would not serve to establish the weights upon which such freight charges are based, but would only be used as an accommodation to the shipper in the determination of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

weights upon a class of property the ownership of which is to be changed, and to be used by the consignor or consignee as a basis in the conduct of private affairs.

The questions to be determined in this proceeding are governed by the provisions of section 7 of article 11 of the state Constitution. The portion of section 7 particularly applicable reads as follows:

"The Commission shall have power and be charged with the duty \* \* \* to require railway companies to provide and maintain adequate depots, stock pens, station buildings, agents and facilities for the accommodation of passengers and for receiving and delivering freight and express. \* \* \* The Commission shall also have power and be charged with the duty to make and enforce reasonable and just rules requiring the supplying of cars and equipment for the use of shippers and passengers."

The State Corporation Commission found, from the evidence adduced before it, that:

"The installation and maintenance of hoof live stock scales in stockyards is not such a facility as is contemplated in the language of the Constitution of the state of New Mexico prescribing the matters and things over which this Commission shall exercise jurisdiction, in that it does not constitute a part of the transportation facility; does not constitute a part of the housing and storage for the protection of freight or live stock presented for shipment; does not constitute a facility as a means of determining the weight upon any given shipment wherein the transportation company is interested, as it is shown by the evidence that all weights upon which the tariff is based are determined by track scales in transit and at points of destination, and that in no case is the use of hoof stock scales used for determining the weight upon which the tariff is based. It is also shown by the evidence that practically the only use to which said hoof stock scales could be used is for the determination of weight of a given shipment for the purpose of settlement between parties engaged in the barter and sale of such live stock. Notwithstanding the fact that it is claimed by petitioners herein that stock scales are used primarily for the purposes of determining the weight of live stock loaded into the car in order to determine when they have reached the minimum weight as provided in the tariffs covering that class of shipment, yet the evidence shows that it is a common practice, and the invariable rule of live stock shippers, that they do not in any wise conform to such weights, but load the car with sufficient number of sheep or cattle or other live stock so as not to overload, and yet carry the maximum number of head of such live stock as will comfortably ride in a car of a given space capacity."

Upon the above and other findings not necessary to incorporate in this opinion, the

Commission entered an order dismissing the complaint and denying the relief asked. From this order the petitioner prosecutes this appeal.

The question as to whether hoof stock scales are a necessary facility for receiving and delivering freight, which the Corporation Commission is authorized to require railway companies to install and maintain, depends upon whether such scales are required or are reasonably necessary for such purpose. The burden of proof rested upon complainant to establish such fact. *State of Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863. Where the evidence shows that the rates for the shipment of live stock are based upon the minimum capacity of cars, in stated pounds, and that the weights are determined upon track scales in transit or at points of destination, and that hoof stock scales are never used for determining the weight upon which the tariff is based, and that in loading stock into the cars the shipper loads the same, not according to weight, but places in a given car only so much stock as will ride safely to the point of destination, without overcrowding and consequent suffocation, and that the only useful purpose such scales would serve would be to enable the shipper to settle with those from whom he has purchased live stock, at the point of shipment, such hoof stock scales cannot reasonably be held to be a necessary facility for receiving and delivering freight.

The evidence taken before the Commission establishes the above facts. It further shows that at practically every point where such scales were asked to be installed by the railroad companies private parties have already erected scales, which shippers are permitted to use upon payment of a slight compensation. As stated, the ascertainment of the weight of live stock, for the purpose of settlement between buyer and seller, does not concern the railroad company, and it cannot justly be required to furnish a facility not a factor in the receipt or delivery of freight or express, or for the accommodation of passengers.

Upon the facts established at the hearing the Commission properly denied the relief sought.

HANNA and PARKER, JJ., concur.

(20 N. M. 39)

## STATE v. MONTGOMERY. (No. 1704.)

(Supreme Court of New Mexico. Jan. 9, 1914.)

(Syllabus by the Court.)

## INTOXICATING LIQUORS (§ 201\*)—INDICTMENT—SUFFICIENCY.

Section 4126, Comp. Laws 1897, construed. *Held*, that such section denominates as a crime the carrying on of a retail liquor business without first having procured a license, and also makes it an offense for a person to sell liquor without having first obtained a license as a retail liquor dealer. Consequently, where an indictment charges but a single sale, and does not allege that the defendant was a retail liquor dealer, it is sufficient to withstand a motion to quash.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 221; Dec. Dig. § 201.\*]

Appeal from District Court, Eddy County; E. L. Medler, Judge.

George Montgomery was charged with unlawfully selling liquors, and from the sustaining of a motion to quash the indictment, the State appeals. Reversed, with directions.

Ira L. Grimshaw, for the State.

ROBERTS, C. J. On the 14th day of January, 1914, the grand jury of Eddy county returned an indictment against the appellee, which, omitting the formal allegations, reads as follows:

"That George Montgomery, late of the county of Eddy, in the state of New Mexico, on the 22d day of November, in the year one thousand nine hundred and thirteen, at the county of Eddy, in said state of New Mexico, did unlawfully sell to Bud Blair, then and there being, spirituous, malt, and vinous liquors, to wit, whisky, in a quantity less than four and seven-eighths gallons, to wit, two quarts, the said George Montgomery not then and there having a license authorizing and allowing him to then and there sell spirituous, malt, and vinous liquors in quantities less than four and seven-eighths gallons, contrary," etc.

Appellee filed a motion to quash the indictment on the ground that it stated no offense known to or denounced by the laws of this state, which was sustained by the court, and judgment accordingly entered. From this judgment the state appealed.

Appellee's counsel filed no brief in the case; consequently we do not have the benefit of their argument in favor of the alleged insufficiency of the indictment. The Attorney General says in his brief:

"The theory of the court below, no doubt, was that the statute did not include the sale of spirituous liquors made by a person not engaged in, and carrying on, the business of a retail liquor dealer. The theory of the court was that a private sale made by an individual did not come within the terms of the statute."

The indictment attempted to charge a violation of section 4126, C. L. 1897, which section reads as follows:

"Any person who shall carry on the business of retail liquor dealer or who shall sell or attempt to sell any spirituous, malt or vinous liquors without having first obtained a license as in section four thousand one hundred and twenty-four hereof provided, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not less than one hundred dollars and not more than five hundred dollars, or by imprisonment for not less than thirty days and not more than one year, in the discretion of the court."

Section 4124, referred to in the section quoted, reads as follows:

"Upon every license granted under the provisions of this act for the retail sale of malt, vinous and spirituous liquors there shall be collected before such license is issued, a tax as follows, viz.:—For such license to do business in a precinct, village or town without the limits of any village, town or city having not more than five hundred inhabitants, and in such town or city having not more than five hundred inhabitants, one hundred dollars; in a precinct, village, town or city of not less than five hundred and not more than one thousand inhabitants, two hundred dollars; in a precinct, village, town or city having more than one thousand inhabitants, four hundred dollars."

The plain meaning of section 4126, *supra*, is that any person who shall carry on the business of a retail liquor dealer, or any person who shall sell or attempt to sell liquor without having first obtained a license, shall be guilty of a violation of such section and punished therefor, as in the section provided. It is evident that the Legislature did not intend to say that the offense could only be committed by a person carrying on the business of a retail liquor dealer. The Legislature did not intend a repetition in stating who might be guilty of selling liquor without a license. If the contention of the trial court, as stated by the Attorney General, is correct, then a repetition must ensue, for the statute would then have to read that any person who shall carry on the business of a retail liquor dealer, and who shall sell or attempt to sell liquors without having first obtained a license, shall be guilty of the offense. The business of carrying on a retail liquor trade must necessarily include the selling of liquor. It is plain, we think, that the statute intended to make it an offense for any person to carry on a retail liquor trade without a license, and also to make it an offense for any person to sell liquor without having first obtained a license. Such is the literal meaning of the statute, and, this being true, it necessarily follows that the trial court erroneously sustained the motion to quash the indictment.

The cause will therefore be reversed, with directions to the trial court to overrule the motion to quash; and it is so ordered.

HANNA and PARKER, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(20 N. M. 43)

**MUNDY v. IRWIN.** (No. 1638.)  
(Supreme Court of New Mexico. Jan. 12, 1915.)

*(Syllabus by the Court.)*

**1. SPECIFIC PERFORMANCE (§ 29\*)—CONTRACT OF SALE—DEFECTS IN DESCRIPTION—CURE.**

Where a vendor puts his vendee into possession of real estate, an uncertainty of description in the contract of sale, which otherwise might prevent specific performance of the contract, is thereby cured.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.\*]

**2. APPEAL AND ERROR (§ 690\*)—PRESENTATION FOR REVIEW—EVIDENCE.**

The admission of alleged incompetent oral evidence to identify real estate defectively described in a written contract of sale cannot be reviewed, in the absence of the evidence from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.\*]

**3. SPECIFIC PERFORMANCE (§ 95\*)—CONTRACT OF SALE—DEFENSE—DEFICIENCY IN AREA.**

Where the findings of the court show, at least inferentially, that the defendant bought by the tract, rather than the acre, he cannot defeat specific performance on account of slight deficiency in area from that mentioned in the contract of sale.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.\*]

**4. SPECIFIC PERFORMANCE (§§ 64, 129\*)—RIGHT—CONTRACT OF EXCHANGE—PARTIAL PERFORMANCE.**

A contract of exchange of real estate may be specifically enforced the same as one for ordinary sale, and the vendee may have a specific performance of that part of the contract which the vendor can perform, with compensation for that part which he cannot perform, the same as in ordinary cases of sales of real estate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 191-195, 198, 420-423; Dec. Dig. §§ 64, 129.\*]

Appeal from District Court, Chaves County; M. C. Mechem, Judge.

Action by Ed. S. Mundy against W. J. Irwin. From decree for plaintiff, defendant appeals. Affirmed.

Gibbany & Black, of Roswell, for appellant. Hiram M. Dow, of Roswell, and Robert C. Dow, of Carlsbad, for appellee.

**PARKER, J.** A motion to dismiss this appeal was denied. *Mundy v. Irwin*, 141 Pac. 877. We also then held that the bill of exceptions was not before us, because not properly certified, leaving only the record proper for consideration.

The amended complaint, upon which the case was tried, sets up three causes of action, all growing out of a written contract for the sale of land by one to the other of the parties thereto, being in reality an exchange or trade of land from one to the other. The first cause of action is for the reformation of the contract as to certain de-

scriptions of the property therein mentioned, alleged to have been inserted in the contract in error by mutual mistake of the parties. The second cause of action is for the specific performance of the contract as reformed. The third cause of action is for damages for the breach of the contract in that the defendant failed and refused to deliver possession to the plaintiff, as was provided in the contract, whereby plaintiff lost the fruit crop then growing on the land purchased by him, and alleged to be worth \$6,000. This cause of action need receive no further consideration, as the court denied the relief asked, and no appeal therefrom was taken.

A demurrer was interposed and overruled by the court, whereupon defendant answered, admitting the execution of the contract, but denying all of the other allegations of the complaint, and, by way of new matter, alleging that, as an inducement to signing the contract, he relied entirely, as to the quality, quantity, and character of the lands for which he was trading, upon the representations of one Vickers, the authorized agent of the plaintiff, in making the exchange of said land, and that he (defendant) had no knowledge of the subject, and that said Vickers made false and fraudulent representations to him as to the quality and quantity of the land in that there were less than 38 acres, instead of 40 acres, as represented by Vickers, and in that more than 15 acres thereof were alkali and subirrigated, instead of not more than 5 acres, as was represented by Vickers. A reply was filed denying each of the allegations of the answer by way of new matter.

The court made findings to the effect that on July 30, 1912, the plaintiff was the owner of certain lands described in the finding, and that the defendant was likewise the owner of certain lands described in the finding, and that on said day the plaintiff and defendant entered into the said contract; that by mutual mistake some of the property was misdescribed in the contract; that defendant initiated the deal or agreement, and requested the said Vickers to ascertain whether the exchange could be effected, and to effect the same, if possible; that defendant knew, or could have known, the quantity and quality of plaintiff's land, and no misrepresentations were made to defendant in that regard; and that tender of good title was made by plaintiff and was refused by defendant. The court found as a conclusion of law that the contract should be reformed, and, as reformed, should be specifically enforced.

At this point a motion for rehearing was interposed on the questions of law involved, and it was stipulated that the defendant was unable to perform as to one piece of property, and that its value was \$1,200. Thereupon final decree was entered, reforming the contract and specifically enforcing it, except

is to the one piece of property which defendant could not convey, and awarding compensation to the plaintiff in the sum of \$1,200 for the value thereof. The defendant appeals.

[1] 1. The first assignment of error challenges the overruling of the demurrer to the complaint. The demurrer was upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and seven different grounds of objection were specifically pointed out. Only one of these grounds is argued in the brief, viz., that the description of the property was so indefinite and uncertain, both in the contract and in the complaint, as to prevent specific performance.

Ordinarily, of course, where a defendant answers over after the overruling of his demurrer, he waives his demurrer and cannot assign error here upon the court's action. *Territory v. Baca*, 134 Pac. 212. But here the demurrer raised the question as to the sufficiency of the complaint to state a cause of action, and we deem this assignment sufficient to present to this court any question which was presented to and decided by the district court in this regard.

The argument of counsel is to the effect that the contract is so indefinite and uncertain as to the description of the property to be conveyed by plaintiff, and the complaint so fails to supply the deficiency, that the contract cannot be specifically enforced. The description in the contract and complaint is as follows: "Forty acres of land adjoining the town of Hagerman, and known as the Arnold Farms."

The argument by counsel proceeds to the effect that as "there might have been a dozen 40-acre tracts near Hagerman known as the Arnold Farms, any one of which would have filled the description in the alleged contract and under the allegations in the said complaint relative to such description," the description is insufficient. He cites authority to the effect that if the complaint had alleged that there was but one "Arnold Farm" adjoining Hagerman, or that the parties verbally agreed upon the property which would suit the description, the objection would be overcome. They cite *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Gray v. Smith* (C. C.) 76 Fed. 525, 533; 1 *Warville on Vendor*, § 96.

But counsel overlook the finding of the court that plaintiff had performed all of the conditions of his contract, which includes the putting of defendant into possession of the property, thus identifying the premises. Under such circumstances, the defect in the description is cured. *Keepers v. Yocum*, 84 Kan. 554, 114 Pac. 1063, Ann. Cas. 1912A, 748, and case note.

It therefore becomes unnecessary for us to lay down any general rule as to the sufficiency of description of real estate, to authorize

the specific performance of contracts for the sale thereof.

Counsel present under this assignment, two other points which were not presented to the court below, viz., that the complaint failed to state facts sufficient to constitute a cause of action, in that it fails to allege ownership by defendant of the property to be by him conveyed to the plaintiff, and that the incumbrance to be assumed by the defendant was not sufficiently described. It is apparent that these objections cannot be presented under this assignment. This assignment challenges the action of the court in overruling the demurrer. They cannot, therefore, be presented here under this assignment, because the court below decided no such question. If the objections are fatal to the complaint, as showing that it fails to state a cause of action, they could be presented under proper assignments, but not under this one.

[2] 2. The second assignment goes to the point that parol proof was improperly admitted to identify appellant's property. As before seen, the testimony is not before us, but counsel seem to have overlooked this proposition entirely. For this reason the assignment is not well founded.

[3] 3. The third assignment is to the point that, there being a failure in quantity of plaintiff's land traded to defendant (37½ acres instead of 40 acres), specific performance of the contract cannot be enforced. It is said in the brief of counsel that the real test in this regard is whether the defendant "intended that he was to get the full 40 acres or whether he intended that he was to get the Arnold Farms, irrespective of the amount of land they contained." Counsel seek to draw certain inferences from the testimony of the defendant to the effect that he bought by the acre, and that quantity was a part of the consideration to him. Of course, as before pointed out, this evidence is not before us. Even if it were, the trouble with the contention is that the court found, in effect at least, exactly the opposite. The court found as follows:

"(5) That the deal or agreement to exchange real estate, which resulted in the making of said written contract between the parties hereto, was initiated by the defendant W. J. Irwin, and was so initiated by the defendant W. J. Irwin requesting one W. A. Vickers, a real estate broker, to ascertain if the plaintiff would trade or exchange the Mundy tract of land, known as the Arnold Farms, and being the tract of land described in finding numbered 1 of this opinion, for the tracts of land described in finding numbered 2 of this opinion, and requesting said W. A. Vickers to procure such trade or exchange if the same could be done.

"(6) That the defendant W. J. Irwin knew or could have known the quantity and quality of the said Mundy tract of land owned by the plaintiff and known as the Arnold Farms."

These show that the understanding of defendant, contrary to his assertions, was that he was to trade for plaintiff's tract of land,

known as the Arnold Farms, and that he knew, or could have known, its area and quality, and that he originated and sought the consummation of the trade. If defendant's understanding is to control the terms of the contract as to area, then the finding of the court defeats him as to this contention.

[4] 4. The fourth assignment presents the proposition that it was error to award, by way of compensation, judgment to the plaintiff for \$1,200, the admitted value of the piece of property which defendant could not convey. The argument is that, in cases of exchange of real property, the courts never award compensation for partial failure to convey, but only so award compensation when there is an ordinary contract of sale and purchase at an agreed price.

Counsel cite and rely upon *Sternberger v. McGovern*, 56 N. Y. 12. The case is precedent for two propositions: First, in cases of exchange of property, where the market value is not fixed by the contract, but rather a comparative value of the two pieces is fixed, and where defendant's title fails in that it is charged with an incumbrance not controllable by him, partial performance will not be decreed with compensation for the incumbrance; second, the dower right of the wife, who refuses to release the same, is an incumbrance of such a nature as not to be capable of valuation in money with justice to the parties, and, in such case, specific performance will be refused for that reason. The latter proposition is not involved in the case at bar. An examination of *Sternberger v. McGovern*, supra, will disclose, however, that it was the case of an exchange of one piece of property for another piece of property, and the defect in defendant's title (the dower right of the wife) attached to the whole estate. In that case the court, after referring to the claim of plaintiff's counsel that plaintiff was entitled to specific performance, notwithstanding the circumstances, said:

"Counsel cites numerous authorities showing that, when a vendor is unable to perform the entire contract, the purchaser may, if he chooses, enforce performance of that part which the vendor can perform and recover compensation for the part unperformed. I have examined these and find that, in general, they are cases where there is a failure of title in the vendor to a part of the premises agreed to be conveyed, and when a proper deduction from the purchase price can be ascertained and determined, so as to do complete justice between the parties in the case before the court. When this cannot be substantially done, it is obvious that specific performance ought not to be decreed, as this should be done only when the court can see that the ends of justice require it."

It thus appears that the court did not deny the right to substantial specific performance with compensation in cases of exchange of property. It held that it would be harsh and oppressive to award such relief under the facts in that case. Allen, J., in concurring in the result, expressly refused to decide that a contract of exchange was different

from an ordinary contract of sale and purchase in this regard.

In the case at bar there is nothing before us showing that the value placed upon the property by the parties was anything but the market value. The plaintiff exchanged one piece of property valued at \$12,000, subject to a mortgage of \$3,800. The defendant exchanged two pieces of property, with a mortgage of \$3,000 on one of them, which plaintiff assumed. There is nothing to indicate but that both properties were fairly valued, at the market value; that it was an even trade; and, if so, the two pieces which plaintiff was to get were worth \$11,200. The title failed as to one piece of the property, and it was worth, as admitted by stipulation, \$1,200, a trifle over one-tenth of the value of both pieces of property.

We know of no reason why the ordinary rules in regard to specific performance should not be applied to a contract of this kind. That a contract for exchange of real property may be specifically enforced, see 17 Cyc. 836; *Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; *Reynolds v. Franklin*, 41 Minn. 279, 43 N. W. 53; *Macdonald v. Bach*, 51 App. Div. 549, 64 N. Y. Supp. 831; *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288; *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394.

In *Te Poel v. Shutt*, supra, an offer to perform is specifically held to be the equivalent of performance, and this is the general doctrine. 4 Pomeroy's Eq. Juris. § 1407. In *Crocket v. Gray*, 31 Kan. 346, 2 Pac. 809, the question was whether specific performance could be decreed; there being a homestead right, for the valuation of which there was no measure furnished by the contract. The court held, per Brewer, Justice, that the location and valuation of the homestead should be ascertained by the lower court, and the plaintiff allowed compensation therefor. See, also, *Rankin v. Maxwell*, 2 A. K. Marsh. (Ky.) 488, 12 Am. Dec. 431, to the same effect.

We are aware that in many jurisdictions specific performance is denied, where there is a failure in quality of estate due to incumbrance in the form of homestead or dower rights, on the ground that the court cannot ascertain from the contract or otherwise, with justice to the parties, the proper allowance to be made by way of compensation to the plaintiff. But in a case like this, where the vendee having performed on his part and seeking specific performance against vendor for all that the vendor can convey, with compensation, at the market value, for that which he cannot convey, we know of no reason, in principle or on authority, why the relief should not be awarded. In this connection it may be remarked that the rule is more liberal in favor of vendees than vendors. The latter must bring themselves substantially within the letter of their contracts before

they can demand specific performance. Vendees, however, may demand less than the contract calls for, and may take compensation for the part the vendor cannot convey. There is a plain reason and justice in this distinction. The vendee, in such case, is demanding no more than the vendor has promised. The vendor, if he substantially fail, cannot perform on his part, and, of course, cannot compel his vendee to accept less than he is entitled to. See 6 Pomeroy's Eq. Juris. § 833; also *Clarke v. Reins*, 12 Grat. (Va.) 98, 113.

5. Counsel submit the evidence contained in the bill of exceptions in support of the sixth assignment of error, but, as the bill of exceptions is not before us, we cannot consider this assignment.

For the reasons stated, the decree of the lower court will be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

20 N. M. 67)

STATE ex rel. LORENZINO v. COUNTY  
COM'RS OF MCKINLEY COUNTY.  
(No. 1723.)

(Supreme Court of New Mexico. Jan. 14, 1915.)

(Syllabus by the Court.)

1. STATUTES (§ 181\*)—CONSTRUCTION—AMBIGUOUS LANGUAGE—LEGISLATIVE INTENTION.

When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

2. INTOXICATING LIQUORS (§ 59\*)—LICENSES—RIGHT TO ISSUE.

Section 1, c. 115, Laws 1905, which prohibits the granting of a license for the sale of intoxicating liquor at any place, except within the limits of a city, town, or village containing at least 100 inhabitants, does not justify the issuance of such a license for the sale of liquor in an isolated building more than 1,800 feet distant from any other house in an unincorporated village; the building being located upon a patented homestead claim of 160 acres, upon which no other residences have been erected, save the applicant's, and beyond which there are no other buildings for some miles, as such building is not "within the limits" of such village.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 59; Dec. Dig. § 59.\*]

(Additional Syllabus by Editorial Staff.)

3. INTOXICATING LIQUORS (§ 59\*)—LICENSES—RIGHT TO ISSUE—VILLAGE—"WITHIN THE LIMITS."

As used in Laws 1905, c. 115, § 1, prohibiting the granting of a license for the sale of intoxicating liquors at any place except within the limits of a city, town, or village containing at least 100 inhabitants, the use of the term "village" prohibits the licensing of the sale of intoxicating liquors in buildings not within the assemblage of houses used for business and residential purposes, reasonably con-

tiguous to each other. An isolated building more than 1,836 feet from any other building within such village is not "within the limits" of the village within the meaning of such act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 59; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, First and Second Series, Within the Limits.]

Appeal from District Court, McKinley County; Herbert F. Reynolds, Judge.

Mandamus by the State, on relation of O. Lorenzino, against the County Commissioners of McKinley County, New Mexico. From judgment for defendants, relator appeals. Affirmed.

O. Lorenzino, the relator and appellant herein, on the 26th day of December, 1913, made application to the assessor of McKinley county for a license to conduct and operate a saloon, as a retail liquor dealer, in the unincorporated village of Allison, said county. The said assessor filed the application with the board of county commissioners of said county, which board thereafter, on the 14th day of February, 1914, denied the application and refused to issue the license. Thereafter, on the 26th day of February, 1914, appellant filed his petition with the district court of said county, praying that an alternative writ of mandamus issue out of said court, directing and compelling the said board of county commissioners to grant and issue said license. The alternative writ was issued, and later the board filed its answer. The cause was submitted to the court, upon an agreed statement of facts, which, after showing the preliminary facts as to the application for the license, composition of the board, refusal to grant the license, etc., proceeded as follows:

"(5) The building in which the said O. Lorenzino, the relator herein, intends to run, operate, and conduct said saloon is 1,836.5 feet in a straight line from the last house in said village situated on the lands owned and operated by the Diamond Coal Company.

"(6) The relator, O. Lorenzino, is a voter in precinct 17, McKinley county, N. M. The polling place of said precinct is in the village of Allison. Said O. Lorenzino received his mail at the post office in said town, has a post office box in said post office, and trades at the store in said village. The public schoolhouse is situated in the village of Allison. Precinct 17, consisting of sections 7, 8, 17, 18, 19, and 20, is a part of the Gallup school district and the school taught in said village is under the supervision of the superintendent of the Gallup schools. The relator pays taxes in precinct No. 17. The post office, store, and voting place are located on section 18 of said precinct.

"(7) The Diamond Coal Company owns section 18 and all of the houses, buildings, and improvements thereon, excepting the schoolhouse already mentioned, which is public property and belongs to the Gallup school district, and except said saloon building of Lorenzino, which was erected at its present location without the permission of the Diamond Coal Company. Said houses for residents are arranged along regular streets, and a water system is maintained and operated by the Diamond Coal Company to furnish water to the houses, for domestic purposes and fire protection.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"(8) Directly north of the houses situated in section 18, it is some miles to any other building. In a northeasterly direction there are two houses situated about a half mile and a mile respectively from the nearest house on section 18. In a westerly direction it is about two miles from the nearest house, and on the south there is one house within about a mile, and another within about three-fifths of a mile from the nearest house on section 18. Gallup is a little north and east of the southernmost house on section 18, and about two miles and a quarter away. There is no building between the proposed saloon and the town of Gallup, about two miles away in an easterly direction.

"(9) O. Lorenzino has resided within precinct No. 17 at his home on the southern part of the northwest quarter of section 20 for about 18 years, and has a patent to said land. Buildings on sections 8, 18, 19, and 20 are all within said precinct 17.

"(10) A blueprint, marked 'Exhibit A,' is attached to this statement of facts and made a part hereof. The location of all the buildings, water tanks, water mains, water and fire hydrants, and other improvements on section 18, 19, and 20, as shown thereon, are to be taken by the court as showing their true location and distances, except that the saloon building located at the extreme southwest portion of section 18 is shown on said blueprint only for the purpose of showing the distance between said building and the nearest building on section 18. Said distance is to be taken as the true measurement between said buildings.

"(11) The owners of the Diamond Coal Company intended that the southern street of houses on section 18 should constitute the southernmost boundary of the village of Allison. The houses on section 18 are arranged along streets running east and west, and all the buildings belonging to the Diamond Coal Company on section 18 are supplied with water by a central water plant with hydrants for domestic purposes and fire protection. The saloon building in question was not built until after the most of the houses on section 18 were completed. Said central water plant does not furnish water for fire protection or for domestic purposes to the said saloon building.

"(12) There are more than 100 inhabitants living on section 18. That Allison is an unorganized village."

The stipulated facts were adopted by the trial court as its findings, upon which it entered a judgment dismissing the alternative writ and denying the relief sought, from which judgment this appeal was taken.

John Venable, of Albuquerque, for appellant. M. U. Vigil and M. E. Hickey, both of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). [1, 2] Section 4123, C. L. 1897, provides for the steps to be taken by an applicant to secure a retail liquor license, where the license is to be used outside the limits of an incorporated town or city. Section 4124, C. L. 1897, reads as follows:

"Sec. 4124. Upon every license granted under the provisions of this act for the retail sale of malt, vinous and spirituous liquors there shall be collected before such license is issued, a tax as follows, viz.: For such license to do business in a precinct, village or town without the limits of any village, town or city having not more than five hundred inhabitants, and in such town or city having not more than five hundred inhabitants, one hundred dollars; in a precinct, village, town or city of not less than five hundred and not more than one thousand inhabitants, two hundred dollars; in a precinct, vil-

lage, town or city having more than one thousand inhabitants, four hundred dollars."

In 1905, this section was amended by section 1, c. 115, Sess. L. 1905, by adding to it the following proviso:

"Sec. 1. That section 4124 of the Compiled Laws of the territory of New Mexico of 1897, is hereby amended by adding thereto the following: 'Provided, that no license shall be granted for the sale of malt, vinous or spirituous liquors at any place in any county of this territory, except within the limits of a city, town or village containing at least one hundred inhabitants; and any officer authorizing or issuing a license contrary to this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars.'"

The controverted proposition in this case turns upon the question as to whether or not the building wherein liquor was to be sold at retail, under the license sought, was within the limits of the village of Allison.

The word "village" is defined in Bouvier's Law Dictionary to mean:

"Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys or not."

In a case note to the case of *People v. McCune*, 35 L. R. A. 396, will be found a collection of cases from the various states, wherein the courts have defined the term, and an examination of these cases will disclose that the meaning of the word is by no means fixed and unvarying. The editor of the case note says:

"Questions as to its meaning most often arise in respect to the construction of statutes, and in such cases will, of course, depend upon the context as showing the intent of the Legislature."

Prior to the Act of 1905, liquor licenses, for the sale of liquor at any place, whether within or without the limits of cities, towns, and villages, could be legally issued by boards of county commissioners.

The rule announced in Kent's Commentaries, § 462, for the interpretation of statutes, and generally followed by the courts, is as follows:

"When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion."

In view of the statute law, under which a license could be obtained for the sale of intoxicating liquor at any place within the territory, however remote the building in which it was proposed to carry on business under the license might be from other habitations, prior to the enactment of the proviso of 1905, it was the evident intention of the Legislature to restrict the issuance of such licenses to the more populous sections of the country. It is properly inferable, we believe, that the chief object which the Legislature had in view was the restriction of the place of sale of intoxicating liquors to such



buildings as were located in close proximity to other inhabited buildings, so that opportunities for the commission of crimes, the perpetration of which, as is well known and recognized, in many instances, is incited by strong drink, would be thereby lessened. Experience has demonstrated that it is unwise to permit the sale of intoxicating liquor in buildings far removed from other habitations, for here there is absolutely no restraint, and, when reason is dethroned by drink, or where unscrupulous and criminal minds so elect, the laws of society are held for naught and indescribable orgies enacted, men robbed and even murdered, with but slight fear of apprehension and subsequent punishment. The above being true, this court would not be justified in placing such a construction upon the meaning of the term "village" as would impair the legislative intent.

In this case the stipulated facts show that the building in which appellant proposed to carry on the liquor business is distant more than 1,836 feet from the nearest house in the village of Diamond; that it is located upon a tract of land embracing 160 acres patented as a homestead; that the village of Diamond is unorganized, and consists of more than 50 buildings used for residential purposes, together with a store building and a schoolhouse; that the buildings are arranged along regular streets and are situated from 60 to 120 feet apart; that the buildings above named were all constructed by the Diamond Coal Company, on its own land, for the use of its employes; that there are no houses beyond appellant's said house for some distance, in that direction; and that the country round about the main group of buildings within the village is very sparsely settled.

Appellant argued that, because the Legislature, in 1912, provided (chapter 27, Sess. Laws 1912) "that the territory embraced in the proposed incorporated village shall not be less than one mile square nor more than three miles square, nor shall any such village be incorporated unless the same shall contain at least one hundred and fifty people," the Legislature has construed the extent of the limits of a village, and that we should give to the term "village" used in the prior act the same construction as to boundaries; that is to say, that we should hold that an unorganized village embraces territory at least one mile square and not more than three miles square. Very little consideration, however, will dispose of this contention. Suppose we should say that it embraces a scope of country at least one mile square, what point shall we select as the center of the square? Shall it be the store, the post office, the schoolhouse, or some other arbitrary monument? It is clear that the statute referred to affords no assistance in the interpretation of the act of 1905, here under consideration.

Appellant also quotes extensively from the

case of *People v. McCune*, 14 Utah, 154, 48 Pac. 659, 35 L. R. A. 386, in support of his contention that his building in question was within the limits of the village of Allison. That case arose under a statute, making it an offense for any person to establish and maintain any corral, camp, or bedding place for the purpose of herding, holding, or keeping any cattle, horses, or sheep within seven miles of any city, town, or village, where the refuse of filth from said corral, camp, or bedding place would naturally find its way into any stream of water used by the inhabitants of any city, town, or village for domestic purposes. It appeared from the evidence in the case that Plateau was a settlement, consisting of 14 families and a population of about 70 persons, and that they resided along Otter creek for a distance of about  $2\frac{1}{2}$  miles, some of the residences being 40 rods from each other and some being a distance of 1 mile or more, and that their occupation was farming. The Utah court said:

"From an examination of the act, which is amended by the section above quoted, it seems clear that by the use of the word 'village' the intent of the Legislature was to include such settlements as the one in question, and there appears to be no reason why the people of such a settlement, who are using the water of a stream for domestic purposes, should not have extended to them the protection which the law affords."

From the above it will be seen that the court simply held that this settlement came within the purview of the act, because it was manifestly the intention of the Legislature to protect the water supply of such a settlement. This case is only authority for the proposition that it is the duty of the court to ascertain the legislative intent, and give it effect, if it can be legally done.

[3] Following the rule, we are compelled to conclude that by the use of the term "village," in the act of 1905, the Legislature intended to prohibit the licensing of the sale of intoxicating liquor in buildings not within the assemblage of houses used for business and residential purposes, reasonably contiguous to each other; that an isolated building more than 1,836 feet from any other building within such village is not "within the limits" of the village, within the meaning of said act.

Another reason might be advanced, were it necessary, in support of our conclusion, viz., the building owned by appellant is located, or was intended to be located, upon his patented homestead claim. The residents of the village, as stated, are all employed by the Diamond Coal Company, and are engaged in and about the mining of coal. The village was established and founded for coal mining purposes. All its residents have a common interest, while appellant, on the other hand, resides upon his patented claim, with divergent interests. He is not a coal miner, has no interest in common with the inhabitants of the village, is engaged in a different pursuit, and has no interest in the affairs of the

village, further than to secure his mail, vote therein, and possibly trade at the store. If we were to include as residents of villages all those like circumstanced in these respects, there would be absolutely no limit upon the right to issue licenses for the sale of intoxicating liquor.

For the reasons stated, the judgment of the district court dismissing the petition will be sustained, and it is so ordered.

HANNA and PARKER, JJ., concur.

(20 N. M. 19)

STATE v. ANCHETA. (No. 1678.)

(Supreme Court of New Mexico. Jan. 9, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—EVIDENCE.

Where there is substantial evidence to support a verdict, the appellate court will not disturb it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

2. CRIMINAL LAW (§ 351\*)—EVIDENCE—BRIBERY OF WITNESSES.

In both civil and criminal causes, a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.\*]

3. CRIMINAL LAW (§ 459\*)—EVIDENCE—IDENTITY OF ACCUSED—TRACKS.

Evidence of the identity of the accused with the person who committed the theft, derived from a comparison of the foot tracks, is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.\*]

4. CRIMINAL LAW (§ 1163\*) — APPEAL — PRESENTATION FOR REVIEW — PREJUDICIAL ERROR.

Errors must not only appear upon the face of the record, but must appear to be probably prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.\*]

5. CRIMINAL LAW (§ 1150\*)—DISCRETIONARY RULING—CHANGE OF VENUE—DENIAL OF MOTION.

An order of the district court denying the motion for a change of venue will not be reversed by this court, unless the record shows an abuse of discretion, which, in this case, it does not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3044; Dec. Dig. § 1150.\*]

Appeal from District Court, Valencia County; M. C. Mechem, Judge.

Amado Ancheta was convicted of rape, and appeals. Affirmed.

On September 1, 1913, the grand jury for the county of Valencia returned an indictment against the appellant charging him, in

the first count, with having carnally known and ravished Maria Inéz Lucero, a female under the age of 14 years, and, in the second count, with attempting to rape said Maria Inéz Lucero. On September 8, 1913, an application for change of venue was made by appellant and denied. Thereafter the trial was begun, and on September 9th the jury found the appellant guilty of the charge in the first count. The appellant was thereafter sentenced to 20 years in the penitentiary, and from such verdict and judgment of the court he appeals.

Because of an attack upon the sufficiency of the evidence, it is necessary to make a more complete statement of the facts than ordinarily would be necessary.

On the night of July 13, 1913, Filmonia Lucero, the mother of Maria Inéz Lucero, the girl upon whom the assault was made, her husband and two other children, aged one and nine years, respectively, retired to their one bed, which was made on the ground outside of the residence of the family, in the town of Cuerva, N. M. The nine year old daughter slept on the outside; next to her slept Maria Inéz, the little girl upon whom the assault was committed; the mother lay next to Maria Inéz; next to the mother lay the one year old daughter; and next to her lay the father. About 3 o'clock in the morning of the 14th of July, the mother reached over to where Maria Inéz had lain during the early part of the night, for the purpose of seeing that the girl was properly covered. The mother discovered that the girl was not in bed, but absent. Later, in the early morning, the six year old girl being still absent, friends and relatives were told of the incident, and a search for the missing girl was begun. This was about sunrise of that morning. Miguel Molina and José Maria Romero were summoned to the Lucero house, and they found large barefoot tracks leading from close to the house. They followed these tracks for some distance. Then the tracks took the appearance of shoe tracks. The witnesses stated that the person whom they were tracking had put on his shoes. The tracks led to some further distance and to a cedar tree. Under the tree the ground looked like it had been freely trampled, and a little pool of blood was seen there by the witnesses. The larger tracks led eastward from the cedar tree, and the smaller tracks led towards the north. Molina and Romero then took up the smaller tracks and after going a short distance they came upon Maria Inéz Lucero, the missing girl, standing mute. The men took her in their arms and carried her to the Lucero house, the home of the child. When they arrived there the girl was in an unconscious condition. When found she was wearing only a short skirt. When put to bed the night previous she had other clothes on her body,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

including the little skirt. The girl was handed to the mother, who placed her in bed, and thereafter summoned a physician. The physician, and others found blood on the girl's legs and clothing. Blood was also flowing from the vagina. The doctor examined the child, and found that a penetration of the vagina had been effected, and that the hymen was ruptured. Ten days later the physician found an unnatural discharge of matter from the vagina, which indicated that the child had "probably" an infection of gonorrhea, although the doctor was not sure that gonorrhea had set in, for he made no microscopical examination of the discharge to ascertain whether the gonococcus was present therein. When the little girl went to bed on the night of the 13th, she was in perfect health. All the tracks were in sandy soil, except at long intervals when a track or two was seen upon the rocks.

About 6 o'clock of the morning of the 14th of July, 1913, the appellant came to the house of a man named Sarracino, where José Carrillo was working, and called in a loud voice to another man working there. The appellant came close to José Carrillo and the latter saw two spots of blood upon the white shirt then worn by appellant. Between 12 and 1 o'clock of the night of July 13th, the appellant was seen within 200 yards of the house of Lucero.

Teodoro Bautista, a Laguna Indian, followed the foot tracks leading from the cedar tree eastward, and found that they then led to the stable of Narciso, then through a little alley into the road, and then to the house of this appellant. The Indian then went in search of the appellant, and later found him. Seeing blood spots on the shirt of the appellant, the Indian led the appellant close to a church, and there endeavored to pull the appellant's shirt up to find more blood, but this action was resisted. The appellant all this time was nervous, and his "chin trembled." The Indian then compared the new tracks made by the appellant in his walk to the church with those leading off from the cedar tree, and found them to be the same. The day following this incident the appellant had a conversation with the Indian, wherein he said to the Indian:

"Here, brother, friend, you are my friend; if you don't tell the truth there in court, because you tracked me, I will pay you \$10. Please do me the favor. When I get home, I will pay you more money; and now tell me how much you want."

A week previous to the date of the trial the appellant offered Miguel Molina, one of the witnesses for the state, \$100 if he "would be in his favor."

The testimony, on the other hand, for the appellant was in the nature of an alibi. He testified that he was at a show until 9 or 10 o'clock, and that he went from there to the saloon of one D'Armond; that he was there with some other boys, and that he went from

there to the house of Mrs. Baca, where he was stopping, and from there to the house of his uncle, Teofilo Sarracino; that he got up about 7 or 8 o'clock the next morning, and ate breakfast at his uncle's house; that he did not see the Indian, Bautista, until after he started to town that morning. The boys who were with him, Rodriguez Baca and Margarito Baca corroborated his story up to the time they left him between 11 and 12 o'clock, and the uncle testified that he saw him in the house in bed about 1 o'clock in the morning, and that he saw him again when he got up in the morning about 7 or half past 7 o'clock, and that he ate breakfast with him; and it is in evidence that he had previously borne a good character, and had never been in trouble before. He was a married man, and had a wife and two children, but was not living with his family.

Edward A. Mann, of Albuquerque, for appellant. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

HANNA, J. (after stating the facts as above). Although numerous errors were assigned, most of them have been waived, and we will consider those presented for our consideration in the order in which they are referred to in appellant's brief; the first error being that there is not sufficient proof to sustain a verdict of guilty.

[1] This assignment presents a double aspect, as argued by appellant; his first contention being that there is a total failure of proof as to practically all the material allegations of the indictment. Because of this assignment we have set out the facts at length, and it is our conclusion, after reading the evidence as contained in the record as a whole, that there was substantial evidence, if believed by the jury, to support the verdict. It has been held on numerous occasions, not only by this court, but by the territorial Supreme Court, that where there is substantial evidence to support a verdict the appellate court will not disturb it. *State v. Padilla*, 139 Pac. 143; *State v. Roberts*, 138 Pac. 208; *State v. Eaker*, 17 N. M. 479, 131 Pac. 489.

[2] The second aspect of this assignment, as presented by appellant, is based upon the alleged inadmissibility of the evidence of the two witnesses, Bautista and Molina, which was to the effect that appellant had attempted to bribe them. It is contended that this evidence, having gone to the jury over appellant's objection, undoubtedly tending to prejudice the jury against him, nevertheless did not tend to prove the offense charged against him, except as to a portion of the evidence of one of the witnesses which went to show that this witness had seen blood upon the shirt of the defendant. Further objection was made to the evidence of the witness Bautista on the ground that there was no attempt to qualify him as an expert

witness, until after his testimony in chief, and upon the suggestion of the court. Upon the first phase of this question—namely, the evidence going to show an attempt to bribe—we believe it is a well-established rule of evidence, in both civil and criminal cases, that a party's fraud in the preparation or presentation of his case, such as the suppression or the attempt to suppress evidence by the bribery of witnesses, can be shown against him as a circumstance tending to prove that his case lacks honesty and truth. *State v. Constantine*, 48 Wash. 218, 93 Pac. 317.

[3] As to the objection that the Indian witness, Bautista, was not qualified as an expert, we are not disposed to agree that this evidence was of a character to be properly denominated as expert evidence. The witness merely detailed the facts which had come under his observation, and, aside from the fact that he identified the tracks which he followed as the tracks of the defendant, basing his testimony upon his subsequent observation of other tracks known to be those of the defendant, it cannot be said that his evidence in any wise assumed the character of expert testimony. And, as to the latter fact, we believe there can be no objection upon the grounds as stated. The opinion of the witness in this respect was based upon measurements of the different tracks, which were compared by the witness, for the purpose of ascertaining whether or not they corresponded with one another. It is laid down as a rule of criminal evidence that:

"Evidence of the identity of the accused with the person who committed the theft, derived from a comparison of the foot tracks, is admissible." *Underhill on Crim. Ev.* p. 364.

The same author also says in the same work, at page 400, that:

"The comparison of footprints proved to have been made by the prisoner with other tracks or footprints found near the scene of the homicide is relevant, if a doubt arises on the evidence which was the slayer."

The same author, at page 438, further says:

"A witness who has measured the tracks of man or beast and compared his measurement with the footwear of the accused, or of a horse owned by him, may testify to the results and may state that, in his opinion, a correspondence exists in size and shape."

Mr. Wharton, in his work on Criminal Evidence (section 936), states that the weight of authority sustains the rule that the witness may always testify to the facts and circumstances of the footprints or tracks, but that the courts are about equally divided upon the question of whether or not the witness may express an opinion as to their identity.

In this case the witness testified the tracks were the same, which, of course, might be contended was, in effect, stating that the particular tracks at the scene of the crime were those of the defendant, as he was connected with the tracks made later, and which were used for the purpose of comparison. We fully

appreciate the fact that great caution should be exercised in admitting evidence of this character, but we believe in this case the facts justify the admission of this particular evidence, and the evidence in question was more closely approximating evidence of the fact in question rather than the conclusion or opinion of the witness which might have required a showing of expert ability, and it was the only evidence, in our opinion, that could have been adduced to prove the fact. For this reason it bears some similarity to the case of *State v. Cooley*, recently decided by this court, and reported at 140 Pac. 1111, at 1118, 52 L. R. A. (N. S.) 230. As stated in that opinion:

"The witness, in effect, describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particulars which go to make up his belief, but he can characterize them."

So, in the present case, the witness characterized the tracks which were the subject of inquiry, and said that they were the same. He could not detail the circumstances which led him to believe that they were the same, and this evidence is admissible by reason of the necessity of the case, and because of the fact that the jury could not be informed upon the matter of the identity of the tracks except upon such evidence as this. We therefore are of the opinion that no error was committed upon this ground of the assignment.

[4] The next assignment of error urged by appellant is predicated upon the refusal of the trial court to allow the defendant to show by a witness, Demécio Baca, what the statement of the prosecutrix was immediately after she regained consciousness after the alleged offense. One of the grounds upon which error in this action of the trial court is predicated is that the statement was a part of the *res gestæ*, but it is further contended that the alleged statement in question was admissible as independent evidence. In our opinion, there are several reasons why this assignment is not well taken. First of all, it cannot be seriously urged that this testimony was a part of the *res gestæ*. The time of the crime is not definitely fixed, but it occurred at some hour during the night. The child was found some time after she was missed in the morning, and was returned to her home, additional time thereby elapsing which is not fixed or certain. At a later time after her return to her home, which by the witness referred to was said to be a very little while after, a question was propounded to the child by the aunt, who, it is alleged, asked her who took her from home. The answer to this question, which was excluded by the court upon the ground that the child was an incompetent witness, is the action upon which error is predicated. It does not appear from the record what the answer would have been had it been admitted, and, so far as the record discloses, the answer

might have been that the defendant was the person who took her from home. In other words, there was no offer to prove any fact which would indicate that the defendant had been prejudiced by the exclusion of the testimony.

As stated by Mr. Elliott, in his work on Appellate Procedure, § 592:

"A ruling must appear by the record, and from the record it must be shown to be erroneous in the strict sense; that is, it must appear that the ruling was wrong, and that it probably so operated as to bring about a wrong final result."

In other words, the error must appear from the face of the record, and we believe it to be well established that errors must not only appear upon the face of the record, but must appear to be probably prejudicial. *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129.

We therefore conclude that this assignment of error is not well taken, as it does not appear that the defendant was prejudiced by the exclusion of the evidence in question.

[5] The third assignment of error presented for our consideration is predicated upon alleged error in the trial court's refusal to grant a change of venue. Appellant, in his affidavit, asserted a belief that he could not obtain a fair trial in Valencia county, by reason of prejudice of the inhabitants thereof against him, arising out of public excitement and local prejudice, which affidavit was supported by the affidavit of two witnesses, who swore they were disinterested and believed the matter alleged in the affidavit of the appellant. The court caused the testimony of the supporting witnesses to be taken, which resulted in a showing that they had heard some conversation concerning the case, and talk that the defendant ought to be punished, but did not know whether the appellant could obtain a fair trial in the county or not. Whereupon the court denied the motion for a change of venue.

It is contended by appellant that the inquiry of the court into the merits of the affidavits upon which the application for change of venue was based could only be directed to the interest of the witnesses, and that the court was limited in its inquiry thus far. It is argued that there is nothing in the statute (section 2881, C. L. 1897) that authorizes the court to inquire into the source of knowledge of the witnesses; the only question before the court being, Are the two witnesses supporting the affidavit disinterested? It being contended that, if the court so finds, the statute is fully complied with, and it is mandatory upon the court to grant the change of venue. This question is ably discussed in the learned brief of the Attorney General, and we do not desire to cumber this opinion with a full discussion of the matter as presented therein, believing it is sufficient to say that we consider that the question is fully disposed of by the territorial Supreme Court in the case of *Territory v. Cheney*, 16 N. M. 476, 120 Pac. 335, where the court said:

"The witnesses produced in support of the application should be examined in court, as to knowledge and interest, and, if the presiding judge is of the opinion that their testimony does not establish the grounds of the motion, he should deny it."

We also fully agree with the holding of the territorial Supreme Court in the case last referred to, which we believe to be applicable to the present case, that an order of the district court denying the motion for a change of venue will not be reversed by this court unless the record shows an abuse of discretion, which in this case it does not.

For the reasons stated, we cannot hold that the assignment as to the denial of the change of venue is well taken.

The only remaining assignment of error urged by appellant in his brief is that the court erred in refusing to quash the indictment, and also in permitting the state to introduce testimony over defendant's objection, for the reason that no offense against the state was charged in the indictment. It is asserted that this indictment, being based upon sections 1090 and 1091 of the Compiled Laws of 1897, is defective, in that the indictment nowhere charged that the defendant was either over the age of 14 years or, being under that age, had the physical ability to commit the offense, which, it is insisted, were essential ingredients of the offense that it was incumbent upon the state both to allege and prove. Appellant cites in support of this assignment the case of *Hubert v. State*, a Nebraska case found in 74 Neb. 220, 104 N. W. 276, 106 N. W. 774, and the case of *Schramm v. People*, 220 Ill. 17, 77 N. E. 117, 5 Ann. Cas. 111, and also the case of *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748, in which case the several courts held that proof of the defendant's age was necessary and material in order to establish the corpus delicti. It is to be observed, however, that the statutes upon which the several indictments in these cases were based were substantially different from that of ours, in that the element of age was an essential part of the statute. As in the Nebraska case, where the statute read, "Or if any male person of the age of eighteen years or upwards," etc., and in the Illinois statute, upon which both the Illinois cases were based, the statute read, "Every male person of the age of sixteen years and upwards, who shall," etc., necessarily the age of the accused must be specified in an indictment based upon either of these statutes. Our statute (section 1091) provides as follows:

"No conviction for rape can be had against one who is under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact beyond a reasonable doubt."

Section 1090, C. L. 1897, which defines the crime of rape, does not contain any limitation as to the age of the person charged with the crime, as in the case of Nebraska and Illinois

statutes, but simply provides "that a person perpetrating" shall be punished as therein provided. And it was under this section of the statutes that the defendant is accused by the indictment in question. If it should appear at the trial that the accused was a person under the age of 14 years, the provisions of section 1091 would apply, and the statute in question might be urged in bar of the conviction, should the evidence fail to prove the physical ability as defined in the statute. It would also be sufficient to say, in connection with this assignment of error, that the point cannot be now raised for the first time, not having been previously called to the attention of the trial court during the progress of the trial.

The record, however, we desire to say, discloses that the appellant was a married man, and the father of two children, which would at least show that the assignment was not meritorious in point of fact, if valid as a technical legal objection.

Finding no errors in the record, the judgment of the trial court is affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(26 Idaho, 723)

#### EXCHANGE STATE BANK v. TABER.

(Supreme Court of Idaho. Jan. 28, 1915.)

#### 1. APPEAL AND ERROR (§ 969\*)—TRIAL (§ 25\*)—DISCRETIONARY RULING—ARGUMENT OF COUNSEL—ORDER.

The order of trial in a civil case is provided by section 4383, Rev. Codes, and directs that the trial must proceed in the order there indicated, unless the judge, for special reasons, otherwise directs, and where an action is brought on promissory notes, and the respondent admits the execution of such notes, but makes special defenses thereto, it rests in the sound discretion of the trial court to direct the order of addressing the jury, and, unless there is a clear abuse of discretion, this court will not disturb the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Dec. Dig. § 969;\* Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

#### 2. ALTERATION OF INSTRUMENTS (§§ 25, 27\*)—TRIAL (§ 250\*)—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS.

Where a note appears to have been altered in a material respect, the onus is on the party seeking to enforce the payment to show that it is not void, but, where the respondent in his answer and counterclaim, in express terms, admits the execution and delivery of the notes, which are set out in full in the complaint, and, when introduced in evidence, are in the same condition as they appeared in the complaint, the respondent should not be permitted to introduce evidence tending to establish any alteration, nor should the court instruct the jury upon the law governing the alteration of written instruments.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 216-229, 230-247; Dec. Dig. §§ 25, 27;\* Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

#### 3. ALTERATION OF INSTRUMENTS (§ 27\*)—NOTES—PRESUMPTION.

Where the notes are set out in the complaint, and, when introduced in evidence, are in the same condition as they appear in the complaint, and respondent admits in express terms the execution and delivery of the notes, it will be presumed that any alteration was made prior to the execution of the notes.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.\*]

#### 4. ESTOPPEL (§ 90\*)—CONDUCT—LEGALITY OF ACT.

Where a party by conduct has intimated that he consents to an act which has been done or will offer no opposition thereto, though it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the action to the prejudice of those who have acted on the fair inference to be drawn from his conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242-244, 248-256; Dec. Dig. § 90.\*]

#### 5. PLEDGES (§ 30\*)—DUTY OF PLEDGEE—COLLATERAL.

A pledgee must exercise ordinary and reasonable diligence to secure the fruits of the collateral, but he is held to no greater degree of diligence, and extraordinary care and efforts in the collection of the collaterals are not necessary.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.\*]

#### 6. PLEDGES (§ 30\*)—COLLATERAL—NEGLIGENCE OF AGENT.

Where a person is jointly agreed upon by the pledgor and pledgee to make collection of collateral notes, he becomes the representative of both parties, and neither can charge the other with negligence.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75-85; Dec. Dig. § 30.\*]

#### 7. REFUSAL OF INSTRUCTIONS.

Refusal to give certain instructions requested by appellant held to be error.

#### 8. PLEDGES (§ 36\*)—COLLATERAL—DAMAGES—EVIDENCE.

Held, that it was error to reject certain evidence offered by appellant.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 92-94; Dec. Dig. § 36.\*]

#### 9. EVIDENCE (§ 271\*)—ADMISSIBILITY—SELF-SERVING LETTER.

The admission of certain evidence over the objection of the appellant held to be error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

#### 10. APPEAL AND ERROR (§ 1176\*)—DISPOSITION OF CAUSE—REMAND WITH DIRECTIONS.

Where a party is entitled to have a verdict directed in his favor at the close of the evidence, and the case is reversed on his appeal, a new trial will not be ordered. The case will be remanded, with instructions that judgment be entered in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.\*]

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by the Exchange State Bank, a corporation, against George C. Taber. From judgment for defendant, plaintiff appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Reversed and remanded, with directions to enter judgment for plaintiff.

Sweeley & Sweeley, of Twin Falls, for appellant. Longley & Walters, of Twin Falls, for respondent.

**BUDGE, J.** This is an action brought in the district court of Twin Falls county, by the appellant, Exchange State Bank, a corporation, against George C. Taber, respondent. Judgment upon a verdict of the jury was entered against the appellant for the sum of \$3,924.07 upon the respondent's counterclaim. From said judgment an appeal was prosecuted to this court. On the 14th day of March, 1914, a majority and minority opinion was handed down, resulting in a reversal of the judgment of the trial court and remanding said cause for a new trial. Thereafter a petition for rehearing was filed by both the appellant and respondent, which petition was granted.

This action was brought to recover upon two promissory notes; one for \$504.49, dated January 1, 1911, payable May 1, 1912; the second note was for \$2,393, dated October 8, 1911, payable six months after date. Both notes bear interest at 6 per cent. per annum.

The respondent, in his answer, admits the execution and delivery of the two notes, but denies that they were the property of the appellant, and that they were unpaid or past due, and alleges affirmatively that each of said notes has been fully paid and discharged by reason of the facts alleged in the affirmative allegations of respondent's answer and the facts as alleged in respondent's counterclaim, which, in substance and effect, are that the appellant had been negligent in its handling of said promissory notes, which had been pledged with the appellant by the respondent as collateral security to respondent's obligation, to his damage in the sum of \$6,566.

From the record it appears that on the 8th day of April, 1907, James T. Robinson, of Jackson county, Mo., and George C. Taber, the respondent herein, then of Corral county, Ill., entered into an agreement whereby Robinson and Taber became the owners of a tract of land in Kansas City, Mo. Taber furnished the purchase price of the land. Robinson was to furnish all material and labor in erecting nine houses, and was to pay for all street improvements, and to furnish all necessary funds to erect the houses, and, on the completion and sale of the houses, Taber was to receive \$9,200 as his full share and interest in the whole transaction, and to accept payments under the following contract:

"Two-thirds of the second mortgage paper received from the sale of the above-described property up to the amount, and not to exceed, nine thousand two hundred dollars, and, in event that two-thirds of the second mortgage paper does not amount to \$9,200.00, the balance to be in cash.

"James T. Robinson agrees to collect all money paid in on the notes turned over to Geo. C.

Taber from the sale of the above-described property, and remit to him the 1st of each month the entire life of notes given, free of charge."

On the 2d day of August, 1908, the respondent called upon John R. Wolf, assistant cashier of the appellant at Lanark, Ill., and told Wolf that he had some notes and collaterals, and wanted to arrange to borrow some money on these notes; that they were at Kansas City and secured by mortgages; that a Mr. Robinson had been and was collecting the monthly installments as they became due, and was sending the payments to him; that for Wolf to investigate the matter, and that a William Hess who resided in the city was well acquainted with Robinson; that he could see him, and that he could write and find out the character of the man, how he was, etc. About two weeks thereafter respondent met Wolf, and it was arranged between them that a loan should be made to the respondent; that the bank would accept the collateral notes, and as they were paid the amounts received would be indorsed upon the respondent's obligation to the bank. On the 7th day of September, 1908, a letter was written by Wolf and signed by Taber, addressed to Robinson at Kansas City, which is as follows:

"I have talked with J. R. Wolf, asst. cashier, with whom I am depositing all my notes as collateral, and have concluded the best way will be for you to send all my notes in your hands to me at Twin Falls, Idaho. I will indorse them and forward them to Exchange State Bank, Lanark; then they return them to you for collection the same as I have done and you receipt to bank instead of me. I inclose your receipts. Please forward notes at once and oblige."

In pursuance to the above communication, Robinson forwarded the collateral notes to Taber at Twin Falls, who indorsed them, and then sent them to the Exchange Bank at Lanark, and by the bank they were forwarded to Robinson at Kansas City.

It appears that in the construction of nine houses upon the land purchased by Taber the material was bought from the Belt Line Lumber Company; that within two months after Robinson received the collateral notes from the Exchange Bank the Belt Line Lumber Company filed notices of materialmen's liens, and, in order to avoid foreclosure, Robinson turned over the collateral notes sent to him by the appellant to the Belt Line Lumber Company in adjustment of its claim, in order to protect the land and houses formerly owned by Robinson and Taber, and which formed the basis of their contract of settlement heretofore referred to. The application of the collateral notes in the adjustment of the Belt Line Lumber Company's claim was not known positively by either the appellant or respondent until November 21, 1911, at which time Robinson wrote a letter to Taber, addressed to Twin Falls, Idaho, in which he admitted, in substance, that he had used the collateral notes as above stated. For some time after the collateral notes were

diverted by Robinson, he continued to make payments to the bank according to the provision of the collateral notes, first regularly, and latterly at irregular periods, and finally ceased to make any payments. The appellant and respondent, as shown by numerous exhibits, persistently urged Robinson to make collections of the collateral notes.

In December, 1911, Taber went to Lanark for a conference with Wolf, which resulted in Wolf making a visit to Kansas City to see Robinson. There is evidence in the record that Taber agreed to go with Wolf. He did not do so. Wolf met Robinson in Kansas City and made a conditional settlement with him, and then returned to Lanark, where he immediately afterwards met Taber. A day or so following the notes agreed in the settlement to be given by Robinson and his brother, W. S. Robinson, were received by mail at Lanark. The notes were made payable to Taber, who thereafter indorsed the notes and left them with the appellant as collateral security. In the settlement between Taber and the bank it appears that there was \$504.49 still due on the larger of the two notes given to the bank by Taber on the 7th day of September, 1908, which is one of the notes in this action. Thereafter Taber returned to Twin Falls.

Upon the trial it was agreed that there was an error in the amount for which Robinson gave his notes at the time of the settlement made in Kansas City of \$400. The trial was had before the court with a jury, and a verdict was rendered in favor of the respondent in the sum of \$3,924.07. This appeal is from the judgment.

[1] Numerous errors are assigned by appellant. The first is that the court erred in holding that the respondent was entitled to open and close the argument to the jury. It rests in the sound discretion of the trial court to direct the order of addressing the jury, and, unless there is a clear abuse of discretion, this court will not disturb the verdict. Section 4383, Rev. Codes; *Goodpaster v. Voris*, 8 Iowa, 334, 74 Am. Dec. 313; *Shaffer v. Des Moines Coal Co.*, 122 Iowa, 233, 98 N. W. 111; *Brunswick & W. Railroad v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181; *Hall v. Weare*, 92 U. S. 728, 23 L. Ed. 500; *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 83, 29 L. Ed. 373; *Florence Oil & R. Co. v. Farrar*, 109 Fed. 254, 48 C. C. A. 345; 38 Cyc. 1300.

[2] The second assignment is that the court erred in giving the following instruction to the jury:

"You are instructed that, if you believe from the evidence in this case, when the notes sued on were originally made or had indorsed thereon by agreement of the parties at any time after making an agreement or indorsement to the effect that the same were not to be collected from the defendant, and that thereafter said notes or either of them were altered without the knowledge, authority, or consent of the defendant, by

cutting from said notes such indorsement, then such an alteration would be material, and the plaintiff cannot recover upon said notes, and your verdict should be for the defendant."

[3] The notes sued upon in this action are set out in full in the complaint. The answer of the respondent admitted the execution and delivery of the notes to the appellant. The respondent did not affirmatively allege in his answer or counterclaim that the notes had been altered in any respect. The alteration of the notes was not an issue in the case. The general rule is that a note which has been altered is not void, unless the alteration is material and was made subsequent to its delivery and without the consent of the parties liable. Where a note appears to have been altered in a material respect, the onus is on the party seeking to enforce the payment to show that it is not void; but, where the respondent in his answer and counterclaim in express terms admits the execution and delivery of the notes which are set out in full in the complaint, and, when introduced in evidence, were in the same condition as they appeared in the complaint, the respondent should not be permitted to introduce evidence tending to establish any alteration, nor should the court instruct the jury upon the law governing the alteration of written instruments. It will be presumed that the alteration was made before the execution of the instrument. The above instruction, as given by the court, was clearly prejudicial error. 14 Ency. Pl. & Pr. 656; *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733; 1 Standard Ency. Proc. 822; 2 Am. & Eng. Ency. Law (2d Ed.) 185.

[5-7] The appellant calls attention to the court's refusal to give instruction No. 5 requested by the appellant, which is as follows:

"In the handling of securities placed with it, the plaintiff was required to exercise only ordinary diligence, and before you will be justified in finding for the defendant on his affirmative defense, or on his counterclaim, it must be established by the evidence that the plaintiff was grossly negligent in handling such securities, and that, if it had used reasonable diligence, it could have collected the amounts due on said collaterals, and, unless you find that through the gross negligence of the plaintiff the defendant was, in fact, damaged, then the defendant has failed to establish his affirmative defense and counterclaim."

This instruction seems to be within the rule announced by this court in the case of *Murphy v. Bartsch*, 2 Idaho (Hasb.) 636, 23 Pac. 82. It is impossible to prescribe any definite rule applicable to every case of property pledged as collateral security; each case must be determined by the attendant facts and circumstances, rather than by any iron-clad rule; but, in view of the peculiar circumstances surrounding this case, it would have been eminently proper for the court to have given this instruction.

[8] The next error that we will consider relates to the refusal of the court to admit certain evidence offered by the appellant touch-



ing the disposition of the collateral security sent to Robinson by the bank and by Robinson diverted. There is evidence in the record which shows that these collateral notes had been used by Robinson for the express purpose of protecting the business interests of the respondent and Robinson. If this was true, and the respondent had, in truth and in fact, received the benefits of the collateral security either in whole or in part by the payment of certain debts that were liens on the property formerly owned by respondent and Robinson, and out of which respondent expected to realize upon the collateral notes, appellant should have been permitted to introduce any testimony that might establish the application of the proceeds of the collateral notes to the benefit of the respondent. This testimony would have been admissible, if for no other reason than for the purpose of reducing damages.

[8] We are of the opinion that the court erred in admitting respondent's exhibit No. 15, a letter of August 1, 1912, written by Taber to Wolf. This letter was self-serving and immaterial. It had reference to a business transaction that had been for some considerable time closed and fully settled.

We do not think it necessary to discuss each of the remaining 17 assignments of error separately. They are based upon the refusal of the court to grant appellant's motion to strike out all of the testimony offered by respondent in support of the affirmative allegations of his answer and the refusal of the court to grant appellant's motion for a nonsuit at the conclusion of the introduction of testimony by respondent in support of his counterclaim. We do not think the court erred in refusing to strike out the testimony offered by respondent in support of the affirmative allegations in his answer.

The serious question that confronts us in this case is: Was there sufficient evidence to justify the court in submitting this case to the jury after all of the testimony was received in support of the affirmative allegations of the answer and counterclaim of respondent? It appears that the respondent, prior to his execution of the two notes given to the Exchange Bank in the year 1908, had entered into a contract in the year 1907 with Robinson, of Jackson county, Mo., whereby they purchased some land in Kansas City for \$6,500. Taber furnished the money for said purchase as his part of the enterprise. Robinson was to furnish the material and labor in the erection and construction of nine houses upon the lots. Upon completion and sale of the houses and lots, Taber was to receive \$9,200 as his share or interest in the transaction. The evidence shows that they proceeded with the contract. Robinson procured the material for the erection of the houses from the Belt Line Lumber Company, to which company he became indebted, and to which company the collaterals were subsequently turned over in order to avoid fore-

closure proceedings against the property. This agreement provided that Robinson should collect all deferred payments for the houses free of charge and remit the money to Taber. When Taber went to the bank, this was the arrangement that existed between him and Robinson and, when he made the loan from the bank, he explained to the assistant cashier, Wolf, that he had these notes and the arrangement between Robinson and himself for the collection of the payments as they became due, free of charge. It was Taber who made the bank acquainted with Robinson, who vouched for his honesty and integrity, and who suggested that an investigation of Robinson's character and standing in the community where he lived should be made and that he would be a proper person with whom to place these collateral notes for collection. Taber also referred Wolf to one Hess, a witness in this case, an old acquaintance of Wolf's, who, Taber said, would substantiate what he had said with reference to Robinson as an additional reason why the collateral notes should be sent to Robinson for collection.

Taber signed a letter, Exhibit J, addressed to Robinson, requesting him to forward all the notes that he had belonging to him (Taber) to Twin Falls for indorsement, and that he (Taber) would forward the same to the Exchange Bank at Lanark after indorsing them, to be by said bank returned to Robinson for collection in the same manner as he had theretofore done for Taber. Upon receipt of the notes from Robinson, Taber wrote Wolf, of date September 21, 1908, that he had just received the notes from Robinson; that he had indorsed the same and sent them for security; that he supposed Robinson had written him (Wolf) and explained all, and further stated: "And he will remit to you from now on the collections on same."

The bank made statements from time to time to Taber, accounted for all payments made through Robinson, and in numerous letters urged Taber to insist that Robinson make collection upon the collateral notes and forward the same to the bank for credit. Taber was notified by the bank repeatedly that Robinson was behind with the collections. The bank informed Taber that they had requested Hess to call upon Robinson, and insist upon the collections of the collateral notes being made. Taber wrote to Wolf in response to these communications, and particularly of date December 5, 1910, as follows:

"Mr. Guy Wolfe, Lanark, Ill.—Dear Sir: Yours rec'd some time ago in regard to Mr. Robinson's delinquency on payments. I have written him and have received no answer from him. I wish you would take this in hand and see what you can do with him. I will write him again this evening.

"Yours respectfully, Geo. C. Taber."

There are numerous communications from Taber to the bank in which he states that he has written Robinson insisting upon the

collection of the collateral notes, and requests the bank to make arrangements with Hess to assist in the collection of these collateral notes. In each and all of these communications, fairly construed, Taber never relinquished ownership or control, or his right to collect the collateral notes. It is quite clear that both Taber and the bank were industrious in their endeavor to bring about the collection of these collateral notes.

On November 21, 1911, Robinson addresses a letter to Taber at Twin Falls, in which he informs Taber that the collateral notes have been diverted. After receiving this information, on December 25, 1911, Taber left Twin Falls for Lanark to consult Wolf. After reaching Lanark a settlement was finally brought about between Robinson and Taber, and the notes received from Robinson were put up as collateral security with the bank to secure the payment of the obligations sued upon in this action. The bank, by the verdict of the jury, has been held responsible for the loss of these collateral notes, upon the ground and for the reason, as appears from the record, that the bank was negligent in handling these collateral notes and their failure to collect the same. We do not think the record supports this conclusion. Within two or three months after the collateral notes were received by Robinson, he diverted them. No effort upon the part of the bank or Taber would have resulted in the recovery of these collateral notes. There could, therefore, be no negligence in the collection of these collateral notes. Robinson had parted with them, and was not in a position to collect the payments as they became due. Therefore, if the bank was negligent at all, its negligence consisted in forwarding the notes to Robinson for collection. This, the bank never would have done if it had not been for the conduct of Taber, which consisted in calling the bank's attention to Robinson, recommending him as a man capable and honest, the proper person to be intrusted with the collection of these notes, who would perform the services free of charge, and calling the bank's attention to Hess, an old acquaintance, to verify what he (Taber) had said with reference to Robinson.

[4] "Where a party by conduct has intimated that he consents to an act which has been done or will offer no opposition thereto,

though it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the action to the prejudice of those who have acted on the fair inference to be drawn from his conduct." *Divide Canal & Reservoir Co. v. Tenney* (Colo.) 139 Pac. 1110; *Truesdail v. Ward*, 24 Mich. 117.

The more consistent position to take is that Robinson was the person jointly agreed upon by Wolf and Taber to collect these collateral notes; that he became the joint agent of both of the parties; that being true, neither could charge the other with negligence. This fact is further emphasized when we consider the letters written by Taber with reference to this transaction, and that Taber ratified the settlement made by Robinson and Wolf, indorsed the notes given by Robinson, and thus adjusted his obligations with the bank. *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Damon v. Waldteufel*, 99 Cal. 234, 33 Pac. 903.

[10] We think that it was the duty of the court, after all of the testimony had been submitted, to have taken the case from the jury and directed that judgment be entered for the appellant. Where a party is entitled to have a verdict directed in his favor at the close of the evidence, and the case is reversed on his appeal, a new trial will not be granted. The case should be remanded with instructions for judgment to be entered in his favor. Section 3818, Rev. Codes; *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904. "Where a party shows no right to recover \* \* \* under any possible state of proof, the court is not bound to submit the case to a jury." *Gorman v. Commissioners of Boise County*, 1 Idaho, 655.

For the foregoing reasons, the judgment appealed from must be reversed, and the cause is hereby remanded, with instructions to the trial court to enter judgment for the appellant as prayed for in its complaint, in accordance with the views expressed in this opinion. Costs are awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

(36 Idaho, 738)

## STATE v. DRISKILL.

(Supreme Court of Idaho. Feb. 3, 1915.)

## CRIMINAL LAW (§ 368\*)—WITNESSES (§ 317\*)—EVIDENCE—RES GESTÆ—RAPE.

*Held*, that the evidence is sufficient to support the verdict, and that the court did not err in refusing to give certain instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. § 368;\* Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.\*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Charles Driskill was convicted of statutory rape, and appeals. Affirmed.

McNamee & Harn, of Lewiston, for appellant. J. H. Peterson, Atty. Gen., E. G. Davis and T. C. Coffin, Asst. Attys. Gen., and Miles S. Johnson, Pros. Atty., of Lewiston, for the State.

SULLIVAN, C. J. The defendant was indicted and convicted of the crime of statutory rape, and sentenced to an indeterminate term of imprisonment of from five to ten years in the state penitentiary. A motion for a new trial was denied and this appeal is from the judgment and order denying a new trial.

Fifteen errors are assigned which go to the admission of certain evidence, the refusal of the court to give certain requested instructions, and in permitting the prosecuting attorney to make certain statements during his argument to the jury, the insufficiency of the evidence, and the impeachment of the prosecutrix.

After an examination of the record, we are fully satisfied that the evidence is sufficient to support the verdict, and that the court did not err in the admission of evidence. There was a sufficient corroboration of the testimony of the prosecutrix.

The action of the court in permitting a witness on behalf of the state to testify that she had sexual intercourse with the defendant within a very few minutes after he had had intercourse with the prosecutrix is assigned as error. It appears that said witness and the prosecutrix went to a barn with the defendant and another young man, and there the acts referred to were committed, and that after the defendant had had intercourse with the prosecutrix it was suggested that the young men change girls, and thereupon the change was made and the defendant had intercourse with the other girl, and the record shows that such acts were not more than 15 minutes apart. Being so close together, and really a part of the *res gestæ*, the court did not err in admitting the evidence referred to.

After an examination of the instructions requested by the defendant and refused by the court, we are satisfied that the court did not err in refusing to give said instructions.

As to the impeachment of the prosecutrix and to what extent the jury would give credence to her testimony, that was for the jury to determine, and we do not think, if the jury believed the prosecutrix had made contradictory statements, they must of necessity reject all of her evidence as untrue. The jury evidently concluded from all of the evidence that the defendant was guilty of the crime charged beyond a reasonable doubt, and we think all of the evidence, taken together, would justify that conclusion.

As to the remarks made by the prosecuting attorney in his argument to the jury, we do not think there was sufficient error in those remarks to warrant a reversal of the judgment.

Finding no reversible error in the record, the judgment must be affirmed, and it is so ordered.

BUDGE and MORGAN, JJ., concur.

(36 Idaho, 741)

## STATE v. HOPKINS.

(Supreme Court of Idaho. Feb. 6, 1915.)

## 1. RAPE (§ 53\*)—ATTEMPT TO COMMIT—SUFFICIENCY OF EVIDENCE.

The evidence in this case examined, and found to be sufficient to justify the conviction of the defendant of the crime charged.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-81; Dec. Dig. § 53.\*]

## 2. CRIMINAL LAW (§ 572\*)—ALIBI—PROOF—SUFFICIENCY.

Where the evidence adduced by the state tends to show that a crime was committed during a two weeks' vacation in school at the Christmas holiday season, and does not fix the date more definitely than that, and where the defendant relies upon an alibi and produces evidence tending to show his whereabouts from December 24th to January 1st, inclusive, and that he was not at the place where the evidence produced by the state tends to show the crime was committed, but produces no evidence tending to show his whereabouts during the remainder of the two weeks in question, the jury is justified in reaching the conclusion that the alibi relied on was not established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1263, 1289-1291; Dec. Dig. § 572.\*]

## 3. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence and the evidence taken as a whole is sufficient to sustain the verdict, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

## 4. CRIMINAL LAW (§ 1137\*)—APPEAL—WAIVER OF ERROR—ADMISSION OF EVIDENCE.

Where a party to an action does not object to a question propounded to a witness, or, having objected, expressly gives consent that the question may be answered, error cannot be predicated upon the action of the court in admitting the testimony, nor upon the refusal of the court to strike out the answer if it is responsive to the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Daniel H. Hopkins was convicted of an attempt to commit rape, and appeals. Affirmed.

John A. Bagley, of Montpelier, for appellant. J. H. Peterson, Atty. Gen., E. G. Davis and T. C. Coffin, Asst. Attys. Gen., and A. H. McConnell and B. H. Miller, both of St. Anthony, for the State.

MORGAN, J. In this case the appellant was convicted of the crime of assault with intent to commit rape. The trial resulted in a verdict of guilty, upon which a judgment of conviction was made and entered, from which judgment, and from an order of the court denying his motion for a new trial, this appeal was taken.

In his brief upon appeal and in his oral argument counsel for the appellant relies upon four assignments of error, in substance as follows: First. That the evidence is insufficient to support the verdict and judgment. Second. That the verdict was rendered by the jury on account of bias and prejudice against this class of cases, and the additional reason that the court permitted, over the objection of the appellant, the respondent to show that the appellant had been found guilty of the offense charged in this case by a tribunal of the church of which he was a member. Third. That the appellant proved a full and complete alibi. Fourth. That there is no evidence to corroborate the prosecutrix, and she is contradicted by the facts and circumstances proved by the appellant.

The first, third, and fourth assignments of error, and the first portion of the second, may be considered together as denying the sufficiency of the evidence. The latter portion of the second assignment will be considered separately as relating to the admissibility of evidence.

[1, 2] We will first consider the evidence which affects the alibi relied upon by the appellant. The testimony of the prosecutrix shows that she attended school during the school year of 1911 and 1912; that there was a vacation, or holiday period, at Christmas time, of two weeks; that the crime of which the appellant was convicted was committed during this vacation period, at a haystack in appellant's field some distance from the house. The prosecutrix further testified that she was unable to give the exact date of the assault upon her, nor to fix the time any closer than that it occurred at about noon on a day during this two weeks' vacation in school.

The defendant testified as to his whereabouts from the 24th of December, 1911, to and including January 1, 1912, and he produced the testimony of a number of witnesses to corroborate his testimony as to his whereabouts, and that he was not at the

place where the prosecutrix testified the crime was committed upon and between said dates. Since the testimony of the prosecutrix does not fix the date of the commission of the crime upon a day between December 24, 1911, and January 1, 1912, inclusive, but does fix it as having occurred on a day during the Christmas holidays of two weeks' duration, it readily appears that the jury was justified in reaching the conclusion that the alibi relied upon by the appellant was not established.

[3] Upon many material points in their testimony the prosecutrix and the appellant contradict each other. The prosecutrix testified that on the occasion of the assault the appellant and herself had gone in a sled to a haystack for a load of hay. The appellant testified, and in this he is corroborated by other witnesses, that he did not begin to haul hay from the stack in question until late in January, 1912, and that during the holiday season of 1911 and 1912 no road was broken through the snow to the haystack. In this he is, however, contradicted by testimony other than that of the prosecutrix.

"Where there is a substantial conflict in the evidence, and the evidence taken as a whole is sufficient to sustain the verdict, the verdict will not be disturbed." *State v. Downing*, 23 Idaho, 540, 130 Pac. 461.

It is true there are some discrepancies between the testimony given by the prosecutrix at the trial and that given by her at the preliminary examination; but these may be accounted for, to a considerable extent at least, upon the theory that she misunderstood certain questions propounded to her at the preliminary examination.

This court, in the recent case of *State v. Driskill*, 145 Pac. 1095, commenting upon the effect of contradictory statements made by a prosecuting witness in a case of this kind, said:

"As to the impeachment of the prosecutrix and to what extent the jury would give credence to her testimony, that was for the jury to determine, and we do not think, if the jury believed the prosecutrix had made contradictory statements, they must of necessity reject all of her evidence as untrue."

The evidence in this case, considered in its entirety, is amply sufficient to justify the jury in reaching the conclusion expressed in its verdict.

[4] Had the trial court, as charged in the second assignment of error, over the objection of the defendant, permitted the state to show that the appellant had been tried and found guilty by a tribunal of his church, such action upon the part of the court would have been reversible error. A careful examination, however, discloses that the said second assignment of error is not borne out by the record.

Mention of this church trial is first found in the testimony of the witness Alfred Hansen, and occurs in the cross-examination of

the said witness by the attorney for the appellant. The witness was asked if a complaint had been filed against the defendant with the church authorities, and, having answered in the affirmative, he was asked whether he made a certain statement on the occasion of the church trial as to his motives in commencing the church proceedings and this case. Upon redirect examination counsel for the state asked the witness as to the result of the church trial, whereupon counsel for the appellant said: "Object to that, if the court please—oh, well, go ahead." Thereafter, upon recross-examination of the witness, Hansen, counsel for appellant went into the question of the proceedings in the church hearing and the result thereof at considerable length. Upon direct examination of the appellant, this church trial was referred to, and upon his cross-examination it was inquired into by counsel for the respondent without objection upon the part of the appellant or his counsel, and upon his redirect examination it was further inquired into.

Where a party to an action does not object to a question propounded to a witness, or, having objected, expressly gives consent that the question may be answered, error cannot be predicated upon the action of the court in admitting the testimony, nor upon the refusal of the court to strike out the answer, if it is responsive to the question, and the answer of the witness Hansen was responsive.

The judgment appealed from is affirmed.

SULLIVAN, C. J., and BUDGE, J., concur.

(26 Idaho, 652)

STATE, for Use of MILLS et al. v. AMERICAN SURETY CO. OF NEW YORK.

(Supreme Court of Idaho. Dec. 14, 1914. On Petition for Rehearing, Feb. 4, 1915.)

# 1. JUDGMENT (§ 120\*)—DEFAULT—ENTRY—VALIDITY.

Where a defendant has been sued in a state court, and summons has been served upon him, and, prior to the expiration of the term within which he is required to answer under the statute and without appearing or answering, he files a petition for a removal to the federal court, and an order denying the removal is made by the state court, and the record is thereafter transferred by the defendant to the federal court, when, on motion in the latter court, the cause is remanded to the state court for want of jurisdiction in the federal court, and the clerk of the district court enters the default of the defendant for failure to appear and answer, *held*, that the action of the clerk in entering the default of the defendant is regular and valid and within the authority and direction of sections 4140 and 4360, Rev. Codes, and that such default is not void for want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. § 120.\*]

# 2. JUDGMENT (§ 126\*)—ENTRY—DEFAULT.

Where the default has been entered by the clerk against the defendant, as was done in this case, the court has jurisdiction to hear the

proofs submitted by the plaintiff and to enter judgment thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.\*]

# 3. JUDGMENT (§ 143\*)—DEFAULT—MOTION TO VACATE—GROUNDS—MISTAKE OF LAW.

Under the above facts, where the defendant moves to have the default vacated on the ground of inadvertence, surprise, or excusable neglect, *held*, that under the excuse presented and the facts of this case, as shown by the record, the trial court did not err in refusing to set aside said default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.\*]

# 4. PLEADING (§ 85\*)—ANSWER—TIME FOR FILING—EXTENSION.

Section 4140, Rev. Codes, fixes the time within which a defendant shall appear and answer, and the fact that, prior to the expiration of that time, the defendant undertook to have the cause removed to the federal court, and it was thereafter remanded, such action on the part of the defendant to change the forum will not serve to extend the time for answer in the state court, and will not relieve the defendant from a default which it thus allows to be entered against it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.\*]

# 5. APPEARANCE (§ 8\*)—WHAT CONSTITUTES—PETITION AND BOND FOR REMOVAL.

The filing of a petition and bond for a removal to the federal court is not an appearance in the state court, under the provisions of the Revised Codes of Idaho.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, First and Second Series, Appearance.]

# 6. REMOVAL OF CAUSES (§ 95\*)—PROCEEDINGS—TRANSFER OF JURISDICTION.

When a defendant attempts to remove an action which he is not entitled to remove, and the state court refuses to surrender its jurisdiction, the state court may proceed with the cause, and its subsequent proceedings are valid.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.\*]

# 7. JUDGMENT (§ 120\*)—DEFAULT—ENTRY—VALIDITY.

*Held*, under the facts of this case, that the default was not prematurely entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 210; Dec. Dig. § 120.\*]

# 8. BANKS AND BANKING (§ 17\*)—EXAMINATION—DUTY OF BANK EXAMINER.

The Legislature, in enacting section 3001, Rev. Codes, making it the duty of the bank commissioner to make an examination of state banks, imposed such duty for the benefit and protection of the depositors as well as the public.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.\*]

# 9. BANKS AND BANKING (§ 17\*)—BANK COMMISSIONER—PERSONAL LIABILITY.

A bank commissioner, in the exercise of discretionary duties, is not responsible to any one receiving an injury through a breach of his official duty, unless he acts maliciously and willfully wrong or clearly abuses his discretion to the extent of acting unfaithfully and in bad faith.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**10. BANKS AND BANKING (§ 17\*)—BANK COMMISSIONER — OFFICIAL BOND — ACTION AGAINST SURETY—PRELIMINARY DETERMINATION.**

In an action by an injured party against the surety on the bond of the bank commissioner executed under section 191, Rev. Codes, for failure of said commissioner to faithfully perform his duty, it is not necessary to first proceed and have the damages of the injured party adjudged against the commissioner.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.\*]

**11. BANKS AND BANKING (§ 17\*)—BANK COMMISSIONER'S BOND—ACTION—PARTIES.**

Under a joint and several bond executed pursuant to section 191, Rev. Codes, it is not necessary to sue jointly the principal and surety, but suit may be maintained against either severally.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.\*]

**12. BANKS AND BANKING (§ 17\*)—BANK COMMISSIONER'S BOND — COMPLAINT — SUFFICIENCY.**

Held, that the complaint herein states a cause of action.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. § 17.\*]

**13. WORDS AND PHRASES—"UNFAITHFULLY"—"IMPROPERLY"—"ILLEGALLY."**

The word "unfaithfully" signifies bad faith. The word "improperly" implies such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of. The word "illegally" means unlawfully and contrary to law (citing Words and Phrases, Unfaithfully; see also Words and Phrases, First and Second Series, Illegal).

**14. BANKS AND BANKING (§ 77\*)—BANK COMMISSIONER — INSOLVENCY — RECEIVERS — "MAY."**

The word "may," as used in Rev. Codes, § 3005, providing that, when the bank commissioner has reasonable cause to consider a bank insolvent, he may immediately apply for a receiver, must be construed to mean "must," where to construe it otherwise would give the bank commissioner such an absolute power that he would be incapable of an abuse of discretion.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.\*]

For other definitions, see Words and Phrases, First and Second Series, May.]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by the State, to and for the use and benefit of Clara Mills and others, against the American Surety Company of New York. From judgment for plaintiff, defendant appeals. Affirmed.

Richards & Haga and McKeen F. Morrow, all of Boise, for appellants. Sullivan & Sullivan, of Boise, for respondents. J. H. Peterson, Atty. Gen., for the State. W. B. Davidson, of Los Angeles, Cal., and W. C. Bristol, of Portland, Or., amici curiæ.

TRUITT, J. This action was brought by the state of Idaho for the use and benefit of 55 depositors, or their assignees, in the Idaho State Bank at Halley, against the American Surety Company of New York, as surety on

the bond of William G. Cruse, former bank commissioner of the state of Idaho, for the failure of said Cruse to faithfully discharge the duties of his office. Said depositors are among those who made deposits during the last four months the bank was open, and subsequent to the time said Cruse had knowledge of its unsafe and insolvent condition, and subsequent to May 12, 1910, which latter date was one year after said bank commissioner's last examination of said bank.

It is not claimed in this action that the deposits of these depositors or other depositors prior to May 12, 1910, could be recovered. On May 15, 1909, a bond was executed by said William G. Cruse, as principal, and the American Surety Company of New York, as surety, as required by section 191, Idaho Rev. Codes, conditioned as follows:

"Now, therefore, if the said William G. Cruse shall well, faithfully and impartially discharge the duties of his office and pay over to the person, entitled by law to receive it, all money coming into his hands by virtue of his office, and that he will pay any and all damages and costs that may be urged against him, under the provisions of chapter 12, tit. 2, Political Code, and chapter 13, tit. 4, of the Civil Code of Idaho, and shall well and truly perform all the duties of such office required by any law to be enacted subsequent to the execution of this bond, then this obligation to be void, otherwise to remain in full force and effect."

The plaintiff to and for the use of certain parties claims the right to bring this action under section 295, Rev. Codes, which is as follows:

"Every official bond executed by any officer pursuant to law, is in force and obligatory upon the principal and sureties therein to and for the state of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

It is alleged in the complaint that on August 31, 1910, the Idaho State Bank of Halley closed its doors and suspended payment, and had been unable to meet the demands of its creditors, and has been in the hands of a receiver ever since; that William G. Cruse was appointed state bank commissioner on March 6, 1909; that said Cruse and the American Surety Company executed a bond conditioned as required by said section 191, Rev. Codes.

The seventh and eighth paragraphs of said complaint are as follows:

"VII. That, under the provisions of chapter 12, tit. 4, of the Civil Code of Idaho, it was, among other things, provided that it shall be the duty of the bank commissioner, when he shall deem it necessary, and at least once in each year, without previous notice, to visit and make complete report and examination of the affairs of each bank falling within the provisions of said chapter, which included the said Idaho State Bank.

"VIII. That, notwithstanding the obligations of said bond, the said William G. Cruse, after the making of said bond and during and before the expiration of his said office, as aforesaid, did not well, faithfully, and impartially discharge

the duties of his said office, according to law and the provisions of said chapter, nor did he observe, fulfill, and perform the said conditions of said bond, but, on the contrary, he wholly failed, neglected, omitted, and refused so to do, and acted unfaithfully, improperly and illegally in this: First, that said W. G. Cruse did not, at least once in each year during his said term of office, without notice, visit and make a complete report and examination of the affairs of said bank, as he made an examination on the 12th day of May, 1909, and did not thereafter visit and make another examination thereof until the 31st day of August, 1910, the day he caused said bank to close its doors and suspend payment; second, that, further, on or about the 12th day of May, 1910, and for some time prior thereto, said William G. Cruse had knowledge of the unsafe condition of said bank, and that the same was being conducted contrary to the provisions of said chapter 13, tit. 4, of the Civil Code of Idaho, and that the books and accounts of said bank were being falsified, which should have caused him to deem it necessary to visit and make a complete report and examination of its affairs, but, nevertheless, he failed, neglected and omitted so to do."

It is also alleged in said complaint that if said Cruse had at least once in each year, and when he had cause to deem it necessary, made an examination of said bank, he would have found that it had been and was then guilty of violating each and every duty and requirement prescribed by our banking laws, and would have found that the books were then falsified in many items and accounts, these items being specifically enumerated, and that he would have then and there found reasonable cause to consider said bank insolvent; that when he had found such a condition, which he would have found had he made an examination, it would have been obligatory upon him, in the discharge of his duties, to have closed said bank and applied immediately in his official capacity for the appointment of a receiver of said bank; that, by reason of the failure of said Cruse to faithfully and impartially discharge his duties, certain depositors, for whose benefit this action was brought, who had deposited certain sums in said bank subsequent to May 12, 1910, suffered loss and damage in certain specified amounts by reason of the failure, neglect, and omission of said Cruse to faithfully and impartially discharge the duties of his office. Then followed the usual allegations of ownership of the amount in controversy, and the demand, and that the sums had not been paid; that no dividends had been declared by any of the receivers of said bank; and that the different amounts due said depositors had been wholly lost to them.

There are 47 separate and distinct causes of action stated in said complaint, and each cause of action is for an amount less than \$2,000.

The record in this case shows that the defendant, before its time for appearance had expired in the lower court, filed a petition and bond for the removal of said cause to the United States District Court, but did not file any demurrer or appearance in the state court therewith, or within the statutory

time allowed to plead in said court; that the time for appearance in the state court expired on October 14, 1912; that on October 7th plaintiff was served with notice of a motion for removal, and in said notice the plaintiff was notified that the defendant would, on October 14, 1912, at 1:30 p. m., at the courthouse in Hailey, move for an order of removal of said cause to the United States District Court of Idaho. In response to said notice, counsel for plaintiff went from Boise to Hailey to appear on the day designated in said notice, to protest against and oppose an order for said removal. At the time noted, to wit, 1:30 p. m., of October 14th, counsel for plaintiff appeared before the district court at Hailey, Idaho. No one appeared on behalf of defendant, and the hearing upon defendant's motion was continued at the request of counsel for plaintiff until the following day at 1:30 p. m., for the purpose of giving counsel for defendant an opportunity to be present at said hearing. Counsel for plaintiff again appeared in said court at the time fixed for hearing said motion on that day, but no one appeared therein for the defendant. The court then heard counsel for plaintiff, and, being of the opinion that the cause was not removable, it made an order denying the removal, a part of which order is as follows:

"It is hereby ordered that the said petition and application on behalf of said defendant be, and the same is, hereby denied. Upon request of counsel for plaintiff, it is further ordered that this court, upon proper showing, will again hear the matter on a motion of defendant to vacate and set aside the order herein made, if said motion be made within proper time.

It thus appears that the plaintiff could have had default in said case entered on October 15, 1912, because no appearance had been made by answer, demurrer, or otherwise, in said court at that time by the defendant. On October 16th, no appearance by the defendant having been made, plaintiff filed a praecipe for default, which was duly entered by the clerk of said court, and thereupon judgment of default was entered by said clerk. On October 17th, three days after plaintiff was noticed for the hearing on removal, counsel for defendant telegraphed or telephoned requesting a hearing to set aside the order of the court theretofore made denying the removal of said cause, which request was granted. The matter was thereafter duly argued by respective counsel, and at the close thereof counsel for plaintiff, in the presence of counsel for defendant, stated in open court that a default had already been entered by the clerk in said case.

The court on October 30th refused to alter its former order of October 15th or to set the same aside, and an order to this effect was thereafter duly entered. The defendant then proceeded on October 28th and filed its record of removal of said cause in the United States District Court. The plaintiff thereupon moved to remand to the state

court, which motion was granted by the United States District Court, and an order to that effect transmitted and filed in said federal court on December 10, 1912. On December 10, 1912, after the United States court had remanded said cause, and after the state court had refused to set aside the default therein, and 57 days after its time had expired to appear in the state court, being 97 days after defendant was served, for the first time it entered its appearance in the state court by filing a demurrer. On December 10, 1912, the defendant, besides going on with its removal proceedings in the United States District Court, filed a motion in the state court to set aside said default. A hearing was had on said motion on November 9, 1912, and the court on December 11th refused to set aside the default of the clerk, but granted the motion of defendant to set aside the judgment on said default entered by the clerk. On December 12, 1912, the defendant filed a renewal of said motion in the state court to set aside said default. Objections to a hearing of the renewal motion were filed by plaintiff, but were overruled by the court and a full hearing granted. Upon this hearing, all of the grounds urged by defendant were fully presented and considered by the court, and another order was thereafter entered by it, denying the renewal motion to set aside said default.

On May 20, 1913, during the next term of the state court, a hearing was had for the purpose of having the court assess the damages in said case. Proofs were submitted over the objection of counsel for the defendant, who was present, and the damages were assessed by the court on each cause of action and judgment entered, and from that judgment this appeal was taken.

Appellant assigns the following errors: (1) That the court erred in not holding and deciding that, appellant having filed a petition for removal of the cause to the federal court and given the required bond and notice, the time for defendant to plead was extended until the cause was remanded to the state court; (2) that the court erred in refusing to vacate or set aside the simple default entered against appellant by the clerk of the court on October 16, 1912; (3) that the court erred in not making an order transferring the cause to the federal court; (4) that the court erred in entering any judgment against appellant; and (5) that the court erred in not dismissing the action at plaintiff's costs because the complaint did not state facts sufficient to constitute a cause of action against the defendant.

These assignments of alleged error are so related that they may be considered under three heads, viz.: (1) Error of the court in refusing an order of removal of the cause to the federal court, and error of the clerk in entering the default against defendant; (2)

error of the court in refusing to set aside said default; and (3) error of the court in holding that the complaint stated a cause of action.

[1, 2] The alleged error of the court as to refusing the order of removal and alleged error in regard to the entering of default against defendant by the clerk of the court may be considered together. The record shows that the default was taken after the expiration of the statutory time to plead had expired. But counsel for appellant contend that the default was prematurely taken because of the removal proceedings in the state court; that the filing of the petition and bond for removal of the cause to the United States court constituted a legal appearance in said action in the state court; that, when the state court entered an order refusing to grant the removal, it should have ordered that the defendant plead further within the time fixed by said court, or, in other words, that the rule respondeat ouster obtained, and that the filing of said petition and bond for removal suspended the jurisdiction of the state court until the cause had been remanded to said court, and therefore the default entered by the clerk of said court was null and void because it was entered between the filing of the petition for removal and the order of the federal court remanding the cause.

The above contentions of appellant are without merit, for the reason that the filing of the petition for removal and the bond is not an appearance in the state court, and does not extend the time to appear therein. The defendant might have demurred or answered at the time it filed its petition for removal, which is the usual practice, without prejudice to its petition for removal, and it would have waived no right by doing so.

These points were distinctly in issue in the case of *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89, and after full consideration it was in that case held as above set forth, and the court there laid down the correct rule. Not having made any appearance in the state court within the time required by our statute, the entry of default by the clerk was within the scope of his authority. *Morbeck v. Bradford-Kennedy Co.*, supra.

The contention of appellant that the filing of the petition and bond on removal was an appearance, and that the default was prematurely entered, is also without merit. The rule of respondeat ouster does not apply in such cases. If the state court had signed an order for removal and thereby voluntarily relinquished its jurisdiction, appellant might with some force claim that a default entered between the time of the filing of the order granting a removal and the filing of the order of the federal court remanding the cause was entered by the clerk without authority.

In this respect there is a marked differ-



ence between the case at bar and the Morbeck-Kennedy Case. In that case the state court voluntarily relinquished its jurisdiction for a time by signing an order for the removal, while in the case at bar the state court considered the matter and refused to relinquish its jurisdiction, entered an order refusing a removal, and thereby claimed and retained its jurisdiction. This difference makes the reason stronger in favor of sustaining the default herein than it was in that case, since in the case at bar there was at no time a break in the jurisdiction of the state court. The trial court all the time had jurisdiction of this action; it refused to surrender such jurisdiction; it acted consistently throughout; and all of its proceedings were valid. The rule is well settled that, if an action is removable and a proper petition and bond filed for removal, it makes no difference whether the state court signs an order removing the cause or refusing to remove it. In fact, no order whatever is necessary or required by the federal law, but the defendant can proceed and file his record for removal to the federal court within the required time, and the state court cannot legally proceed further in the matter, and, if it does proceed, all of such proceedings are void in case the cause is removed. On the other hand, if the action is one which the defendant is not entitled to remove, and the state court, as in this case, refuses to relinquish its jurisdiction by ordering a removal, then the defendant acts at his peril, if he proceeds with the removal and does not protect himself in the state court, as all proper proceedings in the state court will be regular and valid if the case is remanded. So the contention that the mere filing of a petition and bond on removal, whether the same be a case which the defendant is entitled to remove or not, prevents the state court from proceeding further in the action, is untenable. The contentions of appellant are in conflict with all the state and federal decisions, which hold that a state court is not bound to surrender its jurisdiction upon petition for removal until a case has been made which on its face shows that the petitioner has a right to a transfer, and not until such a showing is made is the state court prohibited by the federal statutes from proceeding further in the cause; and, if the petition in connection with the pleadings does not show that the cause is removable, the jurisdiction of the state court is not ousted, and its subsequent proceedings are valid. *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183, 24 L. Ed. 427; *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428; *Gregory v. Hartley*, 113 U. S. 742, 28 L. Ed. 1150; *Stone v. State of S. C.*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *B., C. R. & No. Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Crehore v. O. M. Ry. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Brown v. Nelson & Co. (C. C.)* 43 Fed. 614;

*C. & O. Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; *Springer v. Howes (C. C.)* 69 Fed. 850; *Monroe v. Williamson (C. C.)* 81 Fed. 977, 984; *Mannington v. Hocking Valley Ry. Co. (C. C.)* 183 Fed. 133; *Golden v. No. Pac. Ry. Co.*, 39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886; *Debnam v. So. Bell Telephone & Telegraph Co.*, 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915; *C., R. I. & P. Co. v. Brazzell*, 33 Okl. 122, 124 Pac. 40; *Dillon on Removal of Causes*, § 136; *Moon on Removal of Causes*, § 177; *Foster's Fed. Prac.* § 391; *2 Rose's Code of Fed. Prac.* § 1188 (c) and (g); 18 Ency. Pl. & Pr. 388, 351; 39 Cyc. 1305, 1308.

The federal court having decided that the cause was not removable, we conclude that the default was not prematurely entered, and that the clerk had authority to enter the same. In our opinion, the Morbeck Case is conclusive upon the question above discussed, to wit, the legality of the default and the question of the removal of said cause.

[3-5] Counsel for appellant also contend that the court erred in refusing to vacate and set aside said default entered by the clerk.

The appellant based its first motion to set aside the default on the ground of inadvertence, surprise, and excusable neglect. The excuse offered was that counsel for appellant was of the opinion that it was not necessary for it to plead, answer, or demur in said cause in the state court, and that it would have 30 days, after duly certified copies of the record had been filed in the federal court, to plead in that court. This excuse was one of a mistake of law.

In 1 Black on Judgments, § 335, it is stated:

"When statutes authorize the vacation of a judgment entered against a party through his 'mistake,' it is to be understood that they mean a mistake of fact. Mistake of law (that is, the party's ignorance of the law, or mistake as to his legal rights or duties in the premises) will not warrant the setting aside of the judgment."

And in the case of *Plano Mfg. Co. v. Murphy*, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692, it is held:

"Where a defendant suffered a default by reason of his belief that the service of summons made by plaintiff's agent was invalid because not made by an officer, the default was the result of a mistake of law, and therefore not ground for setting aside the judgment as procured through defendant's mistake or excusable neglect."

A motion to renew its motion to vacate said default was thereafter filed by appellant, and a further excuse offered, namely: That there was a uniform practice and custom in said state court that when motions, demurrers, and interlocutory matters were ruled on not to take default without inquiry from opposing counsel, if he intended to proceed further. This was met by plaintiff with an affidavit of a practicing attorney in said district court to the effect that no such

custom or practice prevailed in said district court. But, even if this excuse had not been met by a counter affidavit, we question whether the practice or custom in a state court could be considered by this court. *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97.

It was recited in the renewal motion that it would be based upon the records and files and upon the affidavit filed in the first motion. On said renewal motion the additional excuse of a mistake of fact and the excuse of a mistake of law above referred to were fully argued and considered by the court. The court, on hearing said renewal motion, considered each and every ground of said motion, and thereupon overruled the same.

Counsel cites many cases dealing with defaults, where the defendant did not appear within the statutory time, and some valid excuse for not appearing was offered. These cases were not applicable to one like the case at bar, where the defendant did come into court before his time had expired to plead, and attempted to take the wrongful procedure. In such a case another principle is involved; that is, What are the rights of the plaintiff where the defendant does appear and attempts to gain what it thinks is an advantage over the plaintiff and a benefit to defendant? In such cases, the defendant becomes an actor. It is aggressive in its own interests and seeks to use its time in an unlawful procedure for its own advantage. It is then that courts, considering the rights of both parties, hold that the plaintiff cannot be charged with such acts of the defendant, and in dealing with substantial justice will require the defendant to assume the risk and consequences that follow its wrongful and unsuccessful procedure. Under the facts of this case, we hold that the trial court did not err in refusing to set aside said default.

As stating these views and showing that the defendant takes his chances when he attempts to remove a case not removable, and that this question is well settled in this state, see *Finney v. American Bonding Co.*, 13 Idaho, 534, 90 Pac. 859, 91 Pac. 318; *Mills v. American Bonding Co.*, 13 Idaho, 556, 91 Pac. 381; *Morbeck v. Bradford-Kennedy Co.*, supra. The views of this court on this question are well stated in the *Morbeck Case*, as follows:

"It seems to us proper and entirely just to both litigants to hold that, when a defendant petitions for the removal of a cause from a state to a federal court, he becomes the actor in that particular, and that he must assume the risk and consequences that follow, if he is unsuccessful, and in the meanwhile has failed to protect and preserve his right under the state statute and rules of practice prevailing in the state court. \* \* \* The fact that appellants exhausted a part of their time in a vain endeavor to get out of the state court into the federal court is neither the fault of the law, the courts, nor the adverse party. If they saw fit to exhaust a part of their 'day in court' in an effort to get into another forum and failed, the consequence should justly and properly fall

upon them and upon no one else. It should not serve as a means of extending the time allowed them by statute or of delaying the adverse party in getting his case to trial after the question of jurisdiction has been determined."

[9-12] We will next consider the question whether the complaint is sufficient and states a cause of action. The appellant contends that the complaint is insufficient in the following particulars: (1) That it is not alleged that the bank commissioner neglected any duty that he owed to plaintiff; (2) that a public officer invested with certain discretionary powers is not liable when acting within the scope of his authority, unless he acts maliciously or willfully wrong; (3) that the words used in section 3001, Rev. Codes, "at least once in each year," refer to a calendar year; (4) that it is not alleged that the damages claimed have been "adjudged against him" (the said bank commissioner).

The first question above enumerated involves a construction of section 3001, Rev. Codes, which, in part, is as follows:

"It shall be the duty of the bank commissioner, when he shall deem it necessary, and at least once in each year, without previous notice, to visit and make complete report and examination of the affairs of each bank falling within the provisions of this chapter."

The law seems to be well settled that an individual has no right of action against a public officer for breach of a duty which he owes to the public only, even though such individual is specifically injured thereby. *Gorman v. Com'rs*, 1 Idaho, 655; *Worden v. Witt*, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 70; *People v. Hoag* (Colo.) 131 Pac. 400, 45 L. R. A. (N. S.) 824; *Miller v. Ouray E. L. & Power Co.*, 18 Colo. App. 131, 70 Pac. 447; *Colo. Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630; *Ryus v. Gruble*, 81 Kan. 787, 3 Pac. 518; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843; *School Dist. No. 80 v. Burress*, 2 Neb. (Unof.) 554, 89 N. W. 609; *Board v. Bladen*, 113 N. C. 379, 18 S. E. 661; *Lowe v. Guthrie*, 4 Okl. 287, 44 Pac. 198; *Cottam v. Oregon City (C. C.)* 98 Fed. 570; *South v. Maryland*, 18 How. 396, 15 L. Ed. 433.

But it is equally well settled that if the plaintiff can show that the duty was imposed for his benefit, and that the Legislature had in mind his protection in passing the act in question, and intended to give him a vested right in the discharge of that duty, then this will give him such an interest as will support an action.

In *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169, it was held:

"In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him."

We think the rule is well settled that in cases of this kind the plaintiff must show that he has an interest in the performance

of the duty by the public officer, and that the duty was imposed for his benefit. But the above does not imply that the duty was imposed for his sole benefit; it is sufficient if it appears that, besides having in mind a public duty, the Legislature also has in mind an additional duty to the individual.

In *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843, it is stated:

"The failure to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance."

In *School Dist. No. 80 v. Burress*, 2 Neb. (Unof.) 557, 89 N. W. 610, on this point it is stated:

"On the other hand, though there may also be a duty, or even a primary duty, to the public, if there is in addition a duty to and right in the individual, he may maintain an action."

Here, then, the real question is whether the Legislature, in passing section 3001, Rev. Codes, had in mind the depositors solely, or in connection with the public, and intended that the duty it was imposing on the bank commissioner to make examination was for the benefit of the depositors, thereby making them interested parties in his performance of such duty. In determining this, and in construing said section 3001, we must take into consideration the subject-matter with which the Legislature was dealing, the language used, and the object and purpose of the law being enacted, and the particular duty in question. The matter of consideration in such a case is well stated in volume 1, *Street's Foundations of Legal Liability*, p. 175, quoting from *Atkinson v. Newcastle*, etc., *Waterworks Co.*, 2 Exch. D. 441, as follows:

"That the question whether or not the breach of a statutory duty gives a private right of action in any case must always depend upon the object and language of the particular statute."

In reading said section 3001 and taking such matters into consideration, as just above referred to, we think it is clear that the Legislature, in prescribing this particular duty of the bank commissioner, had uppermost in its mind the protection of depositors and people dealing with state banks, or at least had in mind a double duty, one owing to the public, and one owing to the depositors; or, stating it in still another way, that in the public duty was involved also a duty to depositors as individuals; that the duty of examining state banks was one of the most important elements in our banking law; that the examinations required by law were of particular interest to the depositing public; that the duty prescribed was for the benefit of depositors, although it might not have been for their sole benefit; that it was intended by said section 3001 to give the depositors a vested right in the discharge of the duty therein prescribed.

It must be borne in mind that the respondent

does not contend that the bank commissioner, under the facts of this case, would be liable to all the depositors of said bank at the time it is alleged he should have closed said bank, by reason of his failure to faithfully perform said duty, or that his surety is a guarantor thereof, but said respondent contends that the depositors who may recover are those that made deposits after the time (May 12, 1910) when said bank commissioner should have closed the bank; that such depositors suffered loss by reason of his unfaithfulness in the performance of a duty, which, if performed, would have prevented their loss, and that the duty violated by him was one which was imposed for their benefit; and that thus being interested parties and intended to be such by the Legislature, in the performance of the duty of examination, as prescribed in said section 3001, the surety is then liable on its bond for the violation of a duty covered by said bond.

This court has already held in *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653, that, where the plaintiff is a party whom the statute was intended to benefit or protect, then the surety is liable. It was also held that:

"The sureties of an officer mentioned in section 403 of the Revised Statutes [same as 295, Rev. Codes] are liable to any person injured or aggrieved by a wrongful act done by the officer in his official capacity."

We will now consider the question of the liability of a public officer and his surety for a breach of a discretionary duty. Here we may say that the cases cited by appellant, and in the brief of counsel appearing as amici curiae herein, do in the main lay down the correct principle of law applicable to such cases, which is quoted from *Reed v. Conway*, 20 Mo. 43, as follows:

"The doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a quasi judge, is not responsible to any one receiving an injury from such act, unless the officer act maliciously and willfully wrong, is most clearly established and maintained."

See *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Wilson v. Mayor of New York*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; *Vanderheyden v. Young*, 11 Johns. 150; *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618; *Gould v. Christianson*, Fed. Cas. No. 5,636; 29 Cyc. 1448 et seq.; *United States v. Clark (C. C.)* 31 Fed. 710; *Kendall v. Stokes*, 3 How. 87, 11 L. Ed. 506.

In the beginning of the discussion on this point, it may be well to divide acts of negligence into two classes, namely: (1) Acts of commission, or positive wrong; and (2) acts of omission, or breach of duty. In other words, the division would be along the lines of affirmative commission and negative omission.

In examining the cases above cited, it will

be found that most all of them involve acts of commission, and, in alleging a breach of duty by acts of commission, it was charged that the acts were committed maliciously or willfully. In other cases, however, and especially where the breach alleged was an act of omission, such words were used as "abuse of discretion," "bad faith," "did not act in good faith," "illegally," "fraudulently," "unlawfully," "wrongfully," "unfaithfully," "knowingly," and words of like meaning.

So from all the cases, including the cases where the breaches were acts of commission and acts of omission, the sound rule seems to be that some words beyond the mere allegations of negligence and failure to perform should be alleged, showing intent to act wrongfully, willfully, maliciously, unfaithfully, or in bad faith, or, in other words, showing evil intent, and then allege such facts as did constitute such intent.

It then follows that it is necessary to examine the complaint herein and determine whether there are sufficient allegations therein to show, not only neglect or failure of the public officer to perform a discretionary duty, but also that he clearly abused his discretion to the extent of acting unfaithfully and in bad faith, and with a willful design not to perform his duty as such officer.

[13] In paragraph 8 of the complaint, as will appear from the copy thereof heretofore set out in this opinion, it is alleged that said William G. Cruse "did not well, faithfully, and impartially discharge the duties of his said office," but, "on the contrary, he wholly failed, neglected, omitted, and refused so to do, and acted unfaithfully, improperly, and illegally," and then sets forth the particular breach of his duty complained of. The word "unfaithfully" signifies "bad faith." 8 Words and Phrases, 7174. The word "improperly" implies such conduct as a man of ordinary and reasonable care and prudence would not, under the circumstances, have been guilty of. The word "illegally" means "unlawfully" and "contrary to law."

In the second breach set forth in the complaint, it is further alleged that said Cruse, prior to the time and at the time it is claimed he should have closed said bank, had knowledge of its unsafe condition, that the same was being conducted contrary to the provisions of said chapter 13, tit. 4, of the Civil Code of Idaho, being our banking law at that time, and that the books and accounts of said bank were being falsified, which should have caused him to deem it necessary to visit and make a complete examination of its affairs. Said allegations of knowledge of such facts were sufficient to show such a condition in said bank as would make it necessary under section 3001 for him to make an examination of said bank, and when taken in connection with the words "wholly failed," "neglected," "unfaithfully,"

"improperly," and "illegally," as used in the complaint herein, are sufficient to charge an evil and wrong intent with a willful design to refrain from performing his duty, which would amount to bad faith, if he then, under such circumstances, failed or refused to make an examination of said bank.

Having held that said bank commissioner abused his discretion and acted in bad faith when he did not deem it necessary, and willfully failed to examine said bank under the circumstances as alleged in the complaint, we now pass to a consideration of the further question as to whether the allegations in the complaint as to the condition he would have found there, had he made an examination of the bank on or before May 12, 1910, were sufficient to give him reasonable cause to consider said bank insolvent, and then, if so, was he required to close the bank and immediately apply for a receiver?

Section 3004, Rev. Codes, treats of the duty of the bank commissioner when it appears that the capital of a bank is reduced by impairment, or otherwise, below the amount required by section 2970; and section 3005 provides that if the bank commissioner shall find that a bank is violating its charter, or the provisions of the chapter relating to banks, he shall by an order direct the discontinuance of such illegal practices.

Appellant contends that the condition alleged may have been of such a character that it would have justified a notice to the bank, as provided in section 3004, or an order to said bank to discontinue such illegal practices, as is provided for in section 3005. But we cannot agree with this contention, as said section 3004 and the first part of section 3005 deal with conditions which the Legislature evidently did not consider as reaching insolvency.

In the next part of said section 3005, following the above, the Legislature dealt with a condition of insolvency and provided a remedy where the bank commissioner has reasonable cause to consider a bank insolvent. This part of said section 3005 referred to is as follows:

"If such bank shall refuse or neglect to comply with such order, or whenever such commissioner has reasonable cause to consider such bank insolvent, he may immediately apply, in his official capacity, to the district court of the county in which such bank has its principal place of business, for the appointment of a receiver for such bank, who, if he be appointed, shall proceed to administer the assets of the bank in accordance with law."

Here, again, in so far as the matter of the bank commissioner having reasonable cause to consider a bank insolvent is concerned, we have to deal with what may be termed another discretionary duty of the commissioner, and the general rules as hereinbefore discussed would apply. We must therefore, in considering this question, again go to the complaint to see what the allegations are as to what condition the bank con-

missioner would have found if he had made an examination on or before May 12, 1910.

In paragraph 9 of the complaint it is alleged as follows:

"That if said William G. Cruse had, at least once in each year, after his examination of May 12, 1909, or on or about the 12th day of May, 1910, when he had cause to deem it necessary to make an examination of the affairs of said bank, as aforesaid, visited said bank and made a complete report and examination thereof, as was his duty so to do, as aforesaid, he would have found that said bank had been, and was then, guilty of violating each and every duty and requirement prescribed in the provisions of the different sections of said chapter 13, tit. 4, and would have further found that the books of said bank had been, and were then, falsified in respect to accounts and items of loans and discounts, overdrafts, bonds and warrants, due to and from bank and bank accounts, cash on hand, surplus funds, undivided profits, individual deposits, time certificates of deposit, accounts of officers and directors and their liabilities, so as to make a proper legal report under date of April 27, 1910, which had been called for a short time prior thereto by said William G. Cruse, as such bank commissioner, in accordance with law, and said William G. Cruse, from an examination of said bank, at said time, would then and there had reasonable cause to consider said bank insolvent."

If the bank was in fact violating "each and every" provision of the banking law, it would indeed be a serious matter and would call for immediate action by the bank commissioner; and we must take it as true that this condition of the bank, as alleged in said paragraph of the complaint, was true, because in passing upon the sufficiency of the complaint such would be the rule. And further, if the bank, besides violating "each and every" provision of the banking law, was also falsifying almost if not all of the principal items and accounts, it would be still more serious and require immediate and drastic action by the commissioner; and, following these charges, it is alleged that said William G. Cruse, from an examination of said bank at said time, would then and there have had reasonable cause to consider said bank insolvent.

These allegations present a condition which should have caused him to consider the bank insolvent. Such being the case, what was his duty? It clearly was to adopt the only remedy given him under the law, and close the bank and apply for the appointment of a receiver. And, if he failed so to do, then it would be a clear abuse of his discretion, and, under such facts and circumstances as alleged, would amount to bad faith and show a willful design not to perform his duty.

[14] The argument that the word "may," in said section 3005, is not mandatory and does not mean "must," is without force under such allegations as are contained in this complaint. When such conditions arose under the old banking law, under which this action is brought, in a bank of this state, as alleged in the complaint herein, then the

word "may" should be construed to mean "must," otherwise the power of the bank commissioner would have been absolute, and there would be no such thing as an abuse of discretion, or of holding him liable for bad faith and corruption.

This court has already in effect held in *Blomquist v. Board of County Commissioners*, 25 Idaho, 293, 137 Pac. 177, that certain duties of the assessors involved the exercise of their legal discretion or individual judgment, but that such legal discretion must be exercised in good faith, and, if not, then an officer who fails to perform his duty is liable for such failure to faithfully perform his duties. In that case the court says:

"If an officer exercises his legal discretion in good faith and without fraud, then he is performing his duty under the law, otherwise not; and, if not, then he fails to perform his duty and is liable for a failure to faithfully perform his duties."

The next question for consideration is whether the words "at least once in each year," as used in section 3001, Rev. Codes, refer to a calendar year. The complaint in paragraph 8 alleges two breaches of duty under section 3001 as to examination by the bank commissioner: (1) That said W. G. Cruse did not, at least once in each year, make an examination of said bank, and that his last examination before the bank was closed on August 31, 1910, was made on May 12, 1909; and (2) that on or before the 12th day of May, 1910, said Cruse had knowledge of the unsafe condition of said bank, its violation of the banking law, and its falsification of the books, and other acts of said bank, as hereinbefore more particularly set forth. We have already discussed the second breach set out in paragraph 8 of the complaint, and held that the facts alleged in regard thereto were sufficient to constitute a breach of the duty of the bank commissioner under section 3001, wherein it is provided that it shall be the duty of the bank commissioner, when he shall deem it necessary, to make an examination of state banks. From the conclusion we there reached, it follows that a cause of action is stated in the complaint regardless of the first breach of duty by said commissioner alleged in said paragraph. It is therefore unnecessary to discuss or consider the breach of duty first alleged in said paragraph to determine whether or not the phrase "at least once in each year" means a calendar year or once in 12 months.

There still remains for consideration the question as to whether or not in this action it was necessary that the damages claimed should be first adjudged against the bank commissioner. Section 191, Rev. Codes, provides that the bank commissioner shall execute a bond with three conditions, as follows: (1) That he shall faithfully and impartially discharge the duties of his office; (2) pay over to the persons entitled by law to receive it all money coming into his hands

by virtue of his office; and (3) conditioned further for the payment of all damages and costs that may be adjudged against him under the provisions of title 2, c. 13, of the Political Code, and under title 4, c. 13, of the Civil Code.

The Legislature intended by the enactment of said section 191 to require a bond covering the faithful and impartial discharge of the duties of said office as a distinct subject-matter or condition of the bond; and it next intended to require the bond to cover the paying over of all moneys coming into the hands of the commissioner, as a second distinct subject-matter or condition; and, lastly, having in mind that in section 3005, Rev. Codes, it had provided that, where the commissioner had proceeded maliciously or without reasonable cause in closing a bank and having a receiver appointed, he was liable to such bank on his official bond for any damages, expenses, and costs resulting therefrom. The Legislature further intended to require a bond covering such damages and costs specifically mentioned in said section 3005, or in any other section of said chapter, and did not intend any one, injured or aggrieved by the failure of the commissioner to faithfully perform his duties, to first proceed and have his damages adjudged against the bank commissioner before he could bring suit against the sureties on said bond. Said three conditions required are separate and distinct. The first words "and conditioned further" imply that it is an additional condition to the two former conditions.

We do not in this decision, in passing upon said third condition, hold that, even in a cause brought thereunder, the injured party would be required to have his damage first adjudged against the bank commissioner before proceeding against his sureties. We reserve a decision on this question until it is

properly before us. Under the bond in question, the principal and surety are jointly and severally liable, and an action on said bond might be brought jointly against said bank commissioner and his sureties, or might have been brought against either of them severally.

We do not consider that the other questions presented in the brief of *amicus curiae*, not raised by appellant, and not dealing with the sufficiency of the complaint, are properly before us, and we will therefore not pass upon these questions further than to state that, from our examination of the same, the points are not well taken when applied to this case.

The judgment of the court below must therefore be affirmed, and it is so ordered, with costs in favor of respondent.

BUDGE, J., and GUHEEN, District Judge, concur.

#### On Petition for Rehearing.

GUHEEN, District Judge. A petition for rehearing has been filed by counsel for the appellant in the above-entitled action.

The court, after carefully considering the same, finds that all of the material questions discussed by the learned counsel for the appellant in his petition on rehearing were fully covered in the briefs and oral arguments upon the original hearing of said cause, and, upon a re-examination of the entire record, we are fully satisfied that we understood the facts and applied the law to the particular facts in this case; that the decision of this court was correct and in harmony with the decisions of this court, as heretofore announced.

The petition for rehearing is denied.

BUDGE, J., concurs.

(11 Okl. Cr. 274)

**WEST v. STATE. (No. A-2155.)**

(Criminal Court of Appeals of Oklahoma. Feb. 2, 1915.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1131\*)—APPEAL—ABANDONMENT—COMMUTATION OF SENTENCE.**

When an appeal in a death penalty case is pending in this court, and the Governor, upon the application of the plaintiff in error, commutes the sentence to life imprisonment, the granting of the commutation operates as an abandonment of the appeal, and, when the action of the Governor is brought to the attention of this court, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2971-2979, 2985; Dec. Dig. § 1131.\*]

Appeal from District Court, Mayes County; Preston S. Davis, Judge.

Sequoyah West was convicted of murder, and appeals. Appeal dismissed.

A. C. Brewster, of Pryor, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Sequoyah West, jointly informed against with Cull K. West and Jesse Clevenger for the murder of one Dan Frame, alleged to have been committed on or about the 7th day of March, 1913, by shooting, was separately tried and convicted of murder with the death penalty assessed. To reverse the judgment an appeal was perfected. While the appeal was still pending in this court, Lee Cruce, Governor, upon the application of plaintiff in error, commuted the sentence to life imprisonment.

Where a commutation of sentence is applied for, and the same is granted, and the action of the Governor in the case is brought to the attention of this court pending the determination of the appeal, the appeal will be dismissed as having been abandoned.

The appeal in this case is therefore dismissed.

FURMAN and ARMSTRONG, JJ., concur.

(11 Okl. Cr. 275)

**FINDLEY v. STATE. (No. A-2138.)**

(Criminal Court of Appeals of Oklahoma. Feb. 2, 1915.)

*(Syllabus by the Court.)***1. INTOXICATING LIQUORS (§ 215\*)—INFORMATION—SUFFICIENCY.**

A conviction cannot be sustained on an information which attempts to charge a violation of the prohibitory law by simply alleging that the accused did give away whisky in violation of law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 258-260; Dec. Dig. § 215.\*]

**2. INTOXICATING LIQUORS (§ 215\*)—INFORMATION—REQUISITES.**

County attorneys desiring to prosecute for giving away or furnishing intoxicating liquor

as provided by the prohibitory law must follow the rule announced in *Scott v. State*, 6 Okl. Cr. 492, 119 Pac. 1023, and reaffirmed in *Tracy v. State*, 9 Okl. Cr. 532, 132 Pac. 692. The rule is clear, and works no hardship upon the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 258-260; Dec. Dig. § 215.\*]

**3. CRIMINAL LAW (§ 753\*)—DISMISSAL—EVIDENCE.**

When a trial court finds it necessary to advise the jury to return a verdict of not guilty on the only offense charged in the information, he should discharge the jury and dismiss the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. § 753.\*]

Appeal from County Court, Osage County; Paul B. Mason, Judge.

Jessie Findley was convicted of violating the prohibitory law, and appeals. Reversed.

Leahy & MacDonald, of Pawhuska, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Jessie Findley, was convicted at the October, 1913, term of the county court of Osage county on a charge of selling intoxicating liquor, and her punishment fixed at imprisonment in the county jail for a period of 30 days and a fine of \$50.

[1] The only question we find it necessary to discuss in this appeal is the sufficiency of the information to charge giving away intoxicating liquor within the meaning of the statute. The information charges a sale of intoxicating liquor, but the court directed the jury to find the plaintiff in error not guilty of a sale, and submitted to the jury the question of whether or not she was guilty of giving away intoxicating liquor under the second count in the information, which is as follows:

"Chas. M. Cope, the duly qualified and acting county attorney in and for Osage county, Okl., in the name and by the authority of the state of Oklahoma, informs the court that on or about the 23d day of October, 1912, at Pawhuska, in said county of Osage, state of Oklahoma, the said defendant, Jessie Findley, did wrongfully and unlawfully give away to one James Hildebrand certain spirituous liquor, to wit, one pint of whisky (said whisky, said Hildebrand, said time and place being the same as referred to in count 1, above, the transaction being the identical transaction set out in said count 1), contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

[2] This so-called count in the information does not charge an offense against the laws of this state.

In *Scott v. State*, 6 Okl. Cr. 492, 119 Pac. 1023, the information charged the plaintiff in error as follows:

"\* \* \* Did unlawfully furnish one pint of spirituous liquor, to wit, one pint of whisky to C. J. L. Beasley, George Myers, Cleve Presley, and Bill Anderson, for \$1."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Discussing the information in that case we said:

"This is entirely too indefinite. If one is to be charged with furnishing liquor, the facts constituting the furnishing should be pleaded. 'Furnishing' is a very indefinite term."

In *Tracy v. State*, 9 Okl. Cr. 532, 132 Pac. 692, we said:

"The vigilant enforcement of the prohibitory law is to be commended, yet a conviction, in order to be sustained, must be based upon facts from which a legitimate deduction of guilt can be had. The proof does not show that the plaintiff in error sold whisky to anybody. All it does show is that two or three parties met in an alley and were drinking. There is nothing to indicate that the plaintiff in error parted with the alcohol, if he ever had it, for a consideration. It may be that he sold the whisky as charged. If so, the state should make proof of that fact. Or, on the other hand, he may have given away or furnished the liquor in violation of law. If so, the specific facts constituting the giving away or furnishing should be pleaded as stated by this court in the *Scott Case*, supra. If a conviction is to be upheld in this case on the theory that the accused is guilty of a sale, then a case should be made on that theory. If the state desires to stand on the giving away or furnishing feature of the charge, the allegation in the information should conform to the rule announced in the *Scott Case*, and the proof made accordingly."

In the case at bar the court should have dismissed the prosecution when he found it necessary to instruct the jury that the plaintiff in error was not guilty of making a sale as charged. The state's evidence, as stated by the Assistant Attorney General in his brief, is to the effect that Mr. Hildebrand went to the home of the plaintiff in error; that she was not in, but came in shortly; that he asked whether or not she had anything, and she said she didn't know, that he could look around and if he saw anything he wanted he could take it along. He found a small bottle which looked like whisky. The seal had been broken and part of the contents gone. He took the bottle, put it in his pocket, and went out. After leaving the house he started to the lumber yard to take a drink from the bottle. He saw an officer coming around toward where he was, and, before

drinking any of the whisky, broke the bottle, to prevent the officer getting it. The officer testified that he saw Hildebrand come out of the Findley house; that it was in the afternoon; that he was coming home; that Hildebrand stuck the bottle in his inside coat pocket and started away. He followed him up the hill, and when he was about to catch up with him Hildebrand pulled the bottle out of his pocket and broke it.

[3] There was no testimony introduced on behalf of the plaintiff in error. The statute penalizing the giving away of intoxicating liquor contemplates the doing of such act as a subterfuge for a sale. The doctrine *ejusdem generis* controls in this class of cases. Facts sufficient to show that intoxicating liquor was given away within the meaning of the statute—that is, as a subterfuge for a sale—must be pleaded. Simply stating that the accused person did give away intoxicating liquor in violation of law is not sufficient. Administering whisky to a person ill, or giving alcohol to hospital patients, which could not by any reasonable deduction be held to come within the purview of the statute, would be crimes under the character of information disclosed by this record, if such information can be sustained. It is therefore necessary that the facts be pleaded in order that the court may determine, as a matter of law, whether or not a crime has been committed, if the facts pleaded be true. If not, a demurrer should be sustained to the information. In the case at bar the facts pleaded do not disclose an unlawful giving away of whisky as a subterfuge for a sale, nor does it appear that the county attorney seriously attempted to establish such contention. A case sufficient to go to the jury on the theory of an unlawful sale could possibly have been made, but the trial court took that issue from the jury, thereby leaving nothing properly before the court under the information.

The judgment is reversed, and the cause remanded for a new trial.

DOYLE, P. J., concurs. FURMAN, J., absent.



(11 Okl. Cr. 378)

MERRILL et al. v. STATE. (No. A-2298.)  
(Criminal Court of Appeals of Oklahoma.  
Feb. 6, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1023\*)—APPEAL—DECISION  
APPEALABLE—DENIAL OF NEW TRIAL.

There is no statute authorizing an appeal from an order denying a motion for a new trial, except as instant to an appeal from a judgment of conviction, and no appeal lies from an order denying a motion for a new trial made after the time allowed by law for taking an appeal has expired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.\*]

Appeal from District Court, Sequoyah County; John H. Pitchford, Judge.

O. H. Merrill and Sam House were convicted of conjoint robbery, and appeal. Appeal dismissed.

E. M. Frye, of Sallisaw, and E. G. Spilman, of Oklahoma City, for plaintiffs in error. Chas West, Atty. Gen., and C. J. Davanport, Asst. Atty. Gen., for the State.

DOYLE, P. J. O. H. Merrill and Sam House, and one Kirk Dearmin, were jointly informed against for the crime of conjoint robbery, and upon their trial were found guilty of conjoint robbery, and their punishment was fixed at imprisonment in the penitentiary for a term of five years. After motions for new trial and in arrest of judgment had been overruled, the court rendered judgment and sentenced each defendant to serve a term of five years in the penitentiary. The judgment and sentence was entered on the 15th day of May, 1913. The record shows that on the 8th day of November, 1913, the plaintiffs in error filed a motion for new trial on the ground that certain papers had been lost from the files, and that said motion was overruled on the 20th day of January, 1914. An appeal from the order overruling the motion for a new trial was attempted to be taken by filing in this court on June 19, 1914, what purported to be a case-made, which contains a transcript of the testimony taken upon the supplemental motion for a new trial.

The Attorney General has filed a motion to dismiss the appeal upon the grounds that said appeal is wholly unauthorized. Under the provisions of our Criminal Code, the appeal must be from the judgment and sentence. Section 5988, Rev. Laws.

There is no statute authorizing an appeal from an order denying a motion for a new

trial, except as instant to the appeal from a judgment of conviction. Parker v. State, 10 Okl. Cr. 541, 139 Pac. 708.

The appeal from the order overruling the defendant's supplemental motion for a new trial should therefore be dismissed.

The purported appeal is hereby dismissed, and the case remanded, with direction to the trial court to carry into execution the original judgment.

FURMAN and ARMSTRONG, JJ., concur.

(11 Okl. Cr. 280)

DULANEY v. STATE. (No. A-2192.)

(Criminal Court of Appeals of Oklahoma. Feb. 6, 1915.)

(Syllabus by Editorial Staff.)

CRIMINAL LAW (§ 1182\*)—APPEAL—DISMISSAL.

Where no briefs had been filed by accused, and when the case was called for final submission no appearance was made on his behalf, and no error appeared from an examination of the record proper, the Attorney General's motion to affirm the conviction for failure to prosecute the writ of error would be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Appeal from County Court, Jefferson County; J. M. Adams, Judge.

Monk Dulaney was convicted of a violation of the prohibitory law, and he appeals. Affirmed.

Hamilton & Saye, of Waurika, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted on an information charging the selling of intoxicating liquor to one John Johnson. On the 5th day of November, 1913, in accordance with the verdict of the jury, he was by the court sentenced to be confined in the county jail for a term of 90 days and to pay a fine of \$50.

No briefs have been filed, and when the case was called for final submission no appearance was made on behalf of plaintiff in error. Thereupon the Attorney General moved to affirm the judgment for failure to prosecute the appeal.

We have examined the record proper, and have discovered no error that will warrant a reversal of the judgment. The motion to affirm is therefore sustained.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

(11 Okl. Cr. 281)

**LOWDERMILK v. STATE.** (No. A-1806.)  
(Criminal Court of Appeals of Oklahoma. Feb. 4, 1915.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 400\*)—EMBEZZLEMENT (§ 44\*)—EVIDENCE—BEST AND SECONDARY—RECORD.**

(a) The fact that there is a record of the election of certain officers of a lodge does not preclude the state from proving by other competent evidence the fact that one acted in such capacity.

(b) If a person assumes to act in the capacity of a lodge officer, is so recognized by the members thereof, and receives and disburses the money of the lodge, proof of these facts is sufficient to sustain a conviction for the embezzlement of the funds of the lodge as an officer of the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400;\* Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.\*]

**2. CRIMINAL LAW (§ 1169\*)—INDICTMENT AND INFORMATION (§ 166\*)—PLEADING AND PROOF—APPEAL—HARMLESS ERROR.**

(a) It is the duty of the county attorney to introduce facts to establish all the material allegations set out in the information presented by him, in the manner and form as charged, and in keeping with the rules of law.

(b) The fact, however, that a county attorney fails of efficiency or through oversight to comply with the rules of law strictly construed, does not justify this court in permitting a criminal to escape punishment when such criminal has been deprived of no substantial right and is clearly guilty of the crime charged.

(c) The admission of incompetent evidence does not necessarily justify the reversal of a conviction when there is competent evidence in the record which conclusively establishes the guilt of the accused, and no defense whatever is offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169;\* Indictment and Information, Cent. Dig. §§ 527-530, 532, 533; Dec. Dig. § 166.\*]

Appeal from District Court, Latimer County; W. H. Brown, Judge.

G. N. Lowdermilk was convicted of embezzlement, and appeals. Affirmed.

Jones & Lester, of Wilburton, for plaintiff in error. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

**ARMSTRONG, J.** The plaintiff in error, G. N. Lowdermilk, was convicted at the March, 1912, term of the district court of Latimer county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a term of one year and one day. This appeal is brought in an effort to secure a reversal of the judgment of conviction.

The information charges that the plaintiff in error, while acting as the financial officer of Gowan Lodge No. 79 of the Ancient Order of United Workmen, embezzled the sum of \$130, funds of the lodge which he came into possession of through his official connection

therewith. The testimony clearly shows that he was acting as financial officer of the lodge in question in the capacity charged, received the money in question, and appropriated the same to his own use. The only contention advanced by his counsel is that the court erroneously permitted certain oral testimony to be introduced to show his official relation to the lodge, instead of requiring the introduction of lodge records. There was no testimony introduced on behalf of the plaintiff in error. A number of witnesses testified that they were members of the lodge and that the plaintiff in error was secretary and financial officer of the lodge. His signature was identified, and receipts he had given members of the lodge for dues were introduced.

[1] Counsel earnestly urge this court to reverse this judgment on the ground that the records of the lodge showing the election of the plaintiff in error to the position of financial officer should have been introduced. The county attorney should have been prepared to introduce, and should have introduced, this record. However, other competent proof in the form of receipts signed by the plaintiff in error in his own handwriting, in the absence of any denial on his part or by any one for him that the receipts spoke the truth, were sufficient to establish the fact that he had held himself out as such officer, and as said by this court in the case of *Ex parte Winters*, 10 Okl. Cr. 592, 140 Pac. 164, 51 L. R. A. (N. S.) 1087, if he was financier and secretary enough to collect the money of the members of this lodge and embezzle it, he was financier and secretary enough to go to the penitentiary for perpetrating such a public wrong. It was sufficient in this case for the state to show that the plaintiff in error acted as such officer and received and accepted for money as such officer, and embezzled the same after he had come into the possession thereof. The question of his lawful election as an officer of the lodge in question was not material. If he acted as an officer thereof, received and embezzled the money thereof in the manner and form as charged, then he was properly convicted. The laws of this state do not tolerate any such crookedness.

[2] While the foregoing is the law of this jurisdiction, county attorneys who prosecute under the character of information set up in this record should exercise diligence to introduce all the records essential to make out their case as charged. The fact, however, that the county attorney fails of efficiency or through oversight does not justify this court in permitting a criminal to escape punishment when he has been deprived of no substantial right and is clearly guilty of the crime charged. The admission of incompetent evidence does not justify the reversal of a conviction when competent evidence conclusively establishes the guilt of the accused.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

and when no defense whatever is made. It is clearly shown by the testimony in the record that members of this lodge paid to the plaintiff in error the assessments and dues provided by the by-laws governing the institution; that he accepted the money and issued receipts therefor as secretary and financial officer thereof; that he unlawfully appropriated the money to his own use—and nobody denies these facts.

The trial was without prejudice, and the conviction proper.

The judgment of the trial court is therefore affirmed.

DOYLE, P. J., concurs. FURMAN, J., absent.

(45 Okl. 451)

WILKINS, Drainage Com'r, v. HILLMAN et al., County Com'rs and Ex Officio Com'rs. (No. 6203.)

(Supreme Court of Oklahoma. Dec. 22, 1914. Rehearing Denied Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. DRAINS (§ 71\*)—SPECIAL ASSESSMENTS—VALIDITY.

In the construction of a drainage ditch, special assessments under the Constitution and laws of this state can be made only for corresponding specific benefits conferred.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74; Dec. Dig. § 71.\*]

2. COUNTIES (§ 160\*)—FUNDS—DRAINS—ASSESSMENT OF BENEFITS.

Where substantial benefits are assessed to a county on account of drainage to the public highways, that part of the expense of constructing the drainage ditch apportioned to the county, corresponding with the amount of benefits conferred, must be paid by the county out of funds raised by general taxation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 219; Dec. Dig. § 160.\*]

3. DRAINS (§ 68\*)—ASSESSMENTS—DRAINAGE OF HIGHWAYS.

That part of the expense in constructing a drainage ditch assessed against a county for benefits accruing to such county by virtue of drainage of the public highways cannot legally be paid out of funds collected by special assessments made against the property owners in said drainage district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 68.\*]

4. EMINENT DOMAIN (§ 2\*)—DRAINAGE OF HIGHWAYS—ASSESSMENTS.

The payment of that part of the expense in constructing a drainage ditch, assessed to the county for benefits to the public highways out of funds collected by special assessments levied upon the individual property located in such drainage district, would be taking private property for public use, without just compensation and violative of the Constitution and laws of this state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

5. DRAINS (§ 68\*)—ASSESSMENTS—BRIDGES—COUNTIES.

The viewers and appraisers assessed benefits to Lincoln county by virtue of the drainage of the public highways in the sum of \$134,500,

and assessed damages in favor of said county in the sum of \$81,930, the cost of erecting 48 steel bridges across said drainage ditch on the public highways. Said assessment was confirmed by the county commissioners. No exceptions were filed, or appeal taken therefrom. The county commissioners refused to erect said bridges, or to pay the amount of benefits assessed to said county. Plaintiffs, who are certain property owners in said district, filed their petition in the district court against the county commissioners, and said commissioners, as ex officio drainage commissioners, and against plaintiff in error as drainage commissioner, praying for a writ of mandamus, requiring them to meet and proceed to let the contract for the erection of said bridges. The court found in favor of the county commissioners, and issued a peremptory writ of mandamus requiring the commissioners, as ex officio drainage commissioners, and the drainage commissioner to meet and proceed to let the contract for the construction of said bridges. *Held*, error.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 68.\*]

Error from District Court, Lincoln County; Roy Hoffman, Judge.

Petition by J. W. Cherry and others against Ed Hillman and others, County Commissioners and Ex Officio Commissioners of Deep Fork Drainage District No. 1, Lincoln county, and from the judgment Homer J. Wilkins, Drainage Commissioner, brings error. Reversed, with directions.

Embry & Hastings, of Oklahoma City, for plaintiff in error. Streeter Speakman, Co. Atty., and F. A. Rittenhouse, both of Chandler, for defendants in error.

RIDDLE, J. On the 7th day of August, 1909, certain property owners residing in Lincoln county filed their petition in the manner provided by law with the board of county commissioners, for the purpose of creating a drainage district within said county. The petition was signed by the requisite number of property owners necessary to confer jurisdiction upon the county commissioners to proceed in the matter. Various proceedings were had, and there is no question raised as to the regularity of the proceedings in the organization of the drainage district and in letting the contract for the construction of the ditch. On February 26, 1914, J. W. Cherry, D. J. Norton, E. W. Hoyt, A. E. Patrick, and D. W. Collier, property owners in said district, filed their petition in the district court of Lincoln county against Ed Hillman, J. F. Collier, and R. A. Morrow, county commissioners and ex officio commissioners of Deep Fork Drainage District No. 1, of Lincoln county, and Homer J. Wilkins, as drainage commissioner. Plaintiffs recite the various steps taken in the organization of said drainage district, and the letting of the contract to construct the ditch; that they are property owners, affected by such proceeding. They further allege that the viewers and appraisers appointed to view and appraise said property reported the necessity of building 48 steel

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bridges across said drainage ditch on the public highways, and designated the localities where said bridges were to be constructed; that said viewers and appraisers estimated the cost of construction of said bridges in the sum of \$81,930. Plaintiffs further allege that said viewers and appraisers assessed the benefit to Lincoln county in the sum of \$134,550. They allege the progress made in the construction of said ditch and the necessity of building said bridges, and the refusal of said defendants, as county commissioners, or either as ex officio drainage commissioners of said drainage district, to construct said bridges, as was their duty to so do, although often requested. It is further alleged, without the construction of said bridges, it will be impossible for plaintiffs to cross said ditch, and many of the farms situated in said district will be cut in two by said ditch, and the owners thereof will not have access to portions of their farms; that they have no adequate remedy at law, and they pray for a writ of mandamus, compelling defendants to meet and proceed to let the contract for the construction of said bridges. An alternative writ of mandamus was issued, setting up substantially the foregoing facts.

Plaintiff in error, Homer J. Wilkins, as drainage commissioner, filed his answer and return to the alternative writ, wherein he sets out the various steps taken by the county commissioners in the organization of said drainage district and the report of the viewers and appraisers and the confirmation thereof by said commissioners. He avers that the viewers and appraisers found the benefits to Lincoln county in the sum of \$134,550, and the damage in favor of Lincoln county for the construction of said 48 steel bridges in the sum of \$81,930. After legal notice by publication, a hearing upon said report was had, and the same was by the commissioners duly confirmed, and no appeal was taken therefrom by the county; and the action of the viewers and the order confirming same have become final. He also makes a part of his answer the order of the board of county commissioners, of date, November, 1910, as follows:

"Chandler, Oklahoma. Nov. 19, 1910. The board met pursuant to recess, all members present; journal of previous meeting read and approved. It is ordered by the board that, whereas, by mutual mistake, the assessment for damages in favor of Lincoln county in the Deep Fork Drainage District No. 1 (by reason of the county being required to construct bridges), not having heretofore been spread of record, the county clerk be and he is hereby instructed to record in the drainage record of said district the assessment hereby made in favor of Lincoln county, on account of the construction of said bridges, the sum of \$81,930, which said sum is hereby declared to be the assessment of damages due said county, as aforesaid. The board then took a recess until Nov. 28, 1910.

"Approved this 28th day of November, 1910.

"Geo. F. Clark, Chairman.

"Attest: J. E. Rea, County Clerk."

He further alleges:

"And by such action the said board of county commissioners elected that Lincoln county would construct said bridges and offset the damages on account thereof, to wit, the sum of \$81,930; \* \* \* that the construction of said bridges is not a legal charge against said drainage district."

He further sets out resolution of the board of county commissioners of July 3, 1911, wherein the board recognizes the validity of the assessment of benefits made to Lincoln county and the provision made by said resolution toward the payment of said assessment, and the further resolution of said board, providing for the issuance of negotiable special assessment warrants with coupons attached in the aggregate sum of \$134,000, to provide the ready funds to pay said sum. He alleges that they refuse to issue said warrants or to build said bridges. The county commissioners filed a demurrer to the petition and alternative writ of mandamus. Plaintiffs filed a demurrer to the answer and return of the drainage commissioner. Upon a hearing of the issues thus raised, the court sustained each of said demurrers; and a peremptory writ of mandamus was issued against the county commissioners, as ex officio commissioners of Deep Fork Drainage District No. 1, and plaintiff in error, as drainage commissioner, requiring them to meet and proceed to let the contract for the construction of said 48 bridges. From this judgment plaintiff in error prosecutes error to this court.

[1-5] There is no question raised on this appeal relative to the necessity of the construction of said bridges, but all parties seem to agree that they are indispensable. The sole question for determination is as to whether said bridges should be constructed by the county commissioners at the expense of and in behalf of the county; or by the drainage commissioners and at the expense of said district. By stipulation filed in this court, the case made has been amended by attaching a true transcript of all the proceedings had before the county commissioners relative to said drainage district. We presume this is done in order that the court may determine the question on the merits and finally fix the liability of building these bridges. A proper determination of the question presented requires the consideration and construction of several provisions of the act of the Legislature of 1907-08, and the amendments thereto, commonly known as the Drainage Act. There is some contention as to whether the act of the commissioners was performed as commissioners of the drainage district, or whether they were acting in the capacity of county commissioners. The law is anything but clear as to when they shall act as county commissioners, or when they shall act as ex officio drainage commissioners. The law begins by providing that the proceedings shall be initiated by filing a petition with the county

commissioners, and section 3045, Comp. Laws 1909, in part provides: "The term 'commissioners' as used in this act, shall mean the board of county commissioners." There is no provision anywhere designating said commissioners "drainage commissioners," or "ex officio drainage commissioners." From an examination of the record, it seems that all the proceedings had before the commissioners were before them as county commissioners, and that all resolutions passed and orders made were in their capacity as county commissioners. In our opinion, it is a matter of minor importance whether or not they were acting in the capacity of county commissioners, or drainage commissioners. It is unnecessary to determine in what capacity they performed their duties, except to the extent and for the purpose of determining the validity of their acts. At common law, the obligation to maintain and repair public highways and bridges rested upon the county. 1 Blackst. Comm. 357. It cannot be doubted that primarily the duty of building bridges of the character and dimensions of the bridges required to be built across said drainage ditch in question upon the public highways is upon the county commissioners under sections 7581 and 7609, Rev. Laws 1910, which sections read:

"7581. All bridges, culverts and roads shall be at least fourteen feet wide, and all bridges and culverts not more than twenty feet in length shall be under the control and supervision of the board of highway commissioners of such township and the road supervisor in whose district such bridge or culvert is situated, and all bridges more than twenty feet long shall be under the control and supervision of the board of county commissioners. Said bridges to be built by the county commissioners at such places as may be necessary for the public convenience. In addition to the compensation already allowed by law, the county commissioners shall receive three dollars for each day actually and necessarily spent in overseeing bridge work: Provided, that no commissioners shall receive pay for such work for more than sixty days in any one year."

"7609. The board of county commissioners shall provide all roads improved, under the provisions of this article, with suitable bridges of a permanent and substantial character and shall keep and maintain same in repairs."

It is the contention of plaintiff in error that under section 3069, Comp. Laws 1909, it is likewise the duty of the county commissioners to construct the bridges in question. This section provides:

"The commissioners may, when the same is necessary for public health, convenience and welfare, cause to be constructed or enlarged, any bridge or culvert made necessary by the crossing of any drain constructed under the provisions of this act: Provided, however, that when such bridge or culvert shall belong to any corporation other than the county, the county clerk shall give such corporation notice by delivering to its agent the order of the commissioners declaring the necessity for constructing or enlarging such bridge or culvert, and a failure to construct or enlarge such bridge or culvert within the time specified, shall be deemed as a refusal to do said work, and thereon the commissioners shall proceed to let the work of constructing or enlarging the same and assess the corporation

with the cost thereof, and the county clerk shall place such assessment on the tax book against said corporation \* \* \* to be collected as taxes. Before the commissioners shall let such work they shall give to the agent of the said corporation at least twenty days' actual notice of the time and place of letting such work."

Construing section 3069, supra, as a whole and in connection with sections 7581 and 7609, Rev. Laws 1910, supra, relating to the same subject, we are clearly of the opinion that the commissioners referred to therein are the county commissioners, and that the bridges provided for are to be constructed on behalf of and at the expense of the county, except where benefits are assessed to a county, it may offset the amount due for benefits by the cost of erecting necessary bridges. This section clearly contemplates that the bridges, other than are owned by any private corporation, shall belong to the county. Also, this section provides only for the construction or repair of such bridges, when it is made necessary for the public health, convenience, and welfare. There is no reference made in this section to the repair or construction of bridges when necessary for the drainage district or for the convenience of the people in said district, but only when necessary for the general public health, convenience, and welfare. In other words, this section contemplates that said bridges are to be built for the use and benefit of the general public, in that all public bridges become a part of the public highways, and the public highways are in the exclusive charge and control of the county officials and must be erected by general tax; and this section puts the burden of constructing such bridges upon the county.

We are also of the opinion that the bridges referred to in this section are a different class from those referred to in section 3050, Comp. Laws 1909. Taking the context of said section 3050, it is reasonably clear that the bridges referred to there are mainly for the use and benefit of the owners of the lands situated in said district. The language used (referring to the viewers) is:

"They shall specify the manner and time in which the improvements shall be made and completed, the number of floodgates, waterways, farm crossings, bridges, and the dimensions thereof, and note the county and township lines and railroad crossings."

In other words, this language, properly construed, would mean the number of floodgates, waterways, farm crossings, and "farm bridges" and dimensions thereof. This section clearly contemplates that these are improvements to be constructed at the expense of the drainage district, and to become a part of the drainage system, and of special benefit to each landowner within the district, and are not public utilities. The drainage law does not provide anywhere the character, material, size in length or width, nor the location of such bridges. The language of the court in the case of Rigney v. Fischer, 113 Ind. 313, 15 N. E. 594, is applicable here:

"Without further extending this opinion, our conclusion is that appellee, as the drainage commissioner, has no authority to determine the necessity for the bridge, nor the sort of bridge, if one is necessary, that should be built, and has no fund that he can use in the erection of the bridge; in short, that he has no authority to erect the bridge. Those questions must now be settled, and the bridge be built, if built at all, by some person or body authorized to do so by the statutes."

It is also his contention that the viewers and appraisers assessed benefits to be derived from the construction of this ditch against Lincoln county in the sum of \$134,550, and damages by reason of the construction of these bridges in the sum of \$81,930, and that said county, through its officials, elected to build these bridges and offset the amount of expense against the amount of benefits assessed, and that said county is now liable under the law by reason of such proceedings and judgment of the commissioners. The jurisdiction and authority conferred upon the county commissioners in the organization and proceedings in the construction of a drainage ditch are very broad and sweeping. There can be no question about the power to assess benefits to the county wherein the viewers and appraisers find that the county will be benefited by reason of the construction of such ditch and the draining of public highways. Part of section 3046, Comp. Laws 1909, provides:

"The benefits to the county as a body politic and which might be assessed under this act against the county where improvements are formed, in districts formed wholly within any county, shall be prorated between the counties in their proportion to the benefits derived to the counties respectively and shall be paid from the public funds of each such county."

And again, section 3056, Id., provides:

"When any drain established under the provisions of this act, drains, either in whole or in part, or benefits any public or corporate road or railroad, the viewers shall apportion to the county or state road, or if a corporate road or railroad, to the person or company owning, operating or controlling the same, the same proportion of the cost of location and construction of the improvement in proportion to the benefits received as to private individuals." (Italics ours.)

It will be seen that the commissioners in their supervisory control over the acts of the viewers and appraisers had the same jurisdiction and authority to assess and approve benefits to the county as to an individual; and when the assessment was made and confirmed, if no appeal was taken within 20 days, the order confirming such assessment became final, equivalent to a judgment of such board, and would not be subject to a collateral attack. Certain powers conferred upon said commissioners are quasi judicial. The determination of the viewers, when affirmed by the county commissioners, is a quasi judicial proceeding and, unless appealed from, is final. In the case of *Sears v. Street Com'rs*, 173 Mass. 350, 53 N. E. 876, it is said:

"It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the Legislature delegates the power is a quasi judicial proceeding which cannot take final effect unless persons to be assessed have an opportunity to be heard. *New London N. R. Co. v. Boston & A. R. Co.*, 102 Mass. 386; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 54, 18 Sup. Ct. 521 [42 L. Ed. 943]; *Hagar v. Reclamation Dist.*, 111 U. S. 701-709, 4 Sup. Ct. 663 [28 L. Ed. 569]; *Irrigation Dist. v. Bradley*, 184 U. S. 112-175, 17 Sup. Ct. 56 [41 L. Ed. 369]; *Stuart v. Palmer*, 74 N. Y. 189 [30 Am. Rep. 289]; *Remsen v. Wheeler*, 105 N. Y. 573 [12 N. E. 564]."

Said commissioners are given exclusive jurisdiction to hear and determine all contests and objections to the creation of such district, and all matters pertaining to same, and have exclusive jurisdiction in all subsequent proceedings, except such as is conferred upon the drainage commissioner after the completion of the ditch. They are given power to adjourn the hearing on any matter from day to day, and all judgments rendered by said commissioners in relation thereto are final, except when appealed from to the district court.

There is no claim that the county failed to receive sufficient notice of all proceedings had, or that there are any defects by reason thereof. Under the broad powers vested in the commissioners, we are of the opinion that their acts in approving the assessment of benefits to the county and in assessing damages in favor of the county to the amount of the cost of the bridges, and the resolution on the 19th day of November, 1910, *supra*, are valid and binding upon the county. The resolution, fairly construed, was an election on the part of the county to offset the benefits assessed to the amount of the cost price of the bridges. There was no appeal taken from the action of the commissioners in any of these matters, and such action must be held to be conclusive on the county. If the judgments of the commissioners are not conclusive on the county, then they are not conclusive on any of the other parties, in that the commissioners had the same jurisdiction over the county as it had over the other parties before them, and was specifically authorized to make the assessments of benefits and damages to the same extent as if all were individuals. The county was authorized to elect, the same as an individual, if it would offset the damages assessed against the benefits, and, having elected, is now estopped to revoke its action in such matter to the prejudice of the drainage district and others interested.

Section 17 of the act, being section 2981, Rev. Laws 1910, in part provides:

"Should any person interested in land appropriated or damaged by the proposed drain or other improvements fail to file their written exceptions to the report of the viewers as hereinafter provided, they shall be deemed to have acquiesced in any such award and shall forever be estopped from prosecuting any action to vacate or avoid the same."

And section 3057, Comp. Laws 1909, in regard to appeals, provides:

"Any person aggrieved may appeal from the order of the commissioners, and upon such appeal there may be determined either or any of the following questions: First, whether just compensation has been allowed for property appropriated, and second, whether proper damages have been allowed for property prejudicially affected by the improvements; third, and whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the cost of the improvements."

Section 3053, Id., in part provides:

"If the commissioners shall find that due notice has been given, they shall examine the report of the surveyor and viewers, and if it shall appear that the assessments of the cost of location and construction and of damages and benefits to each tract are correct, and that the apportionment of the costs of location and construction, is in proportion to the benefits and damages of each tract, fair and just, the same shall be approved and confirmed. \* \* \*"

Then it is provided in said section that in case the commissioners find that the improvements so reported are unjust or erroneous, they may, by an order of record, amend the report upon evidence. The subject-matter certainly was within the authority of the commissioners, and the law specifically gives to the commission authority to adjourn from day to day on the hearing of reports and exceptions, and to make such orders as may be necessary in the letting of the contract and the assessment of damages and benefits. The statute also specifically authorizes the offsetting of benefits by damages assessed, and this applies as well to the county as to individuals, and in our opinion, the commissioners had the authority to confirm and approve the finding of the viewers in assessing benefits against the county in the amount found, and also in assessing the damage for the construction of the bridges, and that the county had a right, acting through its commissioners, to elect whether or not it would construct said bridges. It having elected, its action should be held final.

The contention that counsel make to the effect that it was the duty of the drainage district, under the common law, to construct these bridges, is not tenable. We recognize the common-law rule, to the effect that where a corporation or other person or company crosses a public highway, it must be done with as little damage to the highway as possible, and that it is the legal duty of such person or company to construct bridges or culverts and make such other repairs as may be necessary to replace said highway in a reasonably safe condition at the expense of such person crossing same. Whether or not this rule, under any circumstances, would apply to a drainage district, constructed under the statute, is not necessary to decide; but we do hold it has no application to the case at bar. If all the parties affected, or who expected to be benefited by the cutting of a drainage ditch, should be directly instrumental in initiating proceedings for that

purpose and proceed to organize and construct such a ditch, without reference to any benefits to the public generally, and should construct said ditch across highways, probably in such an instance such persons, corporation, or drainage district might be required to repair the highways so damaged in crossing. It is clear, under the drainage laws and the Constitution, no assessments can be made upon any land on any principle other than that of corresponding benefits received. The undertaking here was a gigantic one, of vast magnitude, and from the great area of country it will drain, we might be justified in inferring that it will be of immeasurable benefit to the general public, even if there were no finding to that effect in the record. One of the prerequisites to the right of making this improvement was a finding that it would be necessary for the "public health, convenience, and welfare" of all, and that it would not be of special benefit to any particular class, or specific property. This alone should be sufficient reason to make the common-law rule inapplicable. No doubt the larger per cent. of the property owners, without their consent, are required to contribute to pay the expense of such improvements, on the theory that they are public utilities and beneficial to the public health, etc., and for specific benefits received equal to the assessments. Under our Constitution, arbitrary assessments can only be made in payment of expense of constructing a drainage ditch when the benefits received are in proportion to the assessments made, and that such improvement is a public utility, or is made in the interest of public health. When such improvements are made in the interest of the public welfare, and without regard to special benefits conferred, the property of citizens can be taken only after just compensation paid therefor, and the expense of such improvements must be paid by a general tax upon all people affected. *People ex rel. Coon Run Drainage & Levee Dist. v. Nortrup*, 232 Ill. 303, 83 N. E. 843; *Cumling County v. Bancroft Drainage Dist. et al.*, 90 Neb. 81, 132 N. W. 927. It is shown from the record and is conclusive, so far as this proceeding is concerned, that the county received benefits to the public roads of \$134,550 by reason of this contemplated improvement. To this extent, the property owners within the district would receive no direct benefit to their property. In other words, every other resident of the county will receive the same benefit by the drainage of the public roads as will the property owners living within the district; and it would be neither right nor legal that the few residing within the district should be compelled to pay the expense for benefits received by the public generally. The bridges required are for the benefit of the general public, and special assessments cannot legally be made to pay the expense of constructing

same. The expense of building said bridges is a subject of general taxation. *Sears v. Street Com'rs*, supra; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Washington Ave.*, In re, 69 Pa. 352, 8 Am. Rep. 255; *Appeal of City of Williamsport*, 187 Pa. 565, 41 Atl. 476; *Dietz v. City of Neenah*, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500; *Dyar v. Farmington Village Corp.*, 70 Me. 527; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739; *Erie v. Russell*, 148 Pa. 384, 23 Atl. 1102. To hold otherwise would be in direct violation of section 24, article 2, of the Constitution, in that it would be taking private property for a public use, to the extent, at least, of the amount of the assessments of benefits to the public highways, amounting approximately to one-sixth of the total value of the improvements.

Page and Jones on Taxation by Assessment, § 449, lay down the following rule:

"Authority to assess for the construction of a system of drains does not include authority to assess for the construction of a bridge at a point where a large drain crosses a highway."

In 14 Cyc. 1025, it is stated:

"Under the various constitutional provisions and acts conferring power upon local authorities to establish drains, it must be shown that such drain is necessary and conducive to public health, convenience, or welfare, or of public benefit or utility" (citing cases from Indiana, Michigan, Ohio, Oregon, Wisconsin, and New York).

Page 1059, Id.:

"In the assessment of benefits in drainage proceedings, the landowner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special. The benefits for which an assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put, and lands not benefited are not subject to assessment."

Page 1061, Id.:

"The general rule is that the expense of construction of a drain cannot be assessed against particular lands to an amount in excess of the benefits received by such land, and an assessment upon a tract of land in excess of the benefits received is void as to such excess."

In 10 Am. & Eng. Encyc. of Law, 230, it is stated:

"The general rule is well settled that a special assessment for the purpose of drainage can be levied only upon property benefited by the proposed drainage, and the amount of such assessment must not exceed the benefit to be derived by the land assessed."

It was said in the case of *Norwood v. Baker*, 172 U. S. 269, 9 Sup. Ct. 187, 43 L. Ed. 443, by Mr. Justice Harlan, speaking for the court:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

It is suggested that the county commissioners cannot be compelled to build said bridges, for the reason it would be in violation of section 26, art. 10, of the Constitution. This same objection, no doubt, could be urged, and properly so, against the enforcement of the collection of the amount of benefits assessed to the county in the sum of \$134,550, yet if said apportionment and assessment are legal, and they appear to be such, under section 3067, Comp. Laws 1909, it is made the duty of said county to pay said amount of benefits assessed in cash, or in time warrants, as it may elect. We have no authority, and it is not our purpose, to require the county commissioners to attempt to violate the provision of the Constitution, but have the authority to require such commissioners to meet in the manner provided by law and take such proceedings as may be necessary, in compliance with law, toward the erection of such number of bridges across the drainage ditch in question upon the public highways as the public good, convenience, and accommodation may require.

It follows that the judgment of the trial court must be reversed, with direction to vacate and set aside same, and to enter a judgment requiring the county commissioners to convene immediately and proceed to take such steps as may be necessary in the manner provided by law, toward letting contracts for the erection of such bridges across Deep Fork Drainage ditch No. 1, of Lincoln county, as may be necessary to accommodate fully and adequately the public, and the court is further directed to proceed in said matter in accordance with the views herein expressed. It is so ordered. All the Justices concur.



(44 Okl. 603)

**ST. LOUIS & S. F. R. CO. v. AMEND,**  
County Treasurer, et al.  
(No. 3499.)

(Supreme Court of Oklahoma. Jan. 19, 1915.)

*(Syllabus by the Court.)*

**TAXATION (§§ 297, 608\*)—LEVY—VALIDITY—  
COLLECTION—INJUNCTION.**

Any tax levied by the county excise board in excess of the estimate of the township or school district officers for the fiscal year is illegal and void.

(a) The collection of such illegal and void tax may be enjoined.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 474-482, 1230-1241; Dec. Dig. §§ 297, 608.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pushmataha County; A. H. Ferguson, Judge.

Action by the St. Louis & San Francisco Railroad Company against J. W. Amend, as County Treasurer of Pushmataha County, and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. A. J. Arnote, Co. Atty., of Antlers, for defendants in error.

**THACKER, C.** Plaintiff in error brought this action in the trial court against defendants in error, treasurer and sheriff, respectively, of Pushmataha county, to enjoin the collection of certain taxes for the fiscal year beginning on July 1, 1910. On December 26, 1910, plaintiff paid, as one-half of such taxes, \$12,616.19; but the defendant treasurer, claiming \$12,706.88, as the half then due, accepted said \$12,616.19 only as a partial payment; the difference between the amount paid by plaintiff and the amount claimed by defendant treasurer as such one-half being \$90.68.

[1, 2] Under Laws 1909, p. 603, as amended by Laws 1910, p. 149 (section 7389, Rev. Laws 1910), a failure to pay one-half of the whole amount of the taxes before January 1, 1911, would have resulted in maturing the whole amount of the taxes for that year on that date.

The plaintiff's claim of excessive levy to the amount of \$181.37 (said \$90.68 being the first half of this amount) arises out of the levy for one township and two school districts in said county; and said \$12,616.19 (being one-half of all taxes plaintiff admits owing in said county) includes a payment of what plaintiff claims to be one-half of the comparatively small amounts levied for such township and school districts.

The county excise board (created, etc., by L. 1910, p. 111, the same being sections 7379-7380 Rev. Laws 1910) made levies as follows: (1)

Upon an assessed valuation of taxable property in Kosoma township (after deducting \$39,815 as nontaxable Indian lands) of \$778,910, and upon that township's estimate of its needs for expenses, sinking fund, and interest coupons of an amount to which an addition of 10 per cent. for delinquent taxes would make \$87.18, a levy of 1 mill (the equivalent of \$778.91) was made; and, the assessed value of plaintiff's property being \$501,021, this shows an excessive levy of \$120.24, but in the petition plaintiff only claims \$50.10. (2) Upon an assessed valuation of the taxable property in school district No. 3 of said county (after deducting \$4,447 as nontaxable Indian lands) of \$227,220 and upon that district's estimate of its needs for expenses, sinking fund, and interest coupons of an amount to which an addition of 10 per cent. for delinquent taxes would make \$416, a levy of 2 mills (the equivalent of \$454.44) was made; and, the assessed value of plaintiff's property being \$212,683, this shows an excessive levy of \$36.15. (3) Upon an assessed valuation of the taxable property in school district No. 22 of said county (after deducting \$6,877 as upon nontaxable Indian lands) of \$287,327, and upon that district's estimate of its needs for expenses, sinking fund, and interest coupons of an amount to which an addition of 10 per cent. for delinquent taxes would make \$1,036.49, a levy of 4 mills (the equivalent of \$1,149.28) was made; and, the assessed valuation of plaintiff's property being \$253,540, this shows an excessive levy of \$96.34, but in the petition plaintiff only claims \$88.74.

It thus appears that the aggregate of the excessive levies upon plaintiff's property in that county is \$174.99. And it further appears that the plaintiff should have tendered and paid, as the first due half of its taxes, the sum of \$12,692.55, or \$76.36 more than it did. There is some disagreement and confusion in the basis for and the results of the calculations of the parties in their briefs, and there may be some minor error in our own calculations; but, if so, we hope our attention will be called to same by petition for rehearing. However, it seems clear that there was an excessive levy of \$174.99, which was illegal and void. *St. Louis & S. F. Ry. Co. v. Thompson, Co. Treas.*, 35 Okl. 138, 128 Pac. 685.

The temporary restraining order should have been made a perpetual injunction to the amount of \$174.99, as such excess; and the judgment of the trial court should be reversed and remanded, with instructions to enter a judgment perpetually enjoining the collection of said sum of \$174.99.

PER CURIAM. Adopted in whole.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(44 Okl. 611)

YOUNG v. MISSOURI, O. & G. R. CO.  
(No. 3855.)

(Supreme Court of Oklahoma. Jan. 19, 1915.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 757\*) — PRESENTATION FOR REVIEW—BRIEF—EVIDENCE.**

Where plaintiff in error complains on account of the admission and rejection of testimony, he must set out in his brief the full substance of the testimony to the admission or rejection of which he objects. Rule 25 (137 Pac. xi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

**2. APPEAL AND ERROR (§ 263\*) — OBJECTION BELOW—INSTRUCTIONS.**

Instructions to the jury will not be considered here unless exceptions thereto were saved and allowed in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McClain, Judge.

Action by W. J. Young against the Missouri, Oklahoma & Gulf Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Brook & Brook, of Muskogee, for plaintiff in error. E. R. Jones and J. C. Wilhoit, both of Muskogee, for defendant in error.

**RITTENHOUSE, C.** [1] The brief of plaintiff in error complains of the admission and rejection of testimony. Rule 25 (137 Pac. xi) of this court requires that, where a party complains on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony to the admission or rejection of which he objects stating specifically his objection thereto. This he has failed to do, and the assignment will therefore not be considered. *Scoville et al. v. Powell et al.*, 33 Okl. 446, 126 Pac. 730.

[2] Plaintiff in error assigns as error the giving of certain instructions. An examination of the record discloses that no exceptions were saved, and, if there was error, the same was waived by failure to except. Section 5003, Rev. Laws 1910; *Finch et al. v. Brown et al.*, 27 Okl. 217, 111 Pac. 391; *Straughan v. Cooper*, 41 Okl. 515, 139 Pac. 265; *Shuler et al. v. Hall*, 141 Pac. 280.

The cause should therefore be affirmed.

**PER CURIAM.** Adopted in whole.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(44 OKL. 745)

**DOLESE BROS. CO. v. CHANEY & RICKARD et al. (No. 3521.)**(Supreme Court of Oklahoma. Dec. 8, 1914.  
Rehearing Denied Jan. 30, 1915.)*(Syllabus by the Court.)***1. PRINCIPAL AND SURETY (§ 59\*)—CONTRACTS OF SURETYSHIP—CONSTRUCTION.**

Under section 2961, Stat. 1890 (section 1053, Rev. Laws 1910), the same rules of interpretation apply to contracts of suretyship as to other contracts.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**2. PRINCIPAL AND SURETY (§ 59\*)—CONTRACT OF SURETYSHIP—CONSTRUCTION.**

After a contract of suretyship is interpreted and the intelligible meaning of its language is ascertained, it will be construed and applied strictly in favor of the surety, and without allowance of an implication against him.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**3. PRINCIPAL AND SURETY (§ 59\*)—CONTRACT OF SURETYSHIP—LIABILITY OF SURETY.**

A surety is not bound beyond the express terms of his contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.\*]

**4. PRINCIPAL AND SURETY (§ 66\*)—CONTRACT OF SURETYSHIP—LIABILITY OF SURETY.**

A surety for a single individual is not liable for any association of several of which such single individual is a member, nor is a surety for several liable for one of them individually.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.\*]

**5. MUNICIPAL CORPORATIONS (§ 347\*)—SIDEWALKS—CONTRACTOR'S BOND—ENFORCEMENT.**

A provision in a bond to a city given by a principal to obtain a license, required by an ordinance, to construct sidewalks therein, that such principal shall pay for material, is valid and enforceable by any person furnishing material used in the construction of such sidewalks by such principal under such license.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.\*]

**6. MUNICIPAL CORPORATIONS (§ 346\*)—SIDEWALKS—CONTRACTOR'S BOND—COMMON LAW.**

Under the common law, a contractor's bond to a city for the construction of sidewalks may provide that he shall pay for all labor and material used therein.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 346.\*]

**7. MUNICIPAL CORPORATIONS (§ 345\*)—CONSTRUCTION OF SIDEWALKS—CONTRACTOR'S BOND—NECESSITY.**

Under section 4541, Stat. 1893 (section 3881, Rev. Laws 1910), any public officer entering into a contract, in any sum exceeding \$100, for the construction of any public improvements, is required to take from the party contracted with a bond conditioned that such contractor shall pay all indebtedness incurred for labor or material furnished and used in constructing such improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 875; Dec. Dig. § 345.\*]

**8. MUNICIPAL CORPORATIONS (§ 346\*)—CONSTRUCTION OF SIDEWALKS—CONTRACTOR'S BOND—PAYEE.**

Under section 4541, Stat. 1893 (section 3881, Rev. Laws 1910), the fact that the municipality, instead of the state of Oklahoma, is named as payee in the bond thereby required, will not invalidate such bond.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 346.\*]

**9. MUNICIPAL CORPORATIONS (§ 347\*)—CONSTRUCTION OF SIDEWALKS—CONTRACTOR'S BOND—LIABILITY.**

Where C. has the requisite license to engage in the business of constructing sidewalks in a city, to procure which he has paid the fee and given the bond required by the city ordinance, which bond contains a provision that he shall pay for all labor and material, although such provision is not required by such ordinance, and where C. and R. subsequently enter into a contract with such city for the construction of such sidewalks under such license and bond therefor, to which license and bond such contract specifically refers as a basis therefor, and where C. and R. thereupon give another bond, with the same sureties who are upon C.'s individual bond, for the faithful performance of their said contract, but which does not contain a provision that they shall pay for all labor and material, both such bonds and such contract will be interpreted together with due regard to such license, and C. alone will be deemed the principal contractor in relation to such city and the public, including all persons furnishing C. and R. material used in the construction of such sidewalks, and the sureties upon such bonds will be liable as such to such persons for material so furnished and used in the construction of such sidewalks.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by the Dolese Bros. Company, a corporation, against J. W. Chaney and C. E. Rickard, partners doing business as Chaney & Rickard, A. H. Reed and C. E. Dawkins, on contractor's bonds for material furnished and used in construction of sidewalks. Judgment for plaintiffs against Chaney & Rickard for amount sued for, and judgment for defendants A. H. Reed and C. E. Dawkins, who were sureties on said bonds, from which adverse judgment plaintiff brings error. Reversed and remanded.

H. Z. Wedgwood, of Enid, for plaintiff in error. Chalmers B. Wilson, of Enid, for defendant in error Reed. W. H. Hills, of Enid, for defendant in error Dawkins.

THACKER, C. Plaintiff in error was plaintiff and defendants in error were defendants in the trial court.

The essential facts, when not stated, are necessarily presupposed by this opinion, and will therefore be understood. There was error in the sustention of the demurrer of the defendants A. H. Reed and C. E. Dawkins to the plaintiff's petition, the pertinent al-

legations of said petition being, in substance, as follows:

(1) That these two defendants are sureties upon the bond of J. W. Chaney as a licensed sidewalk constructor in the city of Enid (since in May, 1910), conditioned that the said J. W. Chaney "shall perform his duties as sidewalk contractor, in compliance with the existing ordinance, and maintain all sidewalks constructed by him for a period of one year from the date of the approval of the sidewalk inspector; except against unavoidable casualty, *and shall pay for all labor and material,*" which bond was given, and a license fee of \$50 paid, as a condition precedent to such license under Ordinance No. 463 of said city; (2) that on August 27, 1910, said J. W. Chaney and C. M. Rickard entered into a contract with said city, predicated upon and referring to said license and bond as authority therefor, for the construction of certain sidewalks in said city, and undertaking to "furnish all the material, tools, and labor, and all the work \* \* \* at his (their) own expense, according to the specifications of the city engineer, \* \* \* and \* \* \* with the provisions of said Ordinance No. 463, \* \* \* the work to be first-class in every particular, \* \* \*" and the contract further providing that the contractor "will faithfully perform the work \* \* \* and protect the city and all property owners interested against loss or damage by reason of the negligence or improper execution of the work upon said improvements; (3) that on September 27, 1910, the said J. W. Chaney and C. M. Rickard gave the said city their bond, with the defendants A. H. Reed and C. E. Dawkins as sureties, conditioned that said Chaney & Rickard "shall well and truly perform the provisions of" their contract; (4) that plaintiff sold and delivered to said Chaney & Rickard, to be used, as the same was, in the construction of said sidewalks, certain crushed limestone at the agreed price of and worth \$749.48, upon which a balance of \$369.18, with interest thereon from November 11, 1910, at 6 per cent. per annum, remains unpaid; and (5) that by reason of said bonds the said A. H. Reed and C. E. Dawkins are liable to plaintiff for said balance, and are estopped from denying such liability.

It appears to be conceded that neither C. M. Rickard nor Chaney and Rickard had license to construct sidewalks in said city, and that said Ordinance No. 463 required that "any person, persons, firm, or corporation desiring to engage in the business of sidewalk construction" within said city should first obtain a license upon application in writing, payment of \$50 as a fee, and giving a bond in the sum of \$1,000, which bond was required by said ordinance (in accord with Sess. Laws 1907-08, p. 171; section 623, Rev. Laws 1910) to be conditioned as said Chaney bond was, except that the italicized provision was not required by said ordinance nor said statute.

[8-9] However, it appears that said italicized provision in the Chaney bond was permissible under the general law, so that parties furnishing Chaney material would be entitled to recover thereon (4 McQuillan, Municipal Corporations, § 1960, p. 4206; State ex rel. v. Liebes, 19 Wash. 589, 54 Pac. 26); and it also appears that such provision is in accord with the general duty of officers (seemingly including city officers) in taking bonds for the construction of sidewalks under section 4541, Stat. 1893 (section 3881,

Rev. Laws 1910), it being immaterial that the state is not named as obligee therein (Thompson v. Grider Implement Co., 36 Okl. 165, 128 Pac. 267).

As neither the contract of August 27, nor the bond of September 27, 1910, require payment for labor or material, the plaintiff cannot, of course, recover alone upon this bond; and, if it may recover at all, it must be by virtue of such provision in J. W. Chaney's individual bond of May 24, 1910, and its recognition by the Chaney & Rickard contract and bond.

[1-3] In interpreting the terms of a contract of suretyship, the same rules will be observed as in the case of other contracts (section 2961, Stat. 1890; section 1053, Rev. Laws 1910); but, after being so interpreted, and the intelligible meaning of its language is ascertained, the same will be construed and applied strictly, in favor of the surety, and so as to not allow any implication against him (Lamm v. Colcord, 22 Okl. 493, 98 Pac. 355, 19 L. B. A. [N. S.] 901; Eager et al. v. Seeds et al., 21 Okl. 524, 96 Pac. 646; Penny v. Richardson et al., 12 Okl. 256, 71 Pac. 227; Lowe et al. v. City of Guthrie, 4 Okl. 287, 44 Pac. 198).

A. H. Reed and C. E. Dawkins, being sureties, are not bound beyond the express terms of their contract. Section 2960, Stat. 1890 (section 1052, Rev. Laws 1910); Lamm v. Colcord, supra; Eager et al. v. Seeds et al., supra; Penny v. Richardson, supra; Lowe et al. v. City of Guthrie, supra. Also see section 2961, Stat. 1890 (section 1053, Rev. Laws 1910); section 2965, Stat. 1890 (section 1057, Rev. Laws 1910); Guthrie Nat. Bank v. Fidelity & Deposit Co., 14 Okl. 636, 79 Pac. 102.

[4] And sureties for one person, as for J. W. Chaney, are not liable for several, as for J. W. Chaney and C. M. Rickard, nor are sureties for several, as for J. W. Chaney and C. M. Rickard, liable for one, as for J. W. Chaney alone. 1 Brandt on Suretyship & Guaranty (3d Ed.) §§ 134, 135, pp. 284-288; Pingrey on Suretyship & Guaranty (2d Ed.) §§ 83, 84; Spencer on Suretyship, § 198; 27 Am. & Eng. Enc. L. (2d Ed.) 459, 460; 32 Cyc. 184.

[8] This brings us to inquire whether the facts in this case take it out of the above rule; that is, as to whether J. W. Chaney should be regarded as the sole principal and primarily liable in the contract with the city, and thus the principal in his relation to the public.

The bond of September 27, 1910, being for the performance of a contract of August 27, 1910, which recognizes and recites as one of its basic facts the license obtained and bond of J. W. Chaney, with the same sureties, given in May, 1910, must be understood as so related to the former bond, and these two bonds and the contract must be interpreted together, and with due regard to the said J.

W. Chaney's license. And it appears, notwithstanding the contract and latter bond do not within themselves distinguish the position of J. W. Chaney in the contract and latter bond from that of C. M. Rickard, who is joined therein as if he was joint principal, Chaney must be regarded as the true principal, and Rickard as merely his associate in a secondary sense and his surety (except as between these two), in deference to the fact that Chaney alone was licensed to construct sidewalks in the city, and Chaney alone could have lawfully contracted as a principal party. Brandt on Suretyship & Guaranty, § 187, pp. 290, 291; Kuhn v. Abat, 2 Mart. N. S. (La.) 168.

The doctrine in Kuhn v. Abat, *supra*, as stated in Brandt on Suretyship & Guaranty, *supra*, in connection with comments on the doctrines of other somewhat similar cases, is as follows:

"By law, no one but persons licensed for that purpose had authority to sell goods at auction,

and a licensed auctioneer had to give bond. A., being a licensed auctioneer, gave bond with surety, but was conducting the business in the name of A. and B. as partners; B. not being licensed. Held, the sureties of A. were liable for goods thus sold by him. As no one but a licensed auctioneer could legally sell goods at auction, if they were properly sold, it must be considered the act of A., and the obligation which he and his sureties contracted in consequence of the privilege granted to him by the government ought not to be impaired by the circumstances of his having conducted the affairs of his office with the aid of a partner in the profits, any more than they would be if he had acted by the assistance of a hired clerk. His situation in relation to his partner did not concern the public who applied to him as an auctioneer. These decisions do not controvert the rule that the surety for a single individual is not liable for a partnership of which such individual is a member, but each case, from its peculiar circumstances, was held not to come within the rule."

For the reasons stated, this case should be reversed and remanded for another trial.

PER CURIAM. Adopted in whole.

(44 Okl. 751)

**PARSONS v. EVANS.** (No. 3522.)  
(Supreme Court of Oklahoma. Dec. 22, 1914.  
Rehearing Denied Jan. 30, 1915.)

(*Syllabus by the Court.*)

**1. EXEMPTIONS (§§ 114, 116\*)—SETTING APART—RIGHT—DUTY OF OFFICER.**

Under the statutes in this state, it is no part of the duty, nor is it the right of an officer holding an execution, to select and set apart the judgment debtor's exempt property. Neither is it his duty to advise him as to his right to certain exemptions. The right to claim and select exempt property rests wholly with and can be exercised only by the judgment debtor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 186, 187; Dec. Dig. §§ 114, 116.\*]

**2. EXEMPTIONS (§ 116\*)—DUTY TO CLAIM—OFFICER HOLDING PROCESS.**

Where a judgment defendant, having more property of a certain class than is exempt by statute, desires to claim his exemptions out of the whole, it is his duty to promptly inform the officer, holding process, of the particular property selected and claimed as exempt from levy.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 187; Dec. Dig. § 116.\*]

**3. SHERIFFS AND CONSTABLES (§ 112\*)—LEVY ON EXEMPT PROPERTY—LIABILITY.**

Where only a part of property levied upon is claimed as exempt, a demand by the execution defendant for the return of his exempt property, unaccompanied by any effort to make a selection of a part out of the entire lot, will not, in an action in replevin for possession of the exempt property subsequently selected and claimed, entitle such party to damages against the officer for the detention of such exempt property; the officer making no further defense to the action than to resist plaintiff's right to recover damages.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 182, 183; Dec. Dig. § 112.\*]

**4. EXEMPTIONS (§ 89\*) — RIGHT — PERSONAL PRIVILEGE.**

The right of exemption is a personal privilege, which, in order to be availed of, must be claimed by the debtor. He is not compelled to take advantage of it. He may let his property go to sale, either by choice or neglect.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 112; Dec. Dig. § 89.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Alfalfa County; A. J. Jones, Judge.

Action by J. P. Evans against W. H. Parsons. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Titus & Carpenter, of Cherokee, for plaintiff in error. A. C. Beeman, of Cherokee, for defendant in error.

**SHARP, C.** This is an action in replevin, filed February 8, 1910, by J. P. Evans against W. H. Parsons, a constable, to recover certain personal property, most of which had on February 5th, prior thereto, been taken from the possession of the plaintiff by defendant, by virtue of an execution issued out of a justice court, in the case of J. W. Howard v. J. P. Evans; judgment having been obtained against the defendant in that action, who is

the plaintiff in the present action. After describing the property sought to be recovered, which consisted of 10 hogs, 2 horses, 2 cows, 1 buggy, 1 set of harness, and about 50 bushels of corn, all of which was alleged to be exempt under the laws of the state, plaintiff in his petition asked for damages in the sum of \$100 for the wrongful detention of said property. With the exception of four hogs taken under the execution, three of which belonged to the tenant of plaintiff, living on the farm from which the property was taken, the other one not being claimed an exempt, and two horses, the property replevined was identical with that taken under the execution. The hog and two horses not claimed as exempt in the present case were sold by defendant in satisfaction of the execution, to which plaintiff herein made no objection. On the same day that the action in replevin was filed, the writ issued to the sheriff, which the latter executed on February 9, 1910, by levying upon and taking said property into his possession. On March 10th following, defendant filed his answer to the petition of plaintiff, denying generally the allegations contained therein, and on December 7th thereafter filed an amended answer, which contained the following additional defenses:

"(1) This defendant admits that he was in possession of the property described in plaintiff's petition.

"(2) That said possession was by virtue of an execution issued out of the justice court of T. J. Hawley, a justice of the peace of Byron township, said county and state, and levied upon said property; that said levy was made subject to a certain mortgage of said plaintiff in favor of the Bank of Cherokee, Okl.; and that, at the time of said levy, the property described in plaintiff's petition was in the possession of said mortgagee.

"(3) That upon demand of said plaintiff for the possession of the property described in said petition, claiming said property by reasons that same were exempt under the laws of this state, this defendant immediately delivered the property to said plaintiff and has not at any time made claim to said property since said date."

Trial was had December 9th and resulted in a judgment in favor of plaintiff for the sum of \$5 and costs. Motion for a new trial, being filed, was sustained. July 26, 1911, defendant filed a second amended answer, in which the further defenses were set up that the 10 hogs replevined were turned over to plaintiff as soon as selected from the 14 taken under the execution, and that, as to the other property, it had never been in the possession of defendant under the execution issued in the case of Howard v. Evans, but instead was in the possession of one D. B. Harrison, for the Bank of Cherokee, which at the time held a mortgage on it. The second trial resulted in a verdict for \$25, and judgment was rendered accordingly. Motion for new trial having been overruled, the case is brought here on appeal.

The defendant by his amended answer having disclaimed right of possession to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property, and conceded it to be in plaintiff, the court very properly instructed the jury that the only questions to be determined by them were whether the property was wrongfully detained by defendant before being released, and, if so, the amount of damages suffered, if any. The principal question for our determination is whether the defendant wrongfully detained the property, or any part of it, from the plaintiff. This involves other considerations, namely: (1) Is it a duty of an officer, when levying an execution, to inform the debtor or his agent of his statutory exemption rights; (2) Is the statute self-executing, or must the debtor claim the exemptions allowed him; and (3) how, if necessary, should he make his claim?

[1] We find nothing in the statutes making it the duty of an officer, when levying an execution, to inform the debtor of his right to exemptions. Section 6405, Comp. Laws 1909 (section 5484, Rev. Laws 1910), provides that the execution for the enforcement of a judgment before a justice of the peace must be directed to a constable of the county, who shall collect the amount of the judgment from the personal property of the debtor, etc. Section 6451, Comp. Laws (section 2075, Rev. Laws 1910), gives a constable, in serving process and doing his duties, generally, the same authority and power over goods and chattels as is granted by law to a sheriff under like process issued from courts of record. Section 5972, Comp. Laws 1909 (section 5156, Rev. Laws 1910), names the property upon which execution shall be levied, etc. Unless, then, the duty of the constable, or other officer, to inform the debtor of his right to exemptions, can be inferred from the statute granting such exemptions (section 3346, Comp. Laws 1909; section 3342, Rev. Laws 1910), we must conclude that it is not imposed upon him. This statute reads in part:

"The following property shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: [Naming different classes of personalty exempt.]"

[2-4] Does this statute of itself sufficiently set apart, from all personal property that a resident of the state may own, so much thereof as is specifically exempted thereby, so that, before it could be taken under execution, the officer of the law must inform the debtor of his right to retain it? Or, continuing, can it be said that specific amounts of the property exempted are placed beyond the reach of an execution in any case? Both of these questions, we think, should be answered in the negative. The statute plainly states the duties of an officer, such as a sheriff or constable, and how such duties shall be performed, but nowhere includes that he shall legally advise a debtor whose property he may be about to subject to an execution. Discussing this question, it is said in Wells on Replevin (2d Ed.) § 269:

"An officer with execution is not bound to consult with the execution debtor as to what property is exempt, but he may seize and proceed to sell any or all the debtor's property upon which he can lay his hands; and, if the debtor desires the protection of the statute, he must invoke its aid. It does not operate unless its shelter is sought. When exempt property is levied on, the debtor ought, at the time, or seasonably thereafter, to specially claim the benefit of the exemption; he cannot sustain replevin for property he has not selected and claimed as exempt. So, when a certain amount of a particular kind of property is exempt, the debtor must select and claim or in some lawful manner assert his rights. If the sheriff levy execution on the whole of that class of property, the debtor cannot sustain replevin until he select and demand the exempted portion."

In *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786, the same question was considered. It is there said:

"Where no duty of selection is imposed upon the officer, the debtor waives his right to the exemption if he fails to demand it."

Judgment debtors should be given an opportunity to claim their exemptions, but this does not mean that they may not waive such right. We have no doubt but that in some instances a debtor may be willing to have a judgment against him satisfied out of exempt property which he may own, rather than have such judgment outstanding unpaid. It has been very generally held that the right of exemption is a personal privilege, which, in order to be availed of, must be claimed by the debtor. *Scanlan v. Guiling*, 63 Ark. 540, 39 S. W. 713; *Kahn v. Hayes*, 22 Ind. App. 182, 53 N. E. 430; *Wilson v. Montague*, 57 Mich. 638, 24 N. W. 851; *York et al. v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Taylor v. Belville*, 70 W. Va. 484, 74 S. E. 517; *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25; *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

In the present case demand was made over the phone, for the return of the exempt property, before the beginning of the action; but there being more stock than was claimed as exempt, and no selection of the exempt from the nonexempt having been made, the mere demand for so much exempt property was not sufficient. It is true that in this case plaintiff demanded 10 of 11 hogs belonging to him as exempt, but there were also 8 other hogs in the same herd held by the defendant belonging to plaintiff's tenant, and it is reasonable to suppose that defendant would, if he had made the selection for defendant, have chosen a part of the hogs belonging to said tenant, for he did not know which belonged to the tenant. When plaintiff did make his selection after this action was commenced, he refused to accept the ten at the time driven out of the herd by the defendant, but made his own selection. This confirms our statement that in all probability he would not have been satisfied had defendant made the selection for him at the time demand was made upon him over the telephone.

In *Schwartz v. Birnbaum*, 21 Colo. 21, 39 Pac. 416, it is said in the syllabus:

"Where only part of property levied on is claimed to be exempt, the mere demand by the execution defendant of his right to select is not equivalent to making the selection, so as to perfect the right of exemption."

In *Smith v. Chadwick*, 51 Me. 515, the opinion quotes from the case of *Clapp v. Thomas*, 5 Allen (Mass.) 158, as follows:

"If the debtor, who has a larger quantity of any kinds of provisions than the law exempts from attachment, sets apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it, when the officer is about to attach the whole, he cannot maintain an action against the officer, who takes the whole."

And adds:

"We recognize that decision as sound law."  
\* \* \*

In *Seaman v. Luce*, 23 Barb. (N. Y.) 240, there is the following discussion of the duties of an officer in a case similar to the present one:

"It will hardly do to hold that the officer is invested with the absolute authority to determine, before he makes the levy, which of the three horses belonging to a defendant in an execution shall be taken, and which two shall be exempt as a team for the defendant. He might leave the defendant one of the three horses which would not work in a team with another horse at all, and thereby literally deprive the defendant of the benefit of a team. If we allow the officer the absolute right of determining which two of the three horses shall be exempt, he may in very many ways use the authority so oppressively as to render this statute, which was intended to secure a team to a judgment debtor as exempt property, of very little value to the debtor. On the contrary, if we allow the defendant in the execution the unqualified right of selecting from the class of exempt property to the extent of holding the officer liable as a trespasser in case he does not, before he makes his levy, call upon the execution debtor and request him to elect from the class of exempt property which he will claim as exempt, such a requirement would render the execution of the process extremely onerous upon public officers, and in many cases would seriously prejudice the rights of judgment and execution creditors."

Other authorities to the same effect are *Tullis v. Orthwein*, 5 Minn. 377 (Gil. 305); *Berge v. Kittleson*, 133 Wis. 664, 114 N. W. 125; *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786; *Haskins v. Bennett*, 41 Vt. 698; *Wells on Replevin*, § 269. No selection of the 10 hogs from the 14 taken under the execution having been made prior to the bringing of plaintiff's action, as to them there could have been no wrongful detention by the defendant, and the plaintiff was not entitled to damages for injuries which may have been suffered by said hogs while in defendant's possession. As to the property other than the hogs, the undisputed evidence shows it to have been taken, not by defendant under the execution, but by one Harrison, for the Bank of Cherokee, the mortgagee of such property, and placed in the possession of one Christensen for said bank, and that said Christensen continued in the possession of said property for the bank until after the commencement of the present action. It is true that defendant levied on the mortgaged property "subject to the mortgage," as well as on the hogs, and which levy as to said property was invalid. *Moore v. Calvert*, 8 Okl. 358, 58 Pac. 627. But this does not contradict the testimony of Christensen and the other witnesses that it was held and taken care of for the Bank of Cherokee, which had taken the property under its mortgage. We conclude, therefore, that the plaintiff was not entitled to damages for the wrongful detention of any of the property levied on, under the execution.

The judgment of the trial court awarding damages should therefore be reversed, but without prejudice to the rights of the defendant in error to retain possession of his exempt property. The costs should be taxed to the defendant in error.

PER CURIAM. Adopted in whole.



(44 Okl. 609)

**J. P. BLEDSOE & SON v. W. B. YOUNG SUPPLY CO.** (No. 3833.)

(Supreme Court of Oklahoma. Jan. 19, 1915.)

*(Syllabus by the Court.)***1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—"TRANSACTIONING BUSINESS"—ACTION.**

An action for debt in a court of this state is not "transacting business," within the meaning of the inhibition of the Laws of 1909, pp. 147, 148, effective June 10, 1909 (sections 1335-1341, Rev. Laws 1910), against a noncomplying foreign corporation's right to sue in a court of this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see Words and Phrases, First and Second Series, 'Transacting Business.'

**2. COMMERCE (§ 46\*)—FOREIGN CORPORATIONS—RIGHT TO SUE—INTERSTATE TRANSACTIONS.**

Laws of 1909, pp. 147, 148, effective June 10, 1910 (sections 1335-1341, Rev. Laws 1910), specifying certain conditions precedent to a foreign corporation's right to sue in the courts of this state, do not apply to a foreign corporation in an action for debt arising out of an interstate commercial transaction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46.\*]

**3. COMMERCE (§ 40\*)—FOREIGN CORPORATIONS—SALE OF GOODS.**

A foreign corporation, which has sold and delivered to a resident of this state goods f. o. b. Kansas City, Mo., upon the latter's mail order from this state, may sue in a court of this state for the purchase price, notwithstanding it has failed to comply with the provisions of the Laws of 1909, pp. 147, 148, effective June 10, 1909 (sections 1335-1341, Rev. Laws 1910), prohibiting such corporations from transacting business and denying them the right to sue in any court in this state unless they shall file their articles of incorporation with the Secretary of State, paying the fees required by law, and appoint a resident citizen agent at the State Capitol upon whom service of process may be made in any action to which such corporation is a party.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Stephens County; W. H. Admire, Judge.

Action by the W. B. Young Supply Company, a foreign corporation, against J. P. Bledsoe & Son, on account for goods sold. Judgment for plaintiff, and defendant brings error. Affirmed.

Gilbert, Riley & Bond, of Duncan, for plaintiff in error. D. M. Smith and F. B. Allen, both of Duncan, for defendant in error.

THACKER, C. Plaintiff in error will be designated as "defendant," and defendant in error as "plaintiff," in accord with their respective titles in the trial court.

The only question which requires consideration in this case is as to whether the plaintiff, a Missouri corporation with place of business at Kansas City, in that state, which has not complied with Laws 1909, pp. 147, 148, effective June 10, 1909 (sections

1335-1341, Rev. Laws 1910), requiring foreign corporations to file their articles of incorporation with the Secretary of State, paying the fees required by law, and appoint a resident citizen agent at the State Capitol upon whom service of process in any action to which such corporation is a party may be made, before transacting any business in the state as a condition precedent to its right to maintain any action in any court of the state, may sue in a court of this state and recover of the defendant \$298.98, with interest, aggregating \$340.80 at the date of the judgment therefor in its favor in the trial court, owing and due on account of three several sales and shipments, f. o. b. Kansas City, of plumbing and steam supplies which the defendant, a copartnership of Marlow, Okl., ordered and purchased by interstate mail, notwithstanding plaintiff's failure to comply with said laws.

[1-3] The indebtedness sued for arose out of an interstate commercial transaction, the present action itself is not a transaction of business within the meaning of such inhibition (Freeman-Sipes Co. v. Corticelli Silk Co., 34 Okl. 229, 124 Pac. 972), and, the exclusive power to regulate commerce between the states being vested by the federal Constitution in Congress, the said state laws cannot and do not attempt to penalize nor to otherwise derogatively affect plaintiff's right to sue for this debt, and such right is not subject thereto in an action arising out of such interstate transaction of business. Fruit Dispatch Co. v. Wood et al., 140 Pac. 1138.

For the reasons stated, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 763)

**UNION CENT. LIFE INS. CO. v. ERWIN.** (No. 3946.)

(Supreme Court of Oklahoma. Dec. 8, 1914. Rehearing Denied Jan. 30, 1915.)

*(Syllabus by Galbraith, C.)***PAYMENT (§ 87\*)—RECOVERY—DURESS—LIEN OF MORTGAGE.**

Where a mortgagee has exercised an option given him by the mortgage to declare the mortgage debt due upon default in the payment of interest, and then demands the payment of a bonus in addition to the principal and interest of the debt, before he will release the mortgage lien, and such bonus is paid, the mortgagor may maintain an action to recover the amount thereof.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 283-287; Dec. Dig. § 87.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Logan County; S. S. Lawrence, Judge.

Action by Frankie E. Erwin against the Union Central Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

McGuire & Smith, of Guthrie, for plaintiff in error. Devereux & Hildreth, of Guthrie, for defendant in error.

**HARRISON, C.** This cause presents the question whether a mortgagor, having under duress paid a bonus to a mortgagee for a release of a mortgage, can afterward maintain an action for the recovery of the bonus thus paid.

The plaintiff below, Frankie E. Erwin, was the mortgagor, and defendant the mortgagee. The mortgagor had obtained a loan of \$1,200 on her homestead quarter section, for which she and her husband executed one note for \$1,200 and one for \$200, each drawing interest at the rate of 6½ per cent. per annum from date until paid, and, to secure the payment of same, executed a mortgage on her homestead quarter section. The two notes and mortgage were executed February 25, 1905, the \$200 note due in two years and the \$1,200 note in ten years. The \$200 note was not paid at maturity but allowed to run until February, 1911, about two years after maturity, at which time the principal being past due, and also some interest payments and taxes being past due and unpaid, the mortgagee declared the whole sum, principal and interest, due and demanded payment thereof. The mortgage provided that upon failure of the mortgagor to pay the principal on either note when same became due, or to make the interest payments upon either note when they became due, or to pay the taxes as they became due, the mortgagee, upon its election, should be authorized to declare the whole sum due and to foreclose the mortgage in satisfaction of the debt. Plaintiff alleged in her petition that in February, 1907, she was threatened by the mortgagee with foreclosure proceedings, unless the amounts due were paid; that she had no other way or means for raising the amount, except by obtaining another loan on her land; that she was unable to obtain a new loan without first satisfying the mortgage and obtaining a release of same; that she was forced to obtain a release of same in order to obtain a new loan with which to satisfy the mortgagee's demands and avoid the threatened foreclosure proceedings; that the mortgagee refused to release the mortgage unless plaintiff would pay the sum of \$50 as a bonus for such release and an additional sum of \$10 for expenses claimed by the mortgagee to have been incurred; that plaintiff protested against the payment of such bonus and extra expenses on the ground that neither of same had been provided for in the mortgage, but that she was forced to pay same in order to avoid foreclosure proceedings, and that after she had paid off the mortgage and the interest, together with the bonus and extra expenses claimed, she made demand for the return of the \$50 bonus and the \$10 extra expenses. Upon defendant's refusal to return same, this suit

was instituted and judgment obtained against defendant for the \$50 bonus and \$2.65 expense money, with interest on the whole amount at 6 per cent. until the judgment be satisfied. From such judgment the insurance company appeals upon seven specifications of error. These specifications of error involve three principal propositions: First, whether the court erred in the admission or rejection of testimony; second, whether the judgment was sustained by the evidence; third, whether the judgment, after the money had been paid to the mortgagee and the benefits of a release received by the mortgagor, was contrary to law.

From an examination of the record of the proceedings, we find no prejudicial error in the admission or rejection of testimony. It also appears from the record that the judgment is sustained by the evidence.

As to the third proposition, it is contended by the insurance company that it was entitled to the bonus paid by the mortgagor for the release, as a remuneration on its investment for the unexpired time; that is, until maturity of the \$1,200 note. A number of authorities are cited by plaintiff in error in support of this contention, but the authorities cited are not applicable to the facts disclosed by this record. They, in the main, are cases where the mortgagor, of his own desire, of his own choice, demanded the right to pay off a mortgage and obtain a release of same before it was due. In such cases the courts have very generally held that the mortgagee, being contented with his investment, and desiring to let it run until maturity, was entitled to a reasonable bonus for the release of his mortgage as remuneration on his investment for the unexpired time. But in the case at bar it was alleged by the mortgagor, and proved to the satisfaction of the court by the evidence, that she had not of her own choice demanded the right to pay off the mortgage and get a release therefrom before it was due, and thereby deprive the mortgagee of the benefits of his investment, but that the mortgagee had become dissatisfied with his investment and had demanded payment of both principal and interest and threatened to foreclose unless it was paid, and that she had been forced to pay it off in order to avoid foreclosure and forced to pay a bonus in order to obtain a release of the mortgage lien. This presents an altogether different aspect to that of a case wherein the mortgagor voluntarily and of his own will demands the right to pay off a mortgage not yet due and to obtain a release therefor, and we think that, under the record and the law, the court very properly gave her judgment for the amount of bonus she had been thus forced to pay. The facts in the case presents this condition: The mortgagee had an option, upon default in interest payments, to either grant further time or to declare the whole amount due and to foreclose. The mortgagor was in

default of interest payments. The mortgagee, being unwilling to grant further time or to make a new loan, and becoming dissatisfied with his investment, chose to exercise his option, declare the whole amount due, foreclose his mortgage, and get his money out of the investment. The mortgagor, desiring to avert a foreclosure proceedings, set about to find some one of whom she could obtain a loan with which to pay off the mortgage, and, upon her finding a place where she could get the money, she proposed to mortgagee to pay all that was due under the mortgage and all that could have been obtained by foreclosure proceedings, if the mortgagee would not foreclose. To this the mortgagee agreed and the mortgagor proceeded to complete arrangements for a new loan; but, when it came to releasing the mortgage, the mortgagee, being aware that a new loan could not be obtained until its mortgage was released, demanded a bonus of \$50 before it would execute a release. Under the circumstances, this was unjust. A mortgagee will not be permitted to force payment of his mortgage under threat of foreclosure proceedings before the mortgage is due and at the same time demand a bonus on his investment before he will release his mortgage. Such conduct is unconscionable and will not be sanctioned by the courts. This principle was applied by this court in *Wagg v. Herbert*, 19 Okl. 525, 92 Pac. 250, in order to prevent a mortgagee from taking advantage of his duress and fraud in obtaining possession of an escrow deed.

In *Cazenove v. Cutler*, 4 Metc. (Mass.) 246, the court held:

"If a mortgagee of land in Maine, who is in possession for condition broken, require that the mortgagor or his assignee pay more than is legally due, in order to redeem, and it is paid accordingly, for the purpose of preventing a foreclosure, it is such a compulsory payment as entitles the party, who so pays, to recover it back in an action, brought in this state, for money had and received."

In *Wagg v. Herbert*, supra, the action was for the cancellation of an escrow deed, possession of which had been obtained by the mortgagee through duress and fraud. This court held that the action could be maintained by the mortgagor upon the principal ground that the mortgagee had taken advantage of the mortgagor's necessities and by undue influence in this way had obtained possession of the escrow deed. In support of this principle, the court cites a number of cases in which the mortgagor had executed a release of his equity of redemption, and afterward brought suit for the cancellation of such release on the grounds that the mortgagee had taken advantage of the necessities of the mortgagor and had induced the execution of the release by duress and fraud.

The case of *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 355, 20 Am. Dec. 145, is quoted

from by this court in the *Wagg Case*, supra, as follows:

"A mortgagee in possession may take a release of equity of redemption. [Citing authorities.] But such a transaction is to be scrutinized, to see whether an undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skillful to take advantage of the necessities of the borrower."

And, after a review of authorities on the question, the court said:

"It will thus be seen that the doctrine announced by the California courts is in full harmony with the doctrine announced by the Supreme Court of the United States in the case of *Russell v. Southard*, supra [12 How. 139, 13 L. Ed. 927], and in harmony with the views herein stated. It holds, as all the courts hold, that a mortgagee may purchase from the mortgagor, if the transaction is fair, honest, and without fraud or undue influence, and where no unconscionable advantage is taken by fraud of the relation existing between the mortgagor and mortgagee. But upon the issue of fraud, undue influence, and unconscionable advantage, the trial court found the issues in favor of the plaintiff and against the defendant, and such finding and judgment of the court upon the evidence adduced is conclusive upon this court, and there being ample evidence to sustain such finding and judgment."

Now the decisive question dealt with by this court in the *Wagg Case*, and by other courts in cases cited in the opinion, was whether the mortgagee had taken advantage of the necessities of the mortgagor, and thus by duress or fraud forced him to deliver an escrow deed or deliver a conveyance which showed on its face to be a deed absolute, whereas in fact it was intended as a mortgage or to execute a release of equity of redemption. There is no difference in law nor in principle in taking advantage of the necessities of the mortgagor and forcing him to deliver an escrow deed, or to execute a release of his equity of redemption, and in forcing him to pay a bonus in order to obtain a release of the mortgagee's lien against his premises, and this was the decisive question dealt with by the trial court in the case at bar. The mortgagee was not entitled to a bonus on his investment. He had become dissatisfied with his investment and had elected to declare the whole amount due, foreclose the mortgage, and get his money out of the investment; but, upon assurance from the mortgagor that she would pay the mortgagee all that could be recovered in a foreclosure proceeding, the foreclosure was averted. The mortgagor had no right thereafter to demand a bonus before the execution of the release of the mortgage. We find no reversible error in the record of the proceedings and believe that, under the record and the law, the judgment of the trial court was correct.

It is therefore affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 763)

**GAULT v. KANE.** (No. 3693.)  
(Supreme Court of Oklahoma. Jan. 12, 1915.  
Rehearing Denied Jan. 30, 1915.)

(Syllabus by the Court.)

**1. BILLS AND NOTES (§ 330\*)—DEFENSES—TRANSFER—EFFECT.**

Under the law in force in this state in January, 1909, a promissory note, payable to M. or order, could not be transferred so as to cut off the defenses of the maker, except by the indorsement of the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804; Dec. Dig. § 330.\*]

**2. BILLS AND NOTES (§ 496\*) — ACTION BY TRANSFEREE—BURDEN OF PROOF—INDORSEMENT.**

Where K. executes certain promissory notes to M. or order, and afterwards G. commences an action thereon against K., alleging in his petition that he (G.) purchased said notes from the Bank of T., to whom said notes were for value received duly indorsed, sold, and delivered by the payee, and when the allegations of the petition are put in issue by a duly verified answer, and where the undisputed evidence shows that the notes were given without consideration and were the result of a fraudulent transaction, but where it is not proven at the trial that the notes were ever indorsed by the payee, but on the other hand the notes themselves introduced by the plaintiff show no indorsement, the plaintiff is not entitled to recover.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1669-1674; Dec. Dig. § 496.\*]

**3. BILLS AND NOTES (§§ 330, 489\*)—ACTION BY TRANSFEREE—DEFENSES—PLEADING AND PROOF.**

A note payable to order can be transferred free from all equities between the original parties to it, only by indorsement, and a transferee of such note must both allege and prove that the note was transferred by indorsement, if he desires to avoid such equities as may be set up against it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-804, 1587-1642; Dec. Dig. §§ 330, 489.\*]

Commissioners' Opinion, Division No. 1.  
Error from District Court, Major County;  
James W. Steen, Judge.

Action by C. E. Gault against P. S. Kane.  
Judgment for defendant, and plaintiff brings error. Affirmed.

S. J. Bardsley, of Fairview, and D. R. Hite, of Topeka, Kan., for plaintiff in error.  
John V. Roberts, of Fairview, and Garber & Kruse, of Enid, for defendant in error.

**SHARP, C.** On December 31, 1908, the defendant in error, Kane, executed and delivered to one Henry J. Martens, payable to said Martens or order, two promissory notes, one for \$400, a second for \$440, each of which notes were due and payable December 31, 1909. These notes were, in the month of January, following, together with a large number of other notes, aggregating in amount \$34,031, hypothecated with the Bank of Topeka, Topeka, Kan., as security for a loan at the time made by said bank to Martens in the sum of \$16,000. The Martens

note to the bank not having been paid, suit was brought thereon by the bank in the district court of Shawnee county, Kan., and an order obtained directing the sale of the collateral notes. At the sale subsequently held, the plaintiff in error, who was attorney for the bank, purchased the entire list of collateral notes, including the notes of the defendant, for \$100, and it is to recover on these latter notes that suit has been brought.

Plaintiff in his petition alleges that the notes in question were for value received duly indorsed, sold, and delivered to the Bank of Topeka by the payee thereof. Both defendant's original and amended answer, which are duly verified, deny and put in issue each and every allegation contained in plaintiff's petition, save such as are therein specifically admitted. Among other defenses set up by the defendant in both its answers was a total failure of consideration. The undisputed evidence shows that defendant in error, Kane, and, it appears, a number of other persons living in the vicinity of Meno, Okla., were victimized by the said Martens, who secured from them a large number of negotiable promissory notes upon the representation that he would deed to them valuable lands in California which he claimed to own. It is necessary to refer but briefly to the fraud perpetrated by the said Martens, as it stands confessed that the notes were executed and delivered wholly without consideration, and as the result of fraud practiced upon the maker by the payee. If, then, the plaintiff is to recover, it can only be upon the theory that he, or at least the Bank of Topeka, was an innocent purchaser, before maturity, for value, and without notice of the equities existing between Kane and Martens. Plaintiff, the purchaser at the foreclosure sale, acquired no greater rights, nor can he be considered a more favored suitor, than if the action were one brought by the bank. It will be necessary therefore for us to consider, not the rights of a subsequent purchaser or indorsee from an innocent purchaser of negotiable paper, purchased at a foreclosure sale, unless first it be determined that the Bank of Topeka was in fact an innocent purchaser in due course.

[1] As a part of his case, plaintiff introduced the two notes in question, which do not appear to have ever been indorsed by Martens. The transfer of the notes in question took place prior to the taking effect of the present negotiable instruments act (Comp. Laws 1909, pp. 1044-1070). Under the law at the time in force (section 4641, Comp. Laws 1909), one who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called an indorsement. By the same statute (section 4657, Comp. Laws 1909), the indorsee in due course is defined to be one who in good faith, in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer. When an instrument is made payable to order, the indorsement of the payee is necessary to transfer the legal title; and the transferee without indorsement takes it subject to all equities that attach to it in the hands of his transferor. The rule is one of wide and general application, and is thus stated in 1 Daniels on Negotiable Instruments, § 741:

"\* \* \* Where a bill or note payable 'to order' is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title. The holder under such a transfer must plead and prove the assignment, for the mere possession of the instrument is not evidence of ownership, and its exhibition in a suit not sufficient ground of recovery. And he can only stand in the shoes of his assignor and recover subject to such defenses as were available against him, although he took it in good faith and for value."

In 2 Randolph on Commercial Paper, § 788, the rule is thus announced:

"If a bill is payable to order, and transferred without indorsement, its transfer will be subject to defenses existing against the transferor. To be clear of defense it must be indorsed before maturity and before notice of the defense has come to the transferee. An assignment in like manner, unaccompanied by an indorsement, is subject to defense."

If therefore a negotiable promissory note, payable to order, is transferred before maturity by delivery merely, and not by indorsement, the assignee obtains merely an equitable interest in the note, and not the legal title thereto, and he must be prepared to meet all equitable defenses that may be set up against it in the event he brings a suit to enforce its payment.

[3] The rule is thus expressed in the syllabus of Central Trust Co. of New York v. First Nat. Bank of Wyandotte, 101 U. S. 68, 25 L. Ed. 876:

"A promissory note, payable to A. or order, cannot be transferred so as to cut off the defenses of the maker, except by the indorsement of the payee."

Many reported cases, in which the law is announced as herein stated, may be found in a comprehensive note to First National Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758, found in the latter volume, in which it is said there can be no question but that a note

transferred by the payee without indorsement is subject, in the hands of the transferee or any subsequent holder, to all the equities existing in favor of the maker against the payee; that such equities can be cut off only by an indorsement by the payee; that the rule as applied to cases where the payee did not indorse the note upon transfer is upheld by a long line of decisions. Such is the rule announced in Story on Promissory Notes, § 120; Story on Bills, § 201; Edwards, Bills, Notes & Neg. Instr. § 404.

[2] Under the issues joined, it was incumbent upon the plaintiff, not only to plead, but to prove, an indorsement by Martens in the transfer of the notes to the Bank of Topeka. As was said in this regard, in Hadden v. Rodkey, 17 Kan. 429:

"If said note was in fact indorsed, the plaintiff should have alleged it either in his petition, as one of the facts constituting his cause of action, and giving such cause of action a more extended and comprehensive scope, or in his reply, as one of the facts defeating any previously existing defense set up by the defendant. The indorsement of the note is not a fact constituting any part of the defendant's defense, and it has no connection therewith. The only connection it has with the case is with the plaintiff's cause of action, being in fact the starting point, the foundation thereof, and enlarging and extending its operation and effectiveness. Therefore, if the plaintiff in such a case should desire the benefit that an indorsement of the note would give him, he should plead and prove such indorsement. Otherwise the defendant may set up and prove any defense that he may have to the note."

There being no evidence offered that the notes or either of them were ever indorsed to the Bank of Topeka by Martens, it was error for the court to overrule the defendant's demurrer to the evidence, interposed after plaintiff had rested his case. Having thus concluded, it will not be necessary to consider the errors assigned by plaintiff in error. Under the evidence Martens could not have enforced payment of the notes, and, as the plaintiff failed to prove an indorsement of the note, neither he nor his assignor occupied a better position than would Martens were the action being prosecuted by him. That the bank took the notes in good faith and for value, so long as there was no indorsement thereof by Martens, does not cut off the equities between the parties thereto, though the bank may have, and probably did, acquire the equitable title to the notes.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 759)

**WALKER v. BOWMAN et al.** (No. 3564.)  
(Supreme Court of Oklahoma. July 7, 1914.  
Rehearing Denied Jan. 30, 1915.)

(*Syllabus by the Court.*)

**JUDGMENT (§ 141\*)—DEFAULT—SETTING ASIDE—GROUNDS.**

Where a default judgment has been rendered awarding damages against a firm of abstracters, in the amount of an alleged lien on real estate not disclosed in the abstract, upon evidence of plaintiff introduced to establish the amount of damage because of the undisclosed lien, and petition was filed within 90 days thereafter to vacate the default judgment, in which it is shown that plaintiff had been sued for the amount of the undisclosed lien, and had litigated the validity of the lien, and a final judgment had been entered to the effect that plaintiff was not liable on account of the alleged lien, and that this knowledge came to defendants after the default had been entered, but was known by plaintiff, and the amount included in the default judgment, *held*, that these facts fully justified the court in vacating the default judgment and granting a new trial on the merits.

[*Ed. Note.*—For other cases, see Judgment, Dec. Dig. § 141.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Mrs. T. J. Walker against O. J. Bowman and others. A default judgment for plaintiff was set aside, and plaintiff brings error. Affirmed, with directions.

Munden & Horton, of Oklahoma City, for plaintiff in error. Winn & Brill, of Oklahoma City, for defendants in error.

**BREWER, C.** Mrs. T. J. Walker sued Bowman & Stevenson, a firm of abstracters, together with a number of individuals as bondsmen, in the probate court of Oklahoma Territory, to recover the amount of an alleged lien on some real estate not set out in the abstract. A trial was had, and judgment rendered for defendants. An appeal was taken to the district court, where a demurrer was sustained to plaintiff's petition. An appeal to the Supreme Court resulted in a reversal and remand of the case. *Walker v. Bowman et al.*, 27 Okl. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839. The mandate was entered of record in the district court on January 28, 1911. On Saturday, August 26, 1911, the last day of the term, plaintiff obtained a default judgment. On November 23, 1911, the defendants filed a petition asking that the default judgment be vacated and set aside. On November 25, 1911, a trial was had on the petition, and the default judgment was vacated and set aside. From this order setting aside the judgment and granting a new trial this appeal is prosecuted.

The petition to vacate the judgment is lengthy, and embraces many alleged grounds and reasons. We will only notice a few of them.

This suit against the abstracters was based

on the claim that the plaintiff bought some lots relying on an abstract of title furnished by defendants; that there was an attachment lien on the property not disclosed in the abstract; that plaintiff had sold the lots, and her grantee had been obliged to pay \$216 to clear off this lien; and that plaintiff was legally liable to her grantee to repay to him this sum. In reversing this case, this court held (27 Okl. 172, 111 Pac. 319, 30 L. R. A. [N. S.] 642, Ann. Cas. 1912B, 839) that in such a case as this the right of action accrues at the time the title is examined and the abstract thereof reported and delivered, and not when the error is discovered and the damages resulting therefrom are paid.

One of the reasons averred for vacating the default judgment is that plaintiff's grantee had sued plaintiff to recover the amount of the lien they had paid off (being the same sum and lien upon which this suit is based), and that at a trial of that case this plaintiff, there as defendant, had defeated a recovery, and had been awarded her costs, and that that judgment had become final, and that therefore this plaintiff could in no event be damaged in the amount of the lien undisclosed in the abstract, because of the final judgment that she ought not to pay same. It was further averred that these facts came to the knowledge of the petitioners after the rendition of the default judgment.

The claim was also made in the petition that defendants were not in default, when they were so adjudged on motion of plaintiff, and that they were prevented from filing a motion for a new trial and to set aside the default at that term of court because of the fraudulent conduct of plaintiff. It was alleged and shown that this case has been in the courts for several years, and in this court, as *Walker v. Bowman et al.*, and so stood on the docket of the district court when the judgment was taken; that in the journal entry of judgment filed and reported in the *Legal News* of this city the title of the case was changed to that of *Walker v. Zalendeck et al.*, a name it had never borne before, Zalendeck being one of the bondsmen for defendant and a codefendant as such; that defendants and their attorneys were subscribers to this paper, and read and kept up with their court business through information imparted by this paper; that by reason of the switching of the names in the court order defendants were misled into not protecting themselves at once, etc.

The court held that, while defendants' answer was on file and among the papers, yet that technically defendants had withdrawn the answer when they presented the demurrer in the former trial, and were in default for not having filed or refiled their answer. But the court held further that it had been shown that defendants had a valid defense, and that the default should be set aside to the end that they could make it.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We think there was ample proof to justify the court in the action taken. The court heard all the evidence, studied the condition of the record and the nature of the default, and the defense shown by defendants. There must be some latitude for discretion in such cases. The court was evidently convinced that to let the judgment stand would be to work injustice. We think he was justified in so believing. If it is true that plaintiff will not and cannot in any event be made to pay, or subjected to a judgment for, the amount of the undisclosed lien, of course she has not been damaged in that amount, and cannot recover it. Therefore to have let this judgment stand would have been putting into plaintiff's pocket this \$216 which, when she filed her suit, it looked like she might later have to pay but which it was later determined she was under no obligation to pay. However, under the doctrine announced in the former opinion in this case, she had the right to sue when she did, and, being right in suing to protect herself against the possibility of loss, she may be entitled to some damage, at least to costs, in the event she should prevail over the other defenses alleged by defendants to be available.

The plaintiff well knew, on the date of the default, when she introduced evidence to sustain her claim, that she could never be called upon to pay the amount of this lien, that her liability to do so had been forever and finally extinguished, if it ever existed; yet she took judgment, including this sum, when she must have known that she was not entitled to it either in law or good conscience. Then for some reason, we do not know what, her journal entry of this unjust judgment is prepared, and, as it was known it would be, was printed in the Legal News under a strange title, a title never used before, one that would most likely, and it seems did, have the effect of keeping defendants in the dark as to the fact that an order had been made in this case.

We think there was a substantial compliance with the statute (subd. 4, § 6094, Comp. L. 1909) relating to the vacating of judgments, and therefore that the judgment should be affirmed, and defendants allowed to answer and have a trial on the merits.

PER CURIAM. Adopted in whole.

(44 Okl. 728)

BANK OF COMMERCE OF RALSTON v. GASKILL. (No. 3495.)

(Supreme Court of Oklahoma. Dec. 8, 1914. Rehearing Denied Jan. 30, 1915.)

(Syllabus by the Court.)

1. TRIAL (§ 139\*)—DIRECTION OF VERDICT—EVIDENCE.

The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the

action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

2. CHATTEL MORTGAGES (§ 225\*)—CONVERSION—LIABILITY OF PURCHASER.

When the mortgagor of personal property, being in possession before default and having the right of possession under the terms of the mortgage, sells the entire property to another, who has notice of the mortgage, either actual or constructive, the purchaser acquires only the interest of the mortgagor, and holds subject to the mortgage; and in such case, after default, the mortgagee may maintain an action against such purchaser for the wrongful conversion of the property mortgaged, purchased by him.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 463-470; Dec. Dig. § 225.\*]

3. CHATTEL MORTGAGES (§§ 160, 225\*)—REMOVAL OF PROPERTY—RIGHT TO POSSESSION—LIABILITY OF PURCHASER.

Where mortgaged property has been removed from the county in which it was situated at the time of the execution of the mortgage, under section 4480, Comp. Laws 1909 (section 4039, Rev. Laws 1910), the mortgagee, independent of any provision of the mortgage, is entitled to the possession of the property mortgaged; and, being so entitled to the immediate possession, an action for conversion will lie against a subsequent purchaser who wrongfully removes it from the county.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 276, 468-470; Dec. Dig. §§ 160, 225.\*]

4. CHATTEL MORTGAGES (§ 229\*)—CONVERSION OF PROPERTY—LIABILITY OF PURCHASER—PROOF—DEMAND AND REFUSAL.

Demand and refusal need not be proved in an action for conversion, brought by a mortgagee against the purchaser of mortgaged chattels, either where, with knowledge of the mortgagee's rights, he received the property by purchase or otherwise from one unauthorized so to dispose of it, or where he, whether a bona fide purchaser or not, has sold such property or otherwise converted it to his own use.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 479-483; Dec. Dig. § 229.\*]

5. CHATTEL MORTGAGES (§ 229\*)—CONVERSION—WHAT CONSTITUTES—RIGHT OF ACTION.

An absolute sale, to the exclusion of the rights of a chattel mortgagee, by a mortgagor, who, under the terms of the mortgage, remains in possession of the chattels, works a conversion thereof, for which the mortgagee may maintain an action for conversion without previous demand.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 479-483; Dec. Dig. § 229.\*]

6. TROVER AND CONVERSION (§ 9\*)—DEMAND—NECESSITY.

In an action for conversion, where the taking is wrongful, it is not necessary to allege a demand before the commencement of the action.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 53-83; Dec. Dig. § 9.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Osage County; C. T. Bennett, Judge.

Action by the Bank of Commerce of Ralston against O. W. Gaskill. Judgment for

defendant, and plaintiff brings error. Reversed and remanded.

*Biddison & Merritt*, of Pawnee, for plaintiff in error. *W. T. Williams*, of Shawnee, for defendant in error.

**SHARP, C.** On December 27, 1909, one Roy Crabtree, a resident of Osage county, executed to the plaintiff in error his promissory note, due June 20, 1910, in the sum of \$440, and on the same day, to secure its payment, executed to the payee thereof a chattel mortgage on five head of horses and four head of mules at the time located in Osage county. On December 29th thereafter, said mortgage was duly filed in the office of the register of deeds in and for Osage county. During either the latter part of February or the early part of March, following, said Crabtree sold one span of the mules to A. Demings, who thereafter and during the latter part of July, 1910, sold them to the defendant in error Gaskill, who, immediately following his purchase thereof, removed said mules from Osage county to Kaw City in Kay county. On July 7th, the interest on said note having been paid, the time of payment was extended to September 20, 1910. In the chattel mortgage, among other covenants was the following:

"The conditions of this mortgage are such that the mortgagor covenants that he will not sell, mortgage or otherwise dispose of said property, or any part thereof, \* \* \* until this mortgage is fully satisfied, and that he will not remove or permit any part of said property to be removed nor go or be out of the said Osage county while this mortgage remains a valid lien for any sum thereon."

It was further provided that until breach be made in some of the conditions thereof, or until such time as the mortgagee should deem itself insecure, said mortgagor should have possession of the mortgaged property, and the use and benefit thereof, and should keep and maintain the same at his own proper cost and expense; but upon breach of any of the conditions provided for, or if at any time the mortgagee should deem the said mortgage insecure, or if any of the above-described notes be not paid when due, then and in either event the mortgagee could at its option, without notice, declare the note and indebtedness due and payable, and might through its agents or attorneys take possession of all or any of the mortgaged property for the purpose of foreclosure.

[1] At the conclusion of plaintiff's testimony, the court, at the defendant's request, instructed the jury to return a verdict in his favor. It is a rule well established in law that, where there is any evidence introduced at the trial of a cause reasonably tending to establish the allegations of plaintiff's petition, it is error for the court to sustain a demurrer to such evidence and render judgment in favor of the defendant. *Conklin v. Yates*, 16 Okl. 268, 83 Pac. 910; *Edmison v. Drumm-Flato Comm. Co.*, 13 Okl. 440, 73

Pac. 958; *Cole v. Missouri, K. & O. R. Co.*, 20 Okl. 227, 94 Pac. 540, 15 L. R. A. (N. S.) 268; *Ziska v. Ziska*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1; *Porter v. Wilson et al.*, 39 Okl. 500, 135 Pac. 732. Likewise it is error to direct a verdict against the plaintiff, when there is evidence fairly tending to support all the necessary averments of his petition entitling him to recover. In such cases the question presented to a trial court is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may reasonably sustain a verdict, should the jury find in accordance therewith. *Baker v. Nichols & Shepard Co.*, 10 Okl. 685, 65 Pac. 100; *Hanna v. Mosher et al.*, 22 Okl. 501, 98 Pac. 358; *Harris et al. v. Missouri, K. & T. Ry.*, 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858.

[2] As we have seen by the terms of the mortgage, the mortgagor covenanted that he would not sell, mortgage, or otherwise dispose of any part of the mortgaged property until after the mortgage was fully satisfied, and that he would not remove nor permit any part of the mortgaged property to be removed, or to go out of Osage county while the mortgage remained a valid lien for any sum due. Independent of this covenant of the mortgage, if in fact an absolute sale of the mortgaged property was made either by Crabtree or by his purchaser, Demings, in exclusion of the rights of the mortgagee bank, it constituted a conversion of such property for which the mortgagee could maintain trover. *Jones on Chattel Mort.* § 454. In such case, the rule that, before default, the mortgagor in possession may sell the mortgaged property subject to the lien of the mortgage, does not obtain.

It is fairly inferable from the testimony that both sales were made without the knowledge of the mortgagee. The first sale was made anterior to the payment of interest and renewal of the note; the second, prior to the maturity of the note as extended. The defendant was a mule buyer, and immediately after having purchased the mules removed them from Osage county. It cannot be said, as a matter of law, keeping out of sight for the time the covenants in the mortgage against sale, that the sales were intended to pass only the title of the mortgagor. It may as well be inferred, under the admitted facts, that the sale was one made in exclusion of the rights of the mortgagee, and, if the latter, then clearly such sale constituted a conversion of the property sold. Aside, however, from the question of fact as to whether the sale was one made to the exclusion of the rights of the mortgagee, both Demings and the defendant had constructive notice of the mortgage, and were charged with knowledge of its contents. The purchase by the former was therefore made in plain and open



violation of the rights of the mortgagee secured to it by the mortgage. Jones on Chattel Mort. (5th Ed.) § 455; Fisher v. Friedman & Co., 47 Iowa, 443; Heflin & Phillips v. Slay, 78 Ala. 180.

[3] Section 2781, Comp. Laws 1909, makes the sale by a mortgagor of personal property without the written consent of the holder of the mortgage a felony. A sale of a chattel, made in violation of a penal provision of the statute, has been held to constitute a conversion, and to relieve the holder of a valid mortgage thereon of the necessity of a demand. Kitchen v. Schuster, 14 N. M. 164, 89 Pac. 261. As to the effect of this statute upon the present case, we express no opinion.

By section 4430, Comp. Laws 1909 (section 4039, Rev. Laws 1910):

"If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due."

Thus, independent of the provisions of the mortgage, the statute gave the mortgagee a right of action upon the removal of the mortgaged property from Osage county, without regard to the fact that its note was not due. In other words, if the mortgagor or those acting through or under him voluntarily removed or permitted the removal of the mortgaged property from Osage county, automatically, by virtue of the statute, a right of action was conferred upon the mortgagee to take immediate possession and dispose of the property as a pledge for the payment of its note. Thus, while plaintiff was not in the actual possession of the mortgaged animals at the time of the conversion, he was by force of the statute entitled to such possession, hence may maintain an action for the conversion of the mortgaged property.

[4-6] Trover will not lie against one lawfully in possession of chattel property; such a possession must first be transformed into a wrongful one by a refusal to surrender the property. Hence demand and refusal are necessary for the maintenance of trover in all cases in which a defendant is lawfully in possession. Phelps et al. v. Halsell, 11 Okl. 1, 65 Pac. 340. Demand and refusal are superfluous whenever a conversion can be otherwise shown, and evidence thereof may be omitted when any one of the following circumstances is proved: Unavailability of demand; a possession maintained in violation of one's contract; a tortious taking; a tortious levy or attachment; acts of ownership; retention of money which it was defendant's duty to pay to plaintiff; diversion of property from the special purpose from which it

was received; an unfulfilled promise to return goods; or any distinct act of conversion in general. 38 Cyc. 2032, 2033. While the testimony is meager and unsatisfactory as to the dominion or control exercised over the mortgaged property by Demings, it is fairly inferable that during said time he had in his possession the mortgaged animals, as during the latter part of August they were sold and delivered to the defendant Gaskill, and by him removed from Osage county. There was sufficient evidence therefore from which the jury might rightfully have found a conversion, and, if a conversion, no demand was necessary. The sole object of a demand is to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it and thus to supply evidence of a conversion. Pease v. Smith, 61 N. Y. 477; Salida Bldg. & Loan Ass'n v. Davis, 16 Colo. App. 294, 64 Pac. 1046; Ilfeld v. Ziegler, 40 Colo. 401, 91 Pac. 825; Reynolds v. Fitzpatrick, 23 Mont. 52, 57 Pac. 452; Edmunds v. Hill, 133 Mass. 445; Allsopp v. Mach. Works, 5 Cal. App. 228, 90 Pac. 39.

The action against defendant was not commenced until after maturity of the note as extended. If the defendant had exercised control and dominion over the mortgaged property, which was antagonistic to the claim of right or title of the mortgagee, his possession was tortious, and no demand was necessary. Purcell Cotton Seed Oil Mills v. Bell et al., 7 Ind. T. 717, 104 S. W. 945; Clinton Nat. Bank v. McKennon, 26 Okl. 835, 110 Pac. 649; Continental Gin Co. v. De Bord, 34 Okl. 66, 123 Pac. 159; Bilby v. Jones, 39 Okl. 613, 136 Pac. 414. On the other hand, if the sale was made in violation of the stipulations of the mortgage, or if there was no subsequent ratification thereof, the possession of both Demings and the defendant Gaskill was wrongful, and no demand upon the latter before the institution of suit was necessary. Demand and refusal need not be proved in trover against a third person either where, with knowledge of one's rights, he received property by purchase or otherwise from one unauthorized so to dispose of it; or whether he, whether a bona fide purchaser or not, has sold such property or otherwise converted it to his own use.

Having reached the foregoing conclusions, a determination of the remaining questions urged in the briefs of counsel is unnecessary.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(44 Okl. 735)

**LIVERPOOL & LONDON & GLOBE INS. CO. v. CARGILL. (No. 3498.)**(Supreme Court of Oklahoma. Oct. 13, 1914.  
Rehearing Denied Jan. 30, 1915.)*(Syllabus by the Court.)***1. INSURANCE (§ 645\*)—ACTION ON POLICY—DEFENSE—PLEADING—CONDITION SUBSEQUENT.**

In an action against an insurance company to recover the amount of a policy on a building totally destroyed by fire, where, subsequent to the issuance of the policy, there was attached thereto a vacancy permit, which by its terms suspended one-third of the amount of recovery in the event of loss or damage during such vacancy, and where the loss occurred subsequent to the date of such permit and while the building may have been vacant, but where the company did not specially plead as a defense pro tanto its reduced liability, such defense cannot be considered either in the trial court or on review.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.\*]

**2. INSURANCE (§§ 624, 672\*)—ACTION ON POLICY—MORTGAGE CLAUSE—RIGHTS OF INSURED—PROTECTION OF MORTGAGEES.**

Where during the life of a policy of fire insurance there was attached thereto the company's "Loss Payable Form," which provided that, "all previous claims having been paid, any loss that may be ascertained and proven to be due Mrs. Annie Mathews, the assured under this policy, shall be payable to State Guaranty Bank of Frederick, Okl., as its interest may appear," and where the amount of the mortgage debt due from the insured to the bank was less than the amount due under the policy, the insured may maintain an action in her own name on the policy. In such case the court should by proper order protect the rights of the mortgagee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557-1570, 1789, 1790, 1792-1794; Dec. Dig. §§ 624, 672.\*]

**3. INSURANCE (§ 388\*)—FORFEITURE—ESTOPPEL.**

Any agreement, declaration, or course of action on the part of the insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.\*]

**4. INSURANCE (§ 560\*)—PROOF OF LOSS—ESTOPPEL.**

When the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy as to proof of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. § 560.\*]

**5. INSURANCE (§ 548\*)—FIRE INSURANCE POLICY—PROVISION FOR EXAMINATION—ABANDONMENT.**

The provision of a fire insurance policy requiring the insured to submit to examination

under oath by any person named by the insuring company, and to subscribe the same, is a reasonable requirement and one that the insured may generally be required to perform. Where, however, notice to appear at a time and place be given, and on the day set for examination the representative of the insurer excuses the insured from attendance, and thereafter no further notice is given, and no agreement relating thereto is entered into, the right to require the examination will be held to have been abandoned.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1354; Dec. Dig. § 548.\*]

**6. INSURANCE (§ 548\*)—POLICY—EXAMINATION OF INSURED—REPRESENTATION BY ATTORNEY.**

At such examination the insured has the legal right to be represented by an attorney at law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1354; Dec. Dig. § 548.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Tillman County; T. E. Campbell, Judge.

Action by Annie Cargill, née Mathews, against the Liverpool & London & Globe Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Mounts & Davis, of Frederick, and Gray & McVay, of Oklahoma City, for defendant in error.

SHARP, C. [1] It is urged that the court's charge directing that, if the jury should find for the plaintiff, they should fix the amount of her recovery at not to exceed \$350, was erroneous. This was the amount of the policy, and the sum which plaintiff would be entitled to recover, unless controlled by a vacancy permit attached to the policy on June 14, 1910, which by its terms limited the amount of plaintiff's recovery to two-thirds of the loss or damage sustained. The limitation upon the amount of recovery was dependent upon the building becoming vacant, and not the mere indorsement of the vacancy permit upon the policy. If the building was vacant at the time of the loss, and this fact had been pleaded as a defense, plaintiff's recovery would be limited as provided in the vacancy permit. Being a condition subsequent, it devolved upon defendant both to allege and prove a state of facts releasing it from the observance of its original undertaking to pay the full amount of the policy. Norwich Union F. Ins. Soc. v. Prude et al., 156 Ala. 565, 46 South. 974; Atlas Ins. Co. v. Robison, 94 Ark. 390, 127 S. W. 456; Tischler v. Cal. Farmers' Mut. F. Ins. Co., 66 Cal. 178, 4 Pac. 1169; Phenix Ins. Co. v. Caldwell, 187 Ill. 73, 58 N. E. 314; Salzman v. Mach. Mut. Ins. Ass'n, 142 Iowa, 99, 120 N. W. 697; Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 Pac. 611; Sprigg v. American Cent. Ins. Co., 101 Ky. 185, 40 S. W. 575, 19 Ky. Law Rep. 363; Benjamin v. Connecticut Indemnity Ass'n, 44 La. Ann.

1017,, 11 South. 628, 32 Am. St. Rep. 362; *Peirce v. Cohasset Ins. Co.*, 123 Mass. 572; *Caplis v. American Fire Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535. As defendant's answer contained no allegation whereby its liability in the event of a recovery against it should be limited, on account of any subsequent act of the parties, the defense was not made an issue and is not properly before us for review.

[2] It is next urged that the plaintiff was not the real party in interest, due to the fact that there was attached to the policy, on June 14, 1910, a "Loss Payable Form," providing that any loss that should be ascertained and proved to be due the insured under said policy, "shall be payable to the State Guaranty Bank of Frederick, Okl., as its interest may appear." The amount of the note given by the plaintiff to the bank, secured by the mortgage on the insured premises, was \$300 and accrued interest. The total amount due on the note at the time of the loss, however, was less than the face of the policy. The mortgagee's interest being less than the full amount recoverable under the policy, the action was one that could be maintained by the mortgagor. *Fire Ins. Cos. v. Feirath*, 77 Ala. 194, 54 Am. Rep. 58; *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598; *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 29 N. W. 769; *Smith v. Continental Ins. Co.*, 108 Iowa, 382, 79 N. W. 126; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *Branigan v. Jefferson Mut. Fire Ins. Co.*, 102 Mo. App. 70, 76 S. W. 643; note to *Chipman et al. v. Carroll*, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; *Briefs on the Law of Insurance*, Cooley, p. 3709 et seq.; *Joyce on Insurance*, § 612.

While it does not appear that the decisions upon this question are in entire harmony, as to whether the mortgagor, mortgagee, or both, have the right to sue on a policy of insurance, where the mortgage clause makes the loss payable to the mortgagee as its interest may appear, yet where the amount recoverable under the policy exceeds the amount due the mortgagee from the insurer, and where in addition, as in this case, it appears that the vice president of the mortgagee bank appeared in court and testified as a witness concerning its indebtedness due from the mortgagor, and thereby tacitly consented to the prosecution of the action in the insured's name, the judgment of the trial court will not be reversed on the ground that the action was not maintained by the real party in interest.

In actions by the mortgagor, the court can and should in its judgment protect the interest of the mortgagee, where the provisions of the policy in that respect have been observed. Section 5573, Comp. Laws 1909 (section 4696, Rev. Laws 1910), provides the court may determine any controversy be-

tween parties before it, when it can be done without prejudice to the rights of others; but, when a determination of the controversy cannot be had without the presence of other parties, the court must order them brought in.

[3,4] It is urged that the insured failed to give the company proof of loss as required by the provisions of the policy. While it is alleged by plaintiff in her petition that she had furnished defendant company with proof of loss and interest, and had otherwise performed all of the conditions of said policy on her part, it is clear that no proof of loss, such as contemplated by the express terms of the policy, was rendered by the insured. There was testimony, however, introduced without objection, that tended to prove on the part of the insurer a waiver of the provisions relating to proof of loss on the part of the insured. This fact was recognized by the insurer, when at its instance the court instructed the jury:

"Provided that if you believe plaintiff has proven a waiver on the part of the defendant of any of said requirements, then plaintiff would, by reason of such waiver, be relieved from the performance of any such waiver requirements."

It is a familiar rule of law that one may preclude himself from insisting on a formal condition inserted for his benefit in a contract or policy of insurance. In such cases it is not necessary that the waiver should be express, but may be a legitimate deduction from the acts and conduct of the party. The chief object of furnishing proof of loss is to enable the insurer to determine the question and extent of its liability. *St. Paul F. & M. Ins. Co. v. Mountain Park Farm Co.*, 23 Okl. 79, 99 Pac. 647; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323. A substantial compliance with the requirements of the policy is all that is required. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16; *Pacific Mutual Life Ins. Co. v. O'Neil*, 36 Okl. 792, 130 Pac. 270.

While questions as to what may or may not constitute a waiver are for the court, the decisions as to such questions, indeed, constituting the body of the law as to waiver, yet the question as to whether there has been a waiver proved in any particular case is primarily one of fact for the jury. *Briefs on the Law of Insurance*, Cooley, pp. 2777, 2779. At the time of the loss plaintiff was living at Lindsay in Garvin county. Immediately after the fire the insurer was notified thereof, and on June 21st wrote Mrs. Mathews, acknowledging receipt of the notice of loss, and inquiring whether she still owned the property, and, if so, to furnish a detailed estimate of the building, with its plans, and information showing how the building was occupied at the time of the loss, the cause of the fire, and the incumbrances if any; and asking further, by way

of postscript, "When was building built, when painted, when repaired?" On June 24th, plaintiff replied to this letter, giving the information called for, except it does not appear that the company was advised as to the cause or origin of the fire. On June 27th, the company replied to plaintiff's letter, demanding the execution in duplicate of a nonwaiver agreement before they would proceed further; and, in addition, stated that, when this request was complied with, a detailed schedule with plans of house should be made up by a competent builder, the party who originally constructed the house, if his services could be obtained; and also advised plaintiff that her reply to its letter of June 21st "is in no way satisfactory." Later on a complete bill of lumber and materials used in the construction of the house was made out and furnished the company at the instance of the insured by the manager of the Dascomb-Daniels Lumber Company at Frederick. No further correspondence appears to have passed between the parties until July 26th, when the insured wrote the company, advising it of the whereabouts of the policy, and making inquiry concerning the settlement of the loss. On August 1st the claim was turned over for settlement by the insurance company to the Bates Adjustment Company, and some time during the month Norman Nelson, representing the latter company, visited Frederick, and called upon the company's local agent, and together they visited the premises where the house had been destroyed, took measurements of the lots, and later called on a local painter and paper hanger, and procured from him a bill for the paint, paper, and canvas used in the building. It appears that later on W. E. Hudson, at the time the insured's attorney, accompanied by plaintiff's husband, called on Nelson at Oklahoma City concerning an adjustment of the loss. The testimony of the husband was to the effect that all proofs and accounts demanded by Nelson were furnished, but that Nelson advised them, before he would make a settlement he would first have to see the insured.

Under the terms of the policy it was the duty of the insured, if required, to furnish verified plans and specifications of the building destroyed; but in all events, unless waived, it was the insured's duty to furnish, within 60 days after the fire, proof of loss covering and including the items of information named in the policy. We think, however, that the effect of the letter of June 21st was to limit the latter information to three particulars: (1) How the building was occupied at the time of the loss; (2) cause of the fire; (3) incumbrances, if any. It would appear further from this letter that the information sought could be imparted by letter or other means of communication, thus doing away with the provisions of the policy requiring that the proof of loss should be sign-

ed and sworn to by the insured. *St. Paul F. & M. Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651. By her letter of the 24th the insured gave the information called for, except as to the cause of the fire. This information, however, was supplied later, according to Cargill's testimony. The only request, therefore, as to additional information, mentioned in the latter letter, was for a detailed schedule with plans of house, made up by a competent builder. These bills, prepared by the lumber company, purported to give in detail the amount of lumber and building materials used in the house, and cover almost two pages in the record. The value of each item of material is shown, the total amount of the bill being \$395.75. On September 2d, after the expiration of the time allowed for making proof of loss, the adjuster wrote the insured a letter which is confusing in its terms and uncertain in its meaning. It acknowledged receipt of "a document purporting to be a correct estimate of building alleged to have been destroyed by fire at Frederick, Okla., on the 18th day of June, 1910," and proceeds:

"You are hereby notified that this document in no manner complies with the terms of the policy as to what constitutes a proof of loss."

Referring to the same instrument, there immediately follows, "Said statement does not give your knowledge or belief as to the origin of the fire or the time of same," and numerous other specific objections, some of which were items properly a part of the proof of loss under the terms of the policy, and others were not. The policy provided that, if required, the insured should furnish verified plans and specifications of buildings destroyed or damaged, and it was this provision which the insured, in the document referred to at the beginning of the letter, had attempted to observe. This so-called statement or document, it is true, did not contain the information referred to in the letter; neither was it necessary that it should. It was but an estimate of the materials used in the building.

From what has been seen, we must conclude that there was sufficient evidence of a waiver of formal proof of loss by the insurer to take the case to the jury. But one item was covered by the policy—a dwelling house, which was totally destroyed by the fire. The company had called upon the insured for certain specific information relating to the loss, and had received it without objection either to its form or sufficiency, except to advise that a certain letter was in no way satisfactory. Its conduct relative to the claim was sufficient to justify the belief on the part of the insured that formal proof of loss would be dispensed with. The company at no time denied its liability; it did not undertake to stand on its legal rights and require of the insured a full and complete com-

pliance with the terms of the policy. The interest of the mortgagee in the policy was known to it, as its previous consent thereto had been obtained. It had also caused to be pursued on its own account an independent investigation of the loss. In this connection, it is said in Cooley's Briefs on the Law of Insurance, p. 2526:

"If the company investigates the loss on its own account, and so conducts itself with relation thereto as to show a satisfaction with the knowledge thus obtained, or to induce reasonable belief in insured that it is so satisfied, and does not desire formal notice or proofs, it will amount to a waiver of such formalities."

The rule thus stated is supported by many authorities, and comports with sound reason. It has been said that slight evidence will raise a waiver against an insurance company when the equities are in favor of the insured. *Bonefant v. American Fire Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Germania Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 39; *German Ins. Co. v. Gibson*, 53 Ark. 494, 1 S. W. 672.

In *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, after the citation of a number of cases, and after calling attention to the fact that forfeitures were not favored by law, being often the means of great oppression and injustice, the court concluded: "These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture."

In *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, after referring to the holding of the court in the Norton Case, the court added:

"Any agreement, declaration, or course of action on the part of the insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

See, also, *Phoenix Mut. Life Ins. Co. v. Oster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed.

It is said in *Joyce on Insurance*, § 3362, that if notice and proof of loss are given the insurer, which it considers in any way defective, good faith requires that it should notify the insured of such fact within a reasonable time. If, however, it should fail so to do, and remain silent, or proceed to negotiate with the insured as if the proof was sufficient, or proceed without referring to any defect therein, then it will be estopped from setting up, as a defense to an action on the policy, the fact that the proof of loss is defective.

5) The letter of September 2d, heretofore referred to, contained a notice demanding of plaintiff that she appear and submit to an examination under oath, relative to the facts and circumstances surrounding the origin of the fire, and as to the ownership, value, and ownership of the property insured under

its policy. The place of meeting was to be at Lindsay on September 14th. This authority was exercised by the insurer pursuant to an additional provision of the policy. While it was no part of the proof of loss (*Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465), it was a reasonable requirement (*Harris et al. v. Phoenix Ins. Co.*, 35 Conn. 310; *Firemen's Fund Ins. Co. v. Sims, Trustee*, 115 Ga. 939, 42 S. E. 269; *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 139, 49 South. 922; *Citizens' Insurance Co. v. Herpolsheimer*, 77 Neb. 232, 109 N. W. 160; *Fleisch v. Ins. Co. of N. A.*, 58 Mo. App. 596; *Gross v. St. Paul F. & M. Ins. Co.* [C. C.] 22 Fed. 74; *Claffin et al. v. Commonwealth Ins. Co.*, 76 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76).

[6] The contention of the plaintiff, however, was not that she refused unconditionally to submit to an examination under oath by some person named by the insurer, but that she demanded the right to have her attorney appear and represent her at such examination; that at the time her attorney was unable to be present, and which fact was communicated by her to Nelson, who thereupon excused her from such examination; and that no further notice or demand in this regard was ever made upon her. There can be no doubt of plaintiff's right to be represented by an attorney while submitting herself to an examination under oath by the company's representative. Special agents and insurance adjusters, who engage in the settlement of insurance losses, are men skilled in their profession, and as a rule are familiar, in a degree at least, with the law of insurance; their employment makes it their duty to represent, not the insured, but the insurer. It is therefore but just that the insured should have the right to be represented by counsel when being examined under oath, relative to the loss. *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 169; *American Central Ins. Co. v. Simpson*, 43 Ill. App. 98; note to *Porter v. Traders' Ins. Co.*, 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424, 426, 427. We hold therefore that plaintiff was clearly within her rights when she demanded of the adjuster the privilege of having her attorney present at the examination. It is true that plaintiff's testimony, relative to a demand to be represented by counsel, and that she was thereafter excused from attending the examination by Mr. Nelson, was denied by the latter. Upon this issue of fact we are concluded by the verdict of the jury.

Under the evidence in this case, there can be no question that plaintiff sustained an honest loss. It is not denied that at the time of the fire the policy was in full force; that the building was totally destroyed; that the company was immediately informed of the loss; that an effort was made to furnish the company with all the information called for; and that an independent investigation was

made by the representative of the adjustment company. There was sufficient proof of a waiver of formal proof of loss to authorize the verdict of the jury.

The judgment of the trial court should be affirmed.

**PER CURIAM.** Adopted in whole.

(44 Okl. 783)

**OKLAHOMA NAT. LIFE INS. CO. v. NORTON.** (No. 6396.)

(Supreme Court of Oklahoma. Jan. 12, 1915.  
Rehearing Denied Jan. 30, 1915.)

(*Syllabus by the Court.*)

**1. INSURANCE (§ 455\*)—POLICY—LIABILITY OF INSURER.**

Where a provision of an accident insurance policy provided that in the event of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means, resulting in death within a given time, and the insured was killed by gunshot wounds inflicted by another, the insurer is liable to the beneficiary to the extent named in the particular provision of the policy, without regard to whether such fatal injury be deemed accidental or not; the character of the bodily injuries covered by the policy being in the disjunctive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.\*]

**2. INSURANCE (§ 455\*)—ACCIDENT POLICY—CONSTRUCTION—LIABILITY OF INSURER.**

Where a different and disconnected provision of the policy creates a liability only where death was caused within a fixed time by bodily injury effected exclusively by external, violent, and accidental means, while riding in or on any vehicle, or public or private conveyance, and where a lesser sum was payable, the provision of the policy named in the former paragraph remains unaffected by the conjunctive feature of the latter, creating liability only when the injury was by external, violent, and accidental means.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.\*]

**3. INSURANCE (§ 455\*)—POLICY—CONSTRUCTION—"OR"—"AND."**

As used in the policy of insurance, the words "or" and "and" cannot be treated as interchangeable, so as to create a liability only where death was the result of external and violent means, but accidental as well. The character of the injuries named in the policy being in the disjunctive, it is sufficient that death result from external and violent means alone.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.\*]

For other definitions, see Words and Phrases, First and Second Series, And; Or.]

**4. INSURANCE (§ 455\*)—ACCIDENT POLICY—CONSTRUCTION.**

As used in the policy of insurance, there is nothing in the context rendering dubious the use of the conjunction "or." Hence the conjunctive particle "and" cannot be substituted in its stead.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.\*]

**5. INSURANCE (§ 146\*)—POLICY—CONSTRUCTION.**

If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by Mary C. Norton against the Oklahoma National Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiff in error. Welborne & Durbin, of Chickasha, for defendant in error.

**SHARP, C.** On February 10, 1910, the Oklahoma National Life Insurance Company issued to George Daniel Norton its policy of insurance, payable, at his death, to his wife, Mary C. Norton, according to the conditions named in the policy. The part of the policy pertinent to the issues presented is as follows:

"The Oklahoma National Life Insurance Company, a stock company, of Oklahoma City, U. S. A., will pay (\$5,000.00) five thousand dollars, to Mary C. Norton, wife of the insured (the beneficiary hereunder), at its home office in Oklahoma City, U. S. A., immediately upon receipt of due proof of the death of George Daniel Norton (the insured hereunder), if such death occur during the continuance of this contract.

"Or, in the event of the death of the insured by bodily injury effected exclusively by external, violent, or accidental means, and occurring within ninety days after such injury, the amount payable hereunder, as above, shall be (\$10,000.00) ten thousand dollars.

"Or, in the event of the death of the beneficiary, first above named, the same being caused by bodily injury effected exclusively by external, violent, and accidental means while riding in or on any vehicle, or public or private conveyance, and occurring within ninety days after such injury, the company will pay to the insured hereunder (\$5,000.00) five thousand dollars immediately upon receipt of due proofs of the death of said beneficiary, in the manner designated."

On August 18, 1913, the insured sustained a bodily injury effected exclusively by external and violent means, said injury being a gunshot wound inflicted by another, and from which bodily injury the insured immediately died. On the day following the burial of the insured, the insurer paid the beneficiary under the policy the sum of \$5,087.55, in full settlement and satisfaction of the policy. Thereafter the present action was brought to recover on the double indemnity provision of the policy, and at the trial plaintiff obtained judgment in the sum of \$5,150.

[1] But two errors are urged in the brief of counsel for plaintiff in error: (1) That, the death of the insured not resulting from accidental means, under the terms of the policy the insurer was not liable for any sum other than that already paid and upon which the settlement was based; (2) that the court erred in not construing the double indemnity provision of the policy, fixing the increased liability of the company, in the event of the death of the insured by bodily injury "effected exclusively by external, vio-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lent, or accidental means," to read "effected exclusively by external, violent, and accidental means." The former assignment of error is dependent upon the latter, and, in view of our conclusion, the latter alone need be considered.

[2-4] It is conceded that the insured met his death in the manner already indicated; hence that it was effected by violent means. If the disjunctive conjunction "or" is to be given its common meaning, there can be no question of plaintiff's right of recovery, for it is only by the substitution of the word "and" for "or" that the insurer can hope to avoid liability. Under the evidence, even were the substitution permitted, we are not prepared to say that a recovery could be defeated, though we are not to be understood as determining this question. It is true that the word "or" is sometimes made to signify "and," when it appears to be consistent with the meaning employed by the context, and in order to carry out the manifest intent of the contracting parties, but not where such interpretation would be inconsistent with any intent which can be reasonably gathered from the connection in which the word is used, from the whole undertaking or from the light of surrounding circumstances. The words are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious. *Witherspoon v. Jernigan*, 97 Tex. 98, 76 S. W. 445. Ordinarily, the words "and" and "or" are in no sense convertible terms, but, upon the contrary, are used in the structure of language for purposes entirely variant. *Robinson v. Southern Pac. Ry. Co.*, 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773; *City of Corona v. Merriam et al.*, 20 Cal. App. 231, 128 Pac. 760; *State v. Beauchlegh*, 92 Mo. 490, 4 S. W. 666; *Starr v. Flynn*, 62 Kan. 845, 62 Pac. 659; *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913; *McGraw v. Davenport et ux.*, 6 Port. (Ala.) 319, 332; *Ayers v. Chicago Title & T. Co.*, 187 Ill. 42, 58, 58 N. E. 318.

In *State ex rel. Caldwell v. Hooker*, 22 Okl. 712, 98 Pac. 964, recognizing this rule, it was said by this court, referring to the statute there under consideration:

"It must be assumed that the Legislature could not have intended to have produced an absurd or unreasonable result, or to express itself in terms which would defeat the very objects of the enactment; and, when such effect would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or vice versa, on the theory that the word to be corrected was inserted by inadvertence or clerical error. While they are not treated as interchangeable, and should be followed when their accurate reading does not render their sense dubious, their strict meaning is more readily departed from than that of other words, and one may be read in place of the other to carry out the evident legislative intent. *Sutherland, Statutory Construction* (Lewis, 2d Ed.) vol. 2, § 397; *Black on Interpretation of Laws*, p. 153; 6 *Words & Phrases*, 5003 et seq.; *Bryan v. Menefee*, 21 Okl. 1, 95 Pac. 472."

See, also, *Williams v. United States*, 17 Okl. 28, 87 Pac. 647.

[5] There is nothing in the context of the policy authorizing or warranting this court in changing the plain and unambiguous language employed by the insurer. The fact that under another provision of the policy the word "and" is employed, instead of the word "or," affords no reason for its use in the provision in question. The other provision is wholly separate and apart from that portion of the policy under which the liability in this case attached. There but a \$5,000 recovery could be had, and the bodily injury causing death must have been effected exclusively by external, violent, and accidental means, and sustained while the beneficiary, and not the insured, was riding in or on a vehicle, or public or private conveyance. As shown at the outset of this opinion, the two provisions of the policy pertain to different classes of injuries, sustained under dissimilar conditions, and are attended by different liabilities on the part of the insurer. If on account of the use of the word "and" in the latter provision we are to change the language of the policy in the former provision to read "and," we can see no good reason why with equal force, in another case, it might not be urged that in the second provision the word "and" be substituted by the use of the word "or." It is difficult to conceive of language less uncertain, and clearer of but one construction than that employed. Having but one meaning, it is the plain duty of the court to give it force and effect. To hold otherwise would be, not to construe the language of the policy, but to change it. *United States v. Fisk*, 3 Wall. 445, 18 L. Ed. 243.

The argument of counsel for plaintiff in error, referring to the printed statements on the front and back pages of the policy, calling attention to the four special benefits, is entitled to little consideration, for the reason that in our opinion such statements form no part of the policy. Neither can they be used in construing the policy, for, as we have already seen, there is nothing to construe. If the terms of the policy are onerous, it was the fault only of the company which had prepared, adopted, and used the form. It must be, and is, charged with knowledge of the meaning of the language employed by it. However, even were we mistaken in our conclusion that the printed statements form no part of the policy, it would avail plaintiff in error nothing; for to give consideration to said printed statements would, at most, only tend to make doubtful when and in what event the insurer would be liable on the double indemnity provision of its policy. Where such is the case, and where the meaning of the policy of insurance is ambiguous, or where the language employed may be fairly susceptible of different constructions, it will be most strictly construed against the

insurer, and that construction adopted which is most favorable to the insured. *Taylor v. Ins. Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; *Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & Simpson*, 30 Okl. 116, 120 Pac. 936; *Standard Accident Ins. Co. v. Hite, Adm'r*, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986; *Union Accident Co. v. Willis*, 145 Pac. 812, this day decided and not yet officially reported.

The death of the insured having been effected exclusively by violent and external means, and occurring within 90 days from the time the fatal injury was received, and the provisions of the policy with regard to the character of the injuries covered by it being clearly in the disjunctive, it is unnecessary to determine whether his death was also accidental within the meaning of the policy.

The foregoing settles the only issues presented here.

For the reasons indicated, the judgment of the trial court should be affirmed.

(44 Okl. 719)

**FIRST BANK OF TEXOLA v. TERRELL.**  
(No. 3492.)

(Supreme Court of Oklahoma. Dec. 8, 1914.  
Rehearing Denied Jan. 30, 1915.)

(Syllabus by the Court.)

**1. ATTACHMENT (§ 248\*)—MOTION TO DISSOLVE—OBJECTION—WAIVER.**

Where there has been a trial, and no objection has been made to the sufficiency of a motion or affidavit to dissolve an attachment, either by demurrer or motion, an objection to the introduction of evidence in support of the motion, on the ground that it does not put in issue or traverse the grounds laid in the affidavit for attachment, will be sustained only when the allegations of the traversing affidavit wholly fail to deny the grounds of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 853-860; Dec. Dig. § 248.\*]

**2. ATTACHMENT (§ 255\*)—TRAVERSING AFFIDAVIT—SUFFICIENCY—OBJECTION.**

Where the traversing affidavit is in the conjunctive, and is laid in the present tense, its legal sufficiency should be tested either by motion or demurrer, and not alone by mere objection to the introduction of testimony.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 902-904; Dec. Dig. § 255.\*]

**3. PLEADING (§ 409\*)—DEFENSE—ESTOPPEL—WAIVER.**

While, as a general rule, estoppel or waiver must be pleaded, failure to do so may be waived by plaintiff by proceeding with the trial of the case without objection, as though the defense relied on had been pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1375-1383, 1386; Dec. Dig. § 409.\*]

**4. FRAUDULENT CONVEYANCES (§ 225\*)—BULK SALES—COMPLIANCE WITH STATUTE—RIGHT TO OBJECT—WAIVER.**

Where the owner of a stock of merchandise, in good faith, and for a fair consideration placed in escrow during the consummation of a transfer of such stock, proceeds to comply with the

provisions of the Bulk Sales Act (section 2903, Rev. Laws 1910), and furnishes a list of his creditors to the representative of the purchasers, which list complies substantially with the requirements of the statute, but where the notice given the creditors was signed by the transferor instead of the transferees, a resident creditor, who receives such notice with knowledge of all the facts connected with the proposed sale, and who assents thereto, waives any objection he might otherwise have to a strict compliance with the statute, and is estopped from thereafter, and within the 10-day period named in the statute, attaching the stock of goods, on the ground that the seller has not fully complied with the statute.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 653-657; Dec. Dig. § 225.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Beckham County; G. A. Brown, Judge.

Action by the First Bank of Texola against William Terrell. From the judgment, plaintiff brings error. Affirmed.

T. Reginald Wise, of Sayre, for plaintiff in error. Echols & Merrill, of Elk City, for defendant in error.

SHARP, C. On January 31, 1911, the plaintiff bank brought its action in the district court of Beckham county, to recover judgment of the defendant, Terrell, in the sum of \$3,500, together with interest and attorney fees, and at the same time procured the issuance of an order of attachment, under authority of which a levy was subsequently made upon a stock of merchandise alleged to be the property of said defendant, Terrell, and at the time located in the town of Texola. Thereafter the said defendant filed his verified motion to discharge the attachment, and which upon trial was sustained by the court. Said order discharging the attachment being excepted to, plaintiff has brought the case to this court for review. The affidavit for attachment charged two grounds: (1) That the defendant is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors; (2) that the defendant has assigned, removed, or disposed of, or is about to dispose of, his property or a part thereof, with the intent to defraud, hinder, or delay his creditors.

It is urged with much ability that the traversing affidavit of the defendant is insufficient, and did not deny both or either of the two grounds for attachment, on account of the fact that the denial was in the conjunctive, and was laid in the present tense. The only objection made at the trial to the sufficiency of the traversing affidavit was upon the introduction of evidence, and arose as follows: The case coming on to be heard on motion to discharge the attachment, counsel for defendant requested the court to order and direct that the burden of proof under the pleadings was on the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plaintiff. This the court refused to do, but, on the other hand, held that, under the allegations of the motion, the burden of proof was upon the defendant, and so ordered. Upon the defendant being placed upon the stand and interrogated by his counsel, plaintiff's counsel made the following objection:

"Comes now the plaintiff and objects to the introduction of any oral testimony in this action on the part of the defendant for the reason that he motion to dissolve the attachment is not verified, and does not put in issue any facts, and for he further reason that oral testimony is not admissible on the part of the defendant."

No other form of objection to the sufficiency of the motion to dissolve the attachment was at any time offered. Ordinarily when an attachment is procured by a plaintiff, and the defendant moves to dissolve it on any legal grounds, and supports his motion by affidavit as here, the burden of proof rests upon the plaintiff to maintain the ground of attachment as laid in his affidavit, by the preponderance of the evidence. *Williams v. Farmers' Grain & Gin Co.*, 13 Okl. 5, 76 ac. 269; *Dunn v. Claunch et al.*, 13 Okl. 77, 76 Pac. 143. The question of testing the legal sufficiency of a pleading by an objection to the introduction of evidence has frequently been before this court, and the rule is well established that, where the sufficiency of a pleading is challenged solely by an objection to the introduction of evidence thereunder, such objection, not being favored by the courts, should generally be overruled, unless there is a total failure to allege some matters essential to the relief sought, and should seldom, if ever, be sustained when the allegations are simply incomplete, indefinite, or conclusions of law. *Marshall v. Homier et al.*, 13 Okl. 264, 74 ac. 368; *First Nat. Bank v. Cochran*, 17 Okl. 538, 87 Pac. 855; *Hogan et al. v. Bailey*, Okl. 15, 110 Pac. 890; *M. O. & G. Ry. McClellan*, 35 Okl. 609, 130 Pac. 916; *Houston et al. v. Chapman*, 38 Okl. 42, 131 ac. 1076; *Abbott et al. v. Dingus*, 145 Pac. 5. The same rule has been observed by the Supreme Court of Kansas in a long line of decisions, among which are *Mitchell v. Lhoan*, 11 Kan. 617; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012. It is obvious that it was the purpose of the motion to put in issue the grounds of attachment, as alleged in plaintiff's affidavit; and though it be doubtful if the motion be technically sufficient, had it been attacked by demurrer or motion, yet when the only objection that was made to its sufficiency was based in the manner indicated, and where, in addition, the court ordered the defendant to assume the burden of proof upon the attachment issue, it is obvious that no reversible error was committed. In *Barkley et al. v. State*, 15 Kan. 100, it was held that where the question of the sufficiency of a petition is raised for the first time by an objection to the introduction of any evidence therefor, and not raised otherwise, the

courts will always construe the allegations of a petition very liberally, so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment, which could by a fair and reasonable intendment be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured. In the course of the opinion the court said:

"But even if correct, and the allegation necessary, still the defective allegations of the petition were cured by the evidence, findings, and judgment."

Treating the traversing affidavit as containing a negative pregnant, the rule announced would apply with equal force; it not appearing that plaintiff had been misled to its injury on account of the manner in which the denial had been drawn. *Hershey v. O'Neill (C. C.)* 36 Fed. 168; 31 Cyc. 203. Obviously the action of the court in overruling the plaintiff's objection did not constitute error.

Did the court err in entering judgment dissolving the attachment? This is the sole remaining question for our consideration. Prior to the date of the controversy between the parties hereto, the defendant in error, Terrell, was the owner of a stock of merchandise in the town of Texola, and in January, 1911, it appears, was financially embarrassed, though not insolvent. His indebtedness was owing largely to various mercantile houses and to the First Bank of Texola. Various plans for raising funds with which to pay off or reduce his indebtedness having failed, in said month of January, one Ernest H. Maupin, credit man of Blair-Hughes & Co., one of Terrell's creditors, procured a firm of merchants, named Dugger & Cotton, to purchase the Terrell stock of merchandise at the agreed price of 66 2/3 cents on the dollar. The stock was invoiced and notices sent out to Terrell's creditors in an attempt to comply with the bulk sales statute (section 2903, Rev. Laws 1910); one of the notices having been sent to and received by the bank. The form of notice addressed to the creditors, besides being signed by the transferor, was in other respects informal, and perhaps legally insufficient, when tested by the statutory requirements. It was upon this fact alone that plaintiff sought to sustain its attachment. Conceding, therefore, that the notice received by the attaching creditor was not in such form as the statute prescribes, and that an attempt was made by Terrell to dispose of his stock of merchandise, does it necessarily follow, under the facts of the present case, that such failure to comply with the statute furnished sufficient evidence to sustain the grounds laid in plaintiff's affidavit for attachment? It was the evident purpose of the Legislature, in enacting the so-called bulk sales law, to provide protection for creditors against the class of sales which

were frequently fraudulent, and which left creditors with no means of collecting what was due them. *Williams v. Fourth Nat. Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970; *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Walp v. Moorar*, 78 Conn. 515, 57 Atl. 277; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Squire & Co. v. Teller*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330, 9 Ann. Cas. 250.

The sale, under the evidence, was of a character clearly within the provisions of the statute. Its requirements are therefore mandatory and controlling, unless it be that the provisions thereof were waived by the attaching bank, or that, by its conduct in the premises, it so conducted itself as to be estopped from attacking the transfer. It is insisted by counsel for defendant in error that defendant, having pleaded neither a waiver or estoppel, was not entitled to offer evidence thereof. It is a rule well supported by authorities that a waiver cannot be proved unless it is within the issues made by the pleadings; and, where the facts constituting a waiver are relied upon as an estoppel, they must be specially pleaded. *Cooper v. Fleener*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; *Nance v. Oklahoma Fire Ins. Co.*, 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426. From an examination of the evidence, however, we fail to find where plaintiff offered any objection to the evidence tending to prove either an estoppel or waiver on its part, but that, on the other hand, all such evidence was introduced without objection. It is therefore too late to raise the objection for the first time in this court. *Hanson v. Buckner's Ex'r*, 4 Dana, 251, 29 Am. Dec. 401; *McDonnell v. De Soto Sav. & Bldg. Ass'n*, 175 Mo. 250, 75 S. W. 438, 97 Am. St. Rep. 592; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *Capital Lbr. Co. v. Barth et al.*, 33 Mont. 94, 81 Pac. 994.

It cannot successfully be controverted that much of the evidence introduced, and to which no objection was made, was offered for the express purpose of proving an estoppel; in fact, was inadmissible for any other purpose. Our conclusion, therefore, is not in conflict with the rule that the failure to object to the introduction of evidence competent or offered for a particular purpose, is not a waiver of an objection to its use for a purpose for which it is incompetent or was not offered. The collection of the Terrell note was in the hands of Ira Speed, the bank's president. The condition of Terrell's affairs, and the proposed purchase by Dugger & Cotton, were at the time known to

Speed and the sale consented to by him. He had been told by Terrell that notice would have to be given to the former's creditors, as provided by the bulk sales law, before the sale would be consummated, and before the purchase price could be paid out to the creditors. Dugger & Cotton had not theretofore been engaged in business in Texola, and Speed requested Terrell to try and have them transact their banking business with the plaintiff bank. The proceeds of the daily sales of Dugger & Cotton were deposited in said bank, which was located immediately across the street from the store. Being asked concerning the sale, Speed testified that he was familiar with the terms of the sale, and that the testimony of the witnesses for the defendant offered at the trial, including Terrell and Maupin, was true. Speed was consulted with on different occasions, pertaining to the sale, and admitted receiving a notice of the proposed sale about a week before the attachment proceeding was instituted. No complaint was made by him of the proposed sale; his only objection being that he wanted some form of security or assurance from Maupin that the latter would secure the bank's claim over and above its share in the proceeds of the sale of the stock. He admitted further that by the sale the bank would be able to collect over \$2,000, and that at his solicitation the proposed purchasers opened an account at his bank. Dugger & Cotton had deposited with Maupin a check and notes in payment of the purchase price of \$5,155.80. These were to be kept by Maupin until the sale was finally consummated, with the specific understanding of all the parties, as found by the trial court, "that the check and these two notes realized from the sale were to be held by Mr. Maupin for the purpose of being distributed among his creditors, and his creditors only." Speed, it appears, was distrustful of Maupin, though there is nothing in the evidence warranting his skepticism. It is further said by the trial court:

"Mr. Speed says himself that he understood that the proceeds of this sale was to be distributed among the creditors. What he wanted to be sure of was that he would get his pro rata share with the others. He did not doubt but that the proceeds of the sale was for the benefit of the creditors. It was only the portion that he was to get that he was uneasy about. \* \* \* The fear that he had in his mind was that he understood Mr. Maupin was to guarantee to him that he would get from \$2,500 to \$2,800, and that Mr. Maupin was to write him a letter so stating."

As found by the court below, the good faith of the parties was abundantly shown. Everything, and more, that could have been accomplished by the most literal observation of the statute, was known to the bank. Both a notice and list of creditors were furnished it; and unaddressed and unsigned copy of the former being in the language following:

"To —: You are hereby notified as a creditor of William E. Terrell of Texola, Oklahoma,

that the said William E. Terrell proposes to sell and transfer his stock of merchandise within ten days after the receipt of this notice by you to Dugger and Cotton, and that the purchase by us of said stock of merchandise is in good faith for a fair consideration actually paid.

"-----."

Maupin, acting for the purchasers, had, prior to the preparation and forwarding of the notices, obtained from Terrell a list containing the names and addresses of each and all of his creditors, which said list showed the amount owing each, and was sworn to by Terrell; no objection being made on that account to the list furnished. The only serious complaint made to the notice was that it was signed by the transferor and not by the transferees, as seemingly required by statute. As we are not resting this decision, however, upon the ground that the statute was in all respects complied with, it will be unnecessary to give further consideration to the effect that should be given to the notices sent out to creditors, and have mentioned it more for the purpose of showing an attempt to comply with the law, and the good faith of the parties, than for any other purpose. Counsel cite *Galbraith et al. v. Oklahoma State Bank*, 36 Okl. 808, 130 Pac. 541, as an authority holding that a transfer, without complying with the requirements of the statute, is conclusively presumed to be fraudulent as to a creditor of the transferor. The decision so holds, but it is not in point here, for the reason that in the present case there was no transfer, and for the additional reason that in *Galbraith v. Oklahoma State Bank*, supra, neither the question of waiver or estoppel was considered or involved. It was not intended that the statute under consideration should be so applied as to work injustice or inequity, which would be the result if plaintiff's contention should be sustained. To permit it thus to acquire an advantage by attachment proceedings based upon said proposed transfer, made in good faith, with full knowledge of all the facts connected with the proposed transfer, and to which it assented, would work a great wrong and open the door for fraud. This result should not be made possible by the courts, where the power to prevent it may be exercised. *Olwell v. B. L. Gordon & Co.*, 40 Wash. 185, 82 Pac. 180; *First Nat. Bank v. Coles et al.*, 40 Wash. 528, 82 Pac. 892; *Whitehouse v. Nelson*, 43 Wash. 174, 86 Pac. 174; *Porter v. Goudzwaard*, 162 Mich. 158, 127 N. W. 295; *Coffey v. McGahey* (Mich.) 148 N. W. 356.

The plaintiff bank waived any right it may otherwise have had on account of the statute; and being present and thoroughly conversant with the terms and conditions of the proposed sale, and having received a notice of the intended transfer, and a list of the transferor's creditors, even though defective in form, it will not be permitted, on account

of the failure of either its debtor or the proposed purchasers to comply literally with the statute, to levy an attachment upon the stock of goods intended to be transferred, upon the sole ground of a failure to comply with the statute in making the sale, and especially where the only objection to the transaction was an unwarranted suspicion or belief that some other creditor would receive a disproportionate share of the proceeds of the sale, and that the representative of the creditors would not give written assurance of the payment of the bank's note.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 690)

BUCHER et al. v. SHOWALTER.

(Nos. 2928, 4302.)

(Supreme Court of Oklahoma. Sept. 2, 1913.  
Rehearing Denied Jan. 30, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1015\*)—VERDICT—VACATION—NEW TRIAL.

An order of court setting aside a verdict and granting a new trial will not be reversed, unless the court erred upon some pure and un-mixed question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

2. INDIANS (§ 13\*)—ENROLLMENT RECORD—EVIDENCE.

An allottee conveyed a portion of his allotment before Act May 27, 1908, c. 199, § 35 Stat. 312, making the enrollment records conclusive evidence as to age, was enacted. At the time of the conveyance he was actually of full age, but the enrollment records showed him to be a minor. After the act was passed making the enrollment records conclusive as to age, and after those records showed him to be of lawful age he made another conveyance of the same land to different persons. In an action by his first grantee against the second grantee, held, that the enrollment records were not competent evidence to show that the allottee was a minor at the time the first conveyance was made.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

3. WITNESSES (§ 380\*)—IMPEACHMENT—SURPRISE.

When a party, relying upon a prior statement of the witness that he will testify to certain facts favorable to the party calling him, places a witness on the stand, and the witness testifies unfavorably and different to what he has led the party calling him to believe his testimony will be, the party calling him has the right to show that the witness made a different statement before he was placed on the stand, which induced the party to call him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.\*]

4. EVIDENCE (§ 333\*)—HEALTH—RECORDS OF HEALTH BOARD.

A record of a board of health showing the date of a person's birth is competent evidence on the issue of the age of such person, when the law of the state in which such person was born made it the duty of such board to keep a record of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

births, and the record offered was made in accordance with law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1266; Dec. Dig. § 333.\*]

**5. TRIAL (§ 223\*)—INSTRUCTIONS — ORAL CHARGE.**

Where in a civil case the court is not requested to instruct the jury in writing and to number and sign the instructions, it is not error to instruct the jury orally.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 514-516; Dec. Dig. § 223.\*]

**6. APPEAL AND ERROR (§ 688\*)—ASSIGNMENTS OF ERROR—MATTERS OF RECORD.**

An assignment of error must be based upon matters appearing in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Henry P. Showalter against George F. and C. S. Bucher. From a judgment sustaining a motion for new trial in No. 2928, defendants bring error, and from a judgment for plaintiff in No. 4302, defendants bring error. Both cases affirmed.

N. B. Maxey and Samuel V. O'Hare, both of Muskogee, and C. S. Bucher, of Salt Lake City, Utah, for plaintiffs in error. Frank L. Moulton and Wm. T. Hutchings, both of Muskogee, for defendant in error.

ROSSER, C. This is a suit to quiet title brought by Henry P. Showalter, hereinafter referred to as plaintiff, against George F. Bucher and C. S. Bucher, hereinafter referred to as defendants. The case was tried and resulted in a judgment for the defendants. The court sustained a motion for a new trial, and defendants appealed from the order of the court granting a new trial. That appeal is numbered 2928 on the docket of this court. While that appeal was pending the case was tried again, resulting in a judgment for the plaintiff. The defendants again appeal, the second appeal being numbered 4302 on the docket of this court. The two cases have been consolidated, and will be disposed of in one opinion.

The error assigned in No. 2928 is that the court erred in granting the motion for a new trial. There was a question of fact in the case as to the age of the allottee, John Kemp. The motion for new trial was based largely on newly discovered evidence.

[1] It is well settled that the action of the court in granting a new trial will not be disturbed on appeal unless the court erred upon a pure, simple, unmixed question of law. As the question presented on motion for a new trial was not such a question, the action of the court in granting a new trial will be affirmed.

[2] The first assignment of error in No. 4302 is that the court erred in excluding the enrollment records, which were offered to

show the age of John Kemp, the allottee. This question comes up in a peculiar way. The allottee, John Kemp, deeded the land to the defendants on the 11th of January, 1908, which was prior to the act of Congress making the rolls conclusive evidence of the age of the allottee. The deed to the plaintiffs was executed on the 15th of June, 1908, subsequent to the act making the rolls conclusive evidence. The defendants sought to introduce the rolls for the purpose of showing that their deed was valid. It was excluded by the court. No authorities are cited by either party bearing upon this question, and it is not believed that such a question ever arose before. At the time the defendants obtained their deed the rolls were not evidence. *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 563. The validity of the defendants' deed, therefore, must be determined by the law in force at the time it was made, and under that law, if the grantor was actually a minor, the deed was not valid, regardless of whether the rolls show he was of age or not. He would not have been estopped by the rolls to show that he was a minor when the deed was made, even in an action brought after the act of Congress was passed. His grantee in this case stands in his shoes, and is entitled to the same rights that he had. It has been decided that the act of Congress making the rolls conclusive evidence of age is not retroactive, and does not affect conveyances made prior to its passage. *Williams v. Joins*, 34 Okl. 733, 126 Pac. 1013; *Rice v. Ruble* (No. 2741) 39 Okl. 51, 134 Pac. 49. Therefore the court did not err in excluding the record showing the age of the allottee.

[3] *Rose Luster*, the mother of the allottee, John Kemp, was called as a witness for plaintiff, and testified, in reply to a question of plaintiff's counsel that Kemp was of lawful age at the time he gave the deed to the defendant. Plaintiff was then permitted to prove by other witnesses that *Rose Luster* had told them that Kemp was a minor at the time he gave the deed. The action of the court in admitting this evidence is assigned as error. The rule is that a party will not be permitted to discredit a witness he himself has called by proving that the witness is of bad reputation, but where a party places a witness on the stand with a reasonable expectation, derived from conversations with the witness, that he will testify favorably upon a particular point, and his testimony is unfavorable, the party calling him has the right to show that the witness made a different statement before going on the stand, favorable to the party calling him, which induced the party to call him. *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57; *Paris v. United States*, 5 Okl. Cr. 601, 115 Pac. 373. See *Wigmore*, Ev. § 904; *Johnson v. Leggett*, 28 Kan. 590; *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731; *Hays v. Tacoma R. & P. Co.* (C.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

C.) 106 Fed. 48; *Swift v. Short*, 92 Fed. 567, 34 O. C. A. 545.

[4] It is also urged that the court erred in admitting in evidence the record of the board of health of the city of Richmond, in Wayne county, Ind., showing the date of the birth of John Kemp, the allottee. The Indiana statute made it the duty of the physicians and accoucheurs to report all births and deaths within 15 days from their happening to the secretary of the board of health of the town, city, or county in which they occurred, and also made it the duty of the board of health to keep a record of all marriages, births, and deaths. The report offered was made in compliance with this statute, and was admissible. No better evidence could be obtained of the fact, and the court did not err in admitting it. *Wigmore on Evidence*, § 1644; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Denoyer v. Ryan* (C. C.) 24 Fed. 77; *Priddy v. Bolce*, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874; *McPhelemy v. McPhelemy*, 78 Conn. 180, 61 Atl. 477; *Lewis v. Marshall*, 5 Pet. (U. S.) 470, 8 L. Ed. 195.

[5] The next assignment of error is that the court erred in not instructing the jury in writing, and in not signing the instructions. The record does not show that the instructions were oral. It is true that the fact that they were not in writing was set up as one of the grounds for a new trial, but the statement in the motion for a new trial that they were not in writing was not proof of that fact. But, assuming that they were oral, the record does not show that the defendants requested written instructions. The fifth paragraph of section 5794, Comp. L. 1909, is as follows:

"When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party."

There is an apparent conflict between the fifth and sixth paragraphs of section 5794. It was held in the case of *Hurst v. Hill*, 32 Okl. 532, 122 Pac. 513, that the provisions of the sixth paragraph, which required the instructions to be signed by the judge, only applied to cases where written instructions were demanded, and that to make the failure to give written instructions in a civil case reversible error they must be demanded. No request was made for written instructions. The defendants sat quietly by while the oral instruction was given, and made no objection to it upon that ground, and he cannot now complain. The statute requiring written instructions could only have been passed for one or two reasons: First, the certainty of getting an accurate record of

the language used by the court, and that reason has largely passed away since courts are given the right to employ competent stenographers. Second, because of the lack of confidence in the integrity of the trial judge and the fear that he might change or alter the instructions after they were given. There is a very remote possibility that this reason might still exist, but there should be no presumption that a trial judge will falsify the record, and there is no reason for extending the rule so as to make the giving of written instructions mandatory. In the opinion of the writer, the requirement that instructions should be in writing is entirely wrong. An honest trial judge of reasonable ability can explain the law of the case to the jury more understandingly in an oral instruction than in an instruction formal and lifeless, as a written instruction must necessarily be.

[6] The next assignment of error is that the court permitted the attorneys for plaintiff to enter the jury room while the jury was in session and explain certain evidence. If this assignment is based upon facts it is grounds for a reversal. Such conduct would be highly improper, not only upon the part of the attorneys for plaintiff, but a communication by any one else, even the judge, to the jurors while engaged in their deliberations, would be a ground for reversal. *Watson v. State*, 7 Okl. Cr. 508, 124 Pac. 329. But the record shows that nothing of the sort occurred. The court was open at the time of the occurrence complained of, and everything that was done or said about the case was done or said in open court. Therefore this assignment will not be considered.

There is no reversible error in the record, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 684)

GILLUM v. ANGLIN. (No. 2882.)

(Supreme Court of Oklahoma. May 12, 1914.  
Rehearing Denied Jan. 30, 1915.)

(Syllabus by the Court.)

1. INDIANS (§ 18\*)—INDIAN LANDS—ALLOTMENT—ASCEND.

Upon the death of mixed blood minor children of the Choctaw Tribe of Indians, the fee in their allotments ascends to the parent of tribal blood, and not to the parent who has become a citizen of the tribe by virtue of an intermarriage.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 13.\*]

2. CHAMPERTY AND MAINTENANCE (§ 7\*)—DEEDS—ADVERSE CLAIMANT.

A deed to lands which have been held by an adverse claimant in open, notorious, and exclusive possession and control for a period of four or five years next prior to the deed, such adverse claimant having collected all the rents and profits, and having openly and notoriously claimed an estate in such lands under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the provisions of chapter 49, Mansfield's Dig. of the Stat. of Ark. [sections 2522-2545], is champertous as between the grantee and such adverse claimant.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54-110; Dec. Dig. § 7.\*]

### 3. PLEADING (§ 205\*)—ANSWER—GENERAL DEMURRER.

Where an answer contains statements of facts which of themselves constitute a defense to plaintiff's action, it is error to sustain a general demurrer to such answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 206.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County; Tom H. Faucher, Special Judge.

Action in ejectment by W. Thomas Anglin against H. Tillman Gillum et al. Judgment for plaintiff, and defendant Gillum appeals. Reversed.

Lewis C. Lawson, of Holdenville, for plaintiff in error. Warren & Miller and Rogers & Harris, all of Holdenville, for defendant in error.

**HARRISON, C.** This was an ejectment suit brought by W. T. Anglin against H. T. Gillum for possession of certain tracts of land aggregating about 670 acres. The material facts in the controversy are substantially as follows: H. T. Gillum was a non-citizen, but had married a woman of Choctaw blood. They lived together as man and wife for a number of years, during which time four children were born to them. However, they finally separated and were legally divorced, and afterwards the wife, Emaline, married a man by the name of Dillbeck. In the meantime the making up of the rolls for the Five Civilized Tribes had taken place, and H. T. Gillum, by virtue of his being an intermarried citizen, was admitted to the rolls and allowed an allotment as other members of the tribe. He chose his allotments, and, pursuant to acts of Congress and provisions of the treaty with the Choctaw Indians, chose allotments for each of his four minor children by his Indian wife. Two of the children had died before allotments were chosen for them, but same were afterwards selected by their father. Another one of the children died after the allotment had been chosen for it by its father, whom, it is not denied, had been duly appointed administrator for the purpose of selecting allotments for each. After selection and award, the father took charge of the allotments of the deceased children, held possession of them, improved them and put them, at least a great portion of them, in cultivation, something like 500 acres, and held possession of same upon the theory that, under the provisions of chapter 49, Mansfield's Digest of the Statutes of Arkansas, which was then in force in the Indian Territory by act of Con-

gress, he inherited title to the lands in question, or at least an undivided one-half interest in same. After the passage of the act of Congress of April 26, 1906 (34 Stat. 157, c. 1876), removing restrictions from the sale of inherited lands in the hands of mixed blood heirs, Emaline Dillbeck joined by her husband, S. M. Dillbeck, acting upon the theory that the lands of her deceased children ascended to her by reason of her Indian blood, and that their allotments came to them through and by virtue of her Indian blood, not by virtue of their father's intermarriage with her, and that therefore, she inherited their allotments, and upon such theory she and her husband executed a warranty deed conveying said lands to W. T. Anglin, the defendant in error here. Whereupon, in August, 1909, he, Anglin, brought this ejectment suit against H. T. Gillum and his tenants.

The defendant, H. T. Gillum, answered, maintaining that the land in question either descended to Albert Gillum, the surviving child, and that therefore he would have a life estate in same, or that it passed clear to him and his former wife, and that therefore he had an undivided one-half interest in the fee in same as the heir of his three dead children, and set up the further defense that, as he had been in full and complete and undisturbed possession and control of such lands since the allotments had been taken, and had collected all the rents and profits therefrom during all those years from the time of taking the allotments to the date of the execution of the deed by the Dillbecks to Anglin, that therefore, holding and claiming same upon the theory that he had either a one-half interest in the fee or a life estate in the same, either of which was adverse to the interests sought to be conveyed to Anglin in the warranty deed from the Dillbecks to Anglin, such deed was champertous and void as between Anglin and him. The court sustained a demurrer to Gillum's answer on the theory that it failed to state a defense, and the cause comes here on a transcript.

There are three material propositions of law involved in the case: First, whether the lands of those deceased children descended in part to the father by virtue of his intermarriage, or whether they descended in whole to the mother by virtue of her Indian blood; second, whether the deed was champertous; third, whether the court erred in sustaining the demurrer to Gillum's answer.

[1] On the first proposition as to whether the father or mother inherited these lands, it appears to us that enough has been said in the case of *Shulthis v. M'Dongal*, 170 Fed. 529, 95 C. C. A. 615, to make the question clear as to which of the parents would inherit and to settle this phase of the controversy in the case at bar. The same application of chapter 49 of the Arkansas Statutes was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sought to be made in the Shulthis Case as in the case at bar; the difference in the Shulthis Case and the case at bar being that in that case it was the father who was the Indian by blood and the mother who was a noncitizen, and the controversy was as to who took the lands of their deceased children; also the further difference that these were Creek Indians, while those in the case at bar were Choctaws. The reasoning in that case by Amidon, district judge, who rendered the opinion, is clear and forceful, but, as both the reasoning and conclusions reached in such case are familiar to the members of the bar who have had to deal with like questions, we shall merely cite such case as authority on this phase of the question in the case at bar. It was held in that case that the allotment of a deceased child went to the father by virtue of the father's tribal blood, and that a deed to such allotment from the father was valid.

An effort is made by counsel for plaintiff in error to distinguish the case at bar from the Shulthis Case because the Shulthis Case was a Creek Indian case, and that under section 6 of the Supplemental Agreement with the Creek Indians (Act June 30, 1902, c. 1323, 32 Stat. 501) non-Creek citizens were expressly prohibited from taking Creek lands by inheritance or otherwise so long as there was a Creek heir to take it, and that no such treaty provision was made between the United States and the Choctaw Tribe. But the decision in the Shulthis Case is not based upon this ground. It is based solely upon the ground that the lands of the Creek Tribe belonged to such tribe as a tribe—belonged to them in common as a society or tribe—that is, prior to allotments; that when the time for allotment came, the minor children of members of the tribe took their allotments, not by virtue of their being the offspring of an intermarried citizen (mother), but by virtue of their Indian blood which came through their father; and that in case of death of such minor heir its estate ascended to the parent through and by virtue of whose tribal blood such minor acquired the right to an allotment. This being a federal question, we feel bound by the doctrine announced by the federal courts. It follows, therefore, that the fee in the allotments of her deceased minor children went to the mother, and that after the act of April 28, 1906, took effect she could convey a valid title to such allotments. See, also, *McKee v. Henry*, 201 Fed. 74, 119 C. C. A. 412.

Also, in the case of *Pigeon et al. v. Buck*, 38 Okl. 101, 131 Pac. 1083, this court, in following the doctrine announced in the Shulthis Case, supra, wherein the same question of descent and distribution of Indian lands are involved, said:

"Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property."

And *Roberts v. Underwood*, 38 Okl. 376, 132 Pac. 673, was decided under the rule announced in *Pigeon v. Buck*, supra.

[2] The next question is whether the deed to Anglin was champertous. It was alleged in Gillum's answer that he held the land upon the theory that he had the right to possession of same either upon the ground that he had inherited the one-half undivided interest in the fee, or upon the ground that, if it descended to the surviving child, he still had a life estate in same, and that upon such theory he was holding such lands openly, notoriously, and exclusively at the time the deed was taken, and that such possession, open, notorious, and exclusive as it was, was adverse to the interest and rights sought to be conveyed in the deed from the Dillbecks to Anglin. The deed in question was a deed of general warranty. Under section 1162, Rev. Laws 1910, the title and rights which were conveyed under a warranty deed are as follows:

"A warranty deed made in substantial compliance with the provisions of this chapter shall convey to the grantee, his heirs or assigns, the whole interest of the grantor in the premises described, and shall be deemed a covenant on the part of the grantor that at the time of making the deed he is legally seized of an indefeasible estate in fee simple of the premises and has good right and full power to convey the same; that the same is clear of all incumbrances and liens, and that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession thereof, and will defend the title thereto against all persons who may lawfully claim the same; and the covenants and warranty shall be obligatory and binding upon any such grantor, his heirs and personal representatives, as if written at length in such deed."

[3] Now, Anglin, the plaintiff below, demurred to Gillum's answer. He therefore admitted the facts pleaded in the answer; that is, he admitted that Gillum was claiming the land in question and holding and exercising complete and exclusive control of same upon the theory that he either inherited an undivided one-half interest in the fee or a lifetime estate in same. This being true, it follows that at the time Anglin took the deed Gillum was holding possession of the land adversely to the rights and interests sought to be conveyed in such deed. The deed therefore falls under the rule announced in *Nicholas V. Bilby v. John W. Gilliland* (on rehearing) 41 Okl. 679, 139 Pac. 988, *Miller v. Fyer*, 35 Okl. 145, 128 Pac. 713, and *Ruby v. Nunn*, 37 Okl. 389, 132 Pac. 128, and is champertous and void as between Anglin and Gillum. It also follows that, such deed being champertous and void, the allegations in the answer to that effect constituted a defense to plaintiff's action, and that the court erred in sustaining the demurrer. This disposes of the third proposition.

It is contended, however, that the surviving minor child, Albert Gillum, inherited the lands in question, and that the court committed numerous errors, which are presented and argued in plaintiff in error's brief,

that were prejudicial to the rights and interests of such minor. But the conclusions which, under the authority of the Shulthis Case, we feel impelled to follow, preclude all rights of such minor heir in this controversy, and adjudge the fee in such lands in the mother. We therefore refrain from passing upon the assignments of error in reference to the rights of the minor, as the action and holdings of the court in this regard are wholly immaterial in the determination of this case. The minor had no interest in the fee at the time the deed was executed. The title to the fee was in the mother, but the deed was clearly champertous, because it purported to convey rights and interests which were claimed and held possession of adverse thereto by Gillum. Hence, while we do not feel authorized to pass upon the question as to whether the rights of the mother or of Anglin might be properly protected in another action, yet we are constrained to hold from the record before us that the judgment should be reversed, and the cause remanded for judgment in harmony with these conclusions.

The judgment is reversed.

PER CURIAM. Adopted in whole.

(44 Okl. 604)

ATCHISON, T. & S. F. RY. CO. v. PITTS.  
(No. 3705.)

(Supreme Court of Oklahoma. Jan. 19, 1915.)

(Syllabus by the Court.)

1. COMMERCE (§ 27\*)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURIES TO SERVANT—CHARACTER OF SERVICE.

A common carrier by railroad engaged in interstate commerce is only liable to its employes for damages for negligence resulting in personal injuries suffered while both such carrier and such employé are engaged in that particular service under the Act of Congress of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, § 8657), and such carrier, when engaged in both interstate and intrastate commerce, is not liable under this act for injuries suffered by one of its employes while effecting a coupling between its engine tender and its baggage car, not appearing to be then in the service of other than intrastate commerce, in making up a train, notwithstanding it was the defendant's intent to immediately thereupon incorporate in said train a number of freight cars, including three then in the service of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.\*]

2. COMMERCE (§ 8\*)—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It is error for the trial court to so instruct as to permit the jury to determine (upon undisputed evidence showing that both the carrier and the employé were, at the particular time the latter was injured, engaged only in intrastate commerce) whether the federal or the state law applies where the defendant relies in part upon the defense of contributory negligence, which only operates to diminish the amount of damage recoverable under the former, but is

a complete defense under the latter, law; it not appearing which law the jury applied.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kay County; W. M. Boles, Judge.

Action for damages for personal injuries by W. N. Pitts against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Cottingham & Bledsoe, S. H. Harris, and Chas. H. Woods, all of Oklahoma City, for plaintiff in error. E. T. Hackney, of Wellington, Kan., and Hackney & Lafferty, of Winfield, Kan., for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

[1] Plaintiff (an employé) recovered a judgment against defendant (a common carrier engaged in both interstate and intrastate commerce) in the trial court for \$5,000 for personal injuries suffered by him in and about his urinary organs in being caught and crushed between the tender of an engine on the rear-end footboard, on which he, as defendant's brakeman, was standing, and a baggage car onto which a coupling was being made, on the afternoon of February 2, 1909, in defendant's yards at Blackwell, Okl., where defendant's road crew, on which plaintiff was a member, were doing yard switching in making up a train for their usual trip thence to Ponca City, Okl. This was to be a mixed train, consisting of both cars used in freight and cars used in passenger traffic. Three of the freight cars of this train had come from or were going to places in other states; but it does not appear that the said engine, tender, or baggage car contained any person or thing en route from or to any place beyond this state, nor that either of these had come from or were destined to any place beyond this state. It appears that this crew, with their train, left Tonkawa each day for Ponca City, via Blackwell, returned thence to Blackwell, where it did yard switching in the afternoon, then returned to Ponca City, and thereupon returned to Tonkawa via Blackwell; and the engine, tender, and baggage car were used on these runs wholly within the state.

The verdict and judgment were predicated upon the alleged negligence of the defendant: (1) In having on the said rear end of said tender a rod end which protruded about 5½ inches therefrom, and about 3 inches beyond the taps on such rod, and while plaintiff was making a timely effort to alight from said footboard to a place of safety, which rod caught into a pocket of his trousers, and held him thereon between said ten-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



er and said baggage car; and (2) in having coupling equipment which permitted said cars in coupling to come within about 5% inches of each other where he was so caught and crushed, instead of holding them apart something like 11 inches, as a proper draw-head would have done. The defendant relied in part upon the defense of contributory negligence.

[2] The trial court so instructed the jury as to leave to it the determination of the question as to whether this action was or should be predicated upon the federal Employers' Liability Act of April 22, 1908, c. 49, 35 Stat. L. 65 (U. S. Comp. Stat. Sup. 911, p. 1322), or upon the local laws governing such cases arising in this state as do not fall within the purview of the federal law, although there was no conflict in the evidence in this regard, and so as to permit the jury to return a verdict against the defendant in either event if they found the facts essential to establish its liability.

If the jury thought the federal law applicable, it was authorized by the instructions in accord with such law to return a verdict against the defendant, if found guilty of negligence proximately causing plaintiff's injuries, notwithstanding it might find plaintiff was guilty of contributory negligence. Under the federal law contributory negligence merely operates to reduce a full measure of damages in the same proportion to the whole amount of damages sustained as such negligence bears to the whole of the combined negligence of both the plaintiff and the defendant which proximately caused the injury; e. g., the full amount of damages suffered must be reduced by one-half if the negligence of each party is equal. If the jury thought the state law applicable, the instructions authorized the jury, in accord with such law, to return a verdict against the defendant only in the event it found plaintiff's injuries were caused alone by the negligence of the defendant, and that the plaintiff was free from any negligence which contributed hereto. Neither the verdict of the jury nor anything else in the record discloses whether the jury applied the federal or the state law in arriving at their verdict.

We express no opinion as to whether in any case (e. g., where there is a conflict in the evidence as to whether at the time of the injury both the defendant common carrier and the plaintiff employé were engaged in interstate commerce) the plaintiff can decline to elect upon which law he will rely, and the court may thereupon so instruct the jury as to permit it to give a verdict for him under either law they may find applicable, although this seems doubtful; but it

seems perfectly clear that this cannot be done where the undisputed evidence shows the state law to be applicable, as in the present case.

In *Illinois Central Railroad Co. v. Behrens, Administrator, etc.*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, it is held, under a state of facts very similar to those in the present case:

"A fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight, between two points in the same city, was not employed in interstate commerce within the meaning of the federal Employers' Liability Act of April 22, 1908, \* \* \* although upon completion of that task the switching crew was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate transportation."

And in the opinion it is said:

"Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employé is engaged is a part of interstate commerce. The act was so construed. \* \* \* It was there said [*Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 150, 33 Sup. Ct. 649, 57 L. Ed. 1125]: 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the employé is engaged in interstate commerce and while the employé is employed by the carrier in such commerce.' Again [*229 U. S. 152, 33 Sup. Ct. 650, 57 L. Ed. 1125*]: 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases."

The only and undisputed evidence in the present case tends to show that at the time of the plaintiff's injuries the "particular service" in which both parties to this action were engaged was intrastate, and not interstate, commerce, while the burden was upon plaintiff to show that defendant was liable under the federal act if he desired to claim liability thereunder; and it follows that this case does not fall within the purview of the act of Congress of April 22, 1908.

This being so, the plaintiff was not entitled to recover any amount if he was guilty of any negligence which proximately contributed to cause his injuries; and it was error for the trial court to take from the defendant the defense of contributory negligence upon the condition that the jury, as they were authorized to do and may have done, determined that the federal law was applicable.

For the reasons stated, this case should be reversed and remanded for another trial in accord herewith.

PER CURIAM. Adopted in whole.

(45 Okl. 507)

**BICE et al. v. MYERS et al.** (No. 6683.)(Supreme Court of Oklahoma. Oct. 13, 1914.  
Application for Rehearing Stricken from  
the Files Feb. 2, 1915.)*(Syllabus by the Court.)***APPEAL AND ERROR (§ 754\*)—ASSIGNMENTS OF  
ERROR—NEW TRIAL—DENIAL.**

Where plaintiff in error fails to assign as error the overruling of the motion for a new trial in the petition in error, no question is properly presented in this court to review errors alleged to have occurred in the progress of the trial in the lower court, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 754.\*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action between Jefferson L. Bice and others and James H. Myers and others. From a judgment in favor of the latter, the former bring error. Dismissed.

W. C. Henderson, of Lawton, for plaintiffs in error. J. A. Diffendaffer and Stevens & Myers, all of Lawton, for defendants in error.

**LOOFBOURROW, J.** Defendants in error have filed a motion to dismiss the appeal herein, for the following reasons:

"(1) That no cause is presented by the petition in error and record thereto attached, which is entitled to be reviewed on appeal; (2) that the first assignment of error cannot be considered in the state of the record and petition in error, for the reason that the plaintiff in error has not assigned the overruling of the motion for new trial as a ground of error; (3) that the second assignment of error presents no question for review under the state of the record and petition in error, for the reason that the overruling of the motion for new trial of plaintiff in error is not assigned as error."

The petition in error sets out the following assignments of error on which plaintiff in error relies for a reversal:

"The trial court erred in overruling and refusing the request and demand for a jury and in denying to the plaintiffs in error a trial by jury in this cause, which ruling of the court was excepted to by the plaintiffs in error and exception allowed, because this cause presented an issue of fact as shown by the pleadings and evidence produced and plaintiffs in error were entitled under the Constitution and laws of this state to have such disputed questions tried by a jury upon demand being made for a jury trial.

"(2) The trial court erred in rendering judgment for the defendants because the great preponderance of the testimony showed that the plaintiffs executed the instrument under which defendants claimed title to the land in controversy, believing the same to be a mortgage to secure a loan of \$200, which belief was induced by the false representations of Jas. H. Myers and his agents and attorney who procured the purported deed, and also because the testimony showed without contradiction that the pretended contract was executed to defraud plaintiffs, and was never carried out by defendant Myers and that there was no consideration whatsoever for said pretended deed. The judgment of the court was contrary to the evidence, and contrary to the law, and should have been for the plain-

tiffs in error, and said verdict and judgment of the court is wholly unsupported by the evidence."

An examination of the record discloses that there was a motion for new trial filed and overruled, and to which action of the court in overruling the same exceptions were saved, but it will be noticed that the plaintiff in error fails to assign as error in his petition in error the overruling of the motion for new trial.

It is a well established rule in this court that, where the plaintiff in error fails to assign as error the overruling of a motion for a new trial in his petition in error, no question is properly presented in the Supreme Court to review errors alleged to have occurred during the progress of the trial in the lower court. See McDonald et al. v. Wilson, 29 Okl. 309, 116 Pac. 920; Cox v. Lavine, 29 Okl. 312, 116 Pac. 920; Kimbriel v. Montgomery, 28 Okl. 743, 115 Pac. 1013; Whiteacre v. Nichols, 17 Okl. 387, 87 Pac. 865; Martin et al. v. Gassert, 17 Okl. 177, 87 Pac. 586; Meyer v. James, 29 Okl. 7, 115 Pac. 1016.

The plaintiffs in error therefore having failed to assign or specify as error the action of the court in overruling the motion for a new trial, and, as the errors assigned and specified are predicated upon alleged errors occurring at the trial, there is nothing properly before this court for review.

The appeal is therefore dismissed. All the Justices concur.

(43 Okl. 769)

**LE FORCE et al. v. SHIRLEY & YOUNG.**  
(No. 6488.)(Supreme Court of Oklahoma. Nov. 17, 1914.  
Application for Rehearing Stricken  
from the Files Feb. 2, 1915.)*(Syllabus by the Court.)***APPEAL AND ERROR (§ 336\*)—PARTIES—DIS-  
MISSAL.**

Where one of plaintiffs in error fails to join in asking the court to grant a new trial, and he did not consent to be made a plaintiff in error, and was not made a party defendant in error, and has not been served with case-made on appeal, and no summons in error has been issued and served upon him, and it appears that his interests would be affected by a reversal or modification of the judgment, the appeal will be dismissed for want of necessary parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1876; Dec. Dig. § 336.\*]

Error from County Court, Pawnee County; Geo. E. Merritt, Judge.

Action between J. A. Le Force and another and Shirley & Young. From the judgment, the parties first mentioned bring error. Dismissed.

F. M. Smith, of Vinita, for plaintiffs in error. Hayes & Cleeton, of Cleveland, for defendants in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

RIDDLE, J. Judgment was rendered in the court below against plaintiffs in error jointly. Plaintiff in error Le Force filed his separate motion for new trial, and did not join as a party thereto plaintiff in error Phelps, and Phelps made no further appearance in court after the rendition of the judgment. Plaintiff in error Le Force has filed his petition in error in this court, with original case-made attached. Motion has been filed to dismiss the appeal, for want of necessary parties. From the affidavit of Phelps attached to said motion, it appears that he was satisfied with the judgment of the trial court, and has not authorized any one to represent him in the appeal of said cause; that he has not been served with case-made or with summons in error; and that he has not been made a party defendant in error. It is a well-settled rule of this court that where all parties to a joint judgment are not made parties to the appeal, and it affirmatively appears that their rights or interests will be affected by a reversal or modification of the judgment, the appeal will be dismissed for want of necessary parties. *Strange v. Crismon*, 22 Okl. 841, 98 Pac. 937; *Continental Gin Co. v. Huff*, 25 Okl. 798, 108 Pac. 369; *Weisbender et al. v. School District No. 23*, 24 Okl. 173, 103 Pac. 639.

The appeal is therefore dismissed. All the Justices concur.

(45 Okl. 439)

**WILLIAMS v. PURCELL et al.**  
**PURCELL et al. v. WILLIAMS et al.**  
(Nos. 4181, 4496.)

(Supreme Court of Oklahoma. Dec. 22, 1914.  
Rehearing Denied Feb. 2, 1915.)

*(Syllabus by the Court.)*

**1. MORTGAGES (§§ 32, 91, 139, 382, 594\*)—ABSOLUTE DEED AS MORTGAGE—RECORD—FORECLOSURE—FORFEITURE—REDEMPTION.**

An instrument purporting to be an absolute conveyance of real estate, but intended to be defeasible or as a security for the payment of money, is deemed a mortgage, and must be recorded and foreclosed as such.

(a) The holder of a deed absolute, taken as a security for a debt, can only acquire title by a foreclosure of his mortgage, and any agreement of forfeiture is void.

(b) Any person having an interest in the mortgaged real estate may redeem from such deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94, 201, 202, 278, 1147, 1709-1731; Dec. Dig. §§ 32, 91, 139, 382, 594.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Mortgage*.]

**2. VENDOR AND PURCHASER (§ 229\*)—PRE-EXISTING DEED—NOTICE TO PURCHASER.**

Williams, to secure payment of money, executed deed to Pearce; Williams remaining in possession, by tenants, receiving the rents and profits. Purcell knew the facts; Goodwin did not; but they went to Pearce and obtained deed to the land, paying therefor \$2,000. Goodwin furnished \$1,250; Purcell being named as the grantee in the deed, but Goodwin in fact owning a half interest. *Held*, that both Goodwin

and Purcell are chargeable with notice of Williams' title, and that the deed from Pearce to Purcell should be treated as an assignment of the mortgage rights of Pearce.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

**3. ESTOPPEL (§§ 58, 97\*)—REQUISITES—GOOD FAITH—CHANGE OF POSITION.**

Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who has, in good faith, been misled to his injury.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 144, 145, 289; Dec. Dig. §§ 58, 97.\*]

Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by H. W. Williams against Rebecca J. Purcell and others. From a judgment in favor of plaintiff Williams against defendant Flora E. Pearce, Rebecca J. Purcell and others bring error, and, from a judgment in favor of the administrators and heirs of Purcell, Williams brings error. Consolidated. Affirmed in part, and reversed and rendered in part.

E. M. Clark, of Pawnee, and Wm. Blake, of Tulsa, for plaintiff in error Williams. Biddison & Campbell, of Tulsa, John M. Hayes, of Cleveland, and Devereux & Hildreth, of Guthrie, for defendants in error Purcell and others. Gilbert M. Gander, of Coffeyville, Kan., for defendant in error Pearce.

LOOFBOURROW, J. This action was commenced in the district court of Pawnee county, Okl., by H. W. Williams, as plaintiff, against Flora E. Pearce, defendant, to recover an undivided one-third interest in 80 acres of land situated in said county. The plaintiff is an attorney at law and had been personally acquainted with the defendant for a number of years, during which time he had been her neighbor, friend, and legal adviser. She had, from time to time, loaned him money, and on the 8th day of March, 1909, plaintiff executed a deed to the defendant to all of his right, title, and interest in and to an undivided one-third interest in and to said 80 acres of land; the instrument being, on its face, a warranty deed, but in his petition plaintiff claims that the same was in fact given as security for the payment of a debt he owed the defendant, and that such instrument was, in fact, a mortgage. The deed was executed March 8, 1909, and a few days thereafter delivered to the defendant. In March, 1911, the defendant Pearce executed a deed to the same tract of land to W. M. Purcell for a consideration of \$2,000. G. W. Goodwin gave his check for \$1,250 to Purcell, which was given to the defendant Pearce, and Pearce took a mortgage for \$750 for the balance of the purchase price. Thereafter, and before the commencement of this action, Purcell died, and his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

heirs and administrators and G. W. Goodwin intervened in said cause. Upon a trial of the issues joined, the court rendered his findings of fact and conclusions of law and entered judgment in favor of Williams against Pearce, decreeing the deed from Williams to Pearce to be a mortgage, and rendered judgment against Pearce in favor of Williams for the sum of \$1,147.46. The court found that Goodwin was an innocent purchaser for value and without notice, and that Purcell held in trust for Goodwin one-half of the land so purchased, and that, as between Williams and Purcell, Williams had, by letter, advised Purcell that defendant Pearce had authority and power to sell and dispose of the land, and that Williams was estopped from maintaining an action to set aside said conveyance between his grantee Pearce and the defendant Purcell. From the judgment in favor of Williams against Pearce, the interveners joined Pearce as plaintiffs in error and appeal; that case being numbered 4496 in this court. From the judgment in favor of the administrators and heirs of Purcell, and Goodwin, H. W. Williams appeals; that case being numbered 4181 in this court—the cases being consolidated.

The record in No. 4496 contains nine assignments of error by the plaintiff in error Pearce; the first being error in overruling motion to make petition more definite and certain. On the trial of the case the matter complained of was thoroughly developed, and it does not appear that the plaintiff in error was materially prejudiced by the ruling of the court.

The second assignment is error in overruling the demurrer to the petition. There is no merit in that contention, as the petition states a cause of action.

The third and fourth assignments of error are so general as not to point out the real error complained of, and the same are too general and indefinite to present a question for review.

The fifth assignment alleges error in overruling the demurrer of the defendant Pearce to the evidence of the plaintiff Williams. This ruling was correct.

The remaining assignments may properly be grouped and determined in ascertaining whether or not the record discloses evidence reasonably tending to support the findings and judgment of the trial court, and the first proposition to be determined is whether or not the deed given by Williams to Pearce was intended as a deed or a mortgage.

Both Pearce and Williams testified on the trial of the cause, and a number of letters which passed from one to the other were offered in evidence. These letters were written at a time when the relations of the parties were friendly and before any controversy arose, and therefore ought to afford very satisfactory evidence as to how each regarded the character of the instrument. The

deed was executed March 8, 1909. On June 15, 1909, Williams wrote a letter to Mrs. Pearce, in substance as follows:

"My Dear Friend: I received your letter this morning and will answer now. I am sorry to hear that everything seems to go wrong and that you are discouraged. \* \* \* I will try and get along out here some way until I can sell that oil land or else something else in Oklahoma. If you go to Okla. you go to Tulsa and see E. M. Riese, he has the oil lease on that land and he knows that my share in the land is very cheap at \$1,000.00 and maybe he can find a buyer at that price and you can make the deed right there then you would have the money to buy out a rooming house. \* \* \* I don't suppose anyone with a rooming house would trade for oil land but you can try it. \* \* \* You said you sent some money. Now I don't want you to rob yourself or the girls or get into any tight place for money so if there is any danger of that don't send the — and I will get along some way."

On September 24, 1909, Williams again wrote Mrs. Pearce from Clovis, N. M. In the letter he states:

"Say about that oil land. I send you Purcell's letter. He wants to buy my interest. I told him before you know I had sold it and it is yours so you tell him the same and go ahead and sell it to him and make the deed or I can make it out here and send it to you and he can meet you in Jennings and pay you the money and price it at \$1,100.00 and I think he will take it at that price. I will write him today and tell him you gave me \$1,000.00 and you have got to have \$100.00 for interest and that I don't think you will sell for any less. He lives six miles S. E. of Cleveland. You write him and make him this offer and you will hear from him right away I think. Don't tell anyone that any of the money is coming to me but that you paid for it in full and all the \$1,100.00 is yours. He says in his letter he wants to sell to you but that is a sham. I know him and know by his letter he wants to buy and not sell. He is pretty smooth."

On October 19, 1909, Williams again wrote Mrs. Pearce from Clovis, N. M., as follows:

"My Dear Friend: I received your letter a few days ago and glad to know you are getting settled down. I read Purcell's letter and I think he wants to buy that land and will pay the \$1,100.00 for it when he sees he can't get it for less. He is a smooth schemer. I know him well. We will not write him any more and I think inside of a month or so you will hear from him again. About the taxes I paid Purcell the money for the first half of 1908 taxes before I left, so there is only the last half of 1908 to be paid as this year 1909 taxes are not due yet. I will write him to pay it and send me the amount and I will pay him. I am getting business started up some and think I will make it here all right. Keep me posted on the land deal if he writes any more."

On December 29, 1909, Williams again wrote Mrs. Pearce from Clovis. In the letter he states:

"I wrote to Bill Purcell about that land and told him to let me know what taxes he has paid but I haven't heard from him yet."

On January 22, 1910, Williams again wrote Mrs. Pearce from Clovis, N. M. In this letter he states:

"Say about that oil land. I haven't heard from Purcell and I guess he thinks he will get it for much less than it is worth. So I would rather you would take it for what I

owe you. I would rather do that than to sell to him for a \$1,000.00 as I know all about the oil business and oil lands and when they quit finding big new oil fields then oil will get scarce in a year or two and then it will sell for several thousand dollars with many buyers after it. The whole 80 is good oil land with one well drilled on the poorest corner. I know there is lots of oil wells that soon play out and don't amount to anything but this case is different. When the price of oil gets better wells will be drilled all over it and will bring an income of \$100.00 a month. This one well pays \$5.00 a month a piece at 35c a barrel. If you want to do this I will make out the papers to you so you will draw the money for the oil."

On June 15, 1910, Williams again wrote Pearce from Clovis, in part:

"Write and let me know what kind of a trade you can make on that oil land."

On September 25, 1910, Mrs. Pearce wrote to Williams, from Coffeyville, Kan., a nice, friendly letter. In the letter she states:

"How are money matters with you. I am needing some pretty bad. Would like to buy some stock as we have lots of feed and will have plenty of pasture."

On October 14, 1910, Mrs. Pearce again wrote Williams, from Coffeyville, Kan.; the letter being friendly in character and discussing her business matters. In the letter she also states:

"I think if Purcell will give eight hundred dollars for that oil land you better let him have it. I will take eight hundred and call us square if you sell it right away for I need my money. This finds us all well. Hoping you are the same."

On December 11, 1910, Williams again wrote Mrs. Pearce from Clovis, N. M., as follows:

"My Dear Friend: I received your letter some time ago and have waited answering to see if I could find a buyer for the land. I sold that  $\frac{1}{4}$  interest in that other 80 acres I told you about that I hadn't paid for. Sold it for \$375.00. That paid the debt in full and all the interest. It was nothing but a rock pile no good for anything but a chance for oil and they are getting oil fever again at Cleveland. Have struck two 600 barrel wells in a deep 2,300-foot sand, two miles northeast of our land and they are drilling closer now and if that deep oil is on our land and it looks very favorable it will be very valuable as it is a good thing even in the 1,300-foot sand, as we have it now. Jim Devins an oil man at Tulsa gave me this news in a letter yesterday. I wrote Bill Purcell some time ago to find out the conditions there but he hasn't answered it and I am writing him again today. I think he is scheming to get hold of our land for a little of nothing compared to what it is worth. Am also going to write to other parties at Cleveland to see what I can find out and let you know."

On December 23, 1910, Mrs. Pearce wrote Williams from Coffeyville, Kan. The letter reads in part:

"Friend Bert: I received your letter several days ago. \* \* \* Well I was in hopes you would of sold that oil land for I am in need of my money. We have been putting in a levee here on the creek. Cost us a great deal more than we expected. \* \* \* For as that oil land being getting higher I think that will be a long time. What is Purcell's initials? I might go down there some time before long.

If I should I would try and see him. If you would send me 50 or a hundred dollars I could get along without borrowing any more. If you can't send it all at once send it as you can. \* \* \* Don't forget to tell me Purcell's given name. I will try these real estate men again on a trade. How much does the well bring you a month?"

On January 2, 1911, Williams again wrote Mrs. Pearce from Clovis, N. M., as follows:

"My Dear Friend: I wrote Bill Purcell a few days ago about the oil business and got his letter yesterday and I send it to you. You see by this letter that things are looking good there again. He wants your name so I will write him and tell him where to write you. These big 500 barrel wells he writes about are three miles northeast and the 500 barrel wells 3 miles southwest of our land so you see we are right halfway between. These wells are the 2,200-foot and we already have the oil and 1,300 feet. The excitement is getting high there and we will soon have some big offers on the land as we are right between the big wells we are sure of big wells ourselves."

On March 13, 1911, Williams again wrote Mrs. Pearce; the portion of the letter offered in evidence being as follows:

"\* \* \* A mortgage on it to secure him. After I get the quitclaim deed back from you and as soon as I hear from him and he says he will let me have the money I will let you know and we can all meet at Cleveland or Jennings and fix up the papers and get your money. It will likely be two weeks before I get matters fixed so when I come there will be no delay. I will get my business shaped up here so I can stay a month or so when I come and will go with you back to Coffeyville. You spoke about them wanting a lease on your land. You mustn't let them have it unless they want to pay pretty well for it. Will close for this time. Write me and let me know if you can come to Cleveland when you hear from me."

On March 10, 1911, Mrs. Pearce wrote to Williams, in part, as follows:

"Friend Bert: I have just got home from Jennings. Been down there to see about leasing when I got home found two letters from you. While down saw in a paper Pawnee paper that there was a drilling machine on your land just started a well. Oh I tell you there is lots of new wells all the way from Coffeyville to Cleveland. I think I have the item in a paper. I will see if I can find it will inclose it."

The remainder of the letter deals with personal matters, except the following postscript:

"I learned a little more about the man that was here to see about your land. He is a contractor for some oil company. Yes I will stand them off on the land until you can come and attend to it."

On March 15, 1911, Mrs. Pearce wrote Williams, evidently in response to the letter of March 13, 1911, as follows:

"Friend Bert: I just received your letter. If nothing turns up more than I expect I could come. I expect Bonnie before long and Jim is in town. Don't think he is able to work. You could send the money and deed to the American State Bank here in Coffeyville and I could sign the deed and return you the deed by return mail. I don't expect Bonnie will be able to do much and I am boarding some gas men. If they should still be here it would be hard for me to get away but if you cant arrange it that way I will come to Cleveland."

On the 21st day of March, 1911, Mrs. Pearce executed warranty deed to the land in controversy to Purcell, and on the same day wrote Williams the following postal card:

"I have sold the land. Could not afford to take any chances any more as the taxes have not been paid and a law suit against it.

"Mrs. F. E. Pearce."

On March 23, 1911, Williams sent Mrs. Pearce the following telegram:

"Your card received. Stop the sale. Will start there tomorrow."

The foregoing letters clearly show that the parties regarded the deed simply as security. If this had not been the common understanding of Mrs. Pearce and Williams when he wrote the letter of September 24, 1909, Mrs. Pearce would, in all probability, have indicated to Williams, in no uncertain terms, that the land was hers and that he had no interest in it. In the letter of January 22, 1910, Williams states:

"I would rather you would take it for what I owe you. I would rather do that than to sell to him [Purcell] for a \$1,000.00," etc.

That was not even an offer, at most a mere suggestion, and there is no evidence that Mrs. Pearce ever acted upon the suggestion and proposed to accept the land in lieu of the money that Williams owed her. In the letter of October 14, 1910, she recommends that the land be sold to Purcell for \$800, and states:

"I will take \$800.00 and call us square if you sell it right away, for I need the money."

[1] In the finding of the trial court that the deed from Williams to Pearce should be treated and considered as a mortgage there is no error. See *Krauss v. Potts*, 38 Okl. 674, 135 Pac. 362; *Wagg v. Herbert*, 19 Okl. 525, 92 Pac. 250; *Balduff v. Griswold*, 9 Okl. 438, 60 Pac. 223; *Weisham v. Hocker*, 7 Okl. 250, 56 Pac. 464.

The court rendered judgment in favor of Williams against Mrs. Pearce for \$1,147.46, the amount remaining in her hands after satisfying the indebtedness due from Williams to Mrs. Pearce.

It is contended by counsel for Mrs. Pearce that she should recover from Williams the further sum of \$200, the expense of a trip made by her to Arizona. In her answer it is alleged and the record shows that, in the course of their correspondence, Williams persuaded Mrs. Pearce to make a trip to Arizona, and suggested, as she contends, that she and her three children could each file upon 320 acres of land. She made the trip to Arizona, but the country did not suit her, and she contends that she could only file her children on 160 acres of land each, and the expense of this trip to her was \$200. But this contention was properly ignored by the trial court for the reason that the proof does not establish a cause of action against Williams as to this item.

She further contends that at one time she

discounted some notes in order to secure money to loan Williams, and that by reason thereof she lost the sum of \$36, and that Williams should be charged with the amount of this discount. The court found that, by reason of the confidential relations existing between Williams and Mrs. Pearce, Williams owed her the highest degree of good faith in dealing with her; that, inasmuch as he did not execute his note or any other evidence covering the amount of his indebtedness to her or fix a time within which the same was to be repaid, he is guilty of bad faith as a confidential adviser; and that, had these loans been made by her to a third person, he would undoubtedly have advised her to take notes bearing the legal rate of interest and fixing the time of payment, but, as he did not do so, that he should be required to pay, not only the principal, but, in addition thereto, interest at the rate of 10 per cent., and as 10 per cent. is the maximum rate which could have been exacted, and she has received that rate upon the entire amount of the indebtedness, the \$36 item is thereby compensated.

As to the status of Purcell and Goodwin, the instrument from Williams to Pearce being on its face a deed but in fact as between them a mortgage, on the day that Williams wrote the letter to Mrs. Pearce, dated September 24, 1909, he wrote the following letter to Purcell:

"Dear Bill: I recd your letter a few days ago, and was glad to hear from you and to know you are well and happy and buying more land. Sorry to hear of poor old Paulus in such a plight. I came here the last of July. Arizona is a poor country to go to now as everything is copper and the copper business is in worse shape than the oil business. This is a booming railroad town and a good farming country; they raise all kinds of crops here better than Okla. this year I guess. The woman I sold my Warren interest to is Mrs. F. E. Pearce of Jennings, Okla. You can write her there. She has a farm 3 miles west of town. I wrote her today and gave her your letter and told her to write what she would take. She has plenty of money but she only bought my interest in the place to accommodate me. She don't know anything about oil land, so I don't think she would buy any more interests in the land. She gave me \$1,000 for it and to get 10% interest and some other expense she was out, she will have to get \$1,100.00 for it and she won't take any less, I don't suppose, as I have explained to her the land is worth much more money than that. The Standard will soon have most of the producers froze out and get the holdings then the price will jump. This country is like Okla. was 15 years ago, lots of people coming here and buying claims and town property. Will close.

"Yours truly, H. W. Williams."

Afterwards Williams says he wrote another letter to Purcell, of which he had no copy, and that, Purcell being dead at the time of the trial, the court properly refused to permit Williams to testify as to its contents. But on December 29, 1910, Purcell wrote Williams the following letter:

"H. W. Williams, Clovis, N. M.: Well old friend I received your letter yesterday and was

uly glad to hear from you. It had been so long since I had any word from you that I thought you had forgotten me. Well as to the business we have what promises to be a real boom sure enough. They have a well just cross the river from Thomas that is making 1,000 barrels every 24 hours and they have one old man McNeal's farm just 2 miles straight out of my home place that is said to be making 500 barrels so you see that things are looking pretty good again. Nearly everything is raised up again and they are paying some fancy prices for a lease. I own the old Paulus farm now and the neighbors are talking about it already. Ha, Ha! Well I never heard any more from the woman that you sold the Warren to and I have forgotten her name and address, wish you would send it to me. So no more at his time.

"Your friend, W. M. Purcell."

And on March 20, 1911, Purcell wrote Williams the following letter:

"Mr. H. W. Williams, Clovis, New Mex.—My Dear Friend: I received your letter Saturday. I was not at home when it came so please excuse the delay. In regard to the loan on your interest in the Warren (referring to the land in controversy) I doubt you being able to raise that much money on it alone. Everybody here has a very bad dose of cold feet just at this time on account of so many dry wells just drill. The Thomas is dry and the McFall is dry and the Lucas is dry and the Edmunson is dry. Have scared everybody but I still have faith in the Warren myself and will have until it is proved dry. I will buy your interest in it so that you will be able to pay the woman back her money and have a little profit yourself, if that would suit you, providing that would suit you. I had thought all the time that you had sold outright but if you have not and want to consider a small profit above the indebtedness please let me know at once before my faith is shaken with the rest of them for if there is another dry one or two drilled the thing is all off.

"Your old friend, W. M. Purcell."

On the same day this last letter was written Purcell and Goodwin went to Coffeyville, Kan., to buy the land of Mrs. Pearce, and on the next day she executed the deed to Purcell.

On the trial of the cause the court made the following findings of fact:

"XXI. That the said W. M. Purcell, in company with G. W. Goodwin, a codefendant, the day after he addressed his letter to Williams in which he stated to Williams that he had understood Williams had sold his interest outright, went to Coffeyville, Kan., where the defendant Pearce resided, and on the following day, March 21, 1911, consummated a deal whereby they purchased the interest of the defendant Flora E. Pearce for the consideration of \$2,000.

"XXII. That the codefendant Goodwin advanced or paid \$1,250 of this amount, and that the defendant Flora E. Pearce made, executed, and delivered the deed to the land; the same being placed in a Coffeyville bank until Goodwin's check should be honored, after which the same was forwarded to the grantee, Wilson M. Purcell.

"XXIII. That the said G. W. Goodwin was the equitable owner of an undivided one-half interest in the interest purchased under said deed, and that his said interest was held in trust by the said W. M. Purcell for his use and benefit.

"XXIV. That the said G. W. Goodwin had no notice, either actual or constructive, that the plaintiff Williams owned or claimed any interest in the land in controversy.

"XXV. That said W. M. Purcell understood

or believed that the plaintiff was claiming an interest in the land at the time of the purchase from Pearce."

And the following conclusions of law:

"I. As between the plaintiff H. W. Williams and the defendant Flora E. Pearce, the deed in controversy is to be treated and considered as a mortgage; the plaintiff having the right to recover from the defendant Flora E. Pearce all sums of money over and above and in excess of her full amount of indebtedness due from said Williams to her, including interest to the date of the sale by her.

"II. That as between Williams and the defendant G. W. Goodwin, inasmuch as said deed was of record, there was no defeasance clause of record to give constructive notice that the same was to be treated as a mortgage, and that there was no evidence to show that said Goodwin had actual notice that same was a mortgage; that he advanced his money to the amount of \$1,250 for a half interest in the land described in the deed of conveyance from Flora E. Pearce to W. M. Purcell; that it was understood between Purcell and Goodwin that he was to have an undivided half interest in the land described in the deed of conveyance from Flora E. Pearce to W. M. Purcell; that he is a bona fide innocent purchaser for value without notice; and that he is entitled to a decree quieting his title as against the plaintiff Williams and all other parties joined in this suit in an undivided one-sixth interest in the land in controversy.

"III. As between the plaintiff Williams and the defendant W. M. Purcell, that inasmuch as the plaintiff Williams had by letter advised the said W. M. Purcell that he had sold this land to the defendant Flora E. Pearce and had advised him to correspond with her relative to purchasing the same, giving to him her address, he thereby led Purcell to believe that Flora E. Pearce was authorized and empowered to sell and dispose of this land and to fix the price, and that having placed Purcell in this position, there being no evidence to show that he had revoked her power to sell or that he had notified Purcell that he had revoked her power to sell, he is estopped from maintaining an action to set aside a conveyance between his grantee Flora E. Pearce and the said W. M. Purcell, unless it should be disclosed by the evidence in the case that the said W. M. Purcell practiced a fraud upon the said Flora E. Pearce in the consummation and closing up of the deal.

"IV. That there was no fraud practiced by Goodwin and Purcell in closing up the deal with the defendant Flora E. Pearce; that they were dealing at arms length; and that they paid a consideration that was not grossly inadequate for the undivided one-third interest described and conveyed in the deed from her to Purcell, and that therefore the said plaintiff is not entitled to recover as against Purcell."

The 80 acres of land in question had, for several years prior to the time Mrs. Pearce executed the deed to Purcell, been the property of one Allen, W. M. Purcell, and Williams. There was a small producing well thereon; the same being held by the Paova Oil & Gas Company by lease from Allen, Purcell, and Williams, and Williams' share of the royalties was paid to him up to the time Mrs. Pearce deeded to Purcell. Purcell had consulted Williams as to permitting a family to reside in the house on the land and take care of the small field and orchard thereon, to which Williams had assented. Williams was therefore in actual possession by his lessee and the family who lived in the house. Mrs. Pearce had never been in possession of

the land, nor seen it, nor received rents and profits therefrom. The uncontradicted testimony of W. A. Stockton is that, at the time Mrs. Pearce executed the deed to Purcell, the land was reasonably worth \$25,000.

Section 1158, Rev. Laws 1910, provides:

"Any person purchasing or taking any security against real estate in good faith and without record notice from one holding under an instrument purporting to be a conveyance but intended as security for the payment of money, and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price paid or actual outlay occasioned, with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay."

And section 1159, Id., provides:

"Any conveyance other than as above provided, by one holding under an instrument purporting to be a conveyance, but intended as security, shall be deemed and treated as an assignment and transfer of the mortgage rights of and indebtedness due the maker thereof."

This court, in *Balduff v. Griswold*, supra, construing section 1156, Rev. Laws 1910, held:

"The holder of a deed absolute, taken as security for a debt, can only acquire title by foreclosure of his mortgage, and any agreement of forfeiture is void. Any person having an interest in mortgaged real estate may redeem from such a debt."

In construing the three sections of the statute above mentioned, this court, in the case of *Krauss v. Potts*, supra, said:

"The foregoing statutes appear to abridge the rights of the innocent purchaser for value in such cases to the amount of the outlay with interest"—citing *McNeil v. Jordan*, 28 Kan. 7.

[2] Since Pearce could not have acquired title to the land under the deed from Williams, except by foreclosure, it follows that Purcell, who was in possession of all the facts, could acquire no greater rights than she held, nor could Purcell invoke the doctrine of estoppel. He secured property of the value of \$25,000 for \$2,000. This fact, when considered in connection with his letter of March 20, 1911, supra, and the further fact that he immediately proceeded with Goodwin to close up the deal with Mrs. Pearce, does not conform to our idea of good faith and fair dealing. In 16 Cyc. 747, the law applicable to such a situation is stated as follows:

"An estoppel in pais is never allowed to be used as an instrument of fraud, but only to prevent injustice, and it is therefore essential that the party claiming the benefit of the estoppel must have proceeded in good faith."

[3] Goodwin is in no better position than Purcell. He permitted Purcell to act for him in the deal, and, as claimed by Goodwin and found by the court, Purcell took the deed in his own name, holding the legal title of Goodwin's interest in trust for him. That Williams remained in possession by lessee and tenant and received the rents and profits, and that Mrs. Pearce was never in possession

up to the time she deeded to Purcell, was a fact which Goodwin could easily have ascertained, had he desired so to do.

There is some testimony tending to show that Purcell exhibited to Goodwin the letter written by Williams to Purcell on September 24, 1909; and it is contended that the writing of this letter by Williams to Purcell would estop him from claiming title as against Goodwin. The rule, stated in 16 Cyc. 777, is:

"Persons Affected—To Whom Available.—Estoppels operate only between parties and privies, and the party who pleads an estoppel must be one who has in good faith been misled to his injury."

In *Bigelow on Estoppel* (6th Ed.) 617:

"Only parties and their privies are bound by their representations, and only those to whom the representation is made or intended to influence, and their privies, may take advantage of the estoppel. If the case was *inter alios*, there can be no estoppel."

In *Mueller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259, it is held:

In obtaining knowledge of a private communication addressed to another party cannot claim to estop the person making the communication by admissions therein contained.

In *Owens v. B. & O. R. Co.* (C. C.) 35 Fed. 715, 1 L. R. A. 75, it is held:

"A member of a railroad relief association is not estopped from claiming compensation from the railroad company, being a distinct corporation, for an injury from a collision, by the fact that he had previously been compensated by the relief association for the injury, which he then falsely alleged was caused by malaria," etc.

In *Murray v. Sells*, 53 Ga. 257, it is held that one who had been guilty of fraud as to a particular parcel of land in his dealings with one person, so that as to this person he is estopped, does not estop him as to another person who is not a privy in estate with the first. See, also, *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408; *Figg v. Handley*, 52 Cal. 244; *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829.

Since both Purcell and Goodwin took with notice, or were at least chargeable with notice that Williams had an interest in the land, they should be subrogated to the rights of Mrs. Pearce; that is, the conveyance from Mrs. Pearce to Purcell should be treated as an assignment of the mortgage rights held by her under the deed from Williams to Pearce, as provided by section 1159, supra.

Judgment must be rendered canceling the mortgage upon the land in controversy given by Purcell to Mrs. Pearce. The judgment in favor of Williams against Mrs. Pearce in the sum of \$1,147.46 is set aside. Judgment is rendered in favor of Goodwin, the heirs and administrators of Purcell, in the sum of \$852.54, together with interest thereon at 10 per cent. against Williams, the same being the amount owed by Williams to Mrs. Pearce, and the same is a lien upon the land in controversy and foreclosure thereof is decreed. The costs are taxed as follows: One-third to Williams; one-third to Mrs. Pearce; one-



third to Goodwin and Purcell's representatives.

TURNER, RIDDLE, and BLEAKMORE, JJ., concur. KANE, C. J., absent and not participating.

(45 Okl. 510)

PENDLEY v. ALLEN, Justice of Peace, et al. (No. 5869.)

(Supreme Court of Oklahoma. Nov. 24, 1914. Application for Rehearing Stricken from the Files Feb. 2, 1915.)

(Syllabus by the Court.)

PROHIBITION (§ 3\*)—RIGHT TO REMEDY—EXISTENCE OF OTHER REMEDY.

Where petitioner has a plain, speedy, and adequate remedy at law by appeal to the district court from the refusal of a justice of the peace to discharge an attachment for failure to require an attachment bond, a petition for the extraordinary writ of prohibition to prohibit such court from proceeding further in such case will be denied.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

Original action for writ of prohibition by Witley Pendley against T. G. Allen, Justice of the Peace of Precinct No. 14, of Miami, Okl., and another. Writ denied, and petition dismissed.

A. C. Towne, of Miami, for petitioner.

RIDDLE, J. This is an original application to this court for writ of prohibition. The petition avers, in substance, that in October, 1913, one Francis Jones filed her bill of particulars before J. L. Spear, a justice of the peace in precinct No. 13, in the city of Miami, Ottawa county, Okl., against petitioner herein; that she also filed her affidavit for attachment and affidavit showing her inability to give security for costs; that the justice of the peace wrongfully and without authority of law issued an attachment directed to the constable to proceed to execute the same, without first requiring an attachment bond to be executed and filed as required by law; that the constable levied said attachment upon certain goods and property of petitioner; that petitioner filed his motion to discharge said attachment, which was overruled by said justice of the peace. Thereafter, upon a change of venue, said proceeding was transferred to T. G. Allen, respondent herein, a justice of the peace of precinct No. 14; that motion was filed before said T. G. Allen to discharge said attachment, which motion was overruled; that said court is without jurisdiction to hear and determine the cause, and was without jurisdiction to issue the writ of attachment, without requiring a bond to be executed and filed. It is further alleged that the application was made to Hon. Preston S. Davis, judge of the district court of said county, for a writ of prohibition, which was, after hearing, denied. The universal rule is that,

where there is a plain, speedy, and adequate remedy at law, the writ of prohibition will not be issued. 32 Oyc. 613-615.

In the case of Pioneer Telephone & Telegraph Co. v. City of Bartlesville, 27 Okl. 214, 111 Pac. 207, this court, speaking through Justice Williams, in the second paragraph of the syllabus said:

"Prohibition will not lie where an inferior court having jurisdiction of both the subject-matter and the parties, making an erroneous application of the law, grants an injunction, an appeal lying from said order to the Supreme Court, pending which such order may be superseded."

In the case of Alexander v. Crollott, Justice of the Peace, 199 U. S. 580, 26 Sup. Ct. 161, 50 L. Ed. 317, which was an appeal from the judgment of the Supreme Court of the territory of New Mexico, quashing a writ of prohibition by that court to defendant Crollott, a justice of the peace of Bernalillo county, it was said:

"Although a writ of prohibition will lie to an inferior court, when it is acting manifestly beyond its jurisdiction, such writ will issue only where there is no other remedy. Smith v. Whitney, 116 U. S. 167 [6 Sup. Ct. 570, 29 L. Ed. 601]; In re Cooper, 143 U. S. 472, 496 [12 Sup. Ct. 453, 36 L. Ed. 232]; In re Rice, 155 U. S. 396, 403 [15 Sup. Ct. 149, 39 L. Ed. 198]; In re New York, etc., Steamship Co., 155 U. S. 523, 531 [15 Sup. Ct. 183, 39 L. Ed. 246]. By his answer Alexander claimed to be the owner of the property, and alleged a want of jurisdiction on the part of the justice to determine the question of ownership in a proceeding for forcible entry and detainer. The justice decided against him. Under such circumstances he should have taken an appeal to the district court under section 3358 of the New Mexican Code, which provides that: 'An appeal shall be allowed to the district court in all cases wherein judgment may be hereafter rendered in forcible entry and unlawful detainer, or both.' No reason is apparent why this appeal was not taken. The fact that the judgment may have been void will not prevent its reversal upon appeal [citing authorities], nor does the requirement of a bond obviate the necessity of an appeal. It is one of the ordinary incidents of litigation."

See, also, Ex parte, In the Matter of the State of Oklahoma, by Charles N. Haskell, Governor, etc., 220 U. S. 191, 31 Sup. Ct. 426, 55 L. Ed. 431; Ex parte, In the Matter of the State of Oklahoma (No. 2), 220 U. S. 210, 31 Sup. Ct. 431, 55 L. Ed. 436.

We would not be understood as laying down a rule that in no case will a writ of prohibition lie on the ground that there is a legal remedy by appeal, for, if there are obstacles in the way which prevents a party from following the usual and ordinary procedure on appeal, or cases where such remedy would not be adequate to protect the rights of the parties, such facts would bring the case within the exception to the general rule, and this court would undoubtedly have jurisdiction to issue the writ in all such cases where its original jurisdiction under the Constitution may be invoked. But the case before us does not come within that class of cases. There is no reason suggested why

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep' Indexes

an appeal in this case would not have afforded complete and adequate relief. The justice had full jurisdiction over the subject-matter and the parties. The question raised is that he issued the ancillary writ of attachment without first requiring the statutory bond to be filed. The case could have been tried in the justice court and appealed to the district court, where the case would be tried de novo, and a motion could be entertained there at any time for the purpose of dissolving the attachment before the court or the judge in chambers. The proceeding provided by law for appeal and for hearing of such motion is speedy, complete, and adequate, and the same relief could be obtained by such proceeding as could be by petition to this court for writ of prohibition. There is no reason assigned why the district court refused the writ of prohibition, but, in the absence of any other showing, it may be presumed that it was upon the ground that petitioner has a plain, speedy, and adequate remedy by appeal.

For the foregoing reasons, the writ must be denied, and the petition dismissed. All the Justices concur, except KANE, C. J., absent and not participating.

(44 Okl. 696)

**WHELAN v. ADAMS et al.  
ADAMS et al. v. WHELAN et al.  
(Nos. 3003, 3027.)**

(Supreme Court of Oklahoma. Oct. 13, 1914.  
Application for Rehearing Dismissed  
Jan. 30, 1915.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 1046\*)—REVIEW—TRIAL—TIME—PREJUDICE.**

Where from the conceded facts it appears that the parties to an action have no title to the subject-matter of the litigation, hence no right to maintain an action or recover affirmative relief by cross-petition, and where the only judgment recovered against them, except an adverse adjudication of the title, is vacated on appeal, error in the trial court forcing them to trial on the day that the issues of fact were joined is without prejudice and furnishes no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.\*]

**2. HOMESTEAD (§ 118\*)—CONVEYANCE—REQUISITES—JOINDER OF SPOUSES.**

Section 2, art. 12, of the Constitution prohibits the sale of the homestead of the family, where the owner is a married man, without the consent of the wife, given in such manner as may be prescribed by law.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

**3. HOMESTEAD (§ 118\*) — CONVEYANCE BY MARRIED WOMAN—JOINDER BY WIFE.**

An attempted conveyance by deed of the homestead of the family, by a married man, given without the wife's consent in the manner prescribed by law, is void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

**4. HOMESTEAD (§ 118\*)—CONVEYANCE—SEPARATION OF SPOUSES—ABANDONMENT.**

Where the relation of husband and wife exists, the deed of the former to the homestead of the family conveys no title, and this notwithstanding the fact that the husband and wife be living separate and apart, or even though the wife may have without justifiable cause abandoned the husband.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

**5. HOMESTEAD (§ 131\*)—MORTGAGE TO WIFE—FORECLOSURE—SALE—RIGHTS OF PURCHASER.**

Where a husband gives a wife a mortgage on the homestead to secure the payment of a postnuptial settlement, and which mortgage she subsequently forecloses by suit, the purchaser at the foreclosure sale succeeds to her rights, and may attack as void a deed given to the homestead by the husband without the wife's consent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 235-243; Dec. Dig. § 131.\*]

**6. HOMESTEAD (§ 111\*)—STATUTES—VALIDITY.**

Sections 882 and 883, Wilson's Rev. & Ann. St. 1903 (sections 1189 and 1190, Comp. Laws 1909), infringe upon and are repugnant to section 2 of article 12 of our Constitution, prohibiting the sale of the homestead, where owned by a married man, without the consent of his wife given in the manner prescribed by law; hence were not extended in force in the state by section 2, art. 25, of the Constitution.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 177, 178; Dec. Dig. § 111.\*]

**7. HOMESTEAD (§ 128\*)—CONVEYANCE BY HUSBAND—SEPARATE DEED—RIGHTS OF WIFE—RENTS.**

Evidence examined, and held, that the wife is not entitled to recover rents for the years 1909 and 1910.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 224-232; Dec. Dig. § 128.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by Frank H. Whelan against P. O. Adams, Effie Adams, Emery L. Metcalf, and Mary F. Whelan. Judgment for defendants Emery L. Metcalf and Mary F. Whelan on their answers and cross-petitions, and plaintiff Frank H. Whelan and defendants P. O. Adams and Effie Adams bring error. Modified and affirmed.

Titus & Carpenter, of Cherokee, for plaintiff in error Frank H. Whelan. Talbot & Owen, of Cherokee, for plaintiffs in error P. O. Adams and Effie Adams. George W. Parridge, of Cherokee, for defendant in error Mary F. Whelan. Garber & Kruse, of Enid, and Riley Cloud, of Cherokee, for defendant in error Emery L. Metcalf.

SHARP, C. The controversy between the parties concerns the title to a quarter section of land in Alfalfa county which was patented by the government to one James D. Whelan in 1906. Prior thereto, and in March, 1904, said James D. Whelan and Mary F. Whelan were married, and continued to reside together as husband and wife on the land in question until July 18, 1907, when, owing to

domestic troubles, they separated, the husband continuing to reside on the farm, and the wife in the city of Cherokee, Alfalfa county. In 1907 each filed a divorce suit against the other, in different courts, which suits were pending and undetermined on May 21, 1908. On the latter day they entered into a contract, whereby the said James D. Whelan was to pay his wife, at fixed times, the sum of \$500, and dismiss his divorce proceedings, and further agreed to begin a new suit for divorce, charging as ground therefor defendant's abandonment of plaintiff, and to which suit to be so instituted the wife would make no defense. The wife also agreed, in consideration of the husband's undertakings, to dismiss her divorce suit, and, further, that upon payment of said sum of money, she would make no claim or demand of him for either temporary or permanent alimony or suit money. The performance of the provisions of this postnuptial contract was secured by a mortgage concurrently executed by the husband on the land in question, which mortgage was on the day of its execution duly placed of record. At the time the land was occupied by the husband as a homestead. Thereafter, and on the 29th day of May following, the said James D. Whelan executed a deed, purporting to convey to the defendant P. O. Adams the land in question, but which deed was not signed by his wife, and was given without her knowledge. On the 1st day of June following, P. O. Adams, joined by his wife, Effie Adams, executed a mortgage on said land to the plaintiff, Frank H. Whelan, a brother of James D. Whelan, which mortgage purported to have been given to secure the payment of a \$3,000 note of even date, in favor of said mortgagee. This mortgage was placed of record on the day of its execution.

James D. Whelan having defaulted in the payment of the amount named in the settlement made with his wife, the latter, on July 17th following, instituted in the district court of Alfalfa county an action to foreclose the mortgage given to secure the performance of the contract. Neither P. O. Adams or his wife or Frank H. Whelan were parties to the foreclosure action. Personal service of summons was had on the defendant James D. Whelan and on the 2d day of October, 1908, a judgment foreclosing said mortgage was rendered by the district court, and at a foreclosure sale subsequently held the land was purchased by the defendant Emery L. Metcalf, subject to a first mortgage in favor of the Monarch Loan Company. The sale being confirmed, a sheriff's deed was executed and delivered to said Metcalf on March 2, 1910, and placed of record in the office of register of deeds.

The present action was brought on December 15, 1910, by Frank H. Whelan, to foreclose his mortgage given by the defendants Adams and wife. It is insisted by each of

the plaintiffs in error that neither Mary F. Whelan or Emery L. Metcalf have any right, title, or interest in the land in question, and, further, that Metcalf was not an innocent purchaser for value, and was not, therefore, entitled to an order restoring to him his expenditures laid out in the purchase of said farm, and the subsequent payment of taxes thereon, and interest on the Monarch Loan Company loan. On the part of Mary F. Whelan it is insisted in her answer and cross-petition that for numerous reasons named the deed executed by her husband to P. O. Adams was void, and that hence Frank Whelan acquired no rights in the premises by virtue of his mortgage. As to her codefendant, Metcalf, Mary F. Whelan asked that the court enter its decree canceling any claim, right, or title that said defendant might have in the premises. In her reply to the answer and cross-petition of defendant Metcalf, said defendant Whelan, set up the mortgage given in her favor by her husband, the contract of May 21, 1908, the mortgage foreclosure proceedings, the sheriff's deed executed pursuant thereto, and charged that said contract and each and all of said proceedings were illegal and void, and tendered back to said Metcalf \$500, and interest. The defendant Metcalf, in his cross-petition, also charged that, for different reasons assigned, Adams acquired no title on account of his purported deed of May 29th, and that therefore the mortgage given by him and his wife to Frank H. Whelan in turn conveyed no interest or right to the property in question. Said defendant further set up the proceedings through which he acquired title at the foreclosure sale, including the sheriff's deed, charged that Mary F. Whelan was estopped from attacking his title, and asked for a cancellation of the deed from James D. Whelan to Adams, for a judgment barring the defendant Mary F. Whelan from any claim, right, title, or interest in the premises, and for a further decree vesting and conferring the title to said premises in him.

It was insisted on the part of the plaintiffs in error that Mary F. Whelan, in July, 1907, voluntarily and without cause abandoned her husband, and that the agreement of May 21, 1908, between James D. Whelan and his wife, and the subsequent foreclosure proceedings brought to enforce the terms thereof, the judgment of the court, order of confirmation, and the sheriff's deed, were each and all illegal and void, being against public policy, and that thereby the said Metcalf acquired no title by virtue of the sheriff's deed; that, Mary F. Whelan having without justifiable cause abandoned her husband, the deed executed by the latter to Adams on May 29th was valid, though not executed by her.

The case was tried before the court, special findings of fact and conclusions of law being made. In the decree Mary F. Whelan was

given the immediate possession of the land in question, which was found to be the homestead of herself and husband. The sheriff's deed executed to the defendant Emery L. Metcalf was adjudged to be void, and it was ordered that said Metcalf have a lien against said land for the sum of \$988.43. The mortgage executed by Adams and wife to Frank H. Whelan and wife was declared to be null and void, and ordered canceled, set aside, and held for naught, and said P. O. Adams and Effie Adams were adjudged to be in wrongful and unlawful possession of the premises, and their title ordered divested. Judgment was rendered against Adams and wife for \$570; that being found to be the reasonable rent and profit arising from the land during their period of occupancy. Neither defendant Mary F. Whelan nor Emery L. Metcalf filed a motion for a new trial; hence, as between them, the judgment of the new trial court is final.

[1] In view of our conclusions, it will be necessary to consider but few of the many assignments of error. The trial court's action in forcing plaintiff and defendants P. O. Adams and Effie Adams to trial on the day the issues of fact were joined was erroneous. The pleadings, it appears, were filed within the time prescribed by statute, or were permitted to be filed with the court's consent. At no time were the parties in default; neither were the demurrers filed by them adjudged to be frivolous. Section 5644, Comp. Laws 1909, provides that whenever the answer contains new matter constituting a right of relief against a codefendant, concerning the subject-matter of the action, such codefendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules as far as applicable. *Long v. Harris et al.*, 37 Okl. 472, 132 Pac. 473. Section 5834, Comp. Laws 1909, provides when actions shall be triable, and has recently been construed by this court in *City of Ardmore v. Orr*, 35 Okl. 305, 129 Pac. 867; *Conwill v. Eldridge*, 35 Okl. 537, 130 Pac. 912; *Title Guaranty & Trust Co. v. Turnbull*, 40 Okl. 294, 137 Pac. 1178; *Chicago, R. I. & P. Ry. Co. v. Pitchford*, 143 Pac. 1146. In view, however, of the conceded facts, and of the law in the present case, by which the rights of both plaintiffs in error are to be determined, the error was without prejudice, and therefore not sufficient to cause a reversal.

[2, 3] The controlling question is that of the right of James D. Whelan to execute to P. O. Adams the deed of May 29, 1908. At the time of its execution said James D. Whelan and Mary F. Whelan were husband and wife, and the land attempted to be conveyed, though owned by the former, was the homestead of the family. Section 2, art. 12, of our Constitution provides that the homestead of the family shall not be sold by the owner, if married, without the consent of his or her spouse, given in such manner as may be prescribed by law. At no time did Mary F.

Whelan give her consent to the sale attempted to be made to Adams. The question presented does not appear to ever have been passed upon by this court. The opinions in *Maloy et ux. v. Cameron*, 29 Okl. 763, 119 Pac. 587, *Kelly v. Mosby et al.*, 34 Okl. 218, 124 Pac. 984, and *Krauss et ux. v. Potts et al.*, 38 Okl. 674, 135 Pac. 362, all involve transfers made or attempted prior to the adoption of our state Constitution. The sale, having been made in direct violation of the express provision of our organic law, was void; hence Adams acquired no rights by reason of his purchase. The constitutional inhibition is plain, unambiguous, and admits of no exceptions which would destroy its obvious design. If the owner be a married man, the consent of the wife, given in such manner as may be prescribed by law, is essential to the valid alienation of the homestead, unless (it may be) the conveyance be made to her. No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he can do or suffer to be done can cast a cloud upon the title; it remains absolutely free from all grants and incumbrances, except those mentioned in the Constitution. *Morris v. Ward*, 5 Kan. 239. Efforts have been made to ingraft exceptions arising out of the supposed necessities of the case, upon similar constitutional provisions or statutory enactments, but in all states save one, so far as we have examined the authorities, they have uniformly failed; for it must be remembered that it is not the homestead of the husband alone, though the title be in his name; it is the homestead of the family, made so by the Constitution.

Provisions similar to that of our Constitution are found either in the Constitutions or statutes of the great majority of the states of the Union, and, with a single exception, so far as our investigation has disclosed, conveyances made or attempted by the husband, without the consent of the wife, given in the manner prescribed by law, are held to be void. Many of the authorities are collected in the notes to *Poole v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481; *Chambers v. Cox*, 23 Kan. 393; *Alt v. Banholzer*, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681; *Stanton v. Hitchcock*, 64 Mich. 316, 31 N. W. 395, 8 Am. St. Rep. 821; *Martin v. Harrington*, 73 Vt. 193, 60 Atl. 1074, 87 Am. St. Rep. 704; *Hart v. Church*, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; *O'Malley v. Ruddy*, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702; *Seiffert & W. L. Lbr. Co. v. Hartwell*, 94 Iowa, 576, 63 N. W. 333, 58 Am. St. Rep. 413; *McKenzie v. Shows*, 70 Miss. 388, 12 South. 336, 35 Am. St. Rep. 654.

[4] Much stress is laid upon the fact that Mary F. Whelan had voluntarily abandoned her husband, and, notwithstanding his entreaties for her return, had continued to absent herself from the homestead, and to

live separate and apart from her husband. The finding of the trial court, however, was to the effect that the abandonment was not voluntary, but was caused by the threats and ill treatment of the husband. We deem the fact of what caused the wife to leave and remain away from home, and whether her abandonment was voluntary or involuntary, as immaterial. They were still husband and wife, never having been divorced, and there is no exception written in our Constitution authorizing the husband to sell the homestead without the wife's consent upon her voluntary abandonment of him. Neither are we disposed to write into the language used an implied exception. *Thompson v. New England, etc., Co.*, 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; *Murphy v. Renner*, 99 Minn. 348, 109 N. W. 593, 8 L. R. A. (N. S.) 535, 116 Am. St. Rep. 418; *Herron v. Knapp*, 72 Wis. 553, 40 N. W. 149; *Chambers et ux. v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Johnston v. Turner*, 29 Ark. 280; *Williams v. Swetland*, 10 Iowa, 51; *Lies v. De Diablar et al.*, 12 Cal. 327; *Rogers v. Day*, 115 Mich. 664, 74 N. W. 190, 69 Am. St. Rep. 593.

[5] The contention that, even though the deed was void because the wife had not joined in its execution, or consented to the sale of the homestead, cannot be availed of by the defendant Metcalf, is without merit. Metcalf purchased at the foreclosure sale, and occupies the same position in law, with regard to the Adams deed, as would Mary F. Whelan. The facts in this case are very similar to those in *Rogers v. Day*, supra. There it was insisted that only the husband, widow, or children could take advantage of the homestead right, and maintain a suit to protect it, and that, since neither in that case disaffirmed the conveyance, the complainant had no standing. There the homestead had been sold upon execution on a decree for alimony rendered in favor of the wife, and it was held that the complainant, who derived his title through mesne conveyances, stood in the shoes of the wife; that, as she chose to have the property sold upon execution on a decree rendered in her favor, she was estopped to set up her homestead right as against the purchaser at the sale and his grantees; that, complainant being in possession under her, and as her grantee under the execution sale, he succeeded to her rights. To the same effect are: *Dorsey v. McFarland*, 7 Cal. 342; *Dye v. Mann*, 10 Mich. 291; *Bolton v. Oberne et al.*, 79 Iowa, 278, 44 N. W. 547; *Goodwin v. Goodwin*, 113 Iowa, 319, 85 N. W. 31; 21 Cyc. 558.

[6] Section 883, Wilson's Rev. & Ann. St. 1903 (section 1190, Comp. Laws 1909), provided that the husband or wife executing the instrument relating to the homestead, without being joined with the other, could only be avoided by the one not joining. In

*Maloy et ux. v. Cameron*, 29 Okl. 708, 119 Pac. 587, Judge Williams called attention to the fact that said section did not appear to have been extended in force by the Constitution. This observation, in our judgment, stated a correct conclusion. The statute mentioned is without doubt repugnant to section 2, art. 12, Constitution, providing how the homestead of the family may be sold, and was therefore not put in force by section 2, art. 25, of the Constitution. By section 882, Wilson's Rev. & Ann. St. 1903 (section 1189, Comp. Laws 1909), it is provided that, where the title to the homestead is in the husband, and the wife voluntarily abandons him for the period of one year, or from any cause takes up her residence outside of the state, he may convey, mortgage, or make any contract relating thereto, without being joined therein by her. We think that this section of the statute must likewise fall. To hold otherwise would be to create an exception whereby, when one of two facts appear, the husband could convey the homestead without the consent of his wife. The fact that the wife may have without any cause taken up her residence outside of the state, or that she may voluntarily abandon her husband for a period of one year, does not of itself dissolve the marriage relation, unless, perhaps, it should continue for a sufficient length of time to raise the legal presumption of death. A similar question was before the Court of Chancery Appeals of Tennessee in *Couch v. Capitol Bldg. & Loan Ass'n et al.*, 64 S. W. 340. It was contended by the defendants in that case, in effect, that the husband having deserted and abandoned his wife, before the execution of her deed, she had the right under Shannon's Code, § 4242, to sell or mortgage the homestead without her husband joining in the conveyance with her. On the other hand, it was urged by the complainant that, under the Constitution, the homestead could only be alienated by the joint consent of husband and wife, when that relation existed, and that in the purview of the law the relation of husband and wife was not dissolved by his desertion and abandonment of her. The opinion reads in part:

"The homestead is a property right fixed in our Constitution. Article 11, § 11, Const. Its extent and duration are also fixed by it. The method of its alienation where the marriage relation exists is prescribed by it, and that is by the joint consent of the husband and wife. Legislation subsequent to the adoption of the Constitution prescribes how this joint consent shall be given. We are of opinion that it is not competent for the Legislature to provide for the alienation of the homestead without the joint consent of the husband and wife, when that relation exists, simply because the Constitution says in explicit terms that it shall not be alienated otherwise. The mode or manner of giving or evidencing the joint consent of the husband and wife is another matter. The Legislature may act here and prescribe. If correct in this, it follows that the section of the Code (Shannon's Code, § 4242) is of no avail to ap-

pellants in this aspect of the case, unless we hold that the desertion of the wife by the husband does away with the relation of husband and wife. It is not believed that such a proposition finds support in any adjudicated case, nor in sound judicial reasoning, when applied to the marriage state and statute. The relation of husband and wife is not dissolved, done away with, or destroyed by the desertion of either spouse by the other."

The clause "given in such manner as may be prescribed by law," in section 2, art. 12, Constitution, deals only, as the context clearly shows, with the form of the consent to the sale of the homestead; such, for instance, as whether the deed of conveyance should be executed jointly by the husband and wife, whether the wife should be privily examined by the officer taking her acknowledgment, or what officer was authorized by law to take such acknowledgment.

The deed from James D. Whelan to P. O. Adams, being void for the reasons already noted, neither the latter or his mortgagee, Frank H. Whelan, acquired any rights thereunder, and as to them it matters not what errors the trial court may have committed. They have no cause to complain, for in no event are they or either of them entitled to any form of relief against the defendants in error.

[7] The judgment for rents against Adams and wife for the years 1909 and 1910 should be vacated. During these years the wife had lived separate and apart from her husband. From the time of their separation in July, 1907, until the filing of her answer and cross-petition in March, 1911, she had not asserted her right in the homestead. On the contrary, in 1908 she and her husband had effected a settlement, purporting to be in full of their property rights, and which

settlement she sought to, and did, enforce by a foreclosure proceeding in court. Her position during the years for which rent was recovered was that of a creditor, and not of a homestead claimant. Whatever we may think of the validity of the postnuptial settlement between James D. Whelan and wife, or of the effect that should have been given her subsequent foreclosure proceedings, enforcing its terms, it cannot be that, covering the very period during which she occupied a wholly antagonistic position, she should be allowed to recover rents and profits arising from the lands sold Metcalf under the judgment against her husband. During the entire period she and James D. Whelan were husband and wife. We are not to be understood as saying that under no circumstances may a wife recover rents from the homestead where the title thereto is in the husband. It may be there are times when she can, though the husband be living and they be not divorced. But under a state of facts such as presented by the record before us we must conclude that no such recovery can be had.

To our minds, the court below erred in canceling the sheriff's deed to Emery L. Metcalf, but, as he appears to be satisfied with the judgment restoring to him the purchase price of the land, and the taxes and interest paid out, we are without authority to review the judgment as between said defendants.

In so far as the judgment of the court below gave judgment for rent against plaintiffs in error P. O. Adams and Effie Adams, it should be vacated and set aside. In all other respects the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 612)

McCAMMON v. JENKINS et al. (No. 3858.)  
(Supreme Court of Oklahoma. Jan. 19, 1915.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 162\*)—"ABANDONMENT."

A homestead cannot be abandoned without a going away from it with the definite intention never to return.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

For other definitions, see Words and Phrases, First and Second Series, Abandon.]

2. HOMESTEAD (§ 162\*)—ABANDONMENT—INTENT NOT TO RETURN.

An intent never to return if and upon the condition that the occupants going away can realize their desires and expectations elsewhere, and thereupon sell their homestead, is not sufficient to constitute an abandonment of such homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

3. HOMESTEAD (§ 181½\*)—ABANDONMENT—INTENT.

Abandonment of a homestead is a question of fact in which the intent of the parties in leaving it is controlling.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 401; Dec. Dig. § 181½.\*]

4. HOMESTEAD (§ 181\*)—ABANDONMENT—PROOF.

Abandonment of a homestead must be established by the most clear, conclusive, and undeniable evidence.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. § 181.\*]

5. APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE.

This court will not review an alleged error involving the weighing of evidence against conflicting evidence, except that it may do so upon questions in equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

6. HOMESTEAD (§ 118\*)—MORTGAGE—JOINDER OF SPOUSE.

Section 2, art. 12 (Williams', § 303), of our Constitution prohibits and renders void a mortgage given by one spouse upon a homestead in which the other spouse did not join.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

\* Commissioners' Opinion, Division No. 1. Error from District Court, Logan County; A. H. Huston, Judge.

Action by Sarah M. McCammon against Della W. and William M. Jenkins on promissory notes and for foreclosure of mortgage. Judgment for plaintiff on notes and for defendants denying foreclosure, from which plaintiff brings error. Affirmed.

Plaintiff in error brought this action in August, 1911, against the defendant Della W. Jenkins, as maker, and the defendant Wm. M. Jenkins, the husband of the maker, as a claimant of an interest in the mortgaged property, upon two promissory notes and a mortgage dated June 7, 1910. The notes are for the principal sum of \$2,000 each, with provision for interest and attorney fees, and the mortgage purports to be upon

the south half of lot 6 and all of lots 7 and 8, in block 34, of East Guthrie. This property only contained about 8,750 square feet, and was never worth to exceed \$5,000. The defendants by separate answers alleged that this property was their homestead, and, in effect, that the mortgage was void. Plaintiff's reply alleges abandonment of the said homestead. The case was tried on December 23, 1911, to the court, without a jury, and judgment on the notes was entered against the defendant Della W. Jenkins; but the court found that the said property had not been abandoned as a home, but was the homestead of the defendants when the mortgage was given, and entered judgment cancelling the mortgage as void for want of signing and execution by Wm. M. Jenkins. The facts immediately pertinent to the question of whether this property was the homestead of the defendants or had been abandoned as such at the time of the giving of the mortgage will now be as fully stated as seems necessary to a correct decision thereon, assuming that the trial court accepted as true all the evidence, including every reasonable inference allowable which tends to support the judgment. In 1898 defendants purchased this property for their home; the defendant Wm. M. Jenkins paying for it, but the title being taken by the defendant Della W. Jenkins. They thereupon immediately established their residence upon it, so that it then became their homestead. They at that time had six minor children; but at the time of the execution of said mortgage only one remained a minor. There is no question about their having continuously resided on this property as their home until in the spring of 1908, since which time the defendants have spent much time in Sapulpa, Creek county, Okl., under circumstances giving some color to plaintiff's claim of abandonment. In the spring of 1908, defendant's son Will had secured a position in the public schools at Sapulpa, and about that time acquired a home there. Since then defendants have spent much of their time with him in his home. They testify to the fact that Wm. M. Jenkins went to Sapulpa as a prospector in search of a permanent location in business as a lawyer, and made temporary arrangements with a firm of lawyers there for office room in anticipation that he might decide to permanently locate and might form a partnership with them; that Wm. M. Jenkins never made any permanent business arrangements there, nor rented an office; that they never intended to abandon this Guthrie property as their home, unless Wm. M. Jenkins should permanently locate, as he never did, in Sapulpa, although Della W. Jenkins alone desired to sell the same in anticipation of such location, but only intended to abandon this homestead in the event of such sale thereof; that they always consider-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed this Guthrie property as their home, and intended to return to it during all the time they were away in Sapulpa, unless they should decide to and, in fact, permanently locate, as they never did, at the latter place; that since the spring of 1908 they have divided their time between their home on said Guthrie property and their temporary abode with their son in Sapulpa, Della W. Jenkins testifying that she spent most of such time at the former place; that they did not move all their furniture from their Guthrie home, although they rented the place to a tenant during a portion of such time; and that they never acquired a home in Sapulpa or elsewhere, although Della W. Jenkins, without the knowledge or consent of Wm. M. Jenkins, purchased and in her own name took title to certain residential property there (in the same transaction in which she gave said mortgage) for another party, to whom she immediately transferred same, to which she has since taken a conveyance of title from her said transferee and now holds same, but they never established a residence on this Sapulpa property. The fact of the execution of the mortgage was concealed from Wm. M. Jenkins because the plaintiff and Della W. Jenkins knew he would object to that transaction if he knew of it, and he did not learn of it until in the spring of 1911. As against their denial of abandonment of their Guthrie homestead, the defendant Wm. M. Jenkins admits that in 1909 he made application for a commission as notary public, in which he stated he had lived one year in Creek county, which commission was issued to him; that in the spring of 1910 he made application to have his name placed on the ticket for nomination by the Republican party in August of that year as its candidate for the office of judge of the superior court of that county, in which application he represented himself to be a resident citizen of said county and qualified under the law for that office; that he was nominated for that office by that party, and was its candidate in the election in November, 1910; and that he registered as a voter and voted in said Creek county during his stay there.

McDougal & Lytle, of Sapulpa, and Arthur R. Swank, of Guthrie, for plaintiff in error. Dale & Blerer, of Guthrie, for defendants in error.

THACKER, C. (after stating the facts as above). [1] When a homestead character once attaches to property, it will continue to be the homestead until abandoned by a going away therefrom with the definite intention never to return. 21 Cyc. 579; Sykes v. Speer (Tex. Civ. App.) 112 S. W. 426; In re Presnall (D. C.) 167 Fed. 406.

[2] And an intent never to return if the

occupants going away from it can realize their desires and expectations elsewhere, and thereupon sell their homestead, being conditional, is not sufficient.

[3] Abandonment is a question of fact in which the intent of the parties in leaving the homestead is controlling. Sykes v. Speer, supra; In re Presnall, supra.

[4] Abandonment must be established by the most clear, conclusive, and undeniable evidence. Shepherd v. Cassidy, 20 Tex. 29, 70 Am. Dec. 372; Gouhenant v. Cockrell, 20 Tex. 96; Cross v. Everts, 28 Tex. 523; Mills v. Von Boskirk, 32 Tex. 360.

The case of Ross v. Hellyer (C. C.) 26 Fed. 413, relied on by plaintiff for a reversal of this case, presents a very strong argument to the effect that, as a matter of fact, the trial court might and should have found that the defendants had abandoned their homestead at the time of the execution of the mortgage. But, notwithstanding the strong evidence of abandonment, the trial court did not find such to be the fact; and there is some evidence reasonably tending to negative the evidence of abandonment and support the finding made.

The following cases show that the evidence was sufficient in the present case to support the finding and judgment of the trial court: Rand Lumber Co. et al. v. Atkins et al., 116 Iowa, 242, 89 N. W. 1104; Minnesota Stone-ware Co. v. McCrossen et al., 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927; Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164; Allen v. Campbell, 53 Tex. Civ. App. 76, 115 S. W. 360; In re Presnall (D. C.) 168 Fed. 406; Sanders et ux. v. Sheran, 66 Tex. 655, 2 S. W. 804; 21 Cyc. 597.

[5] This court will not review an alleged error involving a weighing of evidence against conflicting evidence, except that it may do so upon questions in equity. Board of County Commissioners of Woodward Co. v. Thyfault, 141 Pac. 409; Alfred v. St. L., I. M. & S. Ry. Co., 140 Pac. 415; Elwell v. Purcell, 140 Pac. 412.

[6] Section 2, art. 12 (Williams', § 303), of our Constitution provides:

"\* \* \* Nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law: Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage."

This provision clearly prohibits and renders void the mortgage in this case. Whelan v. Adams et al., 145 Pac. 1158. Also see Alton Mercantile Co. v. Spindel, 140 Pac. 1168.

For the reasons stated, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.



MEMORANDUM DECISIONS

**POLKINGHORN v. SUPERIOR COURT AND FOR SAN BERNARDINO COUNTY et al.** (L. A. No. 3984.) Supreme Court California. Dec. 16, 1914.) In Bank. Application by W. P. Polkinghorn for writ of prohibition directed against the Superior Court of the State of California in and for the County of San Bernardino and another. Ordered that peremptory writ issue. Tyrrell, Abrahams Brown, of Los Angeles, for petitioner. E. F. Freeman and William B. Ogden, both of Los Angeles, for respondents.

**PER CURIAM.** In this proceeding the petitioner, a creditor of the Gibraltar Investment & Home Building Company, filed a petition for a writ of prohibition arresting the proceedings in a certain action pending in the Superior Court of San Bernardino county, entitled "Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. Gibraltar Investment & Home Building Company, a Corporation, Defendant," wherein one S. F. Kelly was appointed receiver of the assets of the defendant. On the authority of C. Edgar Elliott, Petitioner, v. Superior Court, etc., et al. (L. A. No. 3949), 145 Pac. 101, heretofore decided by this court, in which the order appointing said receiver was adjudged void, it is ordered that a peremptory writ of prohibition issue out of this court as prayed for in the petition on file in the above-entitled proceeding.

**PEOPLE v. ZERMAN.** (Cr. 551.) (District Court of Appeal, First District, California. Nov. 11, 1914.) Appeal from Superior Court, City and County of San Francisco; rank H. Dunne, Judge. Edward Zerman was convicted of crime, and appeals. Affirmed. U. S. Sheehan, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John J. Riordan, Deputy Atty. Gen., for the People. **PER CURIAM.** We are satisfied that the writ made in this case in support of the appeal not well taken, namely, that the evidence is sufficient to support the verdict and judgment. From a reading and consideration of the evidence, we are satisfied that the contrary case. The judgment and order appealed from are affirmed.

**HEGINBOTHAM v. WEBSTER et al.** (No. 8015.) (Supreme Court of Colorado. Jan. 4, 1915.) En Banc. Error to Court of Appeals. Action by W. E. Heginbotham against B. M. Webster and another. There was a judgment of the Court of Appeals (23 Colo. App. 229, 129 Pac. 569), reversing a judgment for plaintiff, with directions to enter judgment for defendant Webster, and plaintiff brings error. Affirmed. Munson & Munson, for Sterling, for plaintiff in error. Allen & Webster, of Denver, for defendants in error.

**PER CURIAM.** We have thoroughly examined the record, briefs, and opinion of the Court of Appeals in this cause, and after full and careful consideration are of opinion that the conclusion reached by that court is correct. Its judgment is therefore affirmed. Judgment affirmed.

**MORGAN v. SHAW.** (No. 8037.) (Supreme Court of Colorado. Jan. 4, 1915.) Department 2. Error to County Court, San Juan

County; William Palmquist, Judge. Action by John Morgan against J. E. Shaw. From a judgment for defendant, plaintiff brings error. Affirmed. Frank L. Ross, of Silverton, for plaintiff in error.

**PER CURIAM.** This action was instituted before a justice of the peace in San Juan county, and there were no pleadings. It was for balance on account of \$59.50. The defendant below, defendant in error here, claimed an offset. Judgment before the justice of the peace was for \$1 and costs in favor of the defendant. The plaintiff appealed to the county court, where the cause was tried before a jury, and verdict rendered in favor of the defendant for precisely the same amount. The finding for \$1 was remitted by the defendant, and judgment rendered against the plaintiff in error for costs. An examination of the record discloses no substantial error in the proceedings. The judgment is affirmed.

**WOOD v. YANT, Sheriff, et al.** (No. 4172.) (Court of Appeals of Colorado. Jan. 11, 1915.) Error to District Court, Otero County; J. E. Rizer, Judge. Action between Minnie P. Wood and Alex Yant, Sheriff of Otero County, and others. From a judgment for Yant and others Wood brings error. Motion to strike the abstract of record and the assignment of errors denied. A. B. Wallis, of La Junta, and Thomas & Thomas, of Denver, for plaintiff in error. Fred A. Sabin and Geo. A. Kilgore, both of La Junta, for defendants in error.

**PER CURIAM.** The motion to strike the abstract of record and the assignment of errors is made on the grounds that the abstract does not contain a sufficient number of folio numbers on the margin thereof, that the abstract contains no index, and that the assignment of errors is too general in its nature. It is contended in resistance to the motion that the abstract was printed before the new rules of the Supreme Court went into effect requiring abstracts to be indexed, and that the other grounds of the motion are not well taken. The assignment of errors is quite general in its nature and does not strictly comply with the rule, and the folio numbers on the margin of the abstract are not in strict compliance with the rule; and, while the abstract is not indexed, although it seems to have been filed after the new rules went into effect, yet it is not disputed that it was prepared before that time. The motion is denied, but the attention of counsel is called to the requirements of the old rules as well as the new, and greater particularity should be exercised hereafter in compliance therewith. Courts of review have been criticised very much for lack of a more speedy determination of causes, and counsel who do not specifically follow the rules adopted to facilitate a speedy determination may expect a rigid enforcement of these rules in the future. Motion denied.

**Ex parte BARBER.** (Nos. A-2323, A-2324.) (Criminal Court of Appeals of Oklahoma. Dec. 5, 1914.) Applications of William J. Barber for writ of habeas corpus to secure bail. Bail denied as to one application, and allowed as to the other. Martin & Moss, of Tulsa, for plaintiff in error.

**PER CURIAM.** The petitions for the writ of habeas corpus in Nos. A-2323 and A-2324 were brought for the purpose of securing bail.

The petitioner, W. J. Barber, at the time of the filing of the petitions in this court, had been committed by Lee Daniel, justice of the peace of Tulsa county, in cause No. A-2323, charged with the murder of Ed Plank, committed on the 23d day of July, 1914. The court is of opinion that bail should be denied in No. A-2323, and the writ discharged, and it is so ordered. In cause No. A-2324, petitioner was held in the custody of the sheriff by commitment from the same justice of the peace, charged with the murder of Holmes Davidson. The court is of opinion that bail should be allowed in this case, and bail fixed at \$20,000, to be approved by the clerk of the superior court of Tulsa county under the supervision of the judge of the superior court of said county, whose duty it shall be to see that the bond is in proper form, and in every way in keeping with the provisions of the statute.

**BRADLEY v. STATE.** (No. A-2100.) (Criminal Court of Appeals of Oklahoma. Jan. 23, 1915.) Appeal from Superior Court, Muskogee County; Farrar L. McCain, Judge. B. W. Bradley was convicted of violating the prohibitory law, and appeals. Affirmed. S. E. Gidney, of Muskogee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, B. W. Bradley, was convicted at the July, 1913, term of the superior court of Muskogee county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. The questions of law raised by counsel have been heretofore decided adversely to their contentions by this court. The facts clearly disclose the guilt of the accused. The judgment of the trial court is therefore affirmed.

**CHANDLER v. STATE.** (No. A-2129.) (Criminal Court of Appeals of Oklahoma. Dec. 24, 1914.) Appeal from County Court, Oklahoma County; John W. Hayson, Judge. Bob Chandler was convicted of violating the prohibitory law, and appeals. Affirmed. Reardon & Hereford, of Oklahoma City, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Bob Chandler, was tried and convicted at the July, 1913, term of the county court of Oklahoma county on a charge of selling intoxicating liquor, and his punishment fixed at imprisonment in the county jail for a period of 6 months and a fine of \$500. The appeal was filed in this court on November 12, 1913. A careful examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

**DULANEY v. STATE.** (No. A-2160.) (Criminal Court of Appeals of Oklahoma. Jan. 16, 1915.) Appeal from County Court, Jefferson County; J. M. Adams, Judge. Monk Dulaney was convicted of a violation of the prohibition law, and appeals. Affirmed. Hamilton & Saye, of Waurika, for plaintiff in error. The Attorney General, for the State.

**PER CURIAM.** Plaintiff in error was convicted on an information charging the unlawful conveyance of intoxicating liquors. On the 17th day of October, 1913, judgment was entered, and he was sentenced in accordance with the verdict to be confined in the county jail for a term of 90 days and to pay a fine of \$100 and costs. Upon a careful examination of the record, we are satisfied that no error prejudicial to the substantial rights of the plaintiff in error was committed on his trial, nor have we any

reason to doubt that the verdict was reached only upon a fair and full consideration of the case by the jury. The judgment of conviction is therefore affirmed. Mandate forthwith.

**McGEE v. STATE.** (No. A-2028.) (Criminal Court of Appeals of Oklahoma. Dec. 24, 1914.) Appeal from District Court, Bryan County; Jesse M. Hatchett, Judge. Bun McGee was convicted of assault and battery, and appeals. Affirmed. McPherrren & Cochran, of Durant, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Bun McGee, was convicted at the December, 1912, term of the district court of Bryan county on a charge of assault with intent to kill, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. A careful examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

**MORGAN v. STATE.**† (No. A-2137.) (Criminal Court of Appeals of Oklahoma. Dec. 24, 1914.) Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge. O. Morgan was convicted of violating the prohibitory law, and appeals. Affirmed. McNeill & McNeill, of Pawnee, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, O. Morgan, was convicted at the July, 1913, term of the county court of Pawnee county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. A careful examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

**RHINE v. STATE.** (No. A-2318.) (Criminal Court of Appeals of Oklahoma. Jan. 16, 1915.) Appeal from County Court, Hughes County; J. Ross Bailey, Judge. S. H. Rhine was convicted of violating the prohibitory law, and appeals. Dismissed. Crump, Skinner & Anglin, of Holdenville, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, S. H. Rhine, was convicted at the June, 1914, term of the county court of Hughes county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 3 months. On December 1, 1914, the plaintiff in error filed a motion in this court to dismiss the appeal. The motion is sustained, and the appeal accordingly dismissed.

**ROBERTS v. STATE.** (No. A-2144.) (Criminal Court of Appeals of Oklahoma. Jan. 16, 1915.) Appeal from County Court, Jefferson County; J. M. Adams, Judge. Dillard Roberts was convicted of a violation of the prohibition law, and appeals. Affirmed. J. H. Harper, of Waurika, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted upon an information charging the unlawful sale of whisky to Walter Morton. On the 14th day of October, 1913, judgment was entered, and he was sentenced in accordance with the verdict to be confined in the county jail for 30 days and to pay a fine of \$50 and costs. Only two questions are urged for a reversal of the judgment. The first is that the court erred in giving the statutory definition in an instruc-

† Rehearing denied February 12, 1915.

tion on reasonable doubt. No objection was made or exception taken to the giving of this instruction. For this reason, we cannot do otherwise than hold that the instruction was harmless error. *Harris v. State*, 10 Okl. Cr. 417, 137 Pac. 365, 139 Pac. 846. Four or five witnesses testified as to the transaction. Plaintiff in error offered no testimony. We think that this appeal is without merit. The judgment of conviction is therefore affirmed. Mandate forthwith.

**SMILEY v. STATE.** (No. A-2139.) (Criminal Court of Appeals of Oklahoma. Jan. 18, 1915.) Appeal from County Court, Kiowa County; J. S. Carpenter, Judge. William Smiley was convicted of violating the prohibitory law, and appeals. Affirmed. Hays & Hughes, of Hobart, for plaintiff in error. E. G. Spilman, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, William Smiley, was convicted at the July, 1913, term of the county court of Kiowa county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 120 days. A careful examination of the record reveals no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

**STATE v. JOHNSON.** (No. 12404.) (Supreme Court of Washington. Jan. 13, 1915.) En Banc. Appeal from Superior Court, Mason County; Charles Ethelbert Claypool, Judge. John G. Johnson was charged with a misdemeanor. From a judgment dismissing the information, the State appeals. Judgment reversed. R. A. Lathrop, of Shelton, for the State.

**PER CURIAM.** Appeal by the state from a judgment dismissing an information and dis-

charging the accused upon the ground that the information did not state facts sufficient to constitute a crime. The defendant in this case is the same as in *State v. Johnson*, 144 Pac. 57, and the appeal raises the identical question passed upon in that case. Upon the authority of that case, and for the reasons therein stated, the judgment is reversed.

(83 Wash. 94)

**CITY OF SEATTLE v. SEATTLE, R. & S. RY. CO.** (No. 12127.) (Supreme Court of Washington. Feb. 5, 1915.) On motion to modify opinion. Granted. For former opinion, see 145 Pac. 54.

**PER CURIAM.** The respondent has filed a motion for a modification of the opinion heretofore filed herein, and reported in 145 Pac. 54, in which the conclusion was reached that the judgment appealed from should be reversed. As appears from the first opinion, this was a condemnation case brought by the city, in which it was sought to condemn adjacent property for the purpose of widening Rainier avenue. The improvement affected more than 1,200 distinct pieces of property and 3,500 parties respondent, upon which 1,417 verdicts were entered, but only one judgment. From this judgment the railway company only appealed. We think it is evident from a reading of the first opinion that the order of the court as to the reversal of the judgment was to affect the railway company only, and not disturb the judgment as to the other parties, who took no appeal; but, inasmuch as the judgment affects so many distinct pieces of property, we have concluded, in the interest of certainty, to modify the original opinion, so that the same will read in the last line thereof: "The judgment is reversed only as to the appellant Seattle, Renton & Southern Railway Company."

END OF CASES IN VOL. 145









